Hamdan Confronts the Military Commissions Act of 2006

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In 2006 the law of war experienced two major shock waves. The first was the decision of the Supreme Court in Hamdan, which represented the first major defeat of the President's plan, based on an executive order of November 2001, to use military tribunals against suspected international terrorists. The majority of the Court held the procedures used in the military tribunal against Hamdan violated common article three of the Geneva Conventions. A plurality of four, with the opinion written by Justice Stevens, based their decision as well on a far-reaching interpretation of the substantive law of war. They held that conspiracy to commit terrorist acts did not fall under the customary international law of war. Congress responded by enacting the Military Commissions Act of 2006. The President signed the bill on October 17. The interpretation of Hamdan and the precedents on which it is based will shape future litigation about the constitutionality of the various provisions of this legislation.
There is much praise in liberal circles for the Supreme Court’s decision in *Hamdan v. Rumsfeld*.¹ This is the first time a majority of the Court has stood up and said “no” to the president’s post-9/11 actions taken in the name of national security. The *Hamdan* dispute began on November 13, 2001, when the president followed the wartime precedent of Franklin Delano Roosevelt and decreed military tribunals to prosecute “international terrorists” under the supervision of the Oval Office.² The war in Afghanistan was already underway and there followed a series of arrests and detentions in Guantánamo Bay. One of these detainees was Salim Ahmed Hamdan, who had been Osama bin Laden’s personal driver for five years; he was arrested after 9/11. His case was one of the many prosecutions that began in the summer of 2003 when the Department of Defense decided to invoke the President’s executive order and charge Hamdan in a military tribunal with having joined a conspiracy to engage in terrorist actions against civilian targets.

One of the procedural peculiarities of the newly-created commission is a rule that requires, at the judges’ discretion, the defendant to leave the room when the government’s witnesses testify against him.³ The government understandably wants to protect the identity of its sources. But there is an obvious problem in requiring the defendant’s lawyer to carry on a defense without his client by his side to inform him about the merit of the testimony offered against him. This is precisely why the Sixth Amendment vests in every defendant the right to confront the witnesses against him.

The threatened application of this procedural rule in Hamdan’s case provoked litigation in federal court to enjoin the proceedings. When the case reached the Supreme Court, however, a new issue came into focus—namely, whether the military tribunal had jurisdiction, under the law of war, over the charge of conspiracy to kill civilians. A plurality of four votes—Justices Stevens, Breyer, Ginsburg, and Souter—held that the stand-alone offense of conspir-

³. *Military Commission Order No. 1 § 6B(3) (Mar. 21, 2002); see also id. § 6D(5)* (discussing the judge’s ability to exercise his or her discretion to review evidence outside the presence of the defendant).
acy was not part of the law of war and therefore the tribunal lacked jurisdiction to try Hamdan. In addition they held—together with a fifth vote, Justice Kennedy—that the procedure of requiring the defendant to leave the room violated his rights under Common Article Three of the Geneva Conventions, which was applicable in the tribunals under the law of war. Justice Breyer wrote a brief opinion, signed by three others in the majority but not by Justice Stevens, suggesting that Congress could enact legislation upholding the use of military tribunals. Justices Thomas, Scalia, and Alito dissented on various grounds, including opposition on the issue of conspiracy. Justice Roberts did not participate because he had voted against Hamdan in the D.C. Court of Appeals.

Congress responded to *Hamdan* by enacting the Military Commissions Act of 2006, signed by the President on October 17, 2006 (“MCA 2006”). The new statute seems to have superceded the executive orders—called the Military Commission Instruction Number 2 (MCI2)—that were in place starting in 2003. In this essay I will continue to refer to the provisions of MCI2, though the new statute presumably takes precedence.

The MCA 2006 is the first direct and explicit legislative authorization of the use of military tribunals. It authorizes trials for one category of enemy combatants in military tribunals and for another category in courts martial. Since the executive and the legislative branches are in almost perfect alignment on these issues, supporters are likely to cite Justice Jackson’s concurrence in *Youngstown Sheet & Tube* and assume the constitutionality of the statute.

But legitimate doubts remain about numerous provisions in the new statute. These include questions about authorization under Article I, the capacity of Congress to enact a definitive interpretation to international treaties, court martial jurisdiction, military com-

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4. See *Hamdan*, 126 S. Ct. at 2810 (Scalia, J., dissenting); *id.* at 2823 (Thomas, J., dissenting); *id.* at 2849 (Alito, J., dissenting).
5. The provisions regulating military commissions are technically part of § 3(a)(1) of MCA 2006, which adds Chapter 47A to Title 10 of the U.S. Code. The citations to these new provisions are to the section numbers of the new Chapter 47A. In all other cases the citation refers to the relevant section of the MCA 2006.
7. MCA 2006, *supra* note 5, § 948(c), § 948(d)(b).
8. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) (“When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum . . . .”)
9. MCA 2006, *supra* note 5, § 948(b)(f) (asserting that the statute de facto satisfies the requirements of common Article 3 of the Geneva Conventions).
10. *Id.* § 948(d)(b) (asserting indirectly that courts martial shall have jurisdiction over ‘lawful enemy combatants’ who violate one of the substantive provisions of the statute).
mission jurisdiction, and attempts to restrict federal court jurisdiction both over appeals from military commissions and habeas corpus.

In order to understand the issues at play, we must engage in a systematic review of the Hamdan decision, the congressional reaction to Hamdan, and the four principal cases decided by the Supreme Court between 1866 and 1950 which animate Hamdan: Milligan, Quirin, Yamashita, and Eisentrager. The question at the forefront of our attention will be the possible challenges to the validity of the diverse provisions of the MCA 2006. To construct these possible challenges we shall attend in Part One to the implications of the Geneva Conventions, in Part Two to the relevance of the Constitution, in Part Three to the arguments raised against the charge of conspiracy in the Hamdan deliberations, and, in Part Four, to the future potential of the four leading precedents of the Supreme Court. Finally, I analyze the approach to the charge of conspiracy in the MCA 2006.

I. COMMON ARTICLE THREE

Human rights activists have applauded Hamdan because five Justices recognized the controlling force of Common Article Three of the Geneva Conventions. This article is called “common” because it appears in all four of the Geneva Conventions of August 1949. The obligations imposed by this common article are often regarded as peremptory principles of international law, binding on all national and sub-national groups whether they are parties to the Geneva

\[\text{\textsuperscript{11}}\] Id. § 948(d)(a) (asserting jurisdiction over ‘alien unlawful enemy combatants’ who at any time in the past violated one of the substantive provisions of the statute). 
\[\text{\textsuperscript{12}}\] In Section 7, MCA 2006 amends 28 U.S.C. § 2441 to deny habeas jurisdictions to any judge hearing a petition from an alien detained by the United States as an enemy combatant. 
\[\text{\textsuperscript{13}}\] Ex parte Milligan, 71 U.S. (4 Wall.) 2 (1866). 
\[\text{\textsuperscript{14}}\] Ex parte Quirin, 317 U.S. 1 (1942). 
\[\text{\textsuperscript{15}}\] In re Yamashita, 327 U.S. 1 (1946). 
\[\text{\textsuperscript{18}}\] This language is admittedly vague, but there is nothing more precise in the relevant treaties to identify which actors may be held liable for breaching the Geneva Conventions. The Rome Statute punishes all violations of Common Article Three that are committed by organized groups engaged in internal armed conflicts more serious than “internal
Conventions or not. One of these obligations bans "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." In Hamdan, the Court held that the procedural rule at stake violated Common Article Three.

In MCA 2006 Congress seeks to avoid further rulings on the scope of Common Article Three by legislating a purportedly definitive interpretation of the Geneva Conventions. In its view, the military commission is ipso facto a "regularly constituted court, affording all the necessary 'judicial guarantees recognized as indispensable by civilized peoples for purposes of Common Article Three of the Geneva Convention." Congress also asserts that "no alien unlawful enemy combatant" may "invoke the Geneva Conventions as a source of rights." These provisions are rather crude efforts to usurp the power of the judiciary to interpret binding international agreements. If Congress could rule on the definitive meaning of treaties, judicial review would disappear; the word of Congress would become the supreme law of the land.

The Court could have resolved Hamdan by holding the Constitution applicable to tribunals sitting in Guantánamo Bay. Requiring the defendant to leave the courtroom during trial violates the Sixth Amendment. Yet neither Justice Stevens's opinion for the Court nor Justice Kennedy's concurrence invokes the Constitutional system of rights in criminal trials. Neither of their opinions even

disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature." Rome Statute of International Criminal Court art. 8.2(d), July 17, 1998, 2187 U.N.T.S. 3 [hereinafter Rome Statute].


20. This is the original language of the Geneva Conventions. The reference to "civilized nations" is now regarded as politically incorrect and therefore has been changed to "judicial guarantees which are generally recognized as indispensable." See Rome Statute, supra note 18, art. 8.2(c)(iv). Congress has used the outdated language. See MCA 2006, supra note 5, § 948b(f).

21. Violating these "judicial guarantees" is one of the four prohibitions imposed by Common Article Three. The other three are: (a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) Taking of hostages; (c) Outrages upon personal dignity, in particular, humiliating and degrading treatment." Common Article Three, supra note 17.

22. MCA 2006, supra note 5, § 948b(f).

23. Id. § 948b(g). This provision was upheld in the first decision in the second round of the Hamdan litigation. See Hamdan v. Rumsfeld, 2006 U.S. Dist. Lexis 89933 (D.D.C. 2006).


