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Extending Hamdan v. Rumsfeld to Combatant Status Review Tribunals

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I. INTRODUCTION

In *Hamdan v. Rumsfeld*, the United States Supreme Court struck down a military commission convened by the President to try foreign nationals for violations of the law of war.[1] Over vigorous dissenting opinions, a five-Justice majority[2] held that the commission's structure and procedures violated domestic statutes (the Uniform Code of Military Justice (UCMJ)) and the Geneva Conventions, which had been incorporated by the UCMJ.[3] The controlling provisions interpreted by the Court did not clearly authorize or restrict the President's commission,[4] as is perhaps

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

2. The majority included Justice Stevens, who authored the opinion, and Justices Kennedy, Souter, Ginsburg, and Breyer. Justice Kennedy excepted himself from Parts V and VI(D)(iv) of Justice Stevens's opinion, leaving a four-Justice plurality in those Parts, and wrote a separate opinion concurring in part. Justice Breyer wrote a concurring opinion. Justices Scalia, Thomas, and Alito each wrote dissenting opinions; Chief Justice Roberts, who had decided the case in favor of the President prior to his appointment to the Supreme Court, recused himself. *Id.* at 2758–59.

3. *Id.* at 2759, 2792, 2798; *see infra* notes 50–54 and accompanying text.

4. These provisions include Articles 21 and 36 of the UCMJ, codified at 10 U.S.C. §§ 821, 836 (2000) (amended by the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006) [hereinafter MCA]), and Common Article 3 of the Geneva Conventions. *See Hamdan*, 126 S. Ct. at 2774, 2790–93 (majority opinion construing UCMJ Articles 21 and 36); *id.* at 2795–97 (majority opinion construing Common Article 3); *id.* at 2801–04 (Kennedy, J., concurring in part) (construing UCMJ Articles 21 and 36 and Common Article 3); *id.* at 2824–25 (Thomas, J., dissenting) (construing UCMJ Article 21); *id.* at 2840–49 (Thomas, J., dissenting) (construing and discussing UCMJ Article 36 and Common Article 3); *id.* at 2850–55 (Alito, J., dissenting) (construing Common Article 3).

> One of the most remarkable features of the *Hamdan* decision is the sheer number of issues on which the Court divided . . . . Each of these questions is highly technical and complex. In many of them, and plausibly in all of them, the legal materials were ambiguous. For at least some of the seven issues, the legal materials would surely leave an objective reader unsure, concluding that the standard interpretive sources made both positions plausible.

Cass R. Sunstein, *Clear Statement Principles and National Security:* Hamdan *and Beyond*, 2006 SUP. CT. REV. 1, 23 (2007); *see also* Eric Posner & Cass R. Sunstein, *Chevronizing Foreign Relations Law*, 116 YALE L.J. 1170, 1223 (2007) ("On the key points [in *Hamdan*], the provisions are at least ambiguous."). *But see* Derek Jinks & Neal Kumar Katyal, *Disregarding Foreign Relations Law*, 116 YALE L.J. 1230, 1269–70 (2007).

suggested by the number of opinions issued[5] and the disparate views they express.[6] The Court's holding, reached in the face of such statutory ambiguity, indicates that the Court will not allow the President to unilaterally establish military commissions without specific congressional authorization. In short, *Hamdan* imposed a clear statement requirement on military commissions unilaterally convened by the President. This reading of the case (or one substantially similar to it) is widely held.[7]

In addition, as Professor Sunstein concludes, *Hamdan* resolved an important question, not addressed in Justice Jackson's *Youngstown Sheet & Tube Co. v. Sawyer* concurrence, concerning "the appropriate presumption, or clear statement principle, to apply

5. The Court handed down six opinions. *See supra* note 2.

6. *See* Sunstein, *supra* note 4, at 4 ("[I]t is not easy to find an opinion, in the Court's entire history, in which the Justices divided on so many points; I hereby nominate *Hamdan* as the all-time champion on this count."); *id.* at 23 (enumerating seven primary issues over which the Justices divided).

7. *See* J. Richard Broughton, *Judicializing Federative Power*, 11 TEX. REV. L. & POL. 283, 302 (2007) ("*Hamdan* . . . assumes that the congressional authorization was not specific enough to justify Hamdan's military commissions."); Samuel Estreicher & Diarmuid O'Scannlain, *The Limits of* Hamdan v. Rumsfeld, 9 GREEN BAG 2d 353, 354–55 (2006) (stating that *Hamdan* imposed a "rather demanding 'clear statement' requirement—that Congress, in essence, must state affirmatively, 'we authorize' or 'we approve' the use of military commissions for the particular conflict"); Neal Katyal, *Equality in the War on Terror*, 59 STAN. L. REV. 1365, 1381–82 (2007) (noting that in *Hamdan*, "the Court held that the relevant action had to be authorized by Congress, not the President"); Julian Ku & John Yoo, Hamdan v. Rumsfeld*: The Functional Case for Foreign Affairs Deference to the Executive Branch*, 23 CONST. COMMENT. 179, 205 (2006) ("The *Hamdan* Court is attempting to force a clear statement rule upon congressional delegations of authority to the President. While *Hamdan* could be read narrowly as applying only to military commissions, its approach . . . requires Congress to enumerate every specific element of its war powers it wishes to delegate to the President."); Benjamin V. Madison, III, *Trial by Jury or by Military Tribunal for Accused Terrorist Detainees Facing the Death Penalty? An Examination of Principles that Transcend the U.S. Constitution*, 17 U. FLA. J.L. & PUB. POL'Y 347, 355 (2006) ("The Court in *Hamdan* made clear . . . that the lack of explicit congressional authorization for the tribunals was central to its holding."); Sunstein, *supra* note 4, at 26–27 ("[A] clear statement principle is . . . central to Justice Stevens's opinion, which cannot possibly be understood without it."); D.A. Jeremy Telman, *The Foreign Affairs Power: Does the Constitution Matter?*, 80 TEMP. L. REV. 245, 246 (2007) ("[T]he five-Justice majority in *Hamdan v. Rumsfeld* announced that it will scrutinize executive conduct in that conflict for compliance with norms mandated by . . . Congress."); *cf.* Martin S. Flaherty, *More Real than Apparent: Separation of Powers, the Rule of Law, and Comparative Executive "Creativity" in* Hamdan v. Rumsfeld, 2006 CATO SUP. CT. REV. 51, 58 (2006) ("The Court did not impose anything as mechanical as a clear statement rule, but a refusal to countenance radical transfers of power to the president without some *fairly convincing showing of congressional approval* runs through the majority and concurring opinions.") (emphasis added).

in the face of ambiguous legislation" and certain claims of Executive power:

> What was unsettled was the direction in which any clear statement principle should run. Should the President, as Commander-in-Chief, be presumed to have the authority to act to protect national security, at least when Congress has not said otherwise? Or should principles of constitutional liberty, or liberty in general, forbid the President from acting unless he can claim clear congressional permission?
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> . . . .
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> . . . The Court's answer, at least in the context of the criminal trial, was that the presumption would operate against presidential authority. The dissenting view was that in light of the distinctive constitutional position of the Commander-in-Chief, the President may construe ambiguities as he reasonably sees fit.[8]

Hamdan thus resolved that the President can unilaterally convene penal tribunals only with explicit congressional authorization. Moreover, in the absence of explicit authorization—i.e., where statutory language is ambiguous—the question will be resolved against Presidential authority and in favor of liberty and traditional adjudicative entities.[9]

Even if *Hamdan* is read to apply only to military commissions unilaterally convened by the President,[10] the case has important implications for the initial tribunals through which detainees pass—Combatant Status Review Tribunals (CSRTs). CSRTs were convened at Guantanamo Bay between July 2004 and June 2007 to adjudicate detainees' legal status by answering one question: "whether . . . each detainee me[t] the criteria to be designated as an enemy combatant."[11] A CSRT's finding of enemy combatant status

8. Sunstein, *supra* note 4, at 10–11, 45.

9. *Id.* at 33.

10. The case may have much broader implications. *See, e.g.*, *id.* at 43–44 (suggesting that, after *Hamdan*, "*any* presidential action, not vindicated by history or required by emergency, is likely to need clear congressional authorization, at least if it intrudes into the domain of liberty") (emphasis added). After analyzing *Hamdan*'s clear statement principle generally, Professor Sunstein then examines its implications for warrantless wiretapping by the National Security Agency. *See generally id.*

11. Memorandum from Gordon England, Depnty Sec'y of Def., to Sec'ys of the Military Dep'ts et al. on Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at U.S. Naval Base Guantanamo Bay, Cuba enclosure 1, at 1

has two primary consequences. First, enemy combatants may be detained until the end of active hostilities in the relevant conflict.[12] Second, under the Military Commissions Act of 2006 (MCA) (enacted after *Hamdan* was issued), enemy combatants (or, more precisely, "unlawful enemy combatants"[13]) are eligible for trial by military commission.[14]

This Comment argues that *Hamdan*'s separation-of-powers principles extend to CSRTs because the reasons the Court applied these principles to the military commission in *Hamdan* also exist in the case of CSRTs. First, authority to determine the status of detainees, like authority to convene military commissions, is rooted in the constitutional war powers granted jointly to Congress and the President. Second, like the military commission in *Hamdan*, CSRTs are adjudicatory entities, unilaterally convened by the Executive, that present profound potential deprivations of liberty.[15] Third, domestic

(July 14, 2006), *available at* http://www.defenselink.mil/news/Aug2006/d20060809CSRT Procedures.pdf [hereinafter 2006 CSRT Procedures]; *see also* U.S. DEP'T OF DEF., COMBATANT STATUS REVIEW TRIBUNAL SUMMARY, http://www.defenselink.mil/news/Nov2007/CSRTUpdate-Nov2-07.pdf (572 CSRTs convened).

12. *See* Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2761 (2006) (noting that a CSRT had decided petitioner was an "enemy combatant" and therefore petitioner's ongoing detention was warranted); Hamdi v. Rumsfeld, 542 U.S. 507, 521–22, 538 (2004) (plurality opinion).

13. Military commissions organized under the MCA have jurisdiction over "alien unlawful enemy combatant[s]." Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600, 2603 (codified at 10 U.S.C. § 948c (Supp. 2006)). The distinction between "enemy combatant" status (designated by CSRTs) and "alien unlawful enemy combatant" status (required for jurisdiction under the MCA) has become significant. *See* United States v. Khadr, CMCR 07-001 (Sept. 24, 2007), at 2–3, *available at* http://www.scotusblog.com/movabletype/archives/CMCR%20ruling%209-24-07.pdf; JENNIFER K. ELSEA, CONG. RESEARCH SERV., ENEMY COMBATANT DETAINEES: *HABEAS CORPUS* CHALLENGES IN FEDERAL COURT 6 & n.25 (2007), *available at* http://fas.org/sgp/crs/natsec/RL33180.pdf. The definition of "enemy combatant" under CSRT procedures may also be significantly distinct from that of "unlawful combatant" under the Geneva Conventions. *See, e.g.*, Joseph Blocher, Comment, *Combatant Status Review Tribunals: Flawed Answers to the Wrong Question*, 116 YALE L.J. 667, 667–74 (2006).

14. By contrast, combatants designated as prisoners of war (POWs) and "lawful enemy combatants" are entitled to trial by courts-martial, the military courts used to try members of the United States Armed Forces. *See* MCA, 120 Stat. at 2603 (codified at 10 U.S.C. § 948d); Blocher, *supra* note 13, at 667 & n.1 (2006) ("Prisoners of war (POWs) enjoy special rights under the Geneva Conventions that 'enemy combatants' detained in Guantánamo do not have, including the right to be tried in the same courts and according to the same procedures as members of the detaining power's armed forces.") (citing Geneva Convention Relative to the Treatment of Prisoners of War art. 102, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135) [hereinafter GPW]. Significantly, CSRTs are not capable of designating detainees as POWs or lawful enemy combatants. *See id.* at 670 & nn.15–16; *infra* note 135 and accompanying text.

15. *See supra* text accompanying notes 12–14.

statutes touching upon CSRTs do not expressly authorize the President to convene CSRTs and are thus, to some extent, ambiguous.[16] Because CSRTs present the same legal issues at play in *Hamdan*—tension between liberty interests and unilateral Executive action against a backdrop of statutory ambiguity—and because, factually, CSRTs are adjudicatory entities significantly akin to military commissions, the principles established in *Hamdan* likely apply.

Part II of this Comment sets forth the facts and precedential value of *Hamdan*. Part III provides an overview of combatant status determination and the origin of CSRTs. Part IV argues that, based on the factual and legal similarities between the President's commission and CSRTs, *Hamdan*'s clear statement requirement and statutory presumption apply to CSRTs. In light of those principles, Part IV examines four presently operative statutes that implicate CSRTs: the Authorization for Use of Military Force (AUMF),[17] the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005 (Reagan Defense Act),[18] the Detainee Treatment Act of 2005 (DTA),[19] and the MCA. Part IV concludes that, under principles set forth in *Hamdan*, CSRTs violate Section 1091 of the Reagan Defense Act, which requires timely processing of detainees' legal status and, with language mirroring that of Article 5 of the Geneva Convention Relative to the Treatment of Prisoners of War (GPW), requires that in cases where a detainee's potential POW status is in doubt, the detainee be afforded POW status "until the detainee's status is determined by a competent tribunal."[20] The MCA's indication that CSRTs are "competent tribunals" for some purposes must be read in light of these limitations in the Reagan Defense Act and arguably limiting language in the DTA. Part V offers a brief conclusion.

16. *See infra* Part IV.B.

