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Setting the World Right

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THE YALE LAW JOURNAL

HAROLD HONGJU KOH

Setting the World Right

ABSTRACT. Five years after September 11, 2001, America's response to that traumatic day has effectively turned the world of American public law upside down. Claiming that a global war on terror calls for an entirely new legal paradigm, the Bush Administration and its supporters have pressed for a revamped constitutional and international vision that champions the supremacy of both executive and American unilateralism. Recently, executive power advocates have even begun to claim that in a crisis, executive action validates itself. This Essay reviews this cycle of history and argument and describes what impels executive power in this direction. The Essay argues that the United States Supreme Court's landmark opinion in *Hamdan v. Rumsfeld* has begun setting the world of public law right and explains how *Hamdan* undermines scholarly claims of those who still urge the need for enhanced executive authority in national security affairs.

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In an uncertain world, crisis demands executive action. And so it was that 2005, a year of crises ranging from Hurricane Katrina to the global war on terror, became a year of executive muscle-flexing. Lost in the turmoil was a public awareness that in just five years, the war on terror had turned the world of public law upside down. As that conflict drags into its sixth year, a perceived need for executive flexibility in fighting terrorism has triggered both exorbitant governmental claims of executive power and a growing stream of scholarship supporting the expansion of executive discretion to address the war on terror.[1]

But as the Supreme Court's October 2005 Term ended, the Court issued a landmark ruling in *Hamdan v. Rumsfeld*[2] which has—one might hope—finally begun the much-needed process of turning the legal world right-side up again. This Essay examines how the world of law turned upside down, how some scholarly efforts—exemplified by two academic proposals found elsewhere in this Issue—lend support to that misbegotten exercise, and how *Hamdan* offers principles that can set the legal world aright again.

I. FLIP-FLOP

If the Age of Globalization began in November 1989 with the collapse of one structure, the Berlin Wall, the texture of that age changed dramatically on September 11, 2001, with the collapse of a second, the Twin Towers.[3] The collapse of the towers—and America's response to it—moved us almost literally out of the light and into the shadows of the Age of Globalization.

During the first phase of the Global Era, from 1989 to 2001, the world marveled at the possibilities of global travel, global communications, and global markets. We could communicate with anyone, anywhere in the world, by e-mail or cell phone, withdraw currency from foreign bank machines, travel anywhere at a moment's notice. But in the wake of September 11, we realized with horror that those same tools of globalization could be turned against us: Mail could be used to send anthrax, global commercial transactions could be used to finance terrorist operations, and the very planes that could fly us around the world could be used to kill thousands and destroy our most iconic buildings.

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1. *See, e.g.*, Jack Goldsmith & John F. Manning, *The President's Completion Power*, 115 YALE L.J. 2280 (2006); Jide Nzelibe & John Yoo, *Rational War and Constitutional Design*, 115 YALE L.J. 2512 (2006).

2. 126 S. Ct. 2749 (2006).

3. My colleague, Yale History Professor John Lewis Gaddis, first brought this juxtaposition to my attention.

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How did this recognition affect America's vision of foreign policy and law? In the late twentieth century, U.S. foreign policy had been characterized by four features. First, our policy emphasized the importance of using diplomacy backed by force only as a last resort.[4] Second, we followed a human rights policy based on universal application of the principles of Franklin Delano Roosevelt's 1941 "Four Freedoms" speech (freedom of speech, freedom of religion, freedom from want, and freedom from fear).[5] Third, U.S. democracy-promotion policy focused on building democracy from the bottom up.[6] Finally, we followed a diplomatic approach best described as "strategic multilateralism and tactical unilateralism."[7]

Remarkably, in just five years, the Bush Administration has responded to September 11 by turning each of those four ideas on its head. Instead of diplomacy backed by force, the adventures in Afghanistan and Iraq exemplify a policy of *force first*, where ad hoc "coalitions of the willing" preserve homeland security through discretionary warmaking on real and potential state sponsors of terror—justified by an international law theory of preemptive self-defense and fear of access to weapons of mass destruction.[8] The main constraint on this strategy is not so much international law as the limits imposed by our finite military and economic resources. Second, recent human rights policy has rejected universalism and international criminal adjudication in favor of a Cold War-style double standard. We now downplay torture and violations of the Geneva Conventions committed by ourselves or our allies as necessary elements of the war on terror, claiming that freedom from fear is now the overriding human rights value.[9] Third, we have shifted from bottom-up democracy promotion to top-down, militarily imposed democracy promotion in Afghanistan and Iraq, coupled with soft faith in "domino democratization" throughout the Middle East and reduced democracy promotion in Central and Eastern Europe (Ukraine), Africa (Côte d'Ivoire), Latin America (Venezuela),

4. *See, e.g.*, MADELEINE ALBRIGHT, MADAM SECRETARY 354 (2003).

5. President Franklin D. Roosevelt, Eighth Annual Message to Congress (Jan. 6, 1941), *reprinted in* 3 THE STATE OF THE UNION MESSAGES OF THE PRESIDENTS, 1790-1966, at 2855 (Fred L. Israel ed., 1966).

6. *See, e.g.*, President Ronald Reagan, Address to Members of Parliament, 18 WEEKLY COMP. PRES. DOC. 764 (June 8, 1982). For historical background, see THOMAS CAROTHERS, AIDING DEMOCRACY ABROAD: THE LEARNING CURVE 30-32 (1999); and Harold Hongju Koh, *A United States Human Rights Policy for the 21st Century*, 46 ST. LOUIS U. L.J. 293 (2002).

7. I owe this observation to former Deputy Secretary of State Strobe Talbott. *See* Harold Hongju Koh, *Foreword: On American Exceptionalism*, 55 STAN. L. REV. 1479, 1499 (2003).

8. *See* NAT'L SEC. COUNCIL, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA (2002), *available at* http://www.whitehouse.gov/nsc/nss.pdf.

9. Koh, *supra* note 7, at 1498.

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and South Asia (Pakistan). Fourth and finally, America's new diplomatic strategy emphasizes strategic unilateralism and tactical multilateralism, characterized by a broad antipathy toward international law and global regime-building through treaty negotiation. And so we disregard our signature to the Rome Statute of the International Criminal Court, flout the Kyoto Protocol on Climate Change, and withdraw from the Optional Protocol of the Vienna Convention on Consular Relations.

What does this flip-flop mean for what I called some years ago "The National Security Constitution"?[10] Not surprisingly, this revamped foreign policy vision—of unfettered executive power in the war on terror, human rights double standards, militarily imposed democracy, and strategic unilateralism—cannot operate unless the constitutional vision within which foreign policy functions is also recast.

In 2001, as a matter of constitutional law, national security policy was conducted within four widely accepted premises. First, that executive power operates within a constitutional framework of checks and balances, resting on the vision of shared institutional powers set forth in Justice Jackson's canonical concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*.[11] That vision of shared powers rests on the simple notion that constitutional checks and balances do not stop at the water's edge. To thrive in a global world, we need an energetic executive, to be sure, but checked by an energetic Congress and overseen by a searching judicial branch. Second, that there are no law-free zones, practices, courts, or persons.[12] Third, that we accept no infringement on our civil liberties without a clear statement by our elected representatives.[13] Fourth and finally, that—except for a few political rights, such as the right to vote or serve on a

10. HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR (1990).

11. 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring). In *Dames & Moore v. Regan*, 453 U.S. 654, 661 (1981), a majority of the Court adopted Justice Jackson's tripartite framework.

12. *Cf.* Hillel Neuer, Aharon Barak's Revolution, http://www.daat.ac.il/DAAT/ezrachut/english/hillel.htm (last visited Sept. 1, 2006) ("[T]he world is filled with law. Every human behavior is subject to a legal norm. . . . Wherever there are living human beings, law is there. There are no areas in life which are outside of law." (quoting, in translation, Aharon Barak, *Judicial Philosophy and Judicial Activism*, 17 TEL AVIV U. L. REV. 477, 483 (1992))).

13. Under the clear statement doctrine of *Kent v. Dulles*, 357 U.S. 116 (1958), courts must carefully scrutinize statutes cited by the executive for signs not only that Congress has consented to the President's actions, but also to determine whether the President and Congress acting together have made a clear determination to infringe on individual rights. When individual rights are at stake, courts should "construe narrowly all delegated powers that curtail or dilute them." *Id.* at 129; *accord* Greene v. McElroy, 360 U.S. 474, 507-08 (1959).