25. The closest they come is a footnote reference to Crawford v. Washington, 541 U.S.
mentions the Sixth Amendment or the due process clause of the Fifth Amendment, principles that would have provided a clear foundation for rejecting the procedure invoked against Hamdan.\textsuperscript{26}

The interesting question is why the Court should fear applying the Constitution to the procedures used in military tribunals. The Court had no doubts about this in early cases decided during the Civil War\textsuperscript{27} and World War II.\textsuperscript{28} My supposition is that the Court did not want to revisit the issue it found so troubling in the \textit{Rasul} case decided in 2004,\textsuperscript{29} namely whether the foreign detainees in Guantánamo Bay had a constitutional right to habeas corpus. With Justice Stevens then writing for the \textit{Rasul} majority, the Court preferred to protect the rights of the petitioners by extending the habeas statute to the detainees—thus leaving in doubt whether the Constitution applies in Guantánamo Bay. Similarly, in \textit{Hamdan}, Justice Stevens and the majority preferred to invoke a principle of international law rather than apply the Sixth Amendment to protect the trial rights of foreign detainees.

This is what I consider the dark side of \textit{Hamdan}—using international law to avoid confronting the hard question of when and where Constitutional principles of due process apply abroad. Yet this escape mechanism raises its own problems. First, it is not clear why Common Article Three should apply to Hamdan’s trial. The relevant prohibition—against the use of courts not “regularly constituted” and procedures below the threshold of generally recognized as “indispensable”\textsuperscript{30}—applies only to proceedings growing out of non-international armed conflicts.\textsuperscript{31} The conflict with al Qaeda is international in one sense, and not in another. It is not an internal dispute, and Common Article Three is typically associated with civil war and internal disputes.\textsuperscript{32} Nonetheless we can accept the Court’s formalistic argument that an “international” conflict is one between states,

\begin{footnotes}
\item[26] 36 (2004) (confrontation clause applies to the states as a principle of due process). This appears as note 67 in Section 6(D)(iv) of the Stevens opinion, a small segment mostly about international law to which Justice Kennedy did not adhere. \textit{See} Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2798 (2006).
\item[27] 26. \textit{See id.}
\item[28] 27. \textit{See Ex parte Milligan, 71 U.S. (4 Wall.) 2 (1866).}
\item[29] 28. \textit{See Ex parte Quirin, 317 U.S. 1 (1942).}
\item[31] 30. Rome Statute, \textit{supra} note 18, art. 8(2)(c)(iv). The original phrase used was “judicial guarantees which are recognized as indispensable by civilized peoples.” \textit{See supra} note 20 and accompanying text.
\item[32] 31. \textit{Milligan, 71 U.S. (4 Wall.) 2.}
\end{footnotes}
and the dispute with al Qaeda and other international terrorist gangs is not between the United States and foreign states. In this convoluted sense the dispute is not international.

But Common Article Three is of highly uncertain content. There is little law on the question of what constitutes a regularly constituted tribunal or the specification of judicial guarantees that “are recognized as indispensable by civilized peoples.” The MCA 2006 stipulates that military commissions are regularly constituted tribunals and the legislated procedures meet the demands of “civilized peoples.”

There is room to dispute both whether military tribunals are regularly constituted courts and whether they fall below the contemporary understanding of procedures “generally accepted” as “indispensable.” After all, what are these generally accepted judicial guarantees? Jury trial is not one of them. The right to counsel probably is. Some version of the privilege against self-incrimination is probably also necessary. The specific issue of concern in Hamdan—whether the defendant has the right to be present at all times during his trial—is probably secured by the International Covenant of Civil and Political Rights. Although the notion of minimal judicial guarantees is as vague as the due process clauses of the Fifth and Fourteenth Amendments, we can cobble together basic rights recognized by international agreements as a guide to interpretation.

In the end the Supreme balked when it came to apply the Constitution to the Guantanamo Bay detainees but they did the more adventurous thing of recognizing the international law government the rights of the detainees.

II. THE CONSTITUTIONAL ISSUES

The opinions by Justices Stevens, Kennedy, and Breyer for segments of the majority in Hamdan are all preoccupied with the issue of congressional authorization of the military tribunals. But it is not clear how the question of authorization even arises. If the Consti-
tution does not apply abroad, then why should the Court be concerned with the issue of authorization? If the United States military can act outside the Constitution in foreign territories under their control, then why do their actions need to be justified under Article I? To put the matter differently, how can the Court recognize Article I’s restraining federal legislative power but not Article III’s right to a jury in the “trial of all crimes”? Further, if congressional authorization is an issue, then why do the due process clause of the Fifth Amendment and procedural rights guaranteed in the Sixth Amendment not limit the use of federal power?

The Constitution explicitly requires a jury trial in criminal cases. Article III establishes the right and the Sixth Amendment repeats it just in case we forget. We can only be puzzled by the Supreme Court’s ignoring these issues in *Hamdan*, even though it assumes beyond question that Article I governs whether the tribunals have authority to pass judgment over the defendant Hamdan.

The constitutional inquiry invariably looks to history, but the exact origins of these tribunals or commissions (the terms are used interchangeably) remain open to dispute. According to one theory, they originated during the American Revolution, prior to the enactment of the Constitution. The military trial of Benedict Arnold collaborator John André was the landmark of the time. According to an alternative recitation of the history, military tribunals originated during the Mexican War in 1847, when General Winfield Scott decided that he needed a tribunal in the field to cope with local resistance to the war effort.

The earlier date is critical to the constitutional argument about the right to a jury trial. After all, if the proceedings are criminal in nature, it is not easy to explain why the right to a jury trial does not apply. This was a troubling issue both in *Milligan* in 1866 and in *Quirin* in 1942. The majority in *Hamdan* had literally no interest in revisiting these issues. As a result, Justice Stevens appears to be indifferent to the historical dispute. He is willing to accept the 1847

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38. For a brief summary of the trial of John André, see *Ex parte Quirin*, 317 U.S. 1, 31 n.9 (1942).
39. The leading authority on this history is WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 832–33 (2d ed. 1920).
41. 317 U.S. at 39–41.
42. The Stevens opinion does not mention any provision in the Bill of Rights, though the confrontation clause, due process, and jury trial issues are all relevant. The closest the five Justices come to mentioning the civil liberties jurisprudence of the Court is a footnote reference to Crawford v. Washington, 541 U.S. 36 (2004). *See supra* note 25 and accompanying text.
date, presumably without realizing that he is thereby undermining the argument accepted in Quirin that the tribunals had been "grandfathered" into the Constitution.

Whenever and wherever they may have originated, the tribunals functioned until 1916 as institutions of military common law—without mention in the federal statutes. They functioned directly under the supervision of the Department of Defense (DoD) and the President. In Article 15 of the Articles of War, enacted in the middle of World War I and now codified as 10 U.S.C. § 821 as the Uniform Code of Military Justice [UCMJ], we find at least a covert reference to the existence of the tribunals. The language has been often repeated:

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

For all its complexity, this provision tells us very little. Another provision does vest jurisdiction over offenses against the law of war in courts martial, but this provision merely informs us that potential jurisdiction in a court martial over a violation of the law of war will not prevent a military tribunal from operation. This could be read simply as an anti-preemption provision, but the importance of this 1916 provision lies elsewhere. As interpreted in the major cases,

18 U.S.C. § 821 acknowledges and therefore provides indirect legislative authorization of military tribunals.

It is not clear what the original point of § 821 was. If Congress had wanted to authorize military tribunals in 1916, they would have said so directly. What then, is the value of recognizing concurrent jurisdiction in the military tribunals as a matter of customary law? In practice, to be sure, there have been few efforts to use mili-

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44. 317 U.S. at 41–42.
47. 10 U.S.C § 818.
48. Although there is no legislation or case law on point, I presume that commencement of proceedings in federal court would preclude a simultaneous trial in a military commission.
tary commissions to duplicate the prosecutions of courts martial. The practical purpose of the provision, therefore, is dubious. Its primary impact has been to provide indirect authorization of the tribunals.\(^5\)

Yet § 821 also elicits a confused understanding of the tribunals and where they fit in the scheme of government. According to one view, the tribunals are a slightly watered-down version of courts martial that the military can use to try enemy civilians or soldiers for unspecified crimes against the law of war.\(^5\) Thus the tribunals exist side-by-side with the courts martial and the justice meted out to the enemy should be as close as possible to the treatment of our own soldiers in courts martial. Commissions are courts-martial-lite, the presumption being that the enemy deserves no better.\(^5\) This view is expressed clearly in the oft-litigated § 836 of the same Title 10:

(a) Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals, and procedures for 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.

Note the dual practicability requirement. First, the procedures for the commissions and the courts martial may deviate only so far as the President considers "practicable" from the rules of evidence used in federal court. And second, in a provision adopted after World War II, "practicable" uniformity between the types of courts must prevail. These provisions support the view that the commission is a version of the court martial, the basic difference being that the better court is intended for our own troops, the lesser court is suitable for prosecuting our enemies.

According to the competing view of the role and place of

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\(^{50}\) Some scholars are convinced that § 821 really has authorized the tribunals. See Curtis A. Bradley & Jack L. Goldsmith, Congressional Authorization and the War on Terrorism, 118 HARV. L. REV. 2047, 2129–33 (2005).

\(^{51}\) A version of this view is expressed in MCA 2006, supra note 5, §§ 948d(a) & (b), which seeks to apply courts martial to lawful enemy combatants and military tribunals to unlawful enemy combatants. See id. §§ 948d(a) & (b).

\(^{52}\) See Geneva Convention Relative to the Treatment of Prisoners of War, supra note 17, art.103.
military tribunals, these executive courts derive directly from the law of war. This view is supported by the language of § 821, namely the vesting of jurisdiction over "offenses that . . . by the law of war may be tried by such military commissions." The derivation from international law is further implied by the customary practices of the tribunals. First, they functioned as a matter of customary law, without explicit legislative definition, for at least a century. Further, the constitutional warrant for the tribunals is at best derivative of the other explicit powers related to declaring and fighting wars. Finally, the Supreme Court itself in Quirin drew a convincing analogy between the punishment of spies and the punishment of those who violate the law of war. After explaining the permissibility of punishing unlawful combatants in military tribunals, Chief Justice Stone interrelated the two types of suspects:

The spy who secretly and without uniform passes the military lines of a belligerent in time of war, seeking to gather military information and communicate it to the enemy, or an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of war, but to be offenders against the law of war subject to trial and punishment by military tribunals.