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

18. Pub. L. No. 108-375, 118 Stat 1811 (2004).

19. Pub. L. No. 109-148, 119 Stat. 2739 (2005).

20. Pub. L. No. 108-375 § 1091(b), 118 Stat 1811, 2069 (2004).

II. *HAMDAN V. RUMSFELD*

A. Facts and Procedural History

Petitioner Salim Ahmed Hamdan, a Yemeni national, was captured in November 2001 by United States armed forces in Afghanistan and ultimately detained at Guantanamo Bay.[21] On November 13, 2001, the President issued an order indicating his intention to convene military commissions to try noncitizens the President believed to be members of al Qaeda or to have participated in terrorist activities against the United States. The commissions would try such persons for "offenses triable by military commission," and, as penal tribunals, could impose punishments "including imprisonment or death."[22] In July 2003, the President declared that Hamdan and five other detainees were to be tried by military commission.[23] On July 7, 2004, a CSRT was convened, which concluded that Hamdan was an enemy combatant and should therefore continue to be detained.[24] Six days later, the government charged Hamdan with conspiracy to commit terrorist acts including murder, attacks on civilians, and attacks on civilian property.[25] Specifically, the government alleged that, while knowing the terrorist intentions of his associates, Hamdan served as a driver and bodyguard to Osama bin Laden; accompanied him to events at which bin Laden promoted attacks against Americans; transported weapons for al Qaeda; and received weapons training at camps sponsored by al Qaeda.[26]

Hamdan, acting before the DTA and MCA removed detainees' access to the writ of habeas corpus,[27] petitioned for a writ of habeas corpus in federal district court to challenge the legality of the President's commission.[28] Hamdan conceded that a regularly constituted court martial—the type of military tribunal that tries

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

22. *Id.* at 2760 (citing Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001)).

23. *Id.*

24. *Id.* at 2761.

25. *Id.* at 2760–61.

26. *Id.*

27. Detainee Treatment Act of 2005, Pub. L. No. 109-148 § 1005(e)(2), *superseded by* Military Commissions Act of 2006, Pub. L. No. 109-366 § 10, 120 Stat. 2600, 2637 (2006).

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

citizens who are members of the armed forces, as created and governed by the UCMJ—would be authorized to try him.[29] But the procedures of the President's commission, Hamdan alleged, departed significantly from those used by courts martial.[30] A presiding officer and three or more other commission members would adjudicate the President's commission.[31] The presiding officer would rule on evidentiary and interlocutory issues and on questions of law; the other members would issue sentences and make findings of fact. The commission would also afford defendants the rights typically afforded criminal defendants in court martial proceedings, including a presumption of innocence, the right to see the charge or charges against them, and the right to private or military-appointed counsel.[32] But the President's commission would differ from court martial proceedings in that it authorized the presiding officer to exclude the defendanr from trial proceedings for reasons potentially including "the protection of information classified or classifiable . . . ; information protected by law or rule from unauthorized disclosure; the physical safety of participants in Commission proceedings, including prospective witnesses; intelligence and law enforcement sources, methods, or activities; and other national security interests."[33] Counsel for the defendant could also be prohibited from revealing to the defendant events that happened in closed sessions.[34]

The procedures of the President's commission also departed from those of courts martial in that they would admit evidence of any kind, so long as it, in the view of the presiding officer, "would have probative value to a reasonable person."[35] This commission would thus accept unsworn live and written testimony and, potentially, any hearsay.[36] Further, the commission could also deny the defendant and his civilian counsel access to evidence that was

29. *Id.*

30. *Id.* at 2787.

31. *Id.* at 2786.

32. *Id.* (citing U.S. Dep't of Def., Commission Order No. 1 on Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism §§ 4(A)(1), 4(A)(5), 4(C)(2)–(3) (Aug. 31, 2005), http://www.defenselink.mil/news/Sep2005/d20050902order.pdf) [hereinafter Commission Order No. 1]).

33. *Id.* (citing Commission Order No. 1, *supra* note 32, § 6(B)(3)).

34. *Id.* (citing Commission Order No. 1, *supra* note 32, § 6(D)(1)).

35. *Id.* (citing Commission Order No. 1, *supra* note 32, § 6(D)(1)).

36. *Id.* at 2786–87 (citing Commission Order No. 1, *supra* note 32, § 6(D)(2)(b), (D)(3)).

"protected by law or rule from unauthorized disclosure" and "information concerning other national security interests," as long as the evidence was deemed "probative" by the presiding officer and admitting the evidence without the knowledge of the accused would not "result in the denial of a full and fair trial."[37] The Court noted a statement of the district court below, which expressed that under the President's commission, "Hamdan will not be permitted to hear the testimony, see the witness's face, or learn his name. If the government has information developed by interrogation of witnesses in Afghanistan or elsewhere, it can offer such evidence in transcript form, or even as summaries of transcripts."[38]

Hamdan's underlying concern was, in short, that the President's commission could not afford him a fair trial because it could exclude him from proceedings and prevent him from knowing what occurred there, could admit any evidence considered reasonably probative, and could potentially prevent him from knowing the very basis for the commission's ultimate judgment against him. Hamdan's primary argument, contested by the government, was that the same rules that applied to courts martial, as set forth in the UCMJ, also applied to military commissions. The UCMJ's rules for courts martial required, inter alia, that all other trial proceedings except for deliberation and voting "shall be in the presence of the accused,"[39] and that evidence could be admitted only according to "the detailed Military Rules of Evidence, which are modeled on the Federal Rules of Evidence."[40]

The federal district court stayed the proceedings of the commission, concluding that the UCMJ's rules for courts martial applied to military commissions, and that the President's commission violated the UCMJ "because it had the power to convict based on evidence the accused would never see or hear."[41] On appeal, the D.C. Circuit reversed, finding that the commission would not violate the UCMJ and that the Supreme Court's decision in *Ex parte Quirin* precluded any objection to the jurisdiction of the commission based on the separation of powers.[42]

37. *Id.* at 2787 (citing Commission Order No. 1, *supra* note 32, § 6(B)(3), (D)(1), (D)(5)(a)(v), (D)(5)(b)).

38. *Id.* at 2787 n.43 (citing Hamdan v. Rumsfeld, 344 F. Supp. 2d 152, 168 (D.C. 2004)).

39. 10 U.S.C. § 839(c) (Supp. 2006), *quoted in Hamdan*, 126 S. Ct. at 2790.

40. *Hamdan*, 126 S. Ct. at 2807 (Kennedy, J., concurring in part).

41. *Id.* at 2762 (majority opinion) (citing *Hamdan*, 344 F. Supp. 2d at 158–72).

42. *Id.* (citing Hamdan v. Rumsfeld, 415 F.3d 33, 38, 42–43 (D.C. Cir. 2005)) (other

The Supreme Court granted certiorari in November 2005 to determine whether the President's commission had authority to try Hamdan.[43]

B. Overview of the Court's Holding and Rationale

In Parts II and III of its opinion, the Court denied both the government's motion to dismiss the case for lack of jurisdiction (under the jurisdiction-stripping provisions of the DTA) and the government's motion to abstain from deciding the case until the commission had reached its final outcome.[44]

The Court reached the merits of Hamdan's claims beginning in Part IV. It began by briefly summarizing the history of military commissions, noting they are "neither mentioned in the Constitution nor created by statute," but rather are "born of military necessity."[45] Such commissions, the Court explained, have performed varying functions in United States military campaigns, including the Mexican War, the Civil War, and World War II.[46]

The Court looked for constitutional authority to convene military commissions and concluded that such commissions could be authorized only by "the powers granted jointly to the President and Congress in time of war" in Article I, Section 8, and Article II, Section 2.[47] The Court further concluded that it did not need to reach the question of whether the President, acting alone, had authority to convene commissions because it had previously held, in *Ex parte Quirin*, that Congress had authorized such commissions in Article 15 of the Articles of War, the predecessor statute to UCMJ Article 21.[48] The text of UCMJ Article 21 stated that military

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citations omitted).

43. *Id.*

44. *Id.* at 2762–72.

45. *Id.* at 2772–73 (citing WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 831 (2d ed. 1920)).

46. *Id.* at 2771–74, 2788–90 (discussing circumstances in which military commissions have tried both ordinary crimes in occupied territory and violations of the law of war). Given military commissions' origin outside of statutes and any express textual grant in the Constitution, history assumed a significant role in determining the legality of the President's commission in *Hamdan*. *See id.* at 2772–75, 2788–93; *id.* at 2825–30 (Thomas, J., dissenting).

47. *Id.* at 2773 (majority opinion).

48. *Id.* at 2774. UCMJ Article 21 is codified at 10 U.S.C. § 821 (2000) and has language "substantially identical" to Article 15 of the Articles of War. *Hamdan*, 126 S. Ct. at 2774.

commissions had jurisdiction over "offenses that by statute or by the law of war may be tried by . . . military commissions."[49]

Ultimately, the Court concluded the President's commission was unlawful under two theories. First, in UCMJ Article 21, Congress authorized military commissions, but with the condition that the commissions comply with the law of war,[50] which includes the Geneva Conventions.[51] Common Article 3 of the Geneva Conventions requires that sentences be passed by "a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples."[52] The Court concluded that courts martial are the regularly constituted courts of the United States applicable to persons in Hamdan's position.[53] By contrast, military commissions are considered "regularly constituted" "only if some practical need explains deviations from court-martial practice," and the President had demonstrated no such practical need.[54] Thus, because the President's commission was not a regularly constituted court under Common Article 3, the Court concluded, the commission violated the law of war and therefore violated UCMJ Article 21.[55]

The Court's second theory was as follows: UCMJ Article 36 requires procedures of military commissions to "be the same as those applied to courts-martial unless such uniformity proves impracticable."[56] The procedures of the President's commission deviated from courts martial because the commissions would allow a defendant to be excluded from portions of his trial, whereas courts martial procedures require all proceedings besides deliberation and voting to occur in the presence of the accused.[57] The commission also deviated from the rules of evidence required by courts martial.[58] The President, however, did not demonstrate that it would be

49. *Hamdan*, 126 S. Ct. at 2774 (quoting 64 Stat. 115, codified at 10 U.S.C. § 821 (2000)).

50. *Id.*

51. *Id.* at 2787, 2794.

52. *Id.* at 2795.

53. *Id.* at 2795–97.

54. *Id.* at 2797 (internal quotation omitted).

55. *Id.* at 2795–97.

56. *Id.* at 2790.

57. *Id.* at 2786–92.

58. *Id.* at 2790.

impracticable for the commission to apply courts martial rules, and the commission therefore violated UCMJ Article 36.[59]

Under these theories, the Court concluded that "the military commission . . . lacks power to proceed because its structure and procedures violate both the UCMJ and the Geneva Conventions."[60] It is important to note that although the Court interpreted Common Article 3 of the Geneva Conventions, it did so only because a domestic statute—UCMJ Article 21—incorporated the Geneva Conventions as part of the law of war.[61] As Justice Kennedy noted, "domestic statutes control this case."[62]

C. Analysis of Hamdan

This subsection shows major separation-of-power principles at work in Hamdan that explain the result reached by the Court and inform the precedential value of the case. First, the Court narrowly characterized the President's authority over military commissions vis-à-vis that of Congress. Second, Hamdan imposed a clear statement requirement on military commissions unilaterally convened by the President. Third, when faced with ambiguous statutory provisions, the Court applied a presumption against Executive authority, and therefore broadly construed arguably restrictive statutory language. This subsection then argues that the Court's clear statement requirement and presumption against Executive authority are best explained by the presence of a strong liberty interest and a related interest in traditional adjudicatory entities.[63]

1. Constitutional backdrop: a narrow characterization of presidential war powers vis-à-vis congressional war powers in the context of military commissions

The Court began its analysis of the merits of Hamdan's petition in Part IV. Though only three pages in length, Part IV of the opinion is profoundly important for two reasons: first, the Court sought to locate authority over military commissions in the

59. *Id.* at 2792.

60. *Id.* at 2759.

61. *See id.* at 2793–94.

62. *Id.* at 2800 (Kennedy, J., concurring in part).

63. *See generally* Sunstein, *supra* note 4. I gratefully acknowledge that in addition to the *Hamdan* opinions themselves, Professor Sunstein's insightful article on *Hamdan* is the basis for much of the nnderstanding and discussion of *Hamdan* set forth herein.

Constitution, and found such authority in the Article I and Article II "powers granted jointly to the President and Congress in time of war."[64] Having traced the President's authority over military commissions to power held jointly with Congress, the Court, citing Justice Jackson's concurrence in *Youngstown*, set a constitutional backdrop for the rest of the opinion based on a particularly narrow characterization of presidential war power in the face of congressional disapproval.

The Court first searched the Constitution for a grant of authority to establish military commissions. Noting that the commissions at issue were "penal tribunals not contemplated by Article I, § 8 and Article III, § 1 of the Constitution"[65] and noting that such tribunals could not be justified by "[e]xigency alone,"[66] the Court concluded that the only possible authority for such tribunals was "the powers granted jointly to the President and Congress in time of war."[67] The Court then enumerated those powers: Article II designates the President "Commander in Chief;"[68] but Article 1 grants Congress "powers to 'declare War . . . and make Rules concerning Captures on Land and Water,' to 'raise and support Armies,' to 'define and punish . . . Offences against the Law of Nations,' and 'To make Rules for the Government and Regulation of the land and naval Forces.'"[69]

Significantly, the Court then referenced three sources suggesting that Congress has significant authority over military commissions that limits—and may even predominate over—that of the President.

First, the Court quoted a passage from *Ex parte Milligan* wherein Chief Justice Chase stated that the President cannot, "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."[70] The Court commented on Chief

64. *Id.* at 2773 (majority opinion).