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jury—aliens and citizens are treated largely the same, particularly with respect to economic, social, and cultural rights.[14]

Yet only five years later, this constitutional vision has become similarly inverted. First, the Bush Administration now asserts a constitutional theory of unfettered executive power, based on extraordinarily broad interpretations of the Article II Commander in Chief Clause and the Supreme Court's decision in *United States v. Curtiss-Wright Export Corp.*, which famously called the President the "sole organ of the federal government in the field of international relations."[15] According to this vision, the President's Article II powers are paramount, Congress exercises minimal oversight over executive activity, government secrecy prevails, and the Solicitor General regularly urges the courts to give extreme deference to the President, citing the judiciary's "passive virtues." Second, the Bush Administration rejects human rights universalism in favor of executive efforts to create law-free zones: extralegal spaces (Guantánamo), extralegal courts (military commissions), extralegal persons (enemy combatants), and extralegal practices (extraordinary rendition), all of which it claims are exempt from judicial review. Understandably, the administration opposes judicial efforts to incorporate international and foreign law into domestic legal review so as to insulate the U.S. government from charges that it is violating universal human rights norms in favor of double standards. Third, we increasingly hear claims that the executive can infringe on civil liberties without clear legislative statements, relying on broadly worded laws such as the Authorization for Use of Military Force of September 2001[16] to justify secret National Security Agency surveillance, indefinite detentions, and torture of foreign detainees.[17] And fourth, the war on terror has exacerbated

14. Graham v. Richardson, 403 U.S. 365, 371-72 (1971) ("[T]he Court's decisions have established that classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny. Aliens as a class are a prime example of a 'discrete and insular' minority for whom such heightened judicial solicitude is appropriate.") (internal citations omitted).

15. 299 U.S. 304, 320 (1936); KOH, *supra* note 10, at 94 ("Among government attorneys, Justice Sutherland's lavish description of the president's powers is so often cited that it has come to be known as the '*Curtiss-Wright*, so I'm right cite'—a statement of deference to the president so sweeping as to be worthy of frequent citation in any government foreign-affairs brief.") (footnote omitted); *see also id.* at 93-96 (criticizing the decision).

16. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (codified at 50 U.S.C. § 1541 note (Supp. III 2003)).

17. *See Wartime Executive Power and the National Security Agency's Surveillance Authority II: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2006) (statement of Harold Hongju Koh, Dean, Yale Law School) [hereinafter *National Security Agency's Surveillance Authority II*], *available at* www.law.yale.edu/documents/pdf/HHKNSAtestfinal.pdf; Harold Hongju Koh, *A World Without Torture*, 43 COLUM. J. TRANSNAT'L L. 641 (2005).

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already sharp distinctions between citizens and aliens within American society with respect to political, civil, social, and economic rights. These distinctions have contributed to pronounced scapegoating of Muslim aliens in American life and mass public protests over pending immigration legislation.

II. A LAW UNTO ITSELF

The latest twist, which has emerged during the past year, has been the startling notion that executive action constitutes a law unto itself. The policy rationale for executive action, the President's defenders now argue, has somehow *created* the legal justification for executive unilateralism.

Take, for example, the surprising revelation that the President had ordered the National Security Agency (NSA) to engage in nearly four years of secret, warrantless domestic surveillance of uncounted American citizens and residents, notwithstanding the statutory directive that domestic intelligence wiretapping be conducted exclusively within the terms of the 1978 Foreign Intelligence Surveillance Act (FISA).[18] The Bush Administration first vociferously claimed the necessity of wiretapping telephone calls involving al Qaeda, then ended up asserting that the presidential determination that the executive action was necessary had not only overridden FISA but also rendered application of that statute unconstitutional.[19] In January 2005, before the NSA program came to light, when Alberto Gonzales was being confirmed as Attorney General, Senator Russ Feingold asked him whether he believed the President could violate existing criminal laws and spy on U.S. citizens without a warrant. Mr. Gonzales answered that it was impossible to answer questions concerning a "hypothetical situation," but that it was "not the policy or the agenda of this president to authorize actions that would be in contravention of our criminal statutes."[20] When questioned about this during later hearings on NSA surveillance, he answered that he had not misled Congress because once

18. 18 U.S.C. § 2511(2)(f) (2000).

19. "The President has determined that the speed and agility required to carry out the NSA activities successfully could not have been achieved under FISA. Because the President also has determined that the NSA activities are necessary . . . FISA would impermissibly interfere with the President's most solemn constitutional obligation" to defend the country and therefore would be "unconstitutional as applied." U.S. Dep't of Justice, Legal Authorities Supporting the Activities of the National Security Agency Described by the President 34-35 (Jan. 19, 2006) [hereinafter DOJ White Paper], *available at* http://www.fas.org/irp/nsa/doj011906.pdf.

20. *Confirmation Hearing on the Nomination of Alberto Gonzales To Be Attorney General of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 116-17 (2005).

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the President had authorized an action it *became* legal under the President's constitutional powers and thus could not contravene any criminal statutes.[21]

Or take the debate over torture. In its infamous, now-overruled August 2002 "Torture Opinion," the Justice Department's Office of Legal Counsel opined that even criminal prohibitions against torture do "not apply to the President's detention and interrogation of enemy combatants pursuant to [the President's] Commander-in-Chief authority," and that "[a]ny effort by Congress to regulate the interrogation of battlefield combatants would violate the Constitution's sole vesting of the Commander-in-Chief authority in the President."[22] The Opinion further suggested that executive officials can escape prosecution for torture on the ground that "they were carrying out the President's Commander-in-Chief powers," reasoning that such orders would preclude the application of a valid federal criminal statute "to punish officials for aiding the President in exercising his exclusive constitutional authorities."[23]

Under intense public pressure, President Bush has now backed off such extreme claims, recently telling an interviewer, "I don't think a president can . . . order torture, for example. . . . Yes, there are clear red lines . . . ."[24] But his actions have been far less resolute than his words. Congress overwhelmingly enacted the McCain Amendment to the Defense Authorization Act, which barred the torture of individuals under the "custody or physical control"[25] of U.S. government officials.[26] But even after the President publicly endorsed the law, his presidential signing statement made only a qualified commitment to

21. *Wartime Executive Power and the National Security Agency's Surveillance Authority: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2006) (statement of Alberto Gonzales, Att'y Gen. of the United States).

22. Memorandum from Jay S. Bybee, Assistant Attorney Gen., to Alberto Gonzales, Counsel to the President, 35, 39 (Aug. 1, 2002), *available at* http://www.washingtonpost.com/wp-srv/nation/documents/ dojinterrogationmemo20020801.pdf; *see also id.* at 39 ("Congress can no more interfere with the President's conduct of interrogation of enemy combatants than it can dictate strategic or tactical decisions on the battlefield.").

23. *Id.* at 35.

24. *CBS Evening News* (CBS television broadcast Jan. 27, 2006), *transcript available at* http://www.cbsnews.com/stories/2006/01/27/eveningnews/main1248952_page3.shtml.

25. Detainee Treatment Act of 2005, Pub. L. No. 109-148, div. A, tit. X, 119 Stat. 2739 (codified at 10 U.S.C.A. § 801 note and 42 U.S.C.A. §§ 2000dd to 2000dd-1 (West Supp. 2006)).

26. *See* Eric Schmitt, *President Backs McCain on Abuse*, N.Y. TIMES, Dec. 16, 2005, at A1 (reporting that it was a "stinging defeat" for Bush that both chambers had defied his threatened veto to support McCain's measure resoundingly, especially considering that his party controlled both houses of Congress).

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follow the new law "in a manner consistent with the President's constitutional authority to supervise the unitary executive branch."[27]

How does a well-meaning executive come to make such dangerous constitutional claims? What now makes the executive the "most dangerous branch"? The essays in this Symposium meditate upon the nature, transformation, and limits of executive power at all levels of governance: national, state, and local; public and private. But what, precisely, is the psyche of the executive and how does it evolve?

Let me suggest four practical reasons why executives tend to do the things they do. First, the executive has resources: other people's money—usually a treasury assembled from a tax base, whether that be local, state, or national taxpayers or shareholders; information—often classified; staff; various kinds of hard power, including weapons and troops; and soft power—a bully pulpit, public visibility, and moral standing.

Second, the executive has a duty both to act and to react, particularly in emergencies. Because the executive bears both a duty to break eggs and a duty to respond when eggs are broken, the executive usually has no choice but to exercise destructive power and to get its hands dirty.

Third, increasingly, our executives live isolated in a bubble of "groupthink," which breeds a temptation to act alone, sometimes in secret.[28] Executives often find it stunningly more efficient to act alone. It is far easier for them to respond to crises if they do not take time to talk to others who do not work for them, who often lack the information the leaders have or do not share their views. Over time, living inside the bubble encourages executives to dispense with prior consultation because they begin to find it easier to seek forgiveness than to ask permission.