The interdependency could not be clearer. The unlawful combatant as well as the spy are "subject to trial and punishment in military tribunals." Focusing on this analogy evokes a different conception of the tribunals, one holding that they are a necessary feature of the law of war.

At the time the Lieber code was adopted in 1863, it was acceptable to say simply that spies will "suffer death." The Hague Conventions sought to ameliorate the status of those engaged in espionage. The Hague text does not penalize spying—rather it limits the range of the concept and explicitly requires a trial before pun-

53. See U.S. Const. art. I, § 8, cls. 11 ("declare War"); 12 ("raise and support Armies"), 13 ("Navy"), and 14 ("Government and Regulation of the land and naval Forces").
55. Id.
57. See Convention (IV) Respecting the Laws and Customs of War on Land and its
ishment. So far as the analogy with the treatment of spies holds, one could argue that international law itself requires military commissions—or at least some form of trial—prior to punishing those who violate the law of war.

However the commissions or tribunals come into existence, they are governed by a form of customary law known as the law of war. There is confusion, perhaps deliberate, whether the body [of law defining crimes cognizable in military courts] is equivalent to the set of “offenses against the law of nations” that Congress may define pursuant to Article I, Section 8, Clause 10. The problem with this view lies, textually, in the structure of Article I, Section 8. In Clause 9, the Constitution enables Congress to create “tribunals inferior to the Supreme Court.” Clause 10—labeled “Offenses”—apparently grants Congress the power to define certain of the offenses subject to prosecution in the inferior tribunals, if so created. Thus the implication is that “offenses against the law of nations” should be tried in the lower federal courts. There is no explicit constitutional warrant for relegating the prosecution of these offenses, or indeed any offenses, to military tribunals.

The words of Article I, Section 8 carry a message less than favorable to the prosecution of customary offenses in military tribunals. Congress does not have the power to define international law—only the offenses against international law cognizable in the United States. Indeed there would be something conceptually illogical and deeply troubling about Congress’s attempt to repeal or alter international law by enacting a statute. This suggests that the offenses exist independently of legislation but that Congress must, or least should, define these offenses precisely for the sake of the principle nulla poena sine lege—that is, the prohibition of punishment without the prior statutory definition of offenses. This concern is confirmed by the prohibition of ex post facto laws, enacted either by Congress or the states.

As early as 1812, the Court prohibited the prosecution of non-codified common law offenses in the federal courts. All of this should remind us how peculiar it is for the Supreme Court to affirm the punishment of those who violate the common law of war. The peculiarity is compounded by institutionalizing proceedings in a form of court not mentioned in the Constitution.

Annex: Regulations Concerning the Laws and Customs of War on Land art.29, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539.

58. See id. art. 30 (“A spy taken in the act shall not be punished without previous trial.”).
The MCA 2006 purports to define twenty-eight offenses subject to prosecution in military tribunals. Not all of these are "offenses against the law of nations." The least one can say is that the Court thinks differently about regular crimes and crimes against the law of war. When it comes to criminal prosecutions in the United States, the Court reasons rigorously in the following stages: (1) if the sanction is punitive, the proceedings are criminal in nature, and (2) if the proceedings are criminal in nature, Article III and the Sixth Amendment require a jury trial.

If the prosecutions fall outside this constitutional core—if they are abroad, if they are against those aliens called "enemy combatants"—the Court thinks differently. The Constitution is not so readily applied outside the United States—even when the federal government asserts its power. It has never been clear to me why the government should be free of constitutional restraints abroad. The subject remains under-theorized in the case law and in the literature. Today the restraints on the prosecution of foreigners abroad seem to derive not from the explicit provisions in the Constitution, but as formulated by Hamdan, from Common Article Three of the Geneva Conventions and the international law of war. At least this is now the dominant mode of thought.

One could easily be afraid of an "anything goes" mentality: anything the President thinks is necessary to prosecute the war should be allowed. Some judges and justices—notably, Justice Thomas—hold this view. The extraordinary result of Hamdan is not that the Court applied Common Article Three of the Geneva Conventions in lieu of the Sixth Amendment, but rather that the vague concept "law of war" turned out to have teeth—teeth sharp enough to invalidate the charge of conspiracy laid against Hamdan. The difficult question posed in the MCA 2006 is whether its provision on conspiracy offends the holding in Hamdan or not. In order to reach that issue we need to review the arguments in Hamdan about why conspiracy

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63. See, e.g., 10 U.S.C. § 950v(b)(20) (intentionally mistreating a dead body); 10 U.S.C. § 950v(b)(22) (sexual assault or abuse). Nothing in the statute requires that these offenses be committed in time of war.
66. My thinking was shaped by my role as an expert witness in the case of U.S. v. Tiede, 86 F.R.D. 227 (U.S.C. Berlin 1979), where the Court held that the Constitution applied to the trial of a foreigner in the occupied city of Berlin.
should not be considered part of the law of war applicable in military tribunals.

III. **IS CONSPIRACY AN OFFENSE UNDER THE LAW OF WAR?**

The point is easily forgotten—*Hamdan* is neither about the legitimacy of military commissions nor about the propriety of charging conspiracy against suspected terrorists. It is about the combination of these two elements: the procedural form and the substantive charge. The question in *Hamdan* was whether that combination violates the law of war and therefore falls afoul of the authorization of the tribunals to prosecute offenses under the law of war.

Given the myriad of issues in *Hamdan*—the procedural irregularities of the tribunals, the attempt by Congress to strip jurisdiction from the Supreme Court while the case was pending, and the issue of abstention and interlocutory appeal—one can only be impressed that Justice Stevens and the plurality reached the substantive core of the problem. The four vote plurality could easily have abandoned their interest in the law of war and joined Justice Kennedy in his argument based exclusively on the violation of Common Article Three of the Geneva Convention. This would have been the "Warrenesque" move, the compromise for the sake of unity. But, instead, Justice Stevens and his three colleagues (Justices Breyer, Ginsburg, and Souter) held out in Section Five of the opinion for a deep and lasting analysis of the law of war. In my opinion, this will be the contribution of the case over time. For the first time in history, the Court has delved deeply into this concept that has challenged our understanding for over two hundred years.

Justice Stevens sets up his analysis of the law of war artfully by distinguishing among three types of military commissions. One kind is used in place of the civil courts under conditions of martial law. A second type is used under conditions of occupation. For example, in the occupation of Germany, a military commission heard and judged the case of an American wife of a serviceman who killed her husband on the base. The peculiarity of this type of court is that it applies the local law of the occupied state. The military tribunal on the American base in Germany applied the German law of

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homicide rather than the law of war. The third type of tribunal, as used in the leading cases from Milligan to Hamdan, is called the law-of-war tribunal because the jurisdiction derives from the law of war and the governing substantive law is also the law of war. This is a very helpful conceptualization that will guide future thought on these matters.

In Hamdan the controversy was whether charges of conspiracy are compatible with the law of war as we understand it. This is the point on which Justice Stevens differs most sharply from Justice Thomas and his co-dissenters (Justices Scalia and Alito). In order to understand the position of the plurality, implicitly shared or at least not opposed by Justice Kennedy, we need to immerse ourselves in the arguments.

Preliminarily, the concept of conspiracy requires clarification. The same word is used in three different senses:

(1) *Agreement as a crime.* This is the definition of the stand-alone offense found in the federal statutes and in MCI2 defining the offenses subject to prosecution in the post-9/11 military commissions: “The accused entered into an agreement with one or more persons to commit one or more substantive offenses triable by military commission or otherwise joined an enterprise of persons who shared a common criminal purpose . . .”

(2) *Collective commission of an offense.* This is the sense in which the phrase “collective plan or conspiracy” was used in the Nuremberg trials to refer, retrospectively, to the collective planning, preparing, initiating, and waging of aggressive war. The conspiracy charge was redundant and irrelevant because the very acts of planning, preparing, initiating, or waging war require group participation.

(3) *Conspiracy as a criterion of complicity.* The idea is that co-conspirators are liable as accessories or aiders-and-abettors of all substantive offenses committed

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72. After the application of Common Article Three in Hamdan, we can say that the procedural law is also governed by the law of war, as expressed in the Geneva Conventions.
75. Military Commission Instruction Number 2, supra note 6, § 6(C)(a)(1).
76. Id.
in the course of the conspiracy. This sense is expressed in the Pinkerton rule in the federal courts and was also used in MCI2 defining liability in the military tribunals.

To argue that the charge of conspiracy in Hamdan did not constitute a crime under the law of war, it was essential to bracket off two extraneous senses of "conspiracy"—namely conspiracy as collective commission of the offense (number 2 above) and conspiracy as a criterion of complicity (number 3 above). Nuremberg as a precedent represents a judgment about conspiracy in the second sense—as a charge of conspiracy of engaging in aggressive warfare. There is little harm of using the concept retrospectively in this context. It is confusing to use conspiracy in the third sense, as in MCI2 and the Pinkerton rule, but no claims were made that Hamdan was liable for the 3000 plus murders that occurred on 9/11. He may have had the mental state of desiring the death of infidels but he did not do enough, under any coherent conception of aiding and abetting, to have become an accomplice in mass murder. The charge against Hamdan was limited to the inchoate offense of joining an existing conspiratorial agreement to attack civilian targets in the West—i.e., conspiracy in the first sense.