65. *Id.*

66. *Id.* (quoting *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 121 (1866) ("Certainly no part of the judicial power of the country was conferred on [military commissions]." (alteration in *Hamdan*)); citing *Ex parte* Vallandigham, 68 U.S. (1 Wall.) 243, 251 (1864); and quoting *Ex parte* Quirin, 317 U.S. 1, 25 (1942) ("Congress and the President, like the courts, possess no power not derived from the Constitution.")).

67. *Id.* at 2773 (citing *Quirin*, 317 U.S. at 26–29 and *In re* Yamashita, 327 U.S. 1, 11 (1946)).

68. *Id.* (citing U.S. CONST. art. II, § 2, cl. 1).

69. *Id.* (citing U.S. CONST. art. I, § 8, cls. 11, 12, 10, 14).

70. *Ex parte* Milligan, 71 U.S. (4 Wall.) at 140, *quoted in Hamdan*, 126 S. Ct. at 2773–

Justice Chase's suggestion that the President may unilaterally convene tribunals in circumstances of "controlling necessity," and stated that such was an issue the Court had not resolved definitively.[71]

Second, in a footnote following the *Milligan* passage, the Court quoted Winthrop's treatise on military law thus: "[I]n general, it is those provisions of the Constitution which empower Congress to 'declare war' and 'raise armies,' and which, in authorizing the initiation of *war*, authorize the employment of all necessary and proper agencies for its due prosecution, from which this tribunal derives its original sanction."[72] This passage plainly states Winthrop's view that constitutional authority over military commissions derives from powers granted to Congress.[73]

Third, referencing Justice Jackson's *Youngstown* concurrence, the Court also stated the following: "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."[74] As Professor Ellman has argued, the Court in this statement may have gone further in limiting the President's power in the face of congressional limitations than Justice Jackson would have.[75] Justice Jackson's tripartite model of presidential power provided three "zones" in which the scope of the President's power varies with the extent to which Congress has authorized or limited it.[76] In zone one, "the President acts pursuant to an express or implied authorization of Congress," and therefore "his authority is at its maximum, for it includes all that he possesses in his own right

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71. *Hamdan*, 126 S. Ct. at 2774.

72. WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 831 (2d ed. 1920), *quoted in Hamdan*, 126 S. Ct. at 2774.

73. The *Hamdan* plurality indicates the authoritative weight of Winthrop's treatise by noting that a previous plurality called Winthrop "the Blackstone of Military Law." *Hamdan*, 126 S. Ct. at 2777 (plurality opinion) (quoting Reid v. Covert, 354 U.S. 1, 19 n.38 (1957) (plurality opinion)) (internal quotations omitted).

74. *Id.* at 2774 n.23 (majority opinion) (citing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)).

75. Stephen Ellmann, *The "Rule of Law" and the Military Commission*, 51 N.Y.L. SCH. L. REV. 761, 777 & n.99, 778 (2006–2007).

76. *Youngstown*, 343 U.S. at 635–38 (Jackson, J, concurring). It shonld be noted that, in prefacing his discussion of the three zones, Justice Jackson noted they are "somewhat over-simplified grouping[s]." *Id.* at 635.

plus all that Congress can delegate."[77] In zone two, "the President acts in absence of either a congressional grant or denial of authority," and therefore can "only rely upon his own independent powers."[78] (Justice Jackson also indicated there is "a zone of twilight in which [the President] and Congress may have concurrent authority, or in which its distribution is uncertain."[79]) Finally, in zone three, "the President takes measures incompatible with the expressed or implied will of Congress," and therefore "his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter."[80] Justice Jackson emphasized the need to "scrutinize[] with caution" presidential claims in such circumstances, "for what is at stake is the equilibrium established by our constitutional system."[81]

Justice Jackson indicated that, in zone three, the President's power was "at its lowest ebb," but he did nor indicate that the President there had *no* power to act contrary to Congress. However, per Justice Stevens, the *Hamdan* Court indicated that the President "may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on" the powers of the President.[82] As Professor Ellmann notes:

> If Justice Stevens' assertion that the President cannot "disregard" the limitations of a statute in zone 3 is meant to say that the President cannot disobey these limitations, it goes further than Justice Jackson would have. . . . Justice Stevens . . . does not explicitly address the possibility that even in zone 3 the President's decisions might prevail.[83]

The Court's references to and commentary on *Milligan*, Winthrop's treatise, and *Youngstown* set significant constitutional baselines for the rest of the opinion. First, the Court's narrow characterization of Executive power vis-à-vis that of Congress suggests that, in the context of penal wartime tribunals, Congress has authority at least equal to, and probably greater than, that of the

77. *Id.*
78. *Id.* at 637.
79. *Id.*
80. *Id.*
81. *Id.* at 638.
82. Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2774 n.23 (2006).
83. Ellmann, *supra* note 75, at 777 & n.99.

President.[84] Second, where Congress has placed limitations on presidential power in relation to such tribunals, the President has little—or no—power to act.[85] The end result of the opinion—a conclusion that the President's commission was unlawful—supports the plausibility of these baseline constitutional assumptions.

The Court stated that it did not need to resolve the issue of whether the President could unilaterally convene military commissions in cases of "controlling necessity" because it had held in *Ex Parte Quirin* that Congress, through Article of War 15 (now UCMJ Article 21), had authorized "the use of military commissions in such circumstances."[86] Thus, the Court characteristically did not undertake an inquiry into the unilateral authority of the President to convene military commissions. Instead, it turned to a search for congressional authorization.[87]

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84. The Court does not explicitly state this conclusion, but the opinion suggests the Court may have found additional support for such a conclusion in the text of the war power provisions themselves. *See Hamdan*, 126 S. Ct. at 2773 ("The Constitution makes the President the 'Commander in Chief' of the Armed Forces, *but* vests in Congress [war powers in Art. I, § 8, cls. 10, 11, 12, and 14]") (emphasis added); *supra* text accompanying notes 68–69. An initial assumption that Congress's authority over military commissions predominates over that of the President helps explain at least one of the Court's major holdings: that Congress must specifically authorize military commissions. Such a clear statement requirement is consistent with the assumption that Congress's authority over such commissions exceeds that of the President.

85. This approach is not altogether unprecedented. *See* Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2051 (2005) ("[P]residential wartime acts not authorized by Congress lack . . . [a] presumption of validity, and the Supreme Court has invalidated a number of these acts precisely because they lacked congressional authorization." (citing Duncan v. Kahanamoku, 327 U.S. 304, 324 (1946); *Ex parte* Endo, 323 U.S. 283, 304 (1944); and Samuel Issacharoff & Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime*, 5 THEORETICAL INQUIRIES L. 1, 44 (2004))).

86. *Id.* (citing *Ex parte* Quirin, 317 U.S. 1, 28 (1942)).

87. *See* Bradley & Goldsmith, *supra* note 85, at 2051–52 (2005) ("While the President's constitutional authority as Commander-in-Chief is enormously important, determining the scope of that authority beyond what Congress has authorized implicates some of the most difficult, unresolved, and contested issues in constitutional law. Courts have been understandably reluctant to address the scope of that constitutional authority, especially during wartime, when the consequences of a constitutional error are potentially enormous. Instead, courts have attempted, whenever possible, to decide difficult questions of wartime authority on the basis of what Congress has in fact authorized." (citing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 585, 641, 642 (1952) (Jackson, J., concurring); Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2639 (2004) (plurality opinion); *Ex parte* Quirin, 317 U.S. at 29; and CLINTON ROSSITER, THE SUPREME COURT AND THE COMMANDER IN CHIEF 6 (expanded ed. 1976))).

2. A clear statement requirement: the Executive cannot unilaterally convene military commissions without clear statutory authorization

As noted in Part I, *Hamdan* is widely understood to impose a clear statement rule under which the President cannot unilaterally convene military commissions without clear congressional authorization.[88] Although the Court did not explicitly state that conclusion, the conclusion is compelled based on a reading of the provisions the Court considered insufficient to authorize the President's commission, which included UCMJ Article 21, the AUMF, the DTA, and Common Article 3 of the Geneva Conventions.[89] (Indeed, in a plurality portion of Justice Stevens's opinion, the clear statement requirement is made explicit.[90])

One or more of these provisions could have been read to authorize the commission, and *were* read to that effect by the dissenting Justices.[91] What distinguishes the provisions in *Hamdan* from those disputed in hundreds of other cases is that the provisions are markedly ambiguous,[92] and that the Court nonetheless concluded they were not sufficiently clear to authorize the commission, and actually imposed fatal limitations on it. That result

88. *See supra* note 7 and accompanying text.

89. *Hamdan*, 126 S. Ct. at 2774–75 (construing UCMJ Article 21, the AUMF, and the DTA); *id.* at 2795–97 (construing Common Article 3). It is unfortunately beyond the scope of this Comment to thoroughly deconstruct these provisions and to critique the Justices' interpretations thereof. What is more, at least two scholars have already provided substantial analysis of these provisions. *See* Ellmann, *supra* note 75, at 765–77 (reviewing the Court's interpretations of UCMJ Articles 21 and 36 and considering alternative interpretations); Sunstein, *supra* note 4, at 23–26 (discussing UCMJ Article 36 and Common Article 3 in the context of *Hamdan*); *see also* Bradley & Goldsmith, *supra* note 85, at 2127–32 (construing the AUMF prior to the issuance of *Hamdan*).

90. *See Hamdan*, 126 S. Ct. at 2781 (plurality opinion). In Part V of Justice Stevens's opinion, the plurality considered, and then rejected, the Government's arguments that the President's commission could be used to try Hamdan for the offense of conspiracy. The plurality concluded that sources cited for the government "fail to satisfy the *high standard of clarity required to justify the use of a military commission.*" *Id.* (emphasis added). The fact that the clear statement requirement is explicit in the plurality opinion but only implicit in the majority opinion suggests that such an approach was perhaps necessary to garner a majority. *See* Jeffrey Rosen, *The Dissenter*, N.Y. TIMES MAG., Sept. 23, 2007, at 50, 53–54, *available at* http://select.nytimes.com/preview/2007/09/23/magazine/1154689944149.html?pagewanted=all.

91. *See Hamdan*, 126 S. Ct. at 2824 (Thomas, J., dissenting) (arguing that the AUMF authorized the commission); *id.* at 2824–25 (arguing that "Article 21 alone supports the use of commissions here"); *id.* at 2850–55 (Alito, J., dissenting) (arguing that the President's commission satisfied Common Article 3).

92. *See* Sunstein, *supra* note 4, at 23.

is especially surprising in light of the Court's deference to such commissions in *Ex parte Quirin* and *In re Yamashita*, where the Court considered Article of War 15, which contains language "substantially identical" to UCMJ Article 21.[93] As Professor Sunstein aptly concludes, "[A] clear statement principle is . . . central to Justice Stevens's opinion, which cannot possibly be understood without it."[94]

3. Ambiguous provisions construed with presumption against Executive authority[95]

Given its longstanding hesitation to consider the scope of unilateral presidential power,[96] the Court had to decide whether the ambiguous provisions at hand[97] authorized or prohibited the President's commission. If the Court read the materials to authorize the commission, it would adopt as a result a presumption that military commissions unilaterally convened by the President are lawful unless specifically restricted or limited by Congress. If, on the

93. *Hamdan*, 126 S. Ct. at 2774 (majority opinion) (citing *Ex parte* Quirin, 317 U.S. 1, 28 (1942)); *see also In re* Yamashita, 327 U.S. 1, 7–8 (1946) (construing Article of War 15); Sunstein, *supra* note 4, at 8–9.

94. Sunstein, *supra* note 4, at 26–27.

95. *See id.* at 10–11, 45.

96. *See supra* note 87 and accompanying text.

97. *See Hamdan*, 126 S. Ct. at 2795–98 (construing Common Article 3). The Court seemed to concede there is some degree of ambiguity in, for example, Common Article 3 when it stated that "Common Article 3 obviously tolerates a great degree of flexibility in trying individual captured during armed conflict" and noted that Common Article 3's "requirements are general ones." *Id.* at 2798; *see also* Ku & Yoo, *supra* note 7, at 189 (describing this language from Common Article 3 as "obviously ambiguous terms"). Professors Posner and Sunstein concur with the conclusion that in *Hamdan*, "[o]n the key points, the provisions are at least ambiguous." Posner & Sunstein, *supra* note 4, at 1223. Professors Jinks and Katyal disagree, and argue that

> this is certainly not the way the Supreme Court . . . viewed the matter. After all, the very statute that the government relied upon to claim that the military commission was authorized permitted trial for violations of the 'laws of war.' The petitioner argued, successfully, that a statute that permitted trial for violation of the laws of war ecould not have contemplated such trials in a tribunal that itself violated the laws of war.

Jinks & Katyal, *supra* note 4, at 1269–70 (citations omitted). Professors Jinks and Katyal seem to argue that the comparatively plain language of UCMJ Article 21 requiring compliance with the law of war was the Court's direct basis for striking down the commission. But Article 21 was only half of the analysis on that point: the Court proceeded to conclude that the President's commission violated Common Article 3's "regularly constituted court" requirement—language less clear than that of UCMJ Article 21. *See Hamdan*, 126 S. Ct. at 2795–97.

other hand, the Court read the materials to prohibit the commission, it would adopt as a result the opposite presumption: that military commissions unilaterally convened by the President are unlawful unless specifically authorized by Congress. The Court decided upon the latter.[98] The question then becomes why the Court chose the presumption it did.