Fourth and finally, the executive branch never thinks of itself as dangerous. Instead, it invariably views itself as beleaguered and put-upon, obliged to serve, yet underappreciated, under-resourced, and invariably misunderstood by those who do not recognize its benign motives.

Taken together, these factors help to explain why executive power so often creates a problem for the law. When executives mix a capability to act with a duty to react, backed by resources inside a groupthink bubble, they begin to see the advantages of acting without prior consultation. Over time, a growing sense of feeling put-upon and misunderstood makes it easier for executive actors to convince themselves that their actions must have support from some

27. Statement on Signing the National Defense Authorization Act for Fiscal Year 2006, 42 WEEKLY COMP. PRES. DOC. 23 (Jan. 6, 2006).

28. *See* IRVING L. JANIS, VICTIMS OF GROUPTHINK (1972).

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external source, such as competence, democratic legitimacy, or legal legitimacy. And so it is that executives begin to confuse the "ought" with the "is." They come to believe that they exercise executive power because they *ought* to exercise executive power, which means they must have some kind of right to do so, rooted in competence, law, or democracy. From this reasoning, it is just a short step to the notion that executive power validates itself.

All of which, of course, brings back eerie memories of Richard Nixon's remark: "[W]hen the president does it, that means that it is not illegal."[29] But perhaps the more telling quote is by Henry Kissinger, who said, "The illegal we do immediately. The unconstitutional takes a little longer."[30]

Upon reflection, Kissinger's words carry an unsettling ring of truth. Why does the unconstitutional take a little longer? Because even the most expansive theory of presidential power cannot carry the day unless the checks and balances against such overreaching prove ineffective. Ironically, the executive branch usually asserts exorbitant claims of executive authority not at times of political strength but rather at times of intense political weakness. Weak executives usually assert unilateral power because they feel unsure that Congress will endorse or that the courts will ratify what they feel inexorably pressured by circumstance to do.

Take, for instance, Harry Truman's decision to seize the steel mills during the unpopular Korean War, Richard Nixon's illegal actions during Watergate, Ronald Reagan's privatization of foreign policy during the Iran-Contra Affair, or George W. Bush's recent decision, amid plummeting popularity polls, to defend NSA domestic wiretapping. In each case, the executive branch asserted expansive constitutional justifications for unconstitutional actions, but the public's acceptance of those claims ultimately turned on whether Congress had acquiesced in or the courts had approved the legality of the President's claims.

In short, the unconstitutional takes longer because it takes all three branches, not just one, to create a constitutional crisis. When the President overreaches, he can only remake the law to justify his actions if Congress also disengages and the courts stay blinkered. In the five years since September 11, Congress has been remarkably pliant in refusing to stand up to the President's repeated assertions of unilateral power. But on all three occasions on which the Supreme Court has ruled on the merits of challenges to claims of presidential authority since September 11, the Court has set significant limits on those

29. *Excerpts from Interview with Nixon About Domestic Effects of Indochina War*, N.Y. TIMES, May 20, 1977, at A16.

30. DuPre Jones, *The Sayings of Secretary Henry*, N.Y. TIMES, Oct. 28, 1973, § 6 (Magazine), at 91.

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claims.[31] Happily, Justice Stevens's recent landmark opinion in *Hamdan v. Rumsfeld* may signal that the pendulum is finally swinging away from institutional acquiescence in executive overreaching.

III. *HAMDAN*

Hamdan arose, according to one press account, from a presidential order that was issued without the knowledge or consultation of the Secretary of State, the National Security Advisor or her legal counsel, the General Counsel of the CIA, the Assistant Attorney General for the Criminal Division, or any of the top lawyers in the military's Judge Advocate General (JAG) Corps.[32] In November 2001, President Bush issued a Military Order, without congressional authorization or consultation, which declared that "[t]o protect the United States and its citizens, . . . it is necessary for [alien enemy combatants] . . . to be tried for violations of the laws of war and other applicable laws by military tribunals."[33] Although that decision triggered public outcry,[34] Salim Ahmed Hamdan, alleged once to have been Osama bin Laden's driver, was soon charged with the nebulous crime of "conspiracy . . . to commit offenses triable by a military commission."[35] By the time his case finally arrived at the Supreme Court, the Bush Administration had embedded into its legal argumentation each of the elements of its extreme constitutional vision.

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31. Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006); Hamdi v. Rumsfeld, 542 U.S. 507 (2004); Rasul v. Bush, 542 U.S. 466 (2004). A fourth post-9/11 case, *Rumsfeld v. Padilla*, 542 U.S. 426 (2004), did not rule on the merits of a detainee's habeas petition but merely specified the jurisdiction in which the habeas petition could be heard.

32. Jane Mayer, *The Hidden Power*, NEW YORKER, July 3, 2006, at 44, 52.

33. Military Order of November 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism § 1(e), 66 Fed. Reg. 57,833 (Nov. 16, 2001) [hereinafter Military Order].

34. *See, e.g.*, Letter from Law Professors and Lawyers to Senator Patrick J. Leahy (Dec. 5, 2001), *available at* http://www.law.yale.edu/documents/pdf/Public_Affairs/letterleahy.pdf. Those law professors (including this author) called "the untested institutions contemplated by the Order . . . legally deficient, unnecessary, and unwise." *Id.* In particular, they argued that the Order violates separation of powers, "does not comport with either constitutional or international standards of due process," and "allows the Executive to violate the United States' binding treaty obligations." *Id.* For other legal critiques of the Military Order, see, for example, Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259 (2002) (arguing that the Order is unconstitutional on its face); Harold Hongju Koh, *The Case Against Military Commissions*, 96 AM. J. INT'L L. 337 (2002); and George P. Fletcher, *War and the Constitution: Bush's Military Tribunals Haven't Got a Legal Leg To Stand on*, AM. PROSPECT, Jan. 1, 2002, at 26.

35. *Hamdan*, 126 S. Ct. at 2759.

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First, the Bush Administration urged that the Court accept an extraordinary constitutional presidential prerogative to deal with the war on terror.[36] Second, the government claimed, in effect, that Hamdan was a person outside the law, held in an extralegal zone (Guantánamo), who could be subjected to the jurisdiction of a non-court. Third, the government based its claim of authority not on any clearly delineated congressional statement but rather upon the President's broad authority as Commander in Chief and Congress's terse Authorization for Use of Military Force (AUMF).[37] Fourth and finally, the administration asserted that Hamdan, an accused enemy alien, deserved drastically diminished rights, which could be determined in a criminal proceeding whose rules comported with neither a prior enactment of Congress – the Uniform Code of Military Justice (UCMJ)[38] – nor a binding treaty obligation – Common Article 3 of the Geneva Conventions of 1949.[39]

Informed by an extraordinary array of amici curiae opposing the military commission scheme, Justice Stevens's opinion for a five-Justice majority demolished each of the government's arguments.[40] Calling the Bush military commissions an "extraordinary measure raising important questions about the balance of powers in our constitutional structure,"[41] the Court first rejected the administration's extreme constitutional theory of executive power. Instead, all the Justices who addressed the merits placed the case within the tripartite framework of shared institutional powers set forth in Justice Jackson's concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*.[42] By enacting the

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36. Mayer, *supra* note 32, at 44 ("[T]he Administration's legal strategy for the war on terror . . . [k]nown as the New Paradigm . . . rests on a reading of the Constitution that few legal scholars share – namely, that the President, as Commander-in-Chief, has the authority to disregard virtually all previously known legal boundaries, if national security demands it. Under this framework, statutes prohibiting torture, secret detention, and warrantless surveillance have been set aside.").

37. Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001) (codified at 50 U.S.C. § 1541 note (Supp. III 2003)) (authorizing the President to use "all necessary and appropriate force" against "nations, organizations, or persons" associated with the terrorist attacks of September 11, 2001, in order to protect the nation from the recurrence of such attacks).

38. 10 U.S.C. §§ 801-946 (2000).

39. Geneva Convention Relative to the Treatment of Prisoners of War, art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Common Article 3].

40. For a listing of links to twenty-nine amicus briefs opposing the government's position, see Salim Ahmed Hamdan v. Donald H. Rumsfeld, Secretary of Defense, et al.: Supreme Court Files, http://www.hamdanvrumsfeld.com/briefs (last visited Aug. 30, 2006).

41. Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2759 (2006).