Clarifying these distinctions was a critical part of mounting an argument against conspiratorial agreements as a crime against the law of war. So far as the Court pondered conspiracy in Nuremberg or conspiracy as a criterion of complicity, there was little hope of characterizing conspiracies (in the sense of crimes of agreement) as contrary to the law of war. The critical moment in the oral argument came when Justice Stevens questioned attorney Neal Katyal about the difference between the notion of agreement as a crime and complicity. The exchange went like this:

JUSTICE STEVENS: May I ask . . . this question? Supposing the charge had been slightly amended. Instead of saying, "The criminal purpose, and conspired

77. Pinkerton v. United States, 328 U.S. 640, 646–47 (1946) (holding co-conspirator in jail liable for offenses committed by other members of the conspiracy still at large).
78. Military Commission Instruction Number 2, supra note 6, at § 6(C)(6)(b)(5) ("Each conspirator is liable for all offenses committed pursuant to or in furtherance of the conspiracy by any of the co-conspirators, after such conspirator has joined the conspiracy and while the conspiracy continues and such conspirator remains a party to it.")
79. The arguments as recited here are based on my brief as amicus curiae for experts in conspiracy and the law of war. See Brief of Specialists in Conspiracy and International Law as Amici Curiae Supporting Petitioner, Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006) (No. 05-184).
80. Under Model Penal Code § 2.06(3) (a)(ii) (2001), an accessory must either agree to commit or aid the commission of an offense.
and agreed with Osama bin Laden to commit the following offenses,” it said, “It and Osama bin Laden attempted to—aided and abetted in committing the following offenses.” Would it then be—violate the laws of war?

....

MR. KATYAL: Yes, with respect to this particular claim about conspiracy, that would solve that problem. If you say the charge is attacking civilians, and your theory of proving it is aiding and abetting the murder or the attacking of civilians—

....

JUSTICE STEVENS: What if the trial judge who looked at the indictment or ruling on a motion to dismiss the indictment, or its equivalent at this time—said, “Well, I’m going to construe these words ‘conspired or agreed’ as the substantial equivalent of ‘aiding and abetting.’” Would that let the charge stand?

MR. KATYAL: That would mix apples and oranges, because “conspiracy” and “aiding and abetting” are two entirely different things. One is a standalone offense. And the [other] is a theory of how to prove a violation—

JUSTICE STEVENS: But the language is “conspired and agreed with.” And “agreed with” is pretty close to “tried to do it himself.”

MR. KATYAL: It’s not, Justice Stevens, because it requires a different level of participation, and the liability is entirely different. Because if conspiracy is accepted, you’re accepting Pinkerton liability. That’s what the Government’s own charge said—the Government’s own instruction said, which means that Mr. Hamdan is liable for all the acts of 9/11 and everything al Qaeda has done. “Aiding and abetting,” as you are saying, Justice Stevens, in your hypothetical, is a much more closely tethered theory of liability, requiring a higher level of individual culpability and a
totally different level of punishment.81

This exchange laid the conceptual groundwork for the Stevens plurality. Justice Stevens grasped the critical distinction—which I fear would be lost on many—between conspiracy as a standalone offense of agreement and complicity for aiding and abetting the commission of an offense.

We now are in a position to review the three major attacks on charging conspiracy (as a standalone offense) under the law of war. All three—the comparative, international, and historical critiques—raise worthy methodological problems in their own right.

A. The Comparative Critique

Let us recall that whether conspiracy constitutes a chargeable offense in a military tribunal depends on our construction of the law of war. The first point to note is that the law of war is international law and therefore it should be the same for all the major legal systems of the world. This is the point on which Justice Thomas and his two fellow dissenters82 broke company with the majority view on the Court.83

The modern law of war is based largely on the written conventions signed in The Hague and in Geneva. But the origins of the idea in American law began in customary law, a body of norms that purported to conform to the principles of warfare generally accepted as binding international law. These customary, unwritten norms of international law determine the outcome in the guiding precedents of the Supreme Court, including the four principal cases Milligan, Quirin, Yamashita, and Eisentrager. If these unwritten norms did not apply in foreign as well as in American courts, we could not properly refer to them as expressing a shared sense of being bound by the same rules and principles.

The problem with conspiracy is that it is a distinctively common law idea. Beginning in the seventeenth century, the English courts took the private law concept of “acting in concert” or “con-
spiration" and began to punish specific agreements to commit unlawful acts. The original context was conspiracy to engage in crimes against administration of justice, as by procuring false and malicious indictments.\(^\text{84}\) By the early seventeenth century, the infamous Star Chamber was punishing unexecuted conspiratorial agreements.\(^\text{85}\) The essence of the crime, as defined today in the federal statutes, is an agreement to commit an unlawful act.\(^\text{86}\) The idea that agreements per se are punishable has never found acceptance in Continental European law. Typical of European sentiment is Article 115 of the 1930 Italian Penal Code, which states: "Except where the law provides otherwise, whenever two or more persons agree for the purpose of committing an offense, and it is not committed, none of them is punishable for the sole fact of making the agreement."\(^\text{87}\) With the possible exception of the recently ratified Spanish Criminal Code,\(^\text{88}\) there is no statutory basis in Continental Europe for stigmatizing groups that do nothing more than agree to commit a crime. Continental European scholars agree on this point.\(^\text{89}\) But we need to realize the peculiarly American way of thinking about conspiracy. The charge against Hamdan is not that Hamdan, bin Laden, and others entered into an agreement to commit terrorist acts, but rather that Hamdan, as bin Laden's driver, "joined an existing conspiracy." It is not clear how one joins a conspiracy but if you think of a criminal conspiracy as something like a criminal organization, then presumably you can join by collaborating with the organization with the intent to further its goals.

Formulated in this way, criminal conspiracy comes close to a crime that is recognized in most European criminal codes, namely membership in a criminal or terrorist organization.\(^\text{90}\) The old Soviet Union had a crime of membership in anti-Soviet organizations—a crime tainted by its applications against dissidents.\(^\text{91}\) Politics to one


\(^{85}\) Poulterer's Case, (1611) 77 Eng. Rep. 813 (Star Chamber).

\(^{86}\) See 18 USC § 371 (2000).

\(^{87}\) Codice penale [C.P.] art. 115 (1930) (Italy), translated in GREAT BRITAIN FOREIGN OFFICE, PENAL CODE OF THE KINGDOM OF ITALY, AS APPROVED BY ROYAL DECREE OCTOBER 19, 1930 (IN FORCE FROM JULY 1, 1931), at 33 (1931).


\(^{90}\) StGB § 129 [German Criminal Code]; Code pénal [C. PÉN.] § 450-1 (France).

\(^{91}\) Ugolovnyi Kodeks RSFSR [Criminal Code] art. 72 (U.S.S.R.). For the political uses of this offense, see TELFORD TAYLOR ET AL., COURTS OF TERROR: SOVIET CRIMINAL
side, punishing membership per se raises conundrums. What constitutes membership? Carrying a card? Swearing allegiance? Even if we knew precisely what membership meant, American lawyers would properly have qualms about punishing the passive status of just being there and being counted.

This is something American lawyers in the 1950s and 1960s may have learned from their searing experience with McCarthyism. The Smith Act attempted to make it a crime merely to be a member of the Communist Party. Yet the Supreme Court held firm against this attempt to water down the principles of criminal liability. Even though the justices upheld the Smith Act convictions in *Scales*, the Court interpreted the Smith Act to require "not only knowing membership, but active and purposive membership, purposive that is as to the organization's criminal ends." Membership itself does not threaten anyone. It cannot be a criminal wrong. The wrong to society only occurs when someone, with his or her personal act, actually promotes the criminal objectives of the organization.

Whether Hamdan would be guilty under this standard for promoting the purposes of al Qaeda is open to dispute. The problem basically is whether background providers—drivers, cooks, maids, postmen, those who deliver groceries, etc.—are guilty of being part of a conspiracy just because they know about the criminal ends. There is a powerful precedent in the American courts for holding that background providers are just passive components in the background, not active agents promoting criminal ends.

To sum up, neither conspiracy nor membership in a terrorist organization meets the standards of an international crime acceptable to the leading legal systems of the world. Europeans reject conspiracy as it is understood by Americans, and Americans reject the crime of membership in a terrorist organization, as is commonly recognized in Europe. It follows that the charges of conspiratorial agreement lodged against Hamdan cannot constitute part of the law of war.

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94. *Id.* at 209.
95. I first discussed this theory in *FLETCHER*, supra note 89, at 219–25.
96. *United States v. Falcone*, 109 F.2d 579 (2d Cir. 1940), *aff'd*, 311 U.S. 205 (1940) (seller of sugar to distillers not liable, despite his knowledge, for promoting the criminal end of illegally manufacturing liquor.); United States v. Blankenship, 970 F.2d 283 (7th Cir. 1992) (lessor of apartment to persons making illegal drug not liable, despite his knowledge, for complicity in manufacturing the drugs). *But cf.* *Direct Sales v. United States*, 319 U.S. 703 (1943) (mail order seller of morphine liable where he had a "stake in the outcome" of the illegal use by the buyers of his morphine).
They do not meet the requirement, endorsed by the majority, that the law of war accord with the principles applicable to all leading participants in the international legal order.

As noted in the Stevens opinion, the argument that common law thinkers exaggerate the relevance and legitimacy of conspiracy was instantiated by the objection of the French judge in Nuremberg, Professor Donnedieu de Vabres. He was not willing to accept conspiracy as a "standalone" crime and insisted on a formula that reduced conspiracy to a form of complicity. In his memorable phrase: "The crime absorbs the conspiracy." In other words, if you promote a criminal end, and the end succeeds, you are liable for perpetrating the end, but you are liable neither for attempt nor for complicity per se, both of which are merged in the crime itself.