4. The Court's clear statement requirement and presumption against Executive authority are best explained by strong interests in individual liberty and in traditional adjudicative entities[99]

Professor Sunstein frames the Court's choice between the two presumptions as a choice between broader interests: a presumption in favor of Executive military commissions would reflect a choice in favor of deference to the Executive in matters of national security. Conversely, a presumption against such commissions would reflect a choice in favor of "constitutional liberty, or liberty in general."[100] A presumption against such commissions promotes liberty in at least two ways: First, by preventing the penal process from going forward without the authorization of Congress, the presumption demands the separation of power, which is generally thought to promote liberty.[101] Second, a presumption against such commissions is perhaps more likely to ensure the use of traditional adjudicative structures and procedures, which are also generally thought to ensure fairness (and hence maximize liberty).[102]

Thus, the best explanation for the remarkable principles adopted by the Court—a clear statement requirement with an accompanying presumption against unilaterally convened Executive military commissions—is the presence of a strong liberty interest.[103] The

98. *See supra* notes 7–9 and accompanying text.

99. *See* Sunstein, *supra* note 4, at 10–11, 33, 45.

100. *See* Sunstein, *supra* note 4, at 10–11, 45.

101. *See, e.g.*, Michael P. Allen, *George W. Bush and the Nature of Executive Authority*, 72 BROOK. L. REV. 871, 883 (2007) ("[The doctrine of separation of powers] is in many respects instrumental; it is a means by which citizens' liberty is protected."); Rachael E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 989 (2006) ("It is a familiar premise that the Constitution separates legislative, executive, and judicial power to prevent tyranny and protect liberty.").

102. *See* Sunstein, *supra* note 4, at 33.

103. *Cf.* Hamdi v. Rumsfeld, 542 U.S. 507, 544 (2004) (Souter, J., concurring in part, dissenting in part, and concurring in the judgment) (recognizing that *Ex parte Endo* required a clear statement when Congress intends to limit the liberty of U.S. citizens during wartime).

gravity of the language used in majority opinion confirms as much: for example, in discussing the structure and procedures of the President's commission, the Court noted that the commission generally granted the accused "rights typically afforded criminal defendants in civilian courts and courts-martial,"[104] but that those rights were "subject, however, to one glaring condition: The accused and his civilian counsel may be excluded from . . . any part of the proceeding that . . . the presiding officer decides to 'close.'"[105] The Court later described the right to be present as "one of the most *fundamental* protections afforded not just by the Manual for Courts-Martial but also by the UCMJ itself," and warned that "the jettisoning of so *basic* a right cannot be lightly excused as 'practicable.'"[106] The plurality proceeded to conclude that the right to be present is, under Common Article 3, "recognized as indispensable by civilized peoples," and cited cases construing the Sixth Amendment to support the point.[107]

Similarly, the Court described as "striking" the rules governing Hamdan's commission that would have allowed "the admission of *any* evidence that, in the opinion of the presiding officer, 'would have probative value to a reasonable person,'" which could have potentially included unsworn statements, testimonial hearsay, "and evidence obtained through coercion."[108]

Thus, although the petitioner was a foreign national detained by military forces outside the United States—and thus not generally thought to have constitutional rights[109]—he nonetheless represented a strong liberty interest. This liberty interest—and the related interests in favor of traditional adjudicatory entities and procedures[110] and against concentration of power in one governmental branch[111]—

104. Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2786 (2006).

105. *Id.* (citing Commission Order No. 1, *supra* note 32, § 6(B)(3)).

106. *Id.* at 2792 (emphases added).

107. *Id.* at 2797–98 (plurality opinion) (citing Crawford v. Washington, 541 U.S. 36, 49 (2004) and Lewis v. United States, 146 U.S. 370, 372 (1892)) (other citations omitted).

108. *Id.* at 2786–87 (majority opinion) (quoting Commission Order No. 1, *supra* note 32, § 6(D)(1)).

109. Boumediene v. Bush, 476 F.3d 981, 991 (D.C. Cir. 2007), *cert. granted*, 127 S. Ct. 3078 (2007) ("Precedent in this court and the Supreme Court holds that the Constitution does not confer rights on aliens without property or presence within the United States.").

110. *See Hamdan*, 126 S. Ct. at 2792–93; Sunstein, *supra* note 4, at 11–16, 33.

111. *See Hamdan*, 126 S. Ct. at 2800 (Kennedy, J., concurring in part) ("Trial by military commission raises separation-of-powers concerns of the highest order. Located within a single branch, these courts carry the risk that offenses will be defined, prosecuted, and

best explains the clear statement requirement and anti-Executive (or libertarian) presumption in *Hamdan*.

5. Implicit holdings and the precedential value of Hamdan

The implicit manner in which the Court adopted its principles[112] allows the Court to substantially limit the applicability of the case in future contexts.[113] For example, the Court could in the future limit *Hamdan* to military commissions convened by the President and could say that the legal materials at issue were plain on their face and thus implicated no clear statement rule.[114] These arguments would weaken attempts to apply *Hamdan*'s clear statement rule and libertarian presumption in other contexts. But as Parts III and IV contend, if *Hamdan* and its principles extend to *any* circumstances other than penal military commissions, they extend to CSRTs.

III. STATUS DETERMINATION, ARTICLE 5 TRIBUNALS, AND CSRTS

A. Privileged Versus Unprivileged Combatants

Since early stages in the development of the law of war, nation-states have sought to categorize captives and treat them in a manner considered requisite with their status.[115] The most significant point of distinction among combatants is whether or not they are entitled to the privilege of combat.[116] Privileged combatants are immunized against any liability for damage to life or property while acting pursuant to their legitimate duties in war.[117] By contrast, unprivileged combatants are considered criminals, and are not

adjudicated by executive officials without independent review."); *see also* Sunstein, *supra* note 4, at 28 (citing *Hamdan*, 126 S. Ct. at 2780) (plurality opinion)).

112. *See* Sunstein, *supra* note 4, at 45 ("[T]he operative clear statement principle was (mostly) implicit, not on the surface of the opinion.").

113. *See* Sunstein, *supra* note 4, at 42 ("[T]he Court was badly divided in *Hamdan*, and it would not be a stunning surprise to see a future decision cabining the reach of the Court's analysis.").

114. Professors Jinks and Katyal disagree that the legal sources in *Hamdan* were ambiguous. *See* Jinks & Katyal, *supra* note 4, at 1269–70; *supra* note 97.

115. *See* Chris af Jochnick & Roger Normand, *The Legitimation of Violence: A Critical History of the Laws of War*, 35 HARV. INT'L L.J. 49, 59 (1994).

116. *See* Nathaniel Berman, *Privileging Combat? Contemporary Conflict and the Legal Construction of War*, 43 COLUM. J. TRANSNAT'L L. 1, 9–13 (2004).

117. *Id.*

immune to liability for damage to life or property. The consequences of privileged or unprivileged combatant status are thus significant:

> Criminals are sentenced to prison as a consequence of actions that they have individually committed in violation of criminal law, domestic or international; the length of their imprisonment will depend on the theory of punishment or rehabilitation to which the sentencer subscribes. POWs, by contrast, are detained until the "cessation of active hostilities."[118]

Given the gravity of the consequences of unprivileged combatant status, past and current debates consider what individuals and groups qualify for the combatant's privilege.[119] Under the Geneva Convention Relative to the Treatment of Prisoners of War (GPW) adopted after World War II, detainees who are "prisoners of war" are privileged combatants.[120]

Since 9/11, widespread debate has addressed whether the Taliban, al Qaeda, and persons supporting those organizations should hold the combatant's privilege and therefore be given POW status, or whether they should be denied the privilege and therefore receive the status of unprivileged combatants.[121] The Bush Administration has determined that such persons "do not meet the Geneva Convention's criteria for POW status."[122]

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118. *Id.* at 10 (quoting GPW, *supra* note 14, art. 118).

119. *See id.* at 3–5.

120. *See id.* at 4 (citing GPW, *supra* note 14, art. 4(A)(4)).

121. *See id.* at 8, 37–38. Professor Berman also observes that generally, in this debate, "the pro-POW status positions became identified with the human rights world; the anti-POW status positions became identified with the national security world, or rather, that part of the national security world aligned with the incumbent U.S. administration." *Id.* at 37. He then makes the following notable observation:

> These identifications, however, should have been far from obvious. A broad definition of POW status is linked to an expansion of the combatants' privilege. At first glance, it seems anomalous that such an expansion would be linked to a human rights orientation. . . . [T]he "starting points" of human rights law and jus in bello are quite different—the one provides a right to life, the other provides a right to kill. It should be cause for reflection that an expansive definition of the latter became the pro-human rights position.

Id. at 38 (citation omitted).

122. U.S. DEP'T OF DEF., COMBATANT STATUS REVIEW TRIBUNAL (CSRT) PROCESS AT GUANTANAMO 1 (2007), *available at* http://www.defenselink.mil/news/Jul2007/CSRT%20comparison%20-%20FINAL.pdf [hereinafter CSRT GUANTANAMO PROCESS].

> In February 2002, the President determined that neither the Taliban nor the al-Qaida detainees are entitled to Prisoner of War (POW) status under the Geneva Convention. Although the United States never recognized the Taliban as the

B. The Status Determination Process and Article 5 Tribunals

Article 5 of the GPW states that "[s]hould any doubt arise as to whether persons . . . belong to any of the categories enumerated in Article 4, such persons shall enjoy [POW status] until such time as their status has been determined by a competent tribunal."[123]

During the Vietnam War, the United States Army convened "Article 5 tribunals" in order to determine the legal status of those captured.[124] The procedures governing the Article 5 tribunals called for setting up a hearing to be overseen by three Army officials,[125] and permitted the tribunal to "mak[e] a determination of entitlement or nonentitlement to prisoner of war status."[126] The procedures directed military officials to refer a detainee to an Article 5 tribunal when

(1) He has committed a belligerent act, and

(2) Either of the following circumstances exist:

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legitimate Afghan government, Afghanistan is a party to the Geneva Convention, and the President determined that the Taliban are covered by the Convention. They did not qualify as POWs, however, because they did not satisfy the Convention's four conditions for such status: they were not part of a military hierarchy; they did not wear uniforms or other distinctive signs visible at a distance; they did not carry arms openly; and they did not conduct their military operations in accordance with the laws and customs of war. Al-Qaida is not a state party to the Geneva Convention; it is a foreign terrorist group. As such, its members are uot entitled to POW status.

Id. at 1 n.1.

123. GPW, *supra* note 14, art. 5.

124. 60 DOCUMENTS ON PRISONERS OF WAR 722–31, 748–51 (Howard S. Levie ed., 1979) (reproducing U.S. Military Assistance Command, Vietnam (MACV) Directive 381-46); Blocher, *supra* note 13, at 669.

125. *See* 60 DOCUMENTS ON PRISONERS OF WAR, *supra* note 124, at 725; Enemy Prisoners of War, Civilian Internees, Retained Personnel, and Other Detainees, Army Reg. 190-8 § 1-6(c) (Oct. 1, 1997), *available at* http://www.usapa.army.mil/pdffiles/r190_8.pdf [hereinafter AR 190-8] (stating that a panel of three officers is a "competent tribunal").

126. 60 DOCUMENTS ON PRISONERS OF WAR, *supra* note 124, at 727 (reproducing MACV Directive 381-46 ¶ 6(e)). The MACV Directive contemplated various categories of detainees:

Some persons obviously are prisoners of war; e.g., NVA or Viet Cong regulars taken into custody on the battlefield while they are engaged in open combat. Others obviously are not prisoners of war; e.g., civilians who are detained as suspects, found to be friendly, and released; or returnees who received favored treatment under the Chieu Hoi program.

Id. at 724.

> (a) There is doubt as to whether the detainee is entitled to P[O]W status.
>
> (b) A determination has been made that the status of the detainee is that of a non-prisoner of war and the detainee or someone in his behalf claims that he is entitled to P[O]W status.[127]

Article 5 tribunals were used extensively in the Persian Gulf War and in the conflict in Grenada,[128] and are currently governed by Army Regulation 190-8 (AR 190-8).[129] AR 190-8 permits a three-officer adjudicatory panel to classify detainees as POWs, "retained personnel," "innocent civilian[s]," or "civilian internee[s] who . . . should be detained."[130] Breaking with its past pattern, United States military forces have not convened Article 5 tribunals to determine the status of persons detained at Guantanamo Bay. Instead, CSRTs have been convened.

C. Status Determination at Guantanamo Bay: CSRTs

Nine days after the Supreme Court issued the first three enemy combatant decisions on June 28, 2004,[131] the Department of Defense (DOD) announced its intention to convene CSRTs. Accordingly, CSRTs were to "establish a one-time process for a detainee to contest his status as an enemy combatant."[132] That is, the tribunals are to "determine whether each detainee . . . meets the criteria to be designated as an enemy combatant."[133] The government defined "enemy combatant" as

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127. *Id.* (reproducing MACV Directive 381-46 ¶ 5(f)).

128. *See* Blocher, *supra* note 13, at 669–70 & nn.13–14 (citing JENNIFER K. ELSEA, CONG. RESEARCH SERV., TREATMENT OF "BATTLEFIELD DETAINEES" IN THE WAR ON TERRORISM 37 (2006), *available at* http://www.fas.org/sgp/crs/terror/RL31367.pdf; and U.S. DEP'T OF DEF., CONDUCT OF THE PERSIAN GULF WAR: FINAL REPORT TO CONGRESS 663 (1992), *available at* http://www.ndu.edu/library/epubs/cpgw.pdf).

129. AR 190-8, *supra* note 125, § 1-6(c) (stating that a panel of three officers is a "competent tribunal").

130. *Id.* § 1-6(c), (e)(10).

131. Hamdi v. Rumsfeld, 542 U.S. 507 (2004); Rasul v. Bush, 542 U.S. 466 (2004); Rumsfeld v. Padilla, 542 U.S. 426 (2004).