42. 343 U.S. 579, 635 (1952) (Jackson, J., concurring). As the Court noted in footnote twenty-three of its opinion, "Whether or not the President has independent power, absent congressional authorization, to convene military commissions, he may not disregard

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Uniform Code of Military Justice, the Court reasoned, Congress had authorized the President to use commissions but had specified that, wherever practicable, the executive must follow the same procedural rules in military commissions as are applied in ordinary courts-martial.[43] Accordingly, the majority placed this case within the third *Youngstown* category, in which "the President takes measures incompatible with the expressed or implied will of Congress."[44]

Significantly, the Court refused to accept the government's core premise that a new "crisis paradigm" required that ordinary legal rules be jettisoned. As Justice Kennedy put it, "[A] case that may be of extraordinary importance is resolved by ordinary rules . . . pertaining to the authority of Congress and the interpretation of its enactments."[45] Rather than embracing ad hoc, crisis solutions, he argued, "[r]espect for laws derived from the customary operation of the Executive and Legislative Branches gives some assurance of stability in time of crisis. The Constitution is best preserved by reliance on standards tested over time and insulated from the pressures of the moment."[46] As important, the Court rejected the government's attempted dichotomy between law and war by requiring consistent application of the law of war to Hamdan's case. As Justice Kennedy noted tersely, "If the military commission at issue is illegal under the law of war, then an offender cannot be tried 'by the law of war' before that commission."[47]

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limitations that Congress has, in proper exercise of its own war powers, placed on his powers." *Hamdan*, 126 S. Ct. at 2774 n.23 (citing *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring)); *see also id.* at 2800 (Kennedy, J., concurring) ("The proper framework for assessing whether Executive actions are authorized is the three-part scheme used by Justice Jackson in his opinion in *Youngstown*."). Justice Thomas's dissent also began by invoking the *Youngstown* framework but argued that implicit congressional authorization of the military commissions placed this case into Category One. *Id.* at 2824-25 (Thomas, J., dissenting).

43. "Without for one moment underestimating [the danger posed by international terrorism], it is not evident to us why it should require, in the case of Hamdan's trial, any variance from the rules that govern courts-martial." *Hamdan*, 126 S. Ct. at 2792.

44. 343 U.S. at 637 (1952) (Jackson, J., concurring).

45. *Hamdan*, 126 S. Ct. at 2799 (Kennedy, J., concurring).

46. *Id.*; *see also id.* ("Where a statute provides the conditions for the exercise of governmental power, its requirements are the result of a deliberative and reflective process engaging both of the political branches.").

47. *Id.* at 2802; *see also id.* at 2794 (majority opinion) ("For, regardless of the nature of the rights conferred on Hamdan, they are, as the Government does not dispute, part of the law of war. And compliance with the law of war is the condition upon which the authority set forth in Article 21 [of the UCMJ] is granted.") (internal citations omitted).

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Second, the Court followed its earlier insistence in *Rasul v. Bush*[48] that Guantánamo be treated as a land subject to law and rejected the administration's attempt to depict Hamdan as a person outside the law. Even while acknowledging that Hamdan might be a terrorist who had committed serious crimes, the Court nevertheless proclaimed that "in undertaking to try Hamdan and subject him to criminal punishment, the executive is bound to comply with the Rule of Law that prevails in this jurisdiction."[49]

Third, given the individual liberties at stake, the Court demanded a clear congressional statement before the Commander in Chief could try even a suspected alien terrorist before a special military commission.[50] As Justice Breyer wrote in his concurrence for four Justices, "The Court's conclusion ultimately rests upon a single ground: Congress has not issued the Executive a 'blank check.'"[51] In demanding such clear legislative authorization, the Court followed a critically important line of cases holding that, even in times of war or national crisis, the executive branch may not deprive suspected enemies of their rights absent explicit congressional approval.[52]

Fourth, a majority of the Court denied the government's claim that enemy aliens could never enforce the Geneva Conventions in U.S. courts, reasoning that Hamdan's proposed trial violated Common Article 3 of those Conventions, which prohibits "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples."[53] By so saying, the majority both took note of the treaty's

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48. 542 U.S. 466 (2004).

49. *Hamdan*, 126 S. Ct. at 2798.

50. *See id.* at 2772 (citing a "duty which rests on the courts, in time of war as well as in time of peace, to preserve unimpaired the constitutional safeguards of civil liberty" (quoting *Ex Parte* Quirin, 317 U.S. 1, 19 (1942))).

51. *Id.* at 2799 (Breyer, J., concurring) (citing Hamdi v. Rumsfeld, 542 U. S. 507, 536 (2004) (plurality opinion)).

52. *See* Kent v. Dulles, 357 U.S. 116 (1958) (rejecting a State Department effort to deny a passport to a Communist during the Cold War because of the absence of a clear congressional statement denying passports based on political convictions); *see also* Duncan v. Kahanamoku, 327 U.S. 304 (1946) (blocking the executive branch from using military tribunals to try civilians in Hawaii during World War II because there was no clear authorizing congressional statement); *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 139-40 (1866) (Chase, C.J., concurring) ("[N]or can the President, or any commander under him, without the sanction of Congress, institute tribunals for the trial and punishment of offences, either of soldiers or civilians, unless in cases of a controlling necessity . . . .").

53. Common Article 3, *supra* note 39. Justice Kennedy joined the key part of the majority's opinion regarding applicability of Common Article 3, and his concurring opinion not only referred to Common Article 3 as "part of a treaty the United States has ratified and thus

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intention to be applied universally, not selectively, and confirmed that Congress had effectively internalized Common Article 3 into domestic law when it enacted the UCMJ.[54]

In *Hamdan*, the Supreme Court has given us a *Youngstown* for the twenty-first century. The decision resoundingly rejected the four tenets of the Bush Administration's constitutional vision of the war against terror. Instead the Court reaffirmed the core tenet of what I have called "The National Security Constitution": the notion that constitutional checks and balances do not stop at the water's edge.[55] The ruling confirms that a democracy must fight even a shadowy war on terror through balanced institutional participation: led by an energetic executive but guided by an engaged Congress and overseen by a skeptical judicial branch.

Hamdan reaffirms, at a critical moment in our history, that the Constitution places clear limits on the President's capacity to act unilaterally in national security and foreign affairs. At base, this principle recognizes that interbranch dialogue, and not presidential unilateralism, is the best way to develop a sustained democratic response to external crisis. In Justice Breyer's memorable words:

> Where, as here, no emergency prevents consultation with Congress, judicial insistence upon that consultation does not weaken our Nation's ability to deal with danger. To the contrary, that insistence strengthens the Nation's ability to determine—through democratic means—how best to do so. The Constitution places its faith in those democratic means. Our Court today simply does the same.[56]

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accepted as binding law" but also noted that Congress has made "violations of Common Article 3 . . . 'war crimes,' punishable as federal offenses, when committed by or against United States nationals and military personnel." *Hamdan*, 126 S. Ct. at 2802 (Kennedy, J., concurring) (citing 18 U.S.C. § 2441 (2000)).

54. *Hamdan*, 126 S. Ct. at 2796 ("[T]he commentaries also make clear 'that the scope of the Article must be as wide as possible.' In fact, limiting language that would have rendered Common Article 3 applicable 'especially [to] cases of civil war, colonial conflicts, or wars of religion,' was omitted from the final version of the Article, which coupled broader scope of application with a narrower range of rights than did earlier proposed iterations.") (internal citations omitted). For discussion of internalization of international into domestic law, see generally Harold Hongju Koh, *Bringing International Law Home*, 35 HOUS. L. REV. 623 (1998).

55. KOH, *supra* note 10, at 153-84.

56. *Hamdan*, 126 S. Ct. at 2799 (Breyer, J., concurring).

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Some commentators have tried to cabin *Hamdan* as narrowly concerned with military commissions.[57] But to paraphrase Justice Frankfurter, *Hamdan* did not just decide a particular case: "It overruled a particular way of looking at law . . . [whose] inadequacies had been laid bare."[58] What makes *Hamdan* the most important case on executive power decided since *Youngstown* is not just what it says about military commissions but more fundamentally what it says about how the Constitution requires the President, Congress, and the courts to work together to deal with national crises.