The Americans argued at Nuremberg that conspiracy as a self-standing, non-mergeable crime should apply to all the major charges—aggressive war, war crimes, and crimes against humanity. In the end, however, they lost. The charge of conspiracy was applied exclusively to the crime of collectively "planning, preparing, initiating, and waging of aggressive war." In this context the charge of conspiracy is redundant. The acts of "planning, preparing, initiating, and waging" are by their nature collective actions. Nuremberg illustrates the second sense of conspiracy I outline above, namely the collective execution of a crime viewed ex post.

The comparative critique had some impact on the Stevens opinion, primarily in the citation to Telford Taylor’s explanation why the plan for charging of conspiracy failed at Nuremberg: "The Anglo-American concept of conspiracy was not part of European legal systems and arguably not an element of the internationally recognized laws of war." A plurality of the Court thus accepted the comparative critique of conspiracy. Yet the more devastating arguments were to come in the international and historical refutations of the government’s position.

101. Telford Taylor, Anatomy of the Nuremberg Trials: A Personal Memoir 36 (1992). Taylor also notes that the American effort to use membership in a criminal organization failed as a trial strategy. Id. at 584–585, 638.
B. The International Critique

The Nuremburg charge of conspiracy to engage in aggressive war was nearly the last gasp of the American doctrine of conspiracy in international law. True, the 1948 Genocide Convention makes it a crime to engage in a conspiracy to commit genocide. This is peculiar because Nuremburg had already rejected the application of conspiracy to crimes against humanity, and the concept of genocide grows out of the general category of crimes against humanity. Admittedly, the Statutes of the Yugoslav and Rwanda tribunals unreflectingly adopt the same language in the context of genocide, but in my view these references to conspiracy are merely the afterglow of a dying concept.

Since 1948 and the residue of the Genocide Convention in the statutes of the ad hoc tribunals, every relevant international treaty on international humanitarian law or international criminal law had deliberately avoided the concept and language of conspiracy. The Geneva Conventions of 1949 say nothing about conspiracy. The Convention Against Torture says nothing about it. The recent treaties designed to combat terrorism say nothing about the kind of conspiracy alleged against the supposed terrorist Salim Ahmed Hamdan. And most importantly, the Rome Statute establishing the International Criminal Court remains firmly silent on the issue. The reason for this categorical rejection of the mid-century flirtation with the concept of conspiracy is, I believe, that we have become more strongly committed to the principle of individual accountability.

The only references to conspiracy in the treaties of the last sixty years are found in provisions in highly specialized treaties per-
taining to organized crime. But these treaties do not purport to recognize an international crime of conspiracy. They explicitly defer to local mores on the use of conspiracy charges. Some legal systems recognize conspiracy and others do not. Americans do. Others do not. When only some countries accept a particular doctrine, it cannot become part of customary international law applicable to all nations as part of the law of war.

The Supreme Court plurality (with nothing in Justice Kennedy's concurring opinion to indicate the contrary) recognizes the international trend. At one point Justice Stevens notes that the crime of conspiracy does not appear in the Geneva or Hague Conventions. He sums up in the following lines:

Finally, international sources confirm that the crime charged here is not a recognized violation of the law of war. . . . [N]one of the major treaties governing the law of war identifies conspiracy as a violation thereof. And the only "conspiracy" crimes that have been recognized by international war crimes tribunals (whose jurisdiction often extends beyond war crimes proper to crimes against humanity and crimes against the peace) are conspiracy to commit genocide and common plan to wage aggressive war, which is a crime against the peace and requires for its commission actual participation in a "concrete plan to wage war."

C. The Historical Critique

Even more telling than the silence of international treaties on the issue of conspiracy is the jurisprudential silence of the Supreme Court, which has repeatedly rejected the possibility of affirming conspiracy as a punishable offense before military tribunals. The long

109. E.g., Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances art. 3, Dec. 20, 1988, E/CONF 82/15 (“Each Party shall adopt such measures as may be necessary to establish as criminal offences under its domestic law . . . c) Subject to its constitutional principles and the basic concepts of its legal system . . . iv) Participation in, association or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counseling the commission of any of the offences established in accordance with this article.”) (emphasis added); see also Convention on Psychotropic Substances art. 22(2)(a)(ii), Feb. 21, 1971, 1019 U.N.T.S. 175; Convention Against Transnational Organized Crime art. 6(1)(b)(ii), Nov. 2, 2000, A/55/383.
111. Id. at 2784. I read the last line as a covert endorsement of my thesis that conspiracy to commit aggressive war is redundant because, as Justice Stevens puts it, the crime presupposes "a concrete plan."
series of cases begins with the landmark decision in *Milligan*. The government had charged Milligan with numerous counts of sedition, including a vague reference to a "conspiracy against the United States." There is no mention of the object of this alleged conspiracy, but significantly, this charge is clearly distinguished from count five of the indictment alleging "violation of the law of war," indicating that conspiracy was distinct and different from violations of the law of war. The charge of conspiracy carried no weight in the courageous decision of the Court to reject the jurisdiction of the military tribunal in all cases when the state or federal courts could hear the prosecution. The distinction between conspiracy theories and the law of war, recognized by the Supreme Court in *Milligan*, is confirmed in the leading work of the nineteenth century by Colonel William Winthrop,\(^1\) an author considered the "Blackstone of Military Law."\(^1\)

For our purposes, the most significant case is *Quirin*,\(^1\)\(^4\), the influential Court judgment upholding the use of commissions on a charge of violating the laws of war. The eight German saboteurs were charged with four counts:

1. Violation of the law of war.
2. Violation of Article 81 of the Articles of War, defining the offense of relieving or attempting to relieve, or corresponding with or giving intelligence to, the enemy [18 USC § 904]
3. Violation of Article 82, defining the offense of spying. [18 USC § 906]
4. Conspiracy to commit the offenses alleged in charges 1, 2 and 3.\(^1\)\(^5\)

As in *Milligan*, the distinction between counts one and four, the violation of the law of war and the charge of conspiracy, indicates that Attorney General Biddle, later to become so skeptical about the conspiracy charge in Nuremberg,\(^1\)\(^6\) regarded the two worlds as divided by a conceptual barrier—the law of war on one side, and conspiracy, on the other. Ironically, the conspiracy charge was in fact the most coherent charge against the eight German defendants. Apart from their shared plan of action, they had not committed an offense.

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112. WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 839 (United States War Department 1920) (grouping conspiracy with substantive crimes such as murder and theft, all distinguishable from offenses against the law of war).
113. *Hamdan*, 126 S. Ct. at 2777 (quoting Reid v. Covert, 354 U.S. 1, 19, n. 38 (1957)).
115. *Id.* at 23.
116. On Biddle's sympathies with the position of the French judge Donnedieu de Vibres, see SMITH, *supra* note 97, at 126.
against the laws of the United States—except illegal entry into the
country. They had not done enough on American soil to be liable for
an attempt under either count two (§ 904 (assisting the enemy)) or
count three (§ 906 (spying)).

President Roosevelt had thought, it seems, that the infiltrators
would be liable under these two provisions of Title 10, counts two
and three of the indictment. In drafting the executive order establish-
ing the commission,117 he thought it was sufficient that those who
landed illegally on American shores were “preparing” to commit
sabotage or espionage. The problem was that §§ 904 and 906 of Title
10 do not punish mere “preparation.” They require actual “aid or at-
tempt to aid” the enemy,118 or, in the case of spying, “lurking” around
a sensitive military installation.119

The most coherent charge against the eight defendants, there-
fore, was the fourth count, conspiracy to violate counts one, two, and
three. Surprisingly, however, Chief Justice Stone’s opinion for the
Court does not even mention the possibility of convicting the eight
for conspiracy. Instead—five months after six of the eight convicted
defendants had been executed!—the Chief Justice developed the
novel theory that they were punishable as “unlawful combatants.”

The theory of unlawful combatancy was based on the failure of
the eight defendants to have satisfied the four criteria of the Hague
Convention of 1907 for becoming belligerents and, if captured, pris-
oners of war. The four conditions were: “(1) To be commanded by a
person responsible for his subordinates; (2) To have a fixed distinc-
tive emblem recognizable at a distance; (3) To carry arms openly;
and (4) To conduct their operations in accordance with the laws and
customs of war.”120 The eight infiltrators buried their uniforms upon
landing and proceeded beyond enemy lines without wearing a “fixed
distinctive emblem recognizable at a distance.” Thus they could not
qualify as belligerents and prisoners or war.

The holding in Quirin has long since ceased to be binding un-
der the law of war. First, the Third Geneva Convention Article 4 has
superseded the definition of combatancy in the Hague Conventions.
Now all captured members of the regular armed services should be
treated as prisoners of war. Second, more dramatically, Congress has
implicitly repudiated the theory of liability that Chief Justice Stone

120. Annex to the Hague Convention IV Respecting the Law and Customs of War on
Land art. 1, Oct. 18, 1907, 36 Stat, 2277, T.S. No. 539.
developed in his *Quirin* opinion. Under the new statute on military commissions, an “unlawful enemy combatant”\(^{122}\) is subject to prosecution only for actually causing harm to some person or property.\(^{123}\) The two relevant offenses—murder and destruction of property—require more than walking around behind enemy lines without wearing a uniform.

The intriguing historical question is why the *Quirin* Court chose to focus on the dubious theory of unlawful combatancy. The more plausible charge was conspiracy, but the Court refused to touch it. Toward the end of his opinion, Chief Justice Stone summed up the status of the four charges levied against the four defendants then tried and convicted by the military tribunal:

Since the first specification of Charge I sets forth a violation of the law of war, we have no occasion to pass on the adequacy of the second specification of Charge I, or to construe the 81st [18 USC §§ 904] and 82nd Articles of War [18 USC §§ 906] for the purpose of ascertaining whether the specifications under Charges II and III allege violations of those Articles or whether if so construed they are constitutional.\(^{124}\)

The striking omission from this paragraph is the failure even to mention Charge IV, namely “conspiracy to commit the offenses alleged in charges 1, 2 and 3.” The Court must have realized that the conspiracy charge was not credible under the law of war.