132. News Transcript, U.S. Dep't of Def., Defense Department Background Briefing on the Combatant Status Review Tribunal (July 7, 2004), http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=2751 [hereinafter Background Briefing].

133. 2006 CSRT Procedures, *supra* note 11, enclosure 1, at 1.

> an individual who was part of or supporting Taliban or al Qa[e]da forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.[134]

It is important to note that CSRTs do not consider whether detainees are POWs.[135] They consider only whether detainees are "enemy combatants"—persons who, per the above definition, are members of or have assisted the Taliban, al Qaeda, or affiliated organizations. That determination has profound implications: because the President has determined that Taliban and al Qaeda members "do not meet the Geneva Convention's criteria for POW status,"[136] CSRT "enemy combatant" status *is* unprivileged combatant status. Thus, all detainees determined to be "enemy combatants" under the CSRTs are subject to criminal trial for acts committed in their affiliation with these organizations.[137]

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134. *Id.*

135. CSRT GUANTANAMO PROCESS, *supra* note 122, at 1, 4. For example, in one detainee's CSRT proceeding, the detainee sought to produce a witness who would testify that the detainee was given a POW card while detained by American forces in Afghanistan, which card would arguably qualify him for POW status. *See* Personal Representative Review of the Proceedings 122 (Nov. 17, 2004), http://wid.ap.org/documents/detainees/moazzambegg.pdf. However, when the proceeding was reviewed for legal sufficiency, the reviewing officer determined that evidence of possible POW status "is irrelevant to the narrow mandate of the CSRT." *See* Memorandum from James R. Crisfield Jr., Legal Advisor, to Dir., Combatant Status Review Tribunal 8 (Dec. 16, 2004), http://wid.ap.org/documents/detainees/moazzambegg.pdf.

136. CSRT GUANTANAMO PROCESS, *supra* note 122, at 1.

> In February 2002, the President determined that neither the Taliban nor the al-Qaida detainees are entitled to Prisoner of War (POW) status under the Geneva Convention. Although the United States never recognized the Taliban as the legitimate Afghan government, Afghanistan is a party to the Geneva Convention, and the President determined that the Taliban are covered by the Convention. They did not qualify as POWs, however, because they did not satisfy the Convention's four conditions for such status: they were not part of a military hierarchy; they did not wear uniforms or other distinctive signs visible at a distance; they did not carry arms openly; and they did not conduct their military operations in accordance with the laws and customs of war. Al-Qaida is not a state party to the Geneva Convention; it is a foreign terrorist group. As such, its members are not entitled to POW status.

Id. at 1 n.1.

137. *See supra* notes 13–14 and accompanying text; Berman, *supra* note 116, at 10.

1. CSRTs and the Hamdi *decision*

At the government press conference announcing CSRTs, officials from the Defense and Justice Departments indicated that they relied heavily on the plurality opinion in *Hamdi v. Rumsfeld* in designing the CSRTs.[138] In *Hamdi*, the Court had to resolve whether Hamdi, a U.S. citizen captured in Afghanistan and held by the U.S. military at Guantanamo Bay and later in bases within the United States, had any right to contest the factual basis for his detention—that is, to contest the government's conclusion that he was an "enemy combatant" who allegedly supported and fought alongside anti-U.S. forces.[139] The Court considered what legal process Hamdi was entitled to—the full American criminal procedural protections or something less.

A plurality of the Court, per Justice O'Connor, held that the AUMF passed by Congress authorized the President to detain citizens who fell into the enemy combatant category until active hostilities between the U.S. and opposing forces in Afghanistan had ended.[140] The plurality then proceeded to consider what legal process, if any, Hamdi was entitled to. Rejecting Hamdi's claim that he was entitled to full American criminal protections,[141] the plurality read the habeas statute to require that detainees be allowed to present evidence to contest their detention, but that courts would be allowed to "vary the ways" in which detainees would be able to "present and rebut facts . . . as mandated by due process."[142]

The plurality ultimately held that "a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker."[143] However, the plurality then suggested ways in which due process considerations may be "tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing

138. *See* Background Briefing, *supra* note 132 ("The procedures that . . . have been adopted today . . . are intended to reflect the guidance that the Supreme Court provide [sic] in its decisions last week.").

139. Hamdi v. Rumsfeld, 542 U.S. 507, 509–13 (2004) (plurality opinion).

140. *Id.* at 518–21.

141. *See id.* at 520–24.

142. *Id.* at 526.

143. *Id.* at 533 (collecting cases establishing the due process requirements of notice and an opportunity to be heard).

military conflict."[144] Tribunals established to consider the factual question of whether a detainee is an unlawful combatant, according to the plurality, must be conducted in light of the exigencies that are inherent in wartime. Thus, such tribunals may consider hearsay and may allow a "presumption in favor of the Government's evidence, so long as that presumption remain[s] a rebuttable one and fair opportunity for rebuttal [was] provided."[145] The plurality also stated that a military tribunal of some kind could be a sufficient forum to decide whether a detainee is an enemy combatant.[146] As an example of such a forum, the plurality specifically referenced Article 5 tribunals governed by AR 190-8, noting that "military regulations already provide . . . that tribunals be made available to determine the status of enemy detainees who assert prisoner-of-war status under the Geneva Convention."[147] CSRTs are the government's express attempt to apply the standards stated by the *Hamdi* plurality to alien detainees.[148]

2. CSRT procedures

In a July 2006 memorandum, the DOD outlined, in greater detail than previously available, the structure and procedures of CSRTs.[149] CSRTs provide a "non-adversarial proceeding to determine whether each detainee . . . meets the criteria to be designated as an enemy combatant."[150] However, government

144. *Id.*

145. *Id.* at 534.

146. *Id.* at 538 ("There remains the possibility that the standards we have articulated could be met by an appropriately authorized and properly constituted military tribunal.").

147. *Id.*

148. Background Briefing, *supra* note 132.

> [T]he Department of Defense has tried to put together a process that will respond to the court's concerns [in *Hamdi* and *Rasul*] . . . and to establish a process similar to the process Justice O'Connor referred to in the Hamdi decision as a military process that likely would satisfy even the due process rights of an American citizen, to take that existing Army regulation [190-8] for a form of tribunal and provide actually a little additional process in the form of a personal representative, something that is not a traditional part of the Army regulation, to add on something more to put together a process that will provide the detainees at Guantanamo with any form of process that they have a right to so that when and if there are habeas petitions filed challenging their detention, the government will be in a position to say that we fully satisfied our legal obligations.

Id. (quoting unnamed senior Justice Department official).

149. *See* 2006 CSRT Procedures, *supra* note 11, at 1.

150. *Id.* enclosure 1, at 1.

documents state that "[e]ach detainee whose status will be reviewed by a [CSRT] has previously been determined, since capture, to be an enemy combatant through multiple levels of review by military officers and officials of the Department of Defense."[151]

CSRT proceedings occur as follows: first, military officials were to notify each detainee of his opportunity to contest his status as an enemy combatant by July 17, 2004.[152] (Military documents and stated procedures do not indicate, however, that *future* foreign national detainees will have any right to be brought before a CSRT within a specific timeframe. That is, unless specifically ordered, the military is apparently able to hold those captured indefinitely without giving them an opportunity to contest their enemy combatant designation.[153]) At the time of notice, each detainee was informed of the definition of, and his status as, an enemy combatant, and that he had an opportunity to contest that status.[154] The written notice also informed detainees that "[t]his is not a criminal trial and the Tribunal will not punish you, but will determine whether you are properly held."[155] Detainees were also informed that a personal representative had been assigned to them; that, before the proceeding, they would be given written statements containing unclassified information forming the factual basis for their status as enemy combatants; that they would be able to present evidence and to present live testimony from "reasonably available" witnesses, or, if the witnesses were not reasonably available, written testimony; and

151. *Id.*; *see also* Background Briefing, *supra* note 132 ("Each of the detainees at GTMO has been determined to be an enemy combatant through multiple layers of review by the department.").

This presumption of enemy combatant status may be the government's interpretation of the *Hamdi* plurality's suggestion that "the Constitution would not be offended by a presumption in favor of the Government's evidence" in the enemy combatant proceeding. *Hamdi*, 542 U.S. at 534; Background Briefing, *supra* note 132 ("[A]s provided for—as suggested in Justice O'Connor's opinion in the Hamdi case, there will be a rebuttable presumption in favor of the government's evidence [in CSRT proceedings], but the detainee will be able to have an opportunity to rebut that presumption.").

152. Memorandum from the Deputy Sec'y of Def. to the Sec'y of the Navy, Order Establishing Combatant Status Review Tribunal 1 (July 7, 2004), http://www.defenselink.mil/news/Jul2004/d20040707review.pdf ("Within ten days after the date of this Order, all detainees shall be notified of the opportunity to contest designation as an enemy combatant in the proceeding described herein."); 2006 CSRT Procedures, *supra* note 11, enclosure 1, at 3.

153. *See infra* notes 228–29 and accompanying text.

154. 2006 CSRT Procedures, *supra* note 11, enclosure 4, at 1.

155. *Id.*

that they would be able to attend all tribunal proceedings except for deliberations, voting, and presentation of "testimony or other matters that would compromise U.S. national security" if the detainees were to attend.[156]

The panel considers the "totality of the information" and determines whether a detainee is an enemy combatant using a preponderance of the evidence standard.[157] All decisions are reviewed for legal sufficiency by a legal advisor and the director of the CSRT.[158] As of June 15, 2007, 572 CSRT hearings had been held; 534 proceedings determined that the detainees were properly considered enemy combatants; and 38 proceedings determined that the detainees were non-enemy combatants.[159]

CSRT procedures differ significantly from those set forth in AR 190-8.[160] Besides precluding a consideration of POW status, CSRTs include a rebuttable presumption in favor of Government evidence, as suggested by the plurality in *Hamdi*.[161]

In addition to CSRTs, the government also conducts annual Administrative Review Board (ARB) proceedings, which do not consider *de novo* the CSRT's enemy combatant designation, but perform a "review to determine the need to continue to detain enemy combatants during the course of the current armed conflict against al Qa[e]da . . . or explain why the enemy combatant's release would otherwise be appropriate."[162]

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156. *Id.* Detainees were also informed that they would not be compelled to attend CSRT proceedings, but that proceedings would occur in the presence of their personal representative even if the detainees themselves elected not to attend. *Id.*

157. Gordon England, Sec'y of the Navy, Defense Department Special Briefing on Combatant Status Review Tribunals (Mar. 29, 2005), http://www.defenselink.mil/transcripts/2005/tr20050329-2382.html; 2006 CSRT Procedures, *supra* note 11, enclosure 1, at 6 ("Tribunals shall determine whether the preponderance of the evidence supports the conclusion that each detainee meets the criteria to be designated as an enemy combatant. There is a rebuttable presumption that the Government Evidence . . . is genuine and accurate.").

158. 2006 CSRT Procedures, *supra* note 11, enclosure 1, at 9.

159. U.S. DEP'T OF DEF., COMBATANT STATUS REVIEW TRIBUNAL SUMMARY, http://www.defenselink.mil/news/Nov2007/CSRTUpdate-Nov2-07.pdf.

160. *See* CSRT GUANTANAMO PROCESS, *supra* note 122, at 2–5.

161. *See id.* at 4; *supra* note 145 and accompanying text.

162. Memorandum from Gordon England, Deputy Sec'y of Def. to Sec'ys of the Military Dep'ts et al., on Revised Implementation of Administrative Review Procedures for Enemy Combatants Detained at Guantanamo Bay, Cuba, enclosure 3, at 1 (July 14, 2006), *available at* http://www.defenselink.mil/news/Aug2006/d20060809ARBProceduresMemo.pdf. The ARB conducts a "comprehensive review of all reasonably available and relevant information," including information held by other government agencies and CSRTs, and recommends that

3. Statutes of 2005 and 2006 referencing CSRTs: the DTA and the MCA[163]

In the wake of the initial detainee decisions[164] and the creation of CSRTs by the military, Congress enacted the DTA in 2005. The DTA granted the D.C. Circuit exclusive authority to review final CSRT decisions of aliens detained at Guantanamo Bay, but limited the scope of that review to a consideration of whether the CSRT status determination "was consistent with the standards and procedures specified by the Secretary of Defense" and "whether the use of such standards and procedures to make the determination is consistent with the Constitution and laws of the United States."[165] The DTA also provided for a similarly limited review of the final decisions of the President's military commission in the D.C. Circuit.[166]

In 2006, Congress provided the express authorization for military tribunals required in *Hamdan* by enacting the MCA.[167] The MCA created a military commission for the purpose of trying alien unlawful enemy combatants, and set forth accompanying rules, definitions, and procedures.[168] In addition, the MCA provided that the military commission it created would have jurisdiction over detainees who had been designated as "unlawful enemy combatants" by a CSRT.[169]

With this overview of combatant status determination, CSRTs, and relevant statutes, this Comment now considers the applicability of *Hamdan*'s statutory and separation-of-powers principles to CSRTs.

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detainees be continually detained by the U.S.; released without restrictions to their home nations (or other nations, as needed); or transferred to their home nations or other nations with conditions. *Id.*

163. For a helpful discussion of the development of the law in the wake of the DTA, *Hamdan*, and the MCA, see Boumediene v. Bush, 476 F.3d 981, 984–87 (D.C. Cir. 2007).

164. *See supra* note 131.

165. Pub. L. No. 109-148 § 1005(e)(2)(C), 119 Stat. 2739, 2742 (2005). *See also* Bismullah v. Gates, 501 F.3d 178, 180 (D.C. Cir. 2007) (deciding "procedural motions the parties have filed to govern [the court's] review of the merits of the detainees' petitions" contesting their CSRT designation as enemy combatants).