When the President is conducting a war on terror, *Hamdan* instructs, he ought not go it alone, citing a broad constitutional theory and statutes that do not give him specific authorization. Rather, he should seek to fit his actions within the scope of enacted laws, such as the UCMJ, and ratified treaties, such as Common Article 3. By so saying, *Hamdan* not only gives broad direction on how a war on terror may be constitutionally conducted but also disproves exorbitant claims already made during that war regarding the President's supposed freedom to authorize torture and cruel treatment and to carry out widespread warrantless domestic wiretapping in the face of contrary statutes.[59]

With respect to torture and cruel treatment, *Hamdan* confirms that the President must act within the scope of a specific statute (in this case, the McCain Amendment) and treaty (in this case, Common Article 3), or his actions will likely be invalidated under *Youngstown* Category Three.[60] According to a longstanding canon of statutory construction, courts must construe statutes, absent clear congressional intent to the contrary, consistently with international law.[61] Such a reading would interpret the McCain Amendment—notwithstanding any presidential signing statement to the contrary—to require the executive branch to comply with the anti-torture

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57. *See, e.g.*, Hamdan v. Rumsfeld*: Establishing a Constitutional Process: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2006) (statement of Theodore B. Olson, former Solicitor General).

58. Guaranty Trust Co. v. York, 326 U.S. 99, 101 (1945).

59. *See generally* Hamdan v. Rumsfeld*: Establishing a Constitutional Process: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2006) (statement of Harold Hongju Koh, Dean, Yale Law School), *available at* http://www.law.yale.edu/documents/pdf/Deans_Office/KOH__Hamdan_TESTIMONY.pdf.

60. For further discussion of these issues, see generally Harold Hongju Koh, *Can the President Be Torturer in Chief?*, 81 IND. L.J. 1145 (2006).

61. The *Charming Betsy* canon has long directed that "an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains." Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) (Marshall, C.J.). *See generally* Ralph G. Steinhardt, *The Role of International Law as a Canon of Domestic Statutory Construction*, 43 VAND. L. REV. 1103 (1990).

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provisions of Common Article 3, which the *Hamdan* Court held to apply not just to interstate armed conflicts but to the war on terror as well.[62]

Hamdan similarly destroys the legal case in support of the NSA's sustained program of secret, unreviewed, warrantless electronic surveillance of American citizens and residents.[63] On its face, the 1978 FISA—a criminal statute—requires the executive branch to seek a warrant within three days of commencing surveillance, or within fifteen days after a declaration of war, which by their own admission, the administration's officials never did. The administration claimed that the President has an implied exclusive constitutional authority over "the means and methods of engaging the enemy," including the conduct of "signals intelligence" during wartime.[64] But *Hamdan* obliged the President to follow the UCMJ, which similarly regulates the "means and methods of engaging the enemy."

In addition, the administration claimed that Congress implicitly authorized the NSA surveillance plan when it voted for the AUMF.[65] But to so read the law would violate *Hamdan* by construing the AUMF to give the President a "blank check" to engage in warrantless wiretapping of Americans on U.S. soil. To accept that reading, one would have to conclude that in September 2001, Congress had somehow silently approved what twenty-three years earlier, in FISA, it had expressly criminalized.[66] *Hamdan* thus joins a long string of Supreme Court decisions rejecting the claim that the President may invoke his power as Commander in Chief to disregard an act of Congress designed

62. With respect to covered persons, who after *Hamdan* plainly include al Qaeda detainees, Common Article 3 prohibits "at any time and in any place whatsoever . . . violence to life and person, in particular . . . cruel treatment and torture [and] outrages upon personal dignity, in particular humiliating and degrading treatment." Common Article 3, *supra* note 39.

63. The first district court decision to decide the issue on the merits has declared the NSA surveillance program illegal. ACLU v. NSA, No. 06-CV-10204, 2006 U.S. Dist. LEXIS 57338 (E.D. Mich. Aug. 17, 2006); *see National Security Agency's Surveillance Authority II*, *supra* note 17 (describing the illegality of the NSA program).

64. DOJ White Paper, *supra* note 19, at 6-10, 28-36 (setting forth, after the fact, the Department's analysis of the constitutionality of warrentless foreign intelligence surveillance).

65. *See id.* at 10-17.

66. The *Hamdan* majority noted that "there is nothing in the text or legislative history of the AUMF even hinting that Congress intended to expand or alter the authorization set forth in Article 21 of the UCMJ." Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2775 (2006). Similarly, there is no evidence in the AUMF hinting that Congress intended by that law silently to repeal 18 U.S.C. § 2511(2)(f) (2000), which makes FISA and Title III of the Criminal Code "the exclusive means by which [domestic] electronic surveillance . . . may be conducted."

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specifically to restrain executive conduct in a particular field.[67] If anything, such a claim of presidential power would deserve even less deference in the context of NSA surveillance, in which Fourth Amendment values and a criminal statutory prohibition are also at stake.[68]

In short, *Hamdan* goes a long way toward restoring the constitutional vision that the last five years had turned upside down. By rejecting the President's supposed freedom to try military terrorist suspects before commissions that do not meet the standards of the UCMJ or Common Article 3, it also calls into question the President's supposed freedom to authorize torture and cruel treatment in the face of the McCain Amendment and to authorize warrantless domestic surveillance in the face of FISA. By so doing, *Hamdan* starts the process of setting the world right. It marks a major step toward reestablishing what Justice Jackson termed in his *Youngstown* concurrence the "equilibrium established by our constitutional system."[69]

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67. *See, e.g.*, Hamdi v. Rumsfeld, 542 U.S. 507, 535-36 (2004) (rejecting the President's claim that courts may not inquire into the factual basis for the detention of a U.S. citizen "enemy combatant" and reasoning that "[w]hatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake"); Rasul v. Bush, 542 U.S. 466 (2004) (rejecting the President's claim that it would be an unconstitutional interference with the President's commander in chief power to interpret the habeas corpus statute to encompass actions filed on behalf of Guantánamo detainees); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 586 (1952) (invalidating the President's seizure of the steel mills when Congress had previously "rejected an amendment which would have authorized such governmental seizures in cases of emergency"); *Ex parte* Milligan, 71 U.S. (4 Wall.) 2 (1866) (holding that the executive had violated the Habeas Corpus Act by failing to discharge from military custody a petitioner charged, inter alia, with violation of the laws of war); Little v. Barreme, 6 U.S. (2 Cranch) 170 (1804) (invalidating the seizure of a ship during a conflict with France as implicitly disapproved by Congress); United States v. Smith, 27 F. Cas. 1192, 1230 (Paterson, Circuit Justice, C.C.D.N.Y. 1806) (No. 16,342) ("The president of the United States cannot control the statute, nor dispense with its execution, and still less can he authorize a person to do what the law forbids.").

68. While the Foreign Intelligence Surveillance Court of Review suggested in dictum in *In re Sealed Case*, 310 F.3d 717, 742 (Foreign Intelligence Surveillance Ct. Review 2002) (per curiam), that Congress cannot "encroach on the President's constitutional power" to conduct foreign intelligence surveillance, the court in that case *upheld* FISA's constitutionality, affirming that Congress may constitutionally regulate significant amounts of foreign intelligence without encroaching on exclusive presidential prerogatives.

69. 343 U.S. at 638 (Jackson, J., concurring).

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IV. THE MYTHS OF "THE COMPLETION POWER" AND "RATIONAL WAR"

Hamdan's commitments to checks and balances and the rule of law in foreign affairs call into question not just recent executive branch arguments but also recent legal scholarship urging the need for expanded presidential discretion in national security affairs. Two immediate examples are contributions to this Symposium authored by prominent executive power advocates and former government officials. Professors John Manning and Jack Goldsmith argue for the existence of a presidential "completion power," while Professors Jide Nzelibe and John Yoo claim that a better constitutional design would authorize the executive to engage in discretionary "rational war."

In a post-*Hamdan* world, the call of both essays for more constitutional discretion for the executive already has a dated feel. However well intentioned both scholarly efforts may be, both ultimately exhibit the same flaw: They suggest constitutional myths to provide legal cover for the President's perception that any action in which he chooses to engage must be right, simply because he perceives the need to act.

A. A Completion Power?

Professors Goldsmith and Manning claim a "constitutional tradition" supporting an Article II "completion power," a "distinct presidential power" that, while defeasible by Congress's express action, resides "presumptive[ly]" or by "default" in the executive branch.[70] Using Chief Justice Vinson's *Youngstown* dissent as their touchstone, Goldsmith and Manning claim that "the President possessed a residual capacity to take the steps necessary to carry out Congress's program, even if Congress itself had not provided for those specific steps."[71] A completion power, they claim, finds support in post-*Youngstown* case law and government practice and amounts to an interstitial, autonomous presidential authority to fill the gaps in a statutory scheme.[72]

Upon examination, their completion power is just another term for an implied Necessary and Proper Clause for the President, a power that—unfortunately for these authors—the Framers chose to give to Congress, not

70. Goldsmith & Manning, *supra* note 1, at 2282, 2298, 2303.

71. *Id.* at 2285.