In all the law-of-war commission cases since 1942, the Court has adhered to the choice implicit in *Quirin*, namely that conspiracy is not a basis for prosecuting violations of the law of war. In the prosecution of General Yamashita and his subordinates, the Court could have relied on a theory of conspiracy but instead it developed the novel doctrine of command responsibility based on the negligent failure of the General to supervise his troops in the field.\(^{125}\)

More recently, in a case testing the reach of the “law of nations” in a different legal context, the Supreme Court similarly ignored an obvious conspiracy in contemplating the proper legal characterization of the facts. In *Sosa v. Alvarez-Machain*,\(^{126}\) agents of the

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122. For the definition, see *id.* § 948b(a).
125. *In re Yamashita*, 327 U.S. 1 (1946). This doctrine has since been accepted in the law of war. See Rome Statute, *supra* note 18, art. 28.
United States Drug Enforcement Agency conspired with a group of Mexican nationals to abduct Alvarez-Marchain from his home in Mexico and bring him to the United States to stand trial. Alvarez-Machain subsequently sued Sosa, one of the DEA agents, as well his co-conspirators under the Alien Tort Statute for the torts of abduction and false imprisonment “in violation of the law of nations.”

Though the Supreme Court unanimously upheld the Alien Tort Statute in the abstract, it also rejected Alvarez-Machain’s claim as too speculative for recovery. Justice Souter, writing for the Court, characterized the incident as “arbitrary detention” and found that temporary arbitrary detention was insufficient to constitute a violation of the law of nations. Significantly, however, the detention and kidnapping were in fact executed by a conspiracy constructed for that purpose. The Court did not acknowledge the conspiracy as relevant to the claim under international law. *Sosa* is but another in a long line of cases in which the factor of conspiracy falls below the threshold of the Court’s legal sensibility.

This argument—based essentially on the silence of the Court in the face of conspiracies present in the facts of the Court’s prior cases—found surprising resonance in the thinking of the Stevens plurality in *Hamdan*. His bottom line: “If anything, *Quirin* supports *Hamdan*’s argument that conspiracy is not a violation of the law of war.”

It is worth pondering some of the plurality’s reasoning why the silence of the opinion speaks so clearly to the impermissibility of conspiracy charges:

That the defendants in *Quirin* were charged with conspiracy is not persuasive, since the Court declined to address whether the offense actually qualified as a violation of the law of war—let alone one triable by military commission. The *Quirin* defendants were charged with the following offenses [there follows the list given above].

The Government, defending its charge, argued that the conspiracy alleged “constituted an additional violation of the law of war.” . . . The saboteurs disagreed; they maintained that “the charge of conspiracy can not stand if the other charges fall. . . . The Court, however, declined to resolve the dispute. It concluded, first, that the specification supporting Charge I ade-

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quately alleged a "violation of the law of war . . . ."\textsuperscript{129}

In fact, as already argued, the first count was the least persuasive basis for a conviction. It was tantamount to a licensing violation: the combatants did not qualify as lawful combatants meriting POW status under the Hague Convention. They were fighting without the imprimatur that the DoD has called the "belligerent privilege."\textsuperscript{130} The mere fact of their surreptitiously entering the country hardly threatened a significant interest of the country or of the military. It was largely of symbolic significance—an act connoting the porosity of the American system of shoreline defense. Contrary to Justice Stevens's affirmation of the reasoning in \textit{Quirin}, the opposite seems more plausible. The strongest basis for conviction would have been conspiracy, and had they been charged in federal court, they would presumably have been guilty of a conspiracy to commit sabotage or to engage in other unlawful activities.\textsuperscript{131} That the first count was in fact the weakest underscores the negative implications of the \textit{Quirin} Court's silence about the conspiracy charge.

In his \textit{Hamdan} opinion, Justice Stevens emphasized a peculiar facet of the crime of unlawfully entering the United States, namely that it was a completed crime:

\begin{quote}
[The Quirin Court's] analysis of Charge I placed special emphasis on the completion of an offense; it took seriously the saboteurs' argument that there can be no violation of a law of war—at least not one triable by military commission—without the actual commission of or attempt to commit a "hostile and warlike act."\textsuperscript{132}
\end{quote}

This argument seeks to convert the inchoate act of entering the country with a hostile purpose—an act falling below the threshold of criminal attempt—into a consummated offense, "a hostile and warlike act." Let us suppose that merely entering the country—breaching the country's territorial defenses—is indeed hostile and warlike. It remains an inchoate offense punishable only because it carries with it the potential of serious harm in the future. It is complete only in the sense that all regulatory offenses—practicing medicine or driving without a license—are complete upon engaging in the action without the proper license or privilege.

Yet there may be a subtle point in the Court's reading the of-
fense in *Quirin* as complete on its face. As we have seen since then in the evolution of the law of war and war crimes, these are consummated offenses claiming victims. The preamble to the Rome Statute emphasizes the atrocities that occurred in the course of the twentieth century.\footnote{Rome Statute, *supra* note 18, pmbl., art. 2 ("Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity . . . ").} The law of war emphasizes completed crimes—the law responds to the plight of victims.\footnote{One exception to this pattern is *Eisentrager*, discussed *infra* at notes 151–54. However, *Eisentrager* was implicitly rejected in *Hamdan*. See *supra* text accompanying notes 146–47.} The implication is that purely inchoate offenses, such as conspiracy, should not be punished under the law of war.

Ultimately, the law of war has rejected conspiracy and other purely inchoate offenses because the international community has no effective mechanism of early intervention. If there were some means to catch genocidal conspiracies at their inception it would be a good idea to do so. But that mechanism does not exist and the jealous defense of state sovereignty would very likely hinder the development of an international police force with the capacity for intervention before the occurrence of harm. The law of war, therefore, continues to address offenses retrospectively.

### IV THE RISE AND FALL OF FOUR PRECEDENTS.

The entire law of military commissions revolves around four specific cases that were decided between 1866 and 1950—*Milligan, Quirin, Yamashita,* and *Eisentrager*. Each of the later cases refers to and evaluates the earlier decisions. With the passage of the MCA 2006, the relative influence of these precedents has become of critical moment. The future analysis of jurisdiction in military tribunals will depend not only on *Hamdan* and MCA 2006, but on the precedents that played a part in *Hamdan*. Their historical paths are worth recounting.

#### A. *Milligan*

The defendant, a civilian resident of Indiana, allegedly attempted to liberate Confederate prisoners while the Civil War was still raging. In April 1864 a military commission charged him with "giving aid and comfort to the rebels" as well as a "violation of the
laws of war.”\textsuperscript{135} He was sentenced to be hanged in May 1865, and he may well have been hanged under presidential command before the Court heard the case.\textsuperscript{136} In a gesture of independence from the executive, however, the Court addressed the legality of the military tribunal and found, in a five to four majority, that the use of a military commission in Indiana was an illegitimate attempt to impose martial law in an area under civil jurisdiction. The essential holding of the Court was that the law of war was inapplicable because “the courts are open and their process unobstructed.”\textsuperscript{137}

The underlying conflict elicited in the \textit{Milligan} case is between the domain of the Constitution and the range of the law of war. The test proposed by the Court—when the courts are functioning—implies that if the normal civil functions of government remain operative, the law of war has no application. The specific provision of the Constitution that seemed to matter most to the Court was the right to a jury trial. The justices had to explain why there was no jury trial in military proceedings. This is actually a much more difficult question than meets the eye.

Nothing in the Constitution exempts courts martial from the constitutional requirement of a jury trial.\textsuperscript{138} The constitutional hinge for differential treatment for courts martial is found in the Fifth Amendment, which, after imposing the requirement of indictment by grand jury, imposes an exemption “in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger.” The \textit{Milligan} Court reasoned that if a grand jury was not required in a court martial, then a trial jury should not either:

\begin{quote}
[T]he framers of the Constitution, doubtless, meant to limit the right of trial by jury, in the sixth amendment, to those persons who were subject to indictment or presentment in the fifth.\textsuperscript{139}
\end{quote}

In addition the \textit{Milligan} Court offers us a general theory why court martial jurisdiction should be more expeditious, with fewer guarantees than found in ordinary criminal trials:

\begin{quote}
[T]he discipline necessary to the efficiency of the army and navy, required other and swifter modes of
\end{quote}

\textsuperscript{135} Ex parte \textit{Milligan}, 71 U.S. (4 Wall.) 2, 6 (1866).
\textsuperscript{136} Id. at 12.
\textsuperscript{137} Id. at 121.
\textsuperscript{138} See U.S. CONST. art. III, § 2, cl. 3; see also id. amend. VI.
\textsuperscript{139} Ex parte \textit{Milligan}, 71 U.S. at 123. The jury requirement applies to the states under the Due Process Clause of the Fourteenth Amendment. Duncan \textit{v.} Louisiana, 391 U.S. 145 (1968). No case has yet held the grand jury to be a requirement of due process. The argument quoted in the text is repeated in Ex parte \textit{Quirin}, 317 U.S. 1, 40 (1942), but the reference to the grand jury is dropped.
trial than are furnished by the common law courts; and, in pursuance of the power conferred by the Constitution [in Article I, Section 8, Clause 14 (giving Congress the power “to make Rules for the Government and Regulation of the land and naval Forces”)], Congress has declared the kinds of trial, and the manner in which they shall be conducted, for offences committed while the party is in the military or naval service. Every one connected with these branches of the public service is amenable to the jurisdiction which Congress has created for their government, and, while thus serving, surrenders his right to be tried by the civil courts.