166. *Id.* § 1005(e)(3), 119 Stat. at 2743.

167. Pub. L. No. 109-366, 120 Stat. 2600.

168. *Id.*

169. *See id.*, 120 Stat. at 2603 (codified at 10 U.S.C. § 948d); *supra* notes 13–14 and accompanying text.

IV. *HAMDAN*'S IMPLICATIONS FOR CSRTS

A. Constitutional Authority over Status Determination

Before proceeding to analyze whether and to what extent Congress has authorized CSRTs, it seems appropriate to consider constitutional authority over status determination. The *Hamdan* Court followed this approach and started by looking for authority for the commissions in the Constitution, noting *Ex parte Quirin*'s conclusion that "Congress and the President, like the courts, possess no power not derived from the Constitution."[170] Specifically, the Court began its analysis by categorizing the military commissions at issue and then determining what part of the Constitution authorized the commissions. After providing a two-paragraph summary of the origin of such commissions and stating that they were "born of military necessity," the Court stated:

> Exigency alone, of course, will not justify the establishment and use of penal tribunals not contemplated by Article I, § 8 and Article III, § 1 of the Constitution unless some other part of that document authorizes a response to the felt need. And that authority, if it exists, can derive only from the powers granted jointly to the President and Congress in time of war.[171]

Having concluded that authority for military tribunals could stem only from the constitutional war powers, the Court then enumerated those powers.[172] The Court did not reach the question of whether the President had authority to convene such tribunals unilaterally, but noted that it did not need to because *Quirin* concluded that Congress had authorized such tribunals through Article of War 15.[173]

An inquiry into the authorization of CSRTs appropriately begins at the same place: by accurately categorizing them and then considering what provisions of the Constitution, if any, authorize

170. *Ex parte* Quirin, 317 U.S. 1, 25 (1942), *quoted in* Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2773 (2006).

171. *Hamdan*, 126 S. Ct. at 2773 (citing *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 121 (1866) thus: "Certainly no part of the judicial power of the country was conferred on [military commissions]" and citing *Ex parte* Quirin, 317 U.S. at 25 as follows: "Congress and the President, like the courts, possess no power not derived from the Constitution") (alteration in *Hamdan*) (other citations omitted).

172. *Id.* at 2773 (citing U.S. CONST. art. II, § 2, cl. 1; art. I, § 8, cls. 10, 11, 12, 14).

173. *Id.* at 2774.

them. Although CSRTs are expressly "tribunals," they do not determine detainees' guilt or innocence and are generally not regarded as penal, and thus must be distinguished from the military tribunals at issue in *Hamdan*. As explained above, CSRTs carry out a status determination process: they assess whether detainees meet defined criteria and make corresponding classifications. CSRTs do not purport to order punishments or sentences based on particular unlawful acts. Instead, "enemy combatant" classification has at least two effects on all who fall into the category—detention until the end of active hostilities and eligibility for trial by military commission under the MCA.[174] CSRTs, then, are appropriately understood as status determination entities, as distinguished from the penal tribunals at issue in *Hamdan*.

The question is, then, under the Constitution, what if any government branch has authority to create rules for, and then convene, such status determination entities? As noted in the *Hamdan* analysis, Article II of the Constitution makes the President the "Commander in Chief."[175] But Article I, Section 8 broadly grants various war powers to Congress; Clause 10 grants Congress authority to "define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations"; Clause 11 to "make Rules concerning Captures on Land and Water"; and Clause 14 to "make Rules for the Government and Regulation of the land and naval Forces."

The text of each mentioned Article I provision seems to support the conclusion that Congress has authority to make rules concerning who may be detained during wartime, and, similarly, to make rules for the processes through which the status of a detainee is determined.

Clause 10 seems to support this conclusion that Congress can regulate the process for determining combatant status where that process decides whether a detainee has violated the law of war. First, Clause 10 broadly grants Congress authority to define offenses against the law of nations, and nothing suggests that authority would not extend to processes or entities that consider whether detainees have violated the law of nations (which include, of course, Article 5 tribunals and CSRTs).[176] Second, Clause 10 grants Congress

174. *See supra* notes 12–14 and accompanying text.

175. U.S. CONST. art. II, § 2.

176. *See* Anthony F. Renzo, *Making a Burlesque of the Constitution: Military Trials of*

authority to punish violations of the law of war, and that penal authority would seem to subsume authority to make status classifications, which is an action with consequences less severe than punishment. Clause 10's grant of authority to "punish offenses" also seems to envision a congressional role that exceeds providing substantive definitions to include authority over procedural matters.

Clause 11, the Capture Clause, broadly authorizes Congress to "make Rules concerning Captures."[177] "The term capture under eighteenth-century international law generally referred to the seizure of property, and perhaps people, during war."[178] To the extent the Capture Clause applies to the capture of people, its broad grant of authority would seem to subsume authority to make rules concerning detention, since detention necessarily follows capture.

Clause 14, the Government and Regulation Clause, also supports the conclusion that Congress has authority to regulate the process for determining detainee status under the assumption that authority to "make Rules for the Government and Regulation of the land and naval Forces" includes authority to make rules for military processes affecting persons not in the U.S. military (i.e., detainees).[179]

Together, these provisions leave little doubt that, at least as concerns constitutional text alone, Congress has authority to regulate the process for determining detainee status. Thus, the analysis applied in *Hamdan* applies in the case of CSRTs as well: authority over status determination processes "derive[s] only from the powers granted jointly to the President and Congress in a time of war."[180]

This initial constitutional analysis is significant. Because authority over status determination stems from the war power provisions granted jointly to Congress and the Presidenr, CSRTs are in the same analytical position as the military commission in *Hamdan*. In

Civilians in the War Against Terrorism, 31 VT. L. REV. 447, 516–17 (2007) (describing the "law of war" as "a component of the law of nations").

177. Ingrid Brunk Wuerth, *International Law and Constitutional Interpretation: The Commander in Chief Clause Reconsidered*, 106 MICH. L. REV. 61, 84 (2007).

178. *Id.* (citing EMMERICH DE VATTEL, THE LAW OF NATIONS 299, 385 n.168, 626, 655 (Joseph Chitty ed., 1863) (1758); RICHARD LEE, A TREATISE OF CAPTURES IN WAR (photo. reprint 1967) (1759)).

179. *See* Derek Jinks & David Sloss, *Is the President Bound by the Geneva Conventions?*, 90 CORNELL L. REV. 97, 173 (2004) ("On its face, [the Government and Regulation Clause] is broad enough to empower Congress to prescribe rules for the treatment of military detainees.").

180. Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2773 (2006).

that position (and applying the Court's language to the context of CSRTs), "[w]hether or not the President has independent power, absent congressional authorization, to convene [CSRTs], he may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers."[181] That initial constitutional analysis sets the framework for the rest of the analysis: we must survey statutes that touch upon combatant status determination. Under *Hamdan*, limiting language in those statutes will be presumed to operate in favor of detainee liberty and against the President unless Congress has expressly authorized the status determination process set forth by the President.

Two primary objections oppose the conclusion that *Hamdan*'s clear statement rule and libertarian presumption apply to CSRTs. The first is a claim that, as a matter of fact (or of historical fact), the combatant status determination function is closer to the exclusive realm of the President (assuming there is such a realm) than are military commissions, and therefore Congress has less authority to regulate the status determination function than to regulate military commissions. The second probable objection is that, historically, Congress has regulated military commissions for a longer period than it has regulated the status determination function, and the alleged disparity in historical regulation indicates that Congress has less authority over status determination than it does over military commissions. These objections will be addressed in turn.

As to the first argument, we begin with the common ground, stated by the Court in *Milligan*, that "Congress cannot direct the conduct of campaigns."[182] Some argue that combatant status determination processes fall within the President's widely recognized exclusive authority over battlefield operations.[183] After all, the status determination processes carried out by CSRTs and Article 5 courts are intended to be convened, if needed, near the battlefield.[184] In

181. *Id.* at 2774 n.23 (citing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)).

182. *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 88 (1866), *quoted in Hamdan*, 126 S. Ct. at 2773.

183. *See* Jinks & Sloss, *supra* note 179, at 169–72. Professors Jinks and Sloss also note that "Congress has rarely attempted to interfere with the President's operational control of the military in wartime." *Id.* at 170.

184. *See Examining Proposals to Limit Guantanamo Detainees' Access to Habeas Corpus Review: Hearings Before the Committee on the Judiciary*, 109th Cong. 20 (2006) (testimony of David Rivkin) ("Typically, an Article 5 proceeding is several people sitting in a tent in a desert. . . . [The CSRT process] is meant to be user-friendly, often battlefield-based, back to my point

contrast, proceedings of a full penal tribunal are necessarily more removed from the battlefield and thus, it is argued, more removed from the President's exclusive domain.

On this point, language from the *Hamdi* plurality is instructive and arguably dispositive. Professors Jinks and Sloss state that in *Hamdi*, the plurality "distinguished between the procedures governing 'initial captures on the battlefield' and the procedures that apply 'when the determination is made to continue to hold those who have been seized.'"[185] In short, the plurality concluded that the status determination process—"the determination . . . to continue to hold those who have been seized"—is factually distinct from battlefield operations. Professors Jinks and Sloss conclude that the *Hamdi* plurality "tacitly conceded that [the Court] could not review the rules governing initial captures, but it insisted on judicial review of the policies and procedures governing the continued detention of captured enemy combatants,"[186] as evidenced in this language:

> While we accord the greatest respect and consideration to the judgments of military authorities in matters relating to the actual prosecution of a war . . . it does not infringe on the core role of the military for the courts to exercise their own time-honored and constitutionally mandated roles of reviewing and resolving claims like those presented here.[187]

The plurality thus recognized the distinction between initial battlefield captures and the subsequent determination of whether to continue to detain captured persons (i.e., the status determination process). While the plurality apparently concluded it could not review initial battlefield captures, it held that it could review status determination decisions, presumably because the latter decisions are sufficiently removed from the theater of conflict as to be removed from the President's exclusive authority. If post-capture status determination decisions are outside the exclusive realm of the President's war power, then it seems plausible to conclude that Congress can regulate them, especially given its express authority to "make Rules for the Government and Regulation of the land and

about three officers sitting in a tent in the desert for 15 minutes.").

185. Jinks & Sloss, *supra* note 179, at 174 (quoting Hamdi v. Rumsfeld, 542 U.S. 507, 534 (2004) (plurality opinion)).

186. *Id.*

187. *Id.* (quoting *Hamdi*, 542 U.S. at 535 (plurality opinion)).

naval Forces."[188]

Moreover, as Justice Jackson noted, by constitutional grant, Congress "is also empowered to make rules for the 'Government and Regulation of land and naval Forces,' by which it may to some unknown extent impinge upon even command functions."[189] The Constitution vests Congress "with several powers related to the initiation and prosecution of war," and "[t]he text of Articles I and II of the Constitution do not create a clear picture of where the president's power to prosecute war ends and that of Congress begins."[190] Regardless of the precise location of that boundary, "Supreme Court opinions have recognized since 1800 that Congress has constitutionally based power to place limits on certain commander-in-chief powers during actual war."[191]

The conclusion that Congress can regulate status determination decisions is further supported by its past and current regulation of other central military activities.[192] Significantly, at least as early as "the quasi war with France and the War of 1812, Congress made clear its power to control the treatment of prisoners."[193]

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188. U.S. CONST. art. I, § 8, cl. 14; *cf.* Jinks & Sloss, *supra* note 179, at 174 ("[I]f the courts can review the claims of detainees without infringing on the military's primary function, then Congress can likewise regulate the treatment of detainees without risking such infringement.").

189. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 643–44 (1952) (Jackson, J., concurring).

190. Wuerth, *supra* note 177, at 62, 67 (citing H. JEFFERSON POWELL, THE PRESIDENT'S AUTHORITY OVER FOREIGN AFFAIRS 20 (2002); *Youngstown*, 343 U.S. at 643–44 (Jackson, J., concurring); Mark E. Brandon, *War and American Constitutional Order*, 56 VAND. L. REV. 1815, 1842–43 (2003)). Professor Wuerth further argues that "[t]he contemporary assumption that Congress has little role in war prosecution neglects the significance of the Marque and Reprisal Clause and the Capture Clause of the Constitution." *Id.* at 65.

191. Jordan J. Paust, *Above the Law: Unlawful Executive Authorizations Regarding Detainee Treatment, Secret Renditions, Domestic Spying, and Claims to Unchecked Executive Power*, 2007 UTAH L. REV. 345, 382 (collecting cases).

192. *See* Jon D. Michaels, *Beyond Accountability: The Constitutional, Democratic, and Strategic Problems with Privatizing War*, 82 WASH. U. L.Q. 1001, 1054–60 (2004) (discussing Congress's "power to regulate military personnel, to appropriate funds to the military, and to authorize the deployment of U.S. combat troops in conflict zones.").

193. Wuerth, *supra* note 177, at 95 (citing Act of Mar. 3, 1799, ch. 45, 1 Stat. 743; Act of Feb. 28, 1799, ch. 18, 1 Stat. 624; Act of July 9, 1798, ch. 68, § 8, 1 Stat. 578, 580; Act of June 28, 1798, ch. 62, § 4, 1 Stat. 574, 575; and Act of July 6, 1812, ch. 128, 2 Stat. 777, *repealed by* Act of Mar. 3, 1817, ch. 34, 3 Stat. 358); *see also* Jinks & Sloss, *supra* note 179, at 173 ("Indeed, long before the drafting of the 1949 Geneva Conventions, Congress prescribed rules that directly regulated the treatment of wartime detainees.") (citing WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 45, 931 (2d ed. 1920); *American Articles of*

In sum, while status determination tribunals are factually distinct from military commissions, they are equally within Congress's authority to regulate for three reasons. First, assuming the President has exclusive authority over battlefield operations, Congress may still regulate status decisions because they are made after battlefield captures. Second, the Government and Regulation Clause suggests that Congress itself possesses some authority to prosecute war. Third, Congress has a long history of regulating, and currently regulates, central militaristic activities, including the treatment of prisoners.