72. *Id.* at 2303 ("Where Congress has failed to specify in full the manner of enforcement, the Executive necessarily exercises some discretion in specifying incidental details necessary to carry into execution a legislative program.").

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the President. Goldsmith and Manning claim that the hypothetical completion power empowers the President not just to fill gaps *within*, but actually to "*go beyond* (but not against) the implemental prescriptions of particular statutes" to engage in executive lawmaking, a power that they claim "is neither dictated nor meaningfully channeled by legislative command."[73] While characteristically creative, ultimately these authors' analysis founders on three shoals: the problems of source, overgeneralization, and *Hamdan*.

Take first the problem of source. An executive power to fill statutory gaps may sound benign, but under Goldsmith and Manning's logic, when the President takes steps to complete a statutory scheme, he draws not on delegated power from Congress but on his *own* reservoir of unenumerated constitutional authority. The question, of course, is where, precisely, does that reservoir come from?

Goldsmith and Manning suggest three possible constitutional sources for the completion power: the Commander in Chief Clause, the Clause that vests the "executive Power" in the President, and the President's Article II duty to take care that the laws be faithfully executed. But as *Hamdan* and *Youngstown* amply demonstrate, the Commander in Chief Clause has definite limits, particularly when extended domestically and beyond the military sphere. Nor is there substantial historical evidence that the Framers' decision to vest "executive Power" in the President carried with it a broad unenumerated power to conduct foreign or domestic affairs.[74] And by its own terms, the Take Care Clause speaks in the language of a presidential duty, not a license. The President's duty is to faithfully execute the laws that Congress enacts in a manner consistent with congressional intent. As Professor Henkin has noted, "The principal purport of the clause, no doubt, was that the President shall be a loyal agent of Congress to enforce its laws."[75]

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73. *Id.* at 2285, 2308 (emphasis added).

74. *See, e.g.*, Arthur Bestor, *Respective Roles of Senate and President in the Making and Abrogation of Treaties – The Original Intent of the Framers of the Constitution Historically Examined*, 55 WASH. L. REV. 1, 31 (1979) ("No serious attempt has ever been made to show that the framers of the Constitution accepted . . . that executive power by its very nature includes control of foreign affairs. As a matter of historical fact, the only utterances made in the Federal Convention of 1787 on the subject were emphatic rejections."); *see also* George Winterton, *The Concept of Extra-Constitutional Executive Power in Domestic Affairs*, 7 HASTINGS CONST. L.Q. 1, 24-25 & n. 160, 26-29 (1970) (rejecting a broad view of the Executive Power Clause).

75. LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 54 (1972); *see also* THE FEDERALIST NO. 70, at 451-52 (Alexander Hamilton) (Robert Scigliano ed., 2000). Justice Black echoed this view in *Youngstown*, noting that "the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker." Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952).

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The recent constitutional debate over presidential signing statements has raged precisely because the President has claimed an unenumerated Article II power to interpret a statutory scheme faithfully not to Congress's intent, but rather to his *own* reading of what that scheme's goals might be.[76] As Justice Black put it in *Youngstown*, President Truman's order seizing the steel mills was unlawful because it did "not direct that a congressional policy be executed in a manner prescribed by Congress—it direct[ed] that a presidential policy be executed in a manner prescribed by the President."[77] By so doing, the President's action crossed the line from executive action into lawmaking and violated the separation of powers.

In a variety of contexts, Goldsmith and Manning argue, the President now engages in precisely such interstitial lawmaking, on his own constitutional authority. Yet strangely, Goldsmith and Manning would vindicate that use by invoking Chief Justice Vinson's dissent in *Youngstown*, although that view was rejected by six Justices in 1952 and would also, if *Hamdan* is any indicator, be rejected by five Justices today.

Justice Black's majority opinion in *Youngstown* held that the lawmaking power resides exclusively with Congress, unless Congress chooses to delegate some of its authority to the executive. Because President Truman's actions in seizing the steel mills exceeded that delegated authority, the Court held that Truman had transgressed that legislative prerogative.[78] But under Goldsmith and Manning's logic, constitutional custom now acknowledges that the President does have some inherent lawmaking power—which they call the completion power—that does not derive from a delegation from Congress and is triggered when a statute is unclear. Because this alleged power derives from Article II, Goldsmith and Manning further claim, the executive view deserves presumptive deference from the courts, leaving little role for meaningful judicial oversight.

On examination, Goldsmith and Manning overgeneralize from the various doctrinal areas they collect, which do not in fact read the President's powers as broadly as they do. In the landmark *Chevron* case,[79] for example, the Court famously held that a reviewing court must give an executive agency's interpretation "considerable weight," but in so saying, the Court did not give the executive a blank check to exercise discretion unrooted in legislative

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76. *See generally* ABA TASK FORCE ON PRESIDENTIAL SIGNING STATEMENTS AND THE SEPARATION OF POWERS DOCTRINE, TASK FORCE REPORT WITH RECOMMENDATIONS (2006), *available at* http://www.abanet.org/op/signingstatements.

77. *Youngstown*, 343 U.S. at 588.

78. *Id.* at 589.

79. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

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intent.[80] The Court said, "If Congress has explicitly left a gap for the agency to fill, there is an *express delegation of authority* to the agency to elucidate a specific provision of the statute by regulation."[81] In other words, the authority belongs to Congress in the first place, and only when Congress has acted by delegating that authority to the President does the executive gain the power to act.

Nor does Goldsmith and Manning's vision of a constrained role for judicial review of such executive actions in foreign affairs seem plausible after the Court's decision in *Hamdan*. The authors cite the Court's decision upholding State Department travel restrictions to Cuba in *Zemel v. Rusk*[82] without substantially addressing *Kent v. Dulles*,[83] which directed judges to find a clear legislative statement that Congress has authorized the executive act in question before condoning an executive infringement upon individual rights.[84] As noted above, *Hamdan* refused to read the AUMF to give the Bush Administration a "blank check" to conduct military commissions inconsistent with the UCMJ. Nor did the Justices in *Hamdan* read *Loving v. United States*,[85] as the authors would, to recognize the President's power to supplement the UCMJ with his "independent constitutional authority to determine the conditions of punishments imposed by military trials."[86] Instead, the *Hamdan* majority

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80. Under *Chevron*, the agency's interpretation is given "considerable weight," but first the reviewing court must find that the agency's policy choice could be "a reasonable policy choice for the agency to make." *Id.* at 844-45.

81. *Id.* at 843-44 (emphasis added). Moreover, *Chevron* only directs that the executive may fill in a congressional statutory framework if Congress leaves a gap that forces the executive, when implementing the statute, to choose among "competing interests." *Id.* at 865; *see also id.* at 845 ("If this choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned." (quoting United States v. Shimer, 367 U.S. 374, 382-83 (1961))). Significantly, Goldsmith and Manning read *Chevron* as giving the executive broad freedom to resolve statutory "ambiguities," not just to resolve conflicting interests, thereby giving the executive many more opportunities to act when legislative direction is unclear. *See* Goldsmith & Manning, *supra* note 1, at 2298-99.

82. 381 U.S. 1 (1965); *see also* Regan v. Wald, 468 U.S. 222, 242 (1984) ("Our holding in *Zemel* was merely an example of this classical deference to the political branches in matters of foreign policy.").

83. 357 U.S. 116 (1958). *But see* Goldsmith & Manning, *supra* note 1, at 2289 n.37 ("*Kent* does not deny a completion power.").

84. *See* Goldsmith & Manning, *supra* note 1, at 2888-89.

85. 517 U.S. 748 (1996).

86. Goldsmith & Manning, *supra* note 1, at 2290. To the contrary, Justice Stevens's plurality opinion cites *Loving* for the proposition that

> [w]hen . . . neither the elements of the offense nor the range of permissible punishments is defined by statute or treaty, the precedent must be plain and

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effectively demanded a clear legislative statement, reflecting the simple, democratic principle that executive rules regulating individual rights should "reflect the political consent and public participation embodied in legislation, rather than the self-interested bureaucratic discretion that is likely to be the character of executive action."[87]

Similarly, the authors overread *Dames & Moore v. Regan*[88] as endorsing broad presidential authority in foreign affairs to "complet[e] a congressional scheme by taking an action that was only loosely related to the scheme."[89] In *Hamdan*, the President claimed, in effect, an unenumerated power to complete the military commission scheme envisioned by the UCMJ to cover trials of suspected terrorists. Yet that is precisely the unspecified executive power that the *Hamdan* Court rejected, citing Justice Jackson's concurrence in *Youngstown*.[90] Similarly, *Dames & Moore* relied not on Chief Justice Vinson's *Youngstown* dissent but on Justice Jackson's concurrence, a fact that Goldsmith and Manning nowhere mention.[91]

It is true, as I have argued elsewhere, that *Dames & Moore* diluted the *Youngstown* vision of balanced institutional participation in the national security process by making it "easier to find congressional approval and more difficult for Congress to express its institutional opposition . . . simultaneously strengthen[ing] the President vis-à-vis the courts by effectively requiring them to apply special deference to executive acts in foreign affairs."[92] But *Hamdan*'s

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> unambiguous. To demand any less would be to risk concentrating in military hands a degree of adjudicative and punitive power in excess of that contemplated either by statute or by the Constitution.

Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2780 (2006) (plurality opinion) (citing *Loving*, 517 U.S. at 771); *cf. id.* at 2800 (Kennedy, J., concurring) (citing *Loving*, 517 U.S. at 756-58, 760, for the proposition that military commissions, like courts "[l]ocated within a single branch, . . . carry the risk that offenses will be defined, prosecuted, and adjudicated by executive officials without independent review").

87. Harold Edgar & Benno C. Schmidt, Jr., Curtiss-Wright *Comes Home: Executive Power and National Security Secrecy*, 21 HARV. C.R.-C.L. L. REV. 349, 355-56 (1986).

88. 453 U.S. 654, 669 (1981).

89. Goldsmith & Manning, *supra* note 1, at 2289.

90. *See Hamdan*, 126 S. Ct. at 2774 n.23 ("Whether or not the President has independent power, absent congressional authorization, to convene military commissions, he may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers." (citing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring))); *see also id.* at 2800 (Kennedy, J., concurring).

91. *See Dames & Moore*, 453 U.S. at 661 (noting that Justice Jackson's concurrence in *Youngstown* "brings together as much combination of analysis and common sense as there is in this area").

92. KOH, *supra* note 10, at 142.

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reasoning makes it less likely that future courts will automatically apply special deference in foreign affairs and more likely that courts will find limitations upon independent executive action in detailed congressional prescriptions. In short, the entire thrust of the *Hamdan* ruling runs contrary to Goldsmith and Manning's image of a self-contained completion power that is subject to only minimal checks by the other branches of government.

In the end, Goldsmith and Manning seem unduly driven by an impulse for intellectual tidiness—a desire to bead together disparate doctrinal areas into a single charm bracelet they label the "completion power." Nowhere do they justify their core premise: why we need to lend "conceptual coherence to several important areas of executive authority whose connection has not previously been understood."[93] Is positing the existence of an unenumerated reservoir called the completion power really necessary to make sense of the executive's actions in these disparate areas?

A number of scholars have posited a theory of the "unitary executive," the notion that the President has independent power to control the executive branch and to resist infringements upon the prerogatives of his office.[94] But the Constitution provides no single source for the President's various abilities to promulgate agency regulations, to exercise prosecutorial discretion, and to conduct foreign relations. As Justice Jackson famously wrote in his *Youngstown* concurrence, "Presidential powers are not fixed but fluctuate, depending on their disjunction . . . with those of Congress."[95] The very point of a constitutional system of checks and balances is to separate and divide powers and to foster internal checks within each branch by recognizing multiple sources of enumerated authority operating in a number of different subject matter areas. The genius of Justice Jackson's *Youngstown* analysis rests in its acknowledgement of multiple sources of executive power, rather than implying that all executive actions automatically enjoy heightened deference because they spring from a wellspring of a completion power located somewhere in Article II.

At bottom, *Hamdan* proves again that Justice Jackson's tripartite structure in *Youngstown* is sufficiently flexible to permit robust executive action when Congress genuinely approves, while constraining executive action against the will of Congress. In the end, Justice Jackson's classic analysis of executive

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93. Goldsmith & Manning, *supra* note 1, at 2282.

94. *See, e.g.*, Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1553 (1992); *see also* Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23 (1995).

95. *Youngstown*, 343 U.S. at 635 (Jackson, J, concurring).

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power much better explains the doctrinal pockets that Goldsmith and Manning discuss than does their newly minted theory of an Article II completion power.

B. Should the Constitution Be Read To Permit "Rational War"?

Even more wrong-headed—and irreconcilable with the spirit of *Hamdan*—is Professors Nzelibe and Yoo's suggestion that congressional participation in the process of deciding whether to go to war is "unwise to establish as a constitutional rule."[96] One might think that more than two centuries of congressional participation in the decision to declare and regulate war had settled what was textually established at the Founding in Article I, Section 8 of the Constitution.[97] Nevertheless, the authors simply assert that presidential primacy in warmaking has become the "status quo" and then proceed to offer three "functional reasons"—accountability, expertise and accuracy, and international factors—why this de facto primacy should be treated as a better constitutional design.

The authors claim that Presidents are more accountable than Congress because they "will bear the lion's share of the electoral consequences of victory or defeat in war" and therefore will be more responsive to the sentiments of the country.[98] With respect to expertise and accuracy, they contend that congressional involvement does not necessarily produce better outcomes, measured in terms of more worthy wars won and more unwise wars avoided. While they acknowledge that congressional involvement in warmaking decisions might be desirable in signaling to democratic nations, they suggest that nonstate actors or rogue states do not respond to signals. Thus, they suggest, "a two-tier approach to war powers might be desirable, in which

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96. Nzelibe & Yoo, *supra* note 1, at 2541.

97. As the Court's opinion in *Hamdan* notes:

> The Constitution makes the President the "Commander in Chief" of the Armed Forces, Art. II, §2, cl. 1, but vests in Congress the powers to "declare War . . . and make Rules concerning Captures on Land and Water," Art. I, §8, cl. 11, to "raise and support Armies," *id.*, cl. 12, to "define and punish . . . Offences against the Law of Nations," *id.*, cl. 10, and "To make Rules for the Government and Regulation of the land and naval Forces," *id.*, cl. 14. The interplay between these powers was described . . . in . . . *Ex parte Milligan*: "The power to make the necessary laws is in Congress; the power to execute in the President. . . . But neither can the President, in war more than in peace, intrude upon the proper authority of Congress . . . ."

Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2773 (2006) (quoting *Ex Parte* Milligan, 71 U.S. (4 Wall.) 2, 139 (1866) (Chase, C.J., concurring)).

98. Nzelibe & Yoo, *supra* note 1, at 2520.

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conflicts with similar nation-states should involve congressional authorization," but conflicts with nonstate actors or nondemocratic regimes might not.[99] These functional reasons, they claim, suggest that a rational constitutional design would leave the decision to go to war in the hands of the President, who should have complete discretion over whether to allow Congress to play its assigned constitutional role in that pressing national decision.[100] Courts, they also suggest, should be wholly excluded from this process, because "judicial review would likely undermine the value of signals sent by the President when he seeks legislative authorization to go to war," and "preclude the possibility of beneficial bargaining between the President and Congress by forcing warmaking into a procedural straitjacket."[101]

On reflection, Nzelibe and Yoo's analysis is rebutted both by *Hamdan* and by the current war in Iraq. As noted above, *Hamdan*'s reasoning rebuffs the extreme theory of unilateral presidential power that pervades Professor Yoo's academic and government work.[102] The authors would dismiss *Hamdan* as dealing only with military commissions, "simply fail[ing] to see how [the *Hamdan*] decision is relevant to understanding how the political branches should interact when deciding to initiate the use of force."[103] Yet as I have argued elsewhere, the Constitution's warmaking provisions envision a political procedure "in which decisions to make war are preceded by intrabranch debate and deliberation, interbranch dialogue, and the creation and delineation of institutional precedent."[104] *Hamdan* strongly supports that traditional political

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99. *Id.* at 2536.

100. The authors do concede that "[e]ven under the strongest President-first theories, Congress still retains the ability to check presidential foreign policy and national security decisions through the funding power." *Id.* at 2521.

101. *Id.* at 2537.

102. *See generally* JOHN YOO, THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11 (2005). As an attorney at the Office of Legal Counsel, Professor Yoo was also an architect of the infamous August 2002 "Torture Opinion," the legal decision supporting NSA spying, and the legal conclusion – now rejected by *Hamdan* – that Common Article 3 does not apply to detainees in the war on terror. *See* Dan Eggen, *Bush Authorized Domestic Spying*, WASH. POST, Dec. 16, 2005, at A1 (spying); David Johnston & Neil A. Lewis, *Bush's Counsel Sought Ruling About Torture*, N.Y. TIMES, Jan. 5, 2005, at A1 (torture); Michael Isikoff, *Double Standards?*, NEWSWEEK, May 25, 2004, http://www.msnbc.msn.com/id/5032094/site/newsweek (Common Article 3).