This passage offers cogent arguments why the trial of our troops must be expeditious and “swift” but there is no similar urgency in the trial of enemy troops for violations of the laws of war. American troops need discipline in order to be forged into an effective fighting force. Enemy detainees obviously do not require this discipline. Also, as to our own troops, an argument of waiver applies, more or less—obviously with less force in armies staffed by compulsory service. There is no similar argument applicable to detainees held as prisoners of war or enemy combatants.

*Milligan* and its rhetoric have remained a powerful force in all subsequent cases. On one point there was little dispute. Even if the military authorities try to prevent access to the civil courts, they cannot restrict the availability of habeas corpus as a means for testing the legality of the suspect’s confinement. As the Court concluded in *Quirin*: The district court’s action denying leave to file the petition was in itself judicial action subject to appeal on a writ of certiorari to the Supreme Court.¹⁴⁰ Not until *Eisentrager* in 1950 did the Supreme Court call this principle into question.

The most difficult issues troubling the lawyers in *Quirin* was what they should do about *Milligan’s* dictate that if the courts are open and functioning, they take priority over military authority. The eight defendants were detained in Washington, D.C. The courts were open and functioning—indeed, a few blocks away from their place of detention. How could the Court possibly get around the powerful *Milligan* precedent, holding that if a regular trial in state or federal court remains feasible, the government cannot resort to a military tribunal?

By the time Chief Justice Stone wrote his opinion in *Quirin*,

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¹⁴⁰ *Quirin*, 317 U.S. at 24.
the cases had been decided *per curiam*, the trials concluded, and six of the defendants executed. Yet *Milligan* haunted his opinion. He spoke of the case approvingly several times, but on the critical point of claiming military jurisdiction when the civil courts are open and functioning, he could not accept the implications of the 1866 precedent. The only way to reconcile *Milligan* with a conviction in *Quirin* was to limit the former to its facts:

> [T]he Court concluded that *Milligan*, not being a part of or associated with the armed forces of the enemy, was a non-belligerent, not subject to the law of war save as—in circumstances found not there to be present, and not involved here—martial law might be constitutionally established.\(^1\)

This trimming of *Milligan*’s influence is reinforced by the opinion in *Yamashita*, where the issue was whether a Japanese general could be properly charged in a military tribunal with the novel war crime of failing adequately to supervise his troops, who committed widespread atrocities against civilians in the Philippines. The Court said simply in reference to *Milligan*: “We are not here concerned with the power of military commissions to try civilians.”\(^2\)

In the final case of the four precedents, *Eisentrager*, in which the Court departs from the *Milligan* principle of hearing claims brought on writs of habeas corpus, the Court does not even mention the 1866 precedent.\(^3\) One might have thought that by the time of the Korean War, the critical Civil War precedent was dead and forgotten.

In this vital and contested area, however, old cases never die. *Milligan* reemerged, full-blown, in Justice Stevens’s opinion in *Hamdan*. Unfortunately, for reasons I have pointed out above,\(^4\) the interpretation of the Fifth and Sixth Amendments is left out, but *Milligan* is cited, nonetheless, for the principled limitations on the use of martial law. The famous pronouncement on the scope of military justice is quoted: “Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction.”\(^5\) The interesting question is whether it is possible to take

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141. *Id.* at 45.
142. *In re* Yamashita, 327 U.S. 1, 9 (1946).
143. *In Madsen* v *Kinsella*, 343 U.S. 341 (1952), in which the Court upheld the use of a military tribunal against a civilian—a wife charged with killing her husband soldier on a military base in Germany—the Court mentions in passing that *Milligan* properly explained why there is no right to a jury trial in court martial cases. 343 U.S. at 360 n.26.
144. *See supra* text accompanying note 138.
a position on the law of war without also expressing, implicitly, an interpretation of the Constitution. The whole point of the law of war in *Milligan* was to explain why the right to a jury trial did not apply in military courts and martial or military tribunals. If Justice Stevens endorses *Milligan* as good law and he relies upon the *Milligan* principle limiting the role of martial law to situations in which the courts are not functioning, he must be implicitly endorsing *Milligan*’s premise that but for the law of war, the defendant would have a right to a jury trial. Implicit in the adoption of *Milligan*, therefore, is the acceptance of the dynamic tension between the law of war and the constitutional order. *Milligan* remains, therefore, a vital precedent.

B. *Quirin*

No case on the law of war has attracted more popular interest than the colorful story of the eight German saboteurs who landed off Long Island and Florida in June 1942.\(^{146}\) They buried their uniforms and their explosives on the beach and then headed inland to reconnoiter their potential targets. They did not get far before two of them got cold feet and called the FBI to turn themselves in. All eight were arrested within days, and Roosevelt immediately issued an executive order establishing a military tribunal.

The subsequent proceedings have had an enormous impact on the law related to military tribunals. The first critical step was that the courts agreed to hear claims of habeas corpus while the proceedings were pending. After the Supreme Court’s *per curiam* opinion, the tribunal quickly concluded its finding and issued its verdict. Six of the defendants were hanged within days. Though it was objectionable for Chief Justice Stone to take another four months to write an opinion for the Court—imagine a version of *Bush v. Gore*\(^{147}\) in which the Court says, “Bush wins, and later we will tell you why”—the opinion expresses many important concerns about the law of war. The four prominent issues in *Quirin* are: (1) Why are the eight defendants not entitled to immunity as POWs? (2) What crime did they commit by entering the United States surreptitiously? (3) Why are they not entitled to a jury trial? and (4) Why are the procedural deviations between military commissions and courts martial acceptable under federal law?


\(^{147}\) 531 U.S. 98 (2000).
The answer to most of these questions revolves around the use of two words the Court coined to describe the status of the eight soldiers, namely, as “unlawful combatants.” They failed to meet the four conditions of the Hague Convention that would have made them lawful or ordinary belligerents, entitled to be detained without trial until the end of hostilities.148 Because they wore civilian clothing and failed to carry their arms openly, they were not entitled to POW status and thus, in the Court’s view, they could be found guilty of the violation of the law of war that rendered them unlawful combatants. Because they were guilty under the law of war, they were not subject to the constitutional system of trial, with its jury trial and other procedural rights.

In *Yamashita*, *Quirin* proves to be the leading precedent in favor of convicting the Japanese general of the war crimes of failing adequately to supervise his troops. The only ominous sign in *Yamashita* is that *Quirin* is cited and quoted but totally cleansed of its constitutional concerns about a right to a jury trial. The Constitution recedes in the shadows as a question that might once have concerned the Court but now—as to a tribunal sitting in the Philippines—seemed to be less compelling. In dissent, Justice Murphy tried to convince the Court that the proceedings should be governed by the Due Process Clause of the Fifth Amendment. His thesis reminds us of the constitutional concerns exhibited by the Court in *Milligan* and *Quirin*.

When *Quirin* meets *Eisentrager*, the contradiction becomes too harsh to ignore. The tribunal in *Eisentrager* had convicted a number of German civilians working in sympathy with the Japanese in China in the period after the Germans had surrendered but the war was still being waged against Japan. After their conviction in China, they were sent to an American military base in Germany to serve their sentence.149 They tried to submit a writ of habeas corpus, which was rejected on the ground that, under the circumstances, enemy aliens had no access to our courts. Since enemy aliens did indeed have access to our courts in *Quirin*, the Court had to confront an uncomfortable inconsistency. The majority made a number of solid

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The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:
1. To be commanded by a person responsible for his subordinates;
2. To have a fixed distinctive emblem recognizable at a distance;
3. To carry arms openly; and
4. To conduct their operations in accordance with the laws and customs of war.

points against the applicability of *Quirin* to a military tribunal sitting abroad in war zone:

Those prisoners [in *Quirin*] were in custody in the District of Columbia. . . . They were tried by a Military Commission sitting in the District of Columbia at a time when civil courts were open and functioning normally. They were arrested by civil authorities and the prosecution was personally directed by the Attorney General, a civilian prosecutor, for acts committed in the United States. . . . None of the places where they were acting, arrested, tried or imprisoned were, it was contended, in a zone of active military operations or under martial law or any other military control, and no circumstances justified transferring them from civil to military jurisdiction. None of these grave grounds for challenging military jurisdiction can be urged in the case now before us.\(^{150}\)

All of this is meant to justify not the use of commissions but the banning of the prisoners' access to American courts under a writ of habeas corpus. Thus the case law splits into two lines of development, with one line following *Eisentrager* about the legitimacy of testing confinement under habeas corpus,\(^{151}\) and the second line, leading to *Hamdan*, on the legitimacy and proper contours of military tribunals.