Congress's long record of regulating central military activities also diffuses the argument, stated earlier, that Congress has less authority to regulate CSRTs than it does to regulate military commissions because it has purportedly regulated status decisions for a shorter time than it has regulated military commissions. If Congress has regulated, and does regulate, military personnel and the treatment of prisoners,[194] the argument that Congress has nor yet expressly regulated status decisions is of little moment. Given the fact that status determination decisions stem from constitutional war powers, the Court's words in *Madsen v. Kinsella*, which referenced military commissions, aptly apply to status decisions today: "The policy of Congress to refrain from legislating in this uncharted area does not imply its lack of power to legislate. That evidence restraint contrasts with its traditional readiness to 'make Rules for the Government and Regulation of the land and naval Forces.'"[195]

The mode of analysis in *Hamdan* thus applies with equal force to CSRTs as it did to military commissions for the following reasons: first, like military commissions, status determination processes stem from constitutional war powers, and status determination processes fall well within Congress's regulatory power. Second, like military commissions, CSRTs feature strong opposing interests in liberty and Executive control over national security.[196] Third, like the President's military commission, CSRTs are nontraditional adjudicative forms.[197]

War of 1775, 2 J. CONT. CONG. 111–23 (1775), *reprinted in* WINTHROP, *supra* at 953; and *American Articles of War of 1786*, 30 J. CONT. CONG. 316 (1786), *reprinted in* WINTHROP, *supra* at 972)).

194. *See supra* notes 192–93 and accompanying text.

195. Madsen v. Kinsella, 343 U.S. 341, 348–49 (1952).

196. *See supra* notes 100–03 and accompanying text.

197. *See supra* note 110 and accompanying text.

Fourth, CSRTs are convened solely by the Executive, thus concentrating traditional legislative, judicial, and executive functions within one branch.[198] Under *Hamdan*'s framework, ambiguous statutory language is insufficient to authorize presidential action, and limiting statutory language will be construed against Executive authority and in favor of liberty and traditional adjudicative entities. It is to the statutory provisions that touch upon CSRTs or the status determination process that this Comment now turns.

B. Has Congress Authorized CSRTs? If so, With What, if Any, Limitations?

This section will examine the provisions within the four congressional Acts that most touch upon the status determination function. These Acts provide the best available indication of the extent to which Congress has authorized and imposed limitations on the current CSRT standards and procedures. Two of them—the AUMF and the Reagan Defense Act—do not mention the status determination function specifically, but implicate, with more or less clarity, that function. The other two Acts—DTA and the MCA—specifically reference the CSRTs. These statutes will be considered in the order mentioned, which is the order in which they were passed.

1. The AUMF

Does the AUMF authorize or place limitations upon CSRTs? The AUMF authorizes the President to use "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks . . . in order to prevent any future acts of international terrorism against the United States."[199] In authorizing the use of force against persons who aided the 9/11 attacks, the AUMF on its face authorizes the President to "determine" who such persons are. The process of "determin[ing]" the identity of such persons would seem to include a process to determine the status of persons captured (i.e., the status determination process), since the authorization to use force is limited to certain persons.

Any doubt left by the preceding textual analysis that the AUMF

198. *See supra* note 111 and accompanying text.

199. Authorization for Use of Military Force, Pub. L. No. 107-40 § 2(a), 115 Stat. 224 (2001).

authorizes the President to determine the status of those captured is likely removed by *Hamdi*'s interpretation of the AUMF. There, the plurality held that the AUMF authorized the President not only to capture those determined to have aided the 9/11 attacks, but also to detain them for the duration of the relevant conflict:

> There can be no doubt that individuals who fought against the United States in Afghanistan as part of the Taliban . . . are individuals Congress sought to target in passing the AUMF. We conclude that detention of individuals falling into the limited category we are considering, for the duration of the particular conflict in which they were captured, is so fundamental and accepted an incident to war as to be an exercise of the "necessary and appropriate force" Congress has authorized the President to use.[200]

If the AUMF authorizes the President to capture and also detain, following their capture, a "limited category" of persons,[201] then it implicitly authorizes the President to determine whether those detained indeed fall within that limited category.

In short, the AUMF plainly authorizes the President to carry out a status determination process to determine whether those captured aided the 9/11 attacks. But the AUMF does not specify the timeline, procedures, or structures the President is to follow in making that determination. In addition, nothing in the AUMF indicates that the President is to be given total deference as to the procedures or structures he elects to use. Indeed, the *Hamdi* plurality rejected the Executive's chosen response to a citizen-detainee who contested his status,[202] holding that a citizen-detainee instead has the right to "receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker."[203] The plurality's holding in *Hamdi*, reached even as it construed the AUMF, resolves

200. Hamdi v. Rumsfeld, 542 U.S. 507, 516 (2004) (plurality opinion); *see also id.* at 521 (concluding that under the AUMF, "[t]he United States may detain, for the duration of these hostilities, individuals legitimately determined to be Taliban combatants who engaged in an armed conflict against the United States") (internal quotation omitted).

201. *Id.* at 516.

202. Hamdi's father, who petitioned the Court as next friend, alleged that after the Government concluded Hamdi was an enemy combatant, the Government detained him "without access to legal counsel or notice of any charges pending against him." *Id.* at 511 (internal quotations omitted).

203. *Id.* at 533; *see also supra* notes 143–47 and accompanying text.

that the AUMF does not afford the President total deference as to the procedures the President is to apply in determining detainee status, at least as concerns citizen-detainees.[204]

Further, in light of *Hamdan*'s demand for sufficient statutory clarity, the AUMF's lack of specificity as to status determination procedures, and its silence as to the level of deference due to procedures selected by the President, supports a conclusion that the AUMF is insufficient to authorize the current structure and procedures of CSRTs, even in the case of noncitizen-detainees. An analysis of the AUMF in the context of CSRTs thus reaches a similar conclusion to that reached by the Court in *Hamdan*, which held the AUMF did not modify pre-existing statutory authorization (and limitations) on the President's power to convene military commissions.[205] Not finding "specific congressional authorization"[206] in the AUMF for current CSRT procedures and structures, we consider other statutes.

2. Reagan Defense Act

Section 1091 of this Act, a military fiscal appropriations bill signed by the President in October 2004, states:

> (b) POLICY.—It is the policy of the United States to—
>
> . . . . (4) ensure that, in a case in which there is doubt as to whether a detainee is entitled to prisoner of war status under the Geneva Conventions, such detainee receives the protections accorded to prisoners of war until the detainee's status is determined by a competent tribunal; and
>
> (5) expeditiously process and, if appropriate, prosecute detainees in

204. *Hamdi* concerned the rights due to citizen-detainees under the constitutional guarantees to the writ of habeas corpus and due process of law. *See id.* at 524–39. The extent to which foreign nationals detained by United States military forces outside the country have these or other constitutional rights is a question that is, at the least, not well-settled. *See, e.g.*, Gerald L. Neuman, *Extraterritorial Rights and Constitutional Methodology After* Rasul v. Bush, 153 U. PA. L. REV. 2073 (2005). This question may be addressed by the Court in *Boumediene v. Bush*. *See* 476 F.3d 981 (D.C. Cir. 2007), *cert. granted*, 127 S. Ct. 3078 (2007).

205. Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2775 (2006) ("[T]here 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."). For an attempt to reconcile the interpretation of the AUMF in *Hamdi* with its interpretation in *Hamdan*, see Sunstein, *supra* note 4, at 36–37.

206. *Hamdan*, 126 S. Ct. at 2775.

> the custody of the United States, including those in the custody of the United States Armed Forces at Guantanamo Bay, Cuba.[207]

This portion of the Comment argues that current CSRT procedures violate Section 1091 and the implementing provisions of (Section 1092) of the Reagan Defense Act. Subsection (b)(4) sets forth the requirement that where "there is doubt" about a detainee's POW status, the detainee must receive "the protections accorded to prisoners of war until the detainee's status is determined by a competent tribunal."[208] This language substantially mirrors that of GPW Article 5.[209]

Section 1091(b)(4) of the Reagan Defense Act is significant in light of *Hamdan* for at least two reasons. First, like the provisions at issue in *Hamdan*—including Common Article 3—its terms are ambiguous: it does not specify in whose mind(s) doubt as to POW status must exist in order to warrant presumptive POW status until

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207. Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375 § 1091, 118 Stat. 1811, 2069 (2004), note following 10 U.S.C. § 801 (2006) [hereinafter Reagan Defense Act]. The Supreme Court has given considerable weight to such congressional policy statements. *See, e.g.*, Nat'l Cable & Telecomm. Ass'n v. Gulf Power Co., 534 U.S. 327, 339, 360 (2002) (citing Pub. L. No. 104-104, Tit. VII, § 706(a), (b), (c)(1), 110 Stat. 153, note following 47 U.S.C. § 157 (1994 & Supp. V)).

208. Reagan Defense Act, *supra* note 207, § 1091(b)(4).

209. GPW, *supra* note 14, art. 5 ("Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.").

There has been significant debate as to whether CSRTs properly adjudicate detainee status under GPW Article 5. *See, e.g.*, Blocher, *supra* note 13; Geoffrey Corn, Eric Talbot Jensen & Sean Watts, *Understanding the Distinct Function of the Combatant Status Review Tribunals: A Response to Blocher*, 116 YALE L.J. POCKET PART 327 (2007), http://yalelawjournal.org/2007/04/11/corn_jensen_watts.html; Joseph Blocher, *The Guantanamo Three Step*, 117 YALE L.J. POCKET PART 1 (2007), http://yalelawjournal.org/2007/07/04/blocher.html; Terry D. Gill & Elies van Sliedregt, *Guantánamo Bay: A Reflection On The Legal Status And Rights Of 'Unlawful Enemy Combatants,'* 1 UTRECHT L. REV. 28, 49–50 (2005), http://www.utrechtlawreview.org/publish/articles/000003/article.pdf. This Comment does not consider CSRT status determination under GPW Article 5 per se, but instead considers CSRTs under the similar language of Section 1091(b)(4) of the Reagan Act. (Arguments construing of GPW Article 5 are therefore likely relevant in construing Section 1091(b)(4).) The importation of GPW Article 5 notions of doubt and status determination by a "competent tribunal" into the Reagan Act gives this language statutory (not only treaty-based) force, much as the incorporation of Common Article 3 into UCMJ Article 21 gave Common Article 3 the force of legislation in *Hamdan*. *See supra* notes 50–55, 61 and accompanying text. As such, *Hamdan*'s separation-of-powers principles apply.

The Supreme Court in *Hamdan* explicitly reserved judgment as to the related matter of whether Hamdan's "potential status as a prisoner of war independently renders illegal his trial by military commission[.]" *Hamdan*, 126 S. Ct. at 2795 n.61.

status determination is complete.[210] The Reagan Defense Act also does not identify what constitutes a "competent tribunal" capable of determining detainee status in doubtful cases, much as Common Article 3 does not identify what constitutes a "regularly constituted court."[211] Second, Section 1091(b)(4) of the Reagan Defense Act is operative in a factual context similar to that in *Hamdan*—where significant liberty interests compete against interests in deferring to Executive discretion in national secutity issues. Thus, *Hamdan*'s clear statement requirement and libertarian presumption likely apply in considering whether CSRTs satisfy the Reagan Defense Act. Under that analysis, the President "may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers."[212]

Subsection (b)(4) first conditions granting initial POW status on the presence of "doubt as to whether a detainee is entitled to prisoner of war status under the Geneva Conventions."[213] This language does not indicate in whose mind the doubt must exist. The government and some commentators have argued that the issue of doubt as to detainees' POW status has been previously resolved by Executive determination.[214] That is, in construing the "doubt" element of the Reagan Defense Act (and Article 5 of the GPW), the government and others argue that complete deference is owed to the President's determination—deference that is so complete as to justify wholly precluding CSRTs from considering POW status.[215]

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210. *See* Blocher, *supra* note 13, at 668–70 (discussing "presumptive and conclusive POW status").

211. GPW, *supra* note 14, art. 3.

212. *Hamdan*, 126 S. Ct. at 2774 n.23 (citing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)).

213. Reagan Defense Act, *supra* note 207, § 1091(b)(4).

214. *See supra* note 136 and accompanying text; Corn, Jensen, & Watts, *supra* note 209, at 332–33.

215. CSRT GUANTANAMO PROCESS, *supra* note 122, at 1 ("The President has determined that those combatants who are a part of al-Qaeda, the Taliban or their affiliates and supporters, or who support such forces do not meet the Geneva Convention's criteria for POW status. Because there is no doubt under international law about whether al-Qaida, the Taliban, their affiliates and supporters, are entitled to POW status (they are not), there is no need or requirement to convene tribunals under Article 5 of the Third Geneva Convention in order to review individually whether each enemy combatant detained at Guantanamo is entitled to POW status.") (citation omitted); *see also* Corn, Jensen, & Watts, *supra* note 209, at 333 ("[I]n Afghanistan President Bush determined that the conflict against al Qaeda was not an international armed conflict and that the Taliban forces did not meet the criteria set forth in [GPW] Article 4. This meant that there was no 'doubt' to resolve.") (citing Memorandum

But the argument of complete deference to the Executive in the face of an ambiguous statutory provision, at least in the context of a penal military tribunal, is precisely the argument rejected in *Hamdan*.[216] Given the significant liberty interest at issue in CSRT proceedings, the libertarian or anti-Executive presumption in *Hamdan* likely applies. Thus, at a minimum, the Court is unlikely to defer completely to the Executive's determination that detainees are not and cannot be POWs. Because the Court is unlikely to grant the President such deference, the Court is likely to conclude that the CSRTs did not resolve the question of doubt concerning detainees' POW status as required by the Reagan Defense Act. Subsection (b)(4) of the Act requires that, where doubt exists, detainees "receive[] the protections accorded to prisoners of war until the detainee's status is determined by a competent tribunal."[217]

from George W. Bush, President of the United States, to the Vice President, et al. (Feb. 7, 2002), *available at* http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.02.07.pdf).

216. *See* 126 S. Ct. at 2774 (construing UCMJ Article 21), 2788–93 (construing UCMJ Article 36). As to UCMJ Article 21, the Court concluded that "even *Quirin* did not view the authorization [of UCMJ Article 21] as a sweeping mandate for the President to 'invoke military commissions when he deems them necessary.'" *Id.* at 2774 (quoting Brief for Respondents at 17, Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006) (No. 05-184)). The Court was similarly disinclined to defer completely to the President in construing UCMJ Article 36. Subsection (a) of that provision required the President to, "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." 10 U.S.C. § 836(a) (Supp. 2006) (amended by the MCA, Pub. L. No. 109-366, 120 Stat. 2600, 2630–31 (2006)) (quoted in *Hamdan*, 126 S. Ct. at 2790) (emphasis added). Noting the "he considers" language of this provision, and noting that the President had made a determination under Article 36(a) that the application of such rules would be impracticable, the Court stated that it "assume[d] that complete deference is owed that determination." *Hamdan*, 126 S. Ct. at 2791. However, the Court also construed subsection (b) of UCMJ Article 36. Like 36(a), 36(b) required a practicability determination; but unlike 36(a), 36(b) did not specify that the determination was to be made by the President. *See* 10 U.S.C. § 836(b) (Supp.2006) (amended by MCA, Pub. L. No. 109-366, 120 Stat. 2600, 2630–31) ("All rules and regulations made under this article shall be uniform insofar as practicable."). Where 36(b) did not specify who was to make the practicability determination, the Court concluded that "the level of deference accorded to a determination made under subsection (b) presumably would not be as high as that accorded to a determination under subsection (a)." *Hamdan*, 126 S. Ct. at 2792 n.51; *see also* Douglas W. Kmiec, *The Separation of Powers:* Hamdan v. Rumsfeld*—The Anti-Roberts*, 34 PEPP. L. REV. 573, 576 (2007) ("*Hamdan* ignores what Justice Sutherland assumed was well established, namely, that: 'within the international field, [the President] must often [be] accord[ed] . . . a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved.'") (quoting United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936)) (alterations in Kmiec).

217. Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 1091(b)(4), 118 Stat. 1811, 2069 (2004).

Accordingly, a detainee must be treated as a POW until his "status is determined"—that is, it would seem, until the status determination tribunal deliberates and votes. To "receive[] the protections accorded to prisoners of war until . . . status is determined" means, therefore, that procedures of the status determination tribunal must permit the detainee, as a presumptive POW, to make the argumenr that he is a POW. Likewise, the procedures must also permit the tribunal to consider possible POW classification, and they currently do not.[218]

Hamdan's reluctance to permit departures from traditional adjudicative entities[219] also likely applies in considering whether a CSRT is a "competent tribunal" sufficient to determine detainee status under Section 1091(b)(4) of the Reagan Defense Act.[220] Professor Sunstein opines that the *Hamdan* Court might have been motivated by a "general unwillingness to allow a departure from traditional adjudicative institutions and procedures unless Congress explicitly authorizes the departure. On this view, the clear statement principle is defended by reference to a commitment to the standard judicial forms—no matter the identity or the nationality of the defendant."[221] In a search for a traditional adjudicative entity to which CSRTs may be compared, Article 5 tribunals convened under AR 190-8 are most relevant for two reasons. First, Article 5 tribunals are the traditional status determination entities convened by the military.[222] Second, Article 5 tribunals convened under AR 190-8 were expressly referenced in *Hamdi* as entities in which citizen-detainees could contest enemy combatant status,[223] and CSRTs were created in direct response to *Hamdi*.[224]

Comparing CSRTs to Article 5 tribunals convened under AR 190-8 further supports the conclusion that the possibility of doubt as to detainees' status has not been resolved. AR 190-8 requires a status determination proceeding for a detainee

> not appearing to be entitled to prisoner of war status who has committed a belligerent act or has engaged in hostile activities in

218. *See supra* note 135 and accompanying text.

219. *See supra* note 110 and accompanying text.

220. *See also infra* notes 234–235, 238–241 and accompanying text.

221. Sunstein, *supra* note 4, at 33.

222. *See supra* notes 124–129 and accompanying text.

223. Hamdi v. Rumsfeld, 542 U.S. 507, 538 (2004) (plurality opinion).

224. *See supra* note 148.

> aid of enemy armed forces, and *who asserts that he or she is entitled to treatment as a prisoner of war*, or concerning whom any doubt of a like nature exists.[225]

AR 190-8 thus indicates that "doubt" as to a detainee's status arises whenever a detainee claims POW status, as at least one Guantanamo detainee has.[226]

Under *Hamdan*'s clear statement rule, anti-Executive presumption, and preference for traditional adjudicative entities, the possibility of doubt as to detainees' status remains and has apparently not been adjudicated by a tribunal. Although their POW status has apparently not been thus adjudicated, detainees nonetheless have not been afforded POW status in the interim but have been presumed non-POWs,[227] contrary to the requirements of Section 1091(b)(4) of the Reagan Defense Act.

Subsection (b)(5) of Section 1091 above states that it is the policy of the United States to "expeditiously process and, if appropriate, prosecute detainees in the custody of the United States, including those in the custody of the United States Armed Forces at Guantanamo Bay, Cuba."[228] Like subsection (b)(4), subsection (b)(5) is unclear. Subsection (b)(5) does not indicate the type of proceeding necessary to "process" detainees (e.g., whether the detainee must be "processed" with or without a hearing in which he may participate). The libertarian presumption in *Hamdan*, however, would likely favor a reading of this provision that requires expeditious processing in the form of a status determination hearing. CSRT procedures do not currently guarantee expeditious processing—many were detained more than two years before CSRTs were convened.[229] Therefore, CSRT or other procedures must be

225. AR 190-8, *supra* note 125, § 1-6(b) (emphasis added).

226. *See supra* note 135.

227. *See supra* notes 122, 136, 215 and accompanying text.

228. Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 1091(b)(5), 118 Stat. 1811, 2069 (2004).

229. *See, e.g.*, Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2759, 2761 (2006) (indicating that Hamdan was captured in November 2001 and that a CSRT made a status determination at some time after July 7, 2004); Rasul v. Bush, 542 U.S. 466, 470–71 (2004) (indicating that petitioners, "2 Australian citizens and 12 Kuwati citizens," were held at Guantanamo Bay since early 2002); *supra* notes 131–32 and accompanying text (noting that DOD announced plan to convene CSRTs on July 7, 2004). *See also* ELSEA, *supra* note 13, at 20 ("There is no apparent limit to the amount of time a detainee could spend awaiting a determination as to combatant status.").

amended to require their expeditious application to detainees to determine their legal status.

Under the principles in *Hamdan*, current CSRT procedures likely violate the Reagan Defense Act's requirements of timely processing and presumptive POW status. The practical impact of the non-adjudication of detainees' potential POW status may be significant enough to require reversal and remand for consideration of POW status or perhaps even wholesale rejection of CSRTs as adjudicative entities under the DTA.[230]

3. The DTA

In *Hamdan*, the Court addressed the government's argument that the President's military commission was authorized by the DTA, which expressly mentioned the commission and provided for review of its final decisions in the D.C. Circuit.[231] The Court concluded that Congress's ***acknowledgment*** of the President's tribunals was not sufficient to ***authorize*** their procedures and structure:

> Although the DTA . . . was enacted after the President had convened Hamdan's commission, it contains no language authorizing that tribunal or any other at Guantanamo Bay. The DTA obviously "recognize[s]" the existence of the Guantanamo Bay commissions in the weakest sense, because it references some of the military orders governing them and creates limited judicial review of their "final decision[s]." But the statute also pointedly reserves judgment on whether "the Constitution and laws of the United States are applicable" in reviewing such decisions and whether, if they are, the "standards and procedures" used to try

230. *See supra* note 165 and accompanying text. These possible statute-related defects in CSRTs are raised along with other concerns about CSRT procedures as applied. *See* Boumediene v. Bush, 476 F.3d 981, 1006–07 (D.C. Cir. 2007), *cert. granted*, 127 S. Ct. 3078 (2007) (Rogers, J., dissenting) (citing Mark Denbeaux et al., No-Hearing Hearings: CSRT: The Modern Habeas Corpus?, at 37–39 (2006), http://law.shu.edu/news/final_no_hearing_hearings_report.pdf.); Reply to Opposition to Petition for Rehearing, Al Odah v. United States, *cert. granted*, 127 S. Ct. 3067 (2007) (No. 06-1196) (certiorari consolidated with *Boumediene*), *available at* http://www.scotusblog.com/movabletype/archives/Al%20Odah%20reply%206-22-07.pdf).

231. DTA Section 1005(e)(3) granted the D.C. Circuit "exclusive jurisdiction to determine the validity of any final decision rendered" by the President's commission, but limited that review to a consideration of "whether the final decision was consistent with the standards and procedures specified in the [President's] military order" and "whether the use of such standards and procedures to reach the final decision is consistent with the Constitution and laws of the United States." Pub. L. No. 109-148 § 1005(e)(3), 119 Stat. 2739, 2743 (2005).

> Hamdan and other detainees actually violate the "Constitution and laws."[232]

The DTA also provided for D.C. Circuit-review of final CSRT decisions with language almost identical to its language providing for review of military commissions.[233] Thus, the line of reasoning in *Hamdan* applies: the DTA's mere recognition of the President's commission was not sufficient to authorize the commission. Similarly, the DTA's acknowledgment of CSRTs is also unlikely to constitute authorization of CSRTs.

4. The MCA

The MCA mentions CSRTs in three provisions. First, in defining "unlawful enemy combatant," the MCA states that unlawful enemy combatants includes a person "who . . . has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense."[234] Second, in the provision governing the jurisdiction of military commissions, the MCA states: "A finding . . . by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense that a person is an unlawful enemy combatant is dispositive for purposes of jurisdiction for trial by military commission under this chapter."[235] Third, the MCA amended the DTA to expand the D.C. Circuit's jurisdiction to review final CSRT decisions. Under the DTA, the D.C. Circuit could review final CSRT decisions of detainees "detained by the Department of Defense at Guantanamo Bay, Cuba;"[236] but the MCA replaced the language referencing the DOD and Guantanamo Bay with "the United States,"[237] so that the D.C. Circuit may now review the final CSRT decisions of detainees "detained by the United States."

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232. Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2775 (2006) (citing Brief for Respondents at 15, Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006) (No. 05-184), 2006 WL 460875, at *12; and DTA, § 1005(e)(3) (emphasis added)).

233. *Compare* DTA § 1005(e)(2)(A)–(C) *and* DTA § 1005(e)(3)(A)–(C).

234. Pub. L. No. 109-366 § 3, 120 Stat. 2600, 2601 (2006).

235. *Id.* § 3, 120 Stat. at 2603.

236. DTA, § 1005(e)(2)(B)(i), *amended by* Pub. L. No. 109-366 § 10, 120 Stat. 2600, 2637 (2006).

237. Pub. L. No. 109-366 § 10, 120 Stat. 2600, 2637 (2006).

The MCA's first two references to CSRTs indicate that Congress considers CSRTs "competent tribunals" where CSRTs have found certain detainees are "unlawful enemy combatant[s.]"[238] But these provisions do not indicate that Congress considers CSRTs "competent tribunals" for purposes of adjudicating combatant status in cases where there is doubt as to POW status, as required by the Reagan Defense Act.[239] Additionally, although the MCA amended the DTA to expand the D.C. Circuit's jurisdiction to review final CSRT decisions, the MCA did not modify language in the DTA allowing the D.C. Circuit to consider whether the use of CSRT procedures is "consistent with the Constitution and laws of the United States."[240] In the context of military commissions, *Hamdan* considered that language as "pointedly reserv[ing] judgment."[241]

V. CONCLUSION

Whatever else may be said about the Court's decision in *Hamdan*, it is clear that the Court placed great importance on determining whether and to what extent Congress had authorized the President's commission. When considering the extent of that authorization, the *Hamdan* Court read ambiguous provisions in the legal materials before it in favor of interests in liberty and traditional adjudicative forms and against deference to Executive discretion, ultimately requiring clear congressional authorization for such commissions.

As this Comment has shown, CSRTs present the same legal and factual issues at play in *Hamdan*—a nontraditional adjudicative entity convened by the Executive to decide matters of liberty against a backdrop of statutory ambiguity. Given those similarities, the principles applied to the military commission in *Hamdan* likely apply

238. *See supra* notes 13, 234–35 and accompanying text.

239. *See supra* Part IV.B.2. As noted by the *Hamdan* Court, "'Repeals by implication are not favored.'" 126 S. Ct. at 2775 (quoting Ex parte Yerger, 8 Wall. 85, 105 (1869)). Significantly, the MCA