103. Nzelibe & Yoo, *supra* note 1, at 2539.

104. Harold Hongju Koh, *War and Responsibility in the Dole-Gingrich Congress*, 50 U. MIAMI L. REV. 1, 8 (1995); *see also id.* ("[In Operation Desert Storm] both the executive and legislative branches engaged in lengthy intrabranch deliberation before ultimately committing to war, an interbranch dialogue ensued that culminated in the congressional resolution authorizing use of force in Iraq, and the episode helped delineate an important institutional precedent

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dynamic, clarifying that the Constitution views interbranch dialogue, promoted through litigation if necessary, as the best way to develop a sustained democratic response to external crisis.[105]

Remarkably, the authors suggest that recent setbacks in the Iraq War *support* their case, by disproving a positive correlation "between ex ante statutory authorization and American success" on the battlefield.[106] In Iraq, they claim, prior congressional deliberation about entering a war failed to produce a sense of public buy-in and lasting support for the war effort. Nor did the "inclusion of Congress, ex ante, in the decision to use force . . . lead to any greater accuracy in decision-making," they claim, because "Congress brought no independent collection or analysis of information to bear" on the decision.[107] Nzelibe and Yoo acknowledge that Congress's "decision to authorize the use of force against Iraq [was based on] on the intelligence and analysis presented by the Bush Administration," which falsely, it turned out, reported the existence of weapons of mass destruction in Iraq.[108] Thus, Iraq is an exceedingly poor example to support their claim that the executive can better gather accurate information than Congress because it was not Congress's intelligence-gathering process, but the executive's own National Intelligence Estimate, that proved fatally flawed. To cite the latest Iraq War as a reason to dispense with congressional participation in warmaking decisions would reward the executive for secrecy or presentation of false or misleading information and relieve the executive from any obligation to subject its war justifications and plans to rigorous public scrutiny.

Nzelibe and Yoo also argue that by acting as a natural brake on going to war, congressional participation might also cause "errors of omission," namely, wars we should rationally have fought but did not.[109] But again, their claim that a President can more rationally choose to engage in war assumes that the executive branch is better able than Congress to weigh the likely costs and benefits of going to war. In fact, Iraq provides a devastating counterexample.

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which has served as a touchstone for subsequent deliberations."); Harold Hongju Koh, *Presidential War and Congressional Consent: The Law Professors' Memorandum in* Dellums v. Bush, 27 STAN. J. INT'L L. 247 (1991) (outlining the constitutional argument for congressional consent prior to the invasion of Iraq in the Persian Gulf War).

105. *See* Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2799 (Breyer, J., concurring).

106. Nzelibe & Yoo, *supra* note 1, at 2525.

107. *Id.* at 2524.

108. *Id. See generally* JAMES RISEN, STATE OF WAR: THE SECRET HISTORY OF THE CIA AND THE BUSH ADMINISTRATION 109 (2006) ("[I]n fact, many CIA officials . . . knew before the war that they lacked sufficient evidence to make the case for the existence of Iraq's weapons programs.").

109. Nzelibe & Yoo, *supra* note 1, at 2517-18.

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As one recent account has made clear, the current Iraq occupation "was made possible only through the [executive's] intellectual acrobatics of simultaneously 'worst-casing' the threat posed by Iraq, even while 'best-casing' the subsequent cost and difficulty of occupying the country."[110] In January 2003, for example, Defense Secretary Donald Rumsfeld projected the cost of waging the war as "a number that's something under $50 billion"; only three years later, Nobel Prize-winning economist Joseph Stiglitz projected the likely actual cost to be between $1 and 2 trillion.[111]

The final part of Nzelibe and Yoo's analysis seeks to mix the "democratic peace" literature from political science with signaling theory drawn from rational choice theory to argue that legislative authorization raises the costs of sending threatening signals to other nations. Their argument calls for an unworkable rule allowing higher levels of ex ante congressional participation for going to war with democracies (which, of course, the United States never does) than for waging war upon autocratic governments and nonstate actors. Stripped of the obfuscating techno-speak, their "rational" constitutional system for going to war would give the President complete discretion to dispense with congressional participation, so long as he is waging war against terrorists and dictators.

This claim makes little sense. Why should a dictator such as Kim Jong Il or a terrorist leader like Osama bin Laden have more difficulty understanding signals of war than complex parliamentary democracies? Shouldn't signaling theory take account as well of the *domestic* signal that a declaration of war or authorization for use of force resolution sends to the warmaking country's own citizens about the possible consequences of being at war? Most fundamentally, Nzelibe and Yoo's suggestion flatly violates the spirit of the Constitution by speeding, not slowing, the march to war. As James Wilson made clear during the constitutional debates, the current constitutional design was intended so that "[t]his system will not hurry us into war; it is calculated to guard against it. It will not be in the power of a single man . . . to involve us in such distress; for the important power of declaring war is vested in the legislature at large."[112] As then-Congressman Abraham Lincoln noted in 1848, unilateral presidential warmaking rivals "the most oppressive of all Kingly oppressions" that the

110. THOMAS E. RICKS, FIASCO: THE AMERICAN MILITARY ADVENTURE IN IRAQ 4 (2006).

111. Martin Wolk, *Cost of Iraq War Could Surpass $1 Trillion*, MSNBC.COM, Mar. 17, 2006, http://www.msnbc.msn.com/id/11880954.

112. 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 528 (Jonathan Elliot ed., 1891).

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Framers sought to suppress.[113] Taken seriously, the authors' theory would essentially oust Congress from any decision to go to war, except for the most limited ex post involvement by the politically difficult means of controlling funding after troops were already committed.

Nzelibe and Yoo mischaracterize my view as a "pure Congress-first approach,"[114] as opposed to what it really is: an approach guided by the Constitution's requirement that all three branches of government meaningfully participate in significant warmaking decisions. Claiming that institutional incentives make it unlikely that Congress will restrain the President, they suggest that we must bow to political reality and reframe the Constitution to give the President greater freedom to go to war. Coming from these authors, this suggestion is hardly surprising. In the last five years, with regard to issues ranging from the Torture Memo to NSA spying to Common Article 3, Professor Yoo has repeatedly called for "more realistic" normative frameworks,[115] then ended up justifying policies that are not just anticonstitutional, but that have caused far more problems than they have solved. This latest call for greater presidential unilateralism in warmaking is no exception.

No one denies that the current legislative framework within which warmaking decisions are made could be significantly improved.[116] But the need for new and improved legislation does not render obsolete our current constitutional scheme for warmaking. That scheme rests on a simple, compelling logic: that before the President sends American soldiers out to fight and die, he must both consult with and convince elected officials who do not work for him. Dispensing with that commonsense requirement—as Nzelibe and Yoo would effectively do—furthers neither rational warmaking nor constitutional design.

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113. THE POLITICAL THOUGHT OF ABRAHAM LINCOLN 44 (Richard N. Current ed., 1967); *see also* United States v. Smith, 27 F. Cas. 1192, 1231 (Paterson, Circuit Justice, C.C.D.N.Y. 1806) (No. 16,342) (noting that if constitutionally authorized to do more than repel sudden attacks, the President could, "contrary to the constitutional will . . . involve the nation . . . in all the calamities of a long and expensive war").

114. Nzelibe & Yoo, *supra* note 1, at 2541.

115. *E.g.*, Robert J. Delahunty & John Yoo, *Statehood and the Third Geneva Convention*, 46 VA. J. INT'L L. 131, 157-58 (2005).

116. *See generally* JOHN HART ELY, WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH (1993); KOH, *supra* note 10, at 189-93 (suggesting reforms of the War Powers Resolution); Leslie H. Gelb & Anne-Marie Slaughter, *Declare War*, ATLANTIC MONTHLY, Nov. 2005, at 54.

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CONCLUSION

Global crises make bad law. September 11 turned public law upside down. Thankfully, *Hamdan* has begun to turn it right-side up again. But for that restoration to succeed, we cannot be misled by unfounded claims that the executive constitutes a law unto itself. Once that claim becomes the constitutional formula for dealing with danger, the executive itself soon becomes the most dangerous branch.

Hamdan recognized what too many commentators and academics have misunderstood: that every new political crisis does not demand a new constitutional paradigm. In a war on terror, all three branches of government must continue to play their constitutionally assigned roles. Even the critical importance of maintaining "energy in the executive" in a time of terror cannot justify rewriting the Constitution to endorse unchecked executive power.

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