Despite the attempt by *Eisentrager* to sidetrack *Quirin*, the latter survived as one of the major props of Justice Stevens's opinion in *Hamdan*. The indispensable contribution of *Quirin* is that it stands squarely for the right of interlocutory appeal from military commission proceedings. In all the other cases from *Milligan* to *Yamashita* to *Eisentrager*, the convicted defendants sought relief after verdict and judgment. The remarkable feature of *Quirin* is that the Supreme Court took the case in the middle of the commission proceedings. This precedent was indispensable for the rejection of a strong government argument that the federal government should abstain until the end of the military proceedings. In *Hamdan*, the issue of federal abstention prior to final judgment occupied the judges at all three levels\(^{152}\) and was finally resolved, on the strength of *Quirin*, in favor

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\(^{150}\) *Id.* at 779–80.


of interlocutory appeal to test the jurisdiction of the tribunal.153

Quirin is, in fact, the star player in Hamdan's recasting of prior history. Justice Stevens cites Chief Justice Stone's opinion nearly thirty times, always approvingly, with one exception. The plurality rejects the common view that 10 U.S.C. § 821 authorizes military tribunals: "We have no occasion to revisit Quirin's controversial characterization of Article of War 15 [now § 821] as congressional authorization for military commissions."154 Justice Stevens seems to prefer the view that the commissions are authorized not by analogy to courts martial but directly by the law of war.155

Justice Stevens's most effective use of Quirin was his describing the case as the "high-water mark of military power."156 I should have thought that Eisentrager was the high-water mark, but that would be true only as to the military's ability to avoid defending itself on a writ of habeas corpus. As to why Stevens characterized Quirin as the top card in the government's hand, we should look at his words:

Quirin is the model the Government invokes most frequently to defend the commission convened to try Hamdan. That is both appropriate and unsurprising. Since Guantánamo Bay is neither enemy-occupied territory nor under martial law, the law-of-war commission is the only model available. At the same time, no more robust model of executive power exists; Quirin represents the high-water mark of military power to try enemy combatants for war crimes.157

In making this argument, Justice Stevens relies on the tripartite distinction he carved out at the beginning of his opinion—namely, between cases of martial law, occupied territory, and the law-of-war tribunal.158 Milligan was an example of the former, Kinsella of the second category,159 and Quirin of the third. The only way to justify a military tribunal in Guantánamo, therefore, was to rely on Quirin. But this is puzzling. Why did Justice Stevens not invoke Yamashita or Eisentrager as the model of governmental power in military tribunals? To answer that question, we proceed to analyze the precedential impact of those cases decided between Quirin and Hamdan.

153. Hamdan, 126 S. Ct. at 2771.
154. Id. at 2774.
155. On this thesis, see supra text at notes 53–54.
156. Hamdan, 126 S. Ct. at 2777.
157. Id.
158. See supra notes 50–53 and accompanying text.
C. *Yamashita*

Of the four cases decided between 1866 and 1950, *Yamashita* was the only one to generate a new principle of substantive law, namely the principle of command responsibility now recognized in Article 28 of the Rome Statute. According to the facts alleged in the military commission, General Yamashita failed adequately to supervise his troops in the Philippine provinces when they went on a rampage against civilians. Nonetheless the case has been much criticized for its procedural irregularities\(^{160}\) and seems to have carried little weight in subsequent decisions. On the issue of habeas corpus, *Eisentrager* circumvents *Yamashita* in much the way it disposed of *Quirin*:

By reason of our sovereignty at that time over these insular possessions [the Philippines], Yamashita stood much as did Quirin before American courts. Yamashita’s offenses were committed on our territory, he was tried within the jurisdiction of our insular courts and he was imprisoned within territory of the United States. None of these heads of jurisdiction can be invoked by these prisoners.\(^{161}\)

Thus both *Quirin* and *Yamashita* are interpreted to be cases about domestic detainees. According to the Court, the writ of habeas corpus should be available on behalf of those who had some contact with the territorial United States (even if, as in *Quirin*, the contact was unlawful). But as to those arrested, tried, and detained abroad, the writ should not run. There is more on this point below.

In *Hamdan*, Justice Stevens goes out of his way to undercut the current weight of *Yamashita* as a justification for the use of military tribunals. The key issue in that case, as the plurality saw it, was that it stood for the permissible deviation of military tribunal procedures from court martial procedure.\(^{162}\) Any deviation of this sort collides with the uniformity requirements of § 836 of UCMJ,\(^{163}\) that is, the procedures of tribunals must be as uniform as practicable with those used in courts martial. It will be recalled this was an objection in *Quirin* as well but the Court did not take it seriously. In the *Hamdan* opinion of Justice Stevens, the violation of statutory principles of uniformity became critical. He summed up his critique with a devas--

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160. *See In re Yamashita*, 327 U.S. 1, 28 (1946) (Murphy, J., dissenting); *id.* at 41 (Rutledge, J., dissenting).
163. *See supra* text accompanying note 46.
tating line banning *Yamashita* from further consideration: “The most notorious exception to the principle of uniformity, then, has been stripped of its precedential value.”

**D. Eisentrager**

As the leading and virtually only Supreme Court case denying the writ of habeas corpus to detainees in American prison, *Eisentrager* had a brilliant but brief career after 9/11 in the lower federal courts. It was the leading authority for the president’s position that his office could decide, without judicial review, who should be confined as an enemy combatant. *Eisentrager*’s influence declined in 2004 when the Court held the constitutional writ of habeas corpus available to citizens detained in Guantánamo Bay and extended the equivalent statutory right to foreign detainees.

In the deliberations of the *Hamdan* majority, *Eisentrager* appears to be a dead letter. Justice Stevens writes that “it does not control this case.” Its influence is relegated to the dissent, where it is cited supportively several times by Justice Thomas.

In the end, then, the two cases that carry weight in *Hamdan* are the two oldest precedents, *Milligan* and *Quirin*. Among the four, these two stress the tension between the Constitution and the law of war. This is very significant for the status of the *Hamdan* decision in the face of the MCA 2006.

**V. CONCLUSION: THE FUTURE OF CONSPIRACY**

The new statute reenacts a crime of conspiracy without actually defining it:

Any person subject to this chapter who conspires to commit one or more substantive offenses triable by military commission under this chapter, and who knowingly does any overt act to effect the object of the conspiracy shall be punished, if death results to one or more of the victims, by death or such other punishment as a military commission under this chap-

169. *Id.* at 2844–46.
The provision of the MCI2 invalidated in *Hamdan* had defined the offense as consisting of three elements:

1) The accused entered into an agreement with one or more persons to commit one or more substantive offenses triable by military commissions or otherwise joined an enterprise of persons who shared a common criminal purpose that involved, at least in part, the commission or intended commission of one or more offenses triable by military commission.

2) The accused knew the unlawful purpose of the agreement or the common criminal purpose of the enterprise and joined it willfully, that is, with the intent to further the unlawful purpose.

3) One of the more conspirators or enterprise members, during the existence of the agreement or enterprise, knowingly committed an overt act in order to accomplish some objective or purpose of the agreement or enterprise.

The only significant substantive departure from the MCI2 in the current statute is the requirement that each of the conspirators commit an overt act. If Hamdan could be shown to have "conspired" with al Qaeda to kill civilians, his driving for bin Laden would probably be sufficient to qualify as an overt act. He would presumably be guilty of conspiracy and subject to the death penalty. Whether this new form of conspiracy is properly subject to liability in a military commission is now possibly a question of life or death.

How should we interpret this reenactment of conspiracy as a crime? Does it represent contempt for the Supreme Court, or is the narrowing of the offense sufficient to rescue it from the ambit of *Hamdan*? Congress does not attempt to reenact the procedural deficiency that the Court held in violation of Common Article Three. Why should they treat conspiracy differently? Here are some possible replies:

1. This is a different offense, not equivalent to the charges made in *Hamdan*.

2. The Stevens opinion represents a plurality—four votes. It is not binding.

3. A judicial ruling about the law of war is subject to change by Congress. This makes interpretations of the law of war different from interpretations of Common Article Three or of the Constitution.

As for the first point, adding a stricter overt act requirement does not change the essential nature of conspiracy as a stand-alone inchoate offense. It still runs afoul of the law of war, which focuses on ex post arrest and punishment—after harm has occurred. Yet, to the credit of the MCA 2006, in contrast to the MCI2, the statute mentions conspiracy only once, thus avoiding the use of the concept both as an offense and as a criterion of complicity. Indeed, the way the provision is formulated, the level of punishment depends on the consequences, which makes the crime a hybrid between the stand-alone offense and conspiracy as a mode of liability for homicide. In cases where death has occurred, the government could argue effectively that the notion of conspiracy used in the statute stakes out new ground. It is no longer an inchoate agreement punishment at a stage prior to occurrence of concrete harm to anyone. For purposes of argument, however, let us assume that the MCA 2006 definition of conspiracy is sufficiently close to the prior definition of conspiracy to fall within the ambit of Justice Stevens opinion in Hamdan.

There remains a problem that the Stevens opinion is a plurality of four votes. Yet Justice Kennedy said nothing to disapprove of plurality’s interpretation of the law of war. And Justice Roberts, though he voted against Hamdan in the Court of Appeals, might feel bound by Justice Stevens’s plurality opinion. On this issue we shall simply have to wait and see.

As for the status of the law of war, there is good case for the constitutionality of Justice Stevens’s interpretation of tradition. As pointed out in my review of the precedents, he relies directly and intensively on Quirin and Milligan, both of which juxtapose the law or war with the Sixth Amendment. In both, the law of war trumps the right to a jury trial. Arguments about the law of war are constitutional in the sense that they have an impact on the content of constitutional rights. In my opinion, this is the way future courts should read Hamdan and if they do, they will strike down the re-enactment of the conspiracy provision in MCA 2006. Reaching beyond the scope of the law of war, the statute defines crimes that can be prosecuted only in civil courts, not in military commissions. Thus, it is unconstitutional.

It is doubtful, however, that the government will allege a conspiracy to kill civilians against the background providers who play
minimal roles similar to those of drivers, cooks, maids, and those who deliver bread in the morning. It would make more sense to invoke a new charge in the panoply commission offenses, adapted from federal law,171 a conspiracy to “provide material support or resources to an international terrorist organization.”172 According to the definitions provided in the federal statute, providing transportation or other services is sufficient to trigger liability.173

The challenge for the future will be to analyze whether this and other newly conceived offenses fall within the law of war. The government has vast prosecutorial powers under the new statute, and if they choose to use it, we can expect serious litigation challenging the statute on the basis of Hamdan and the Supreme Court’s jurisprudence from Milligan to Quirin.

172. MCA 2006, supra note 5, §§ 950v(b)(25), (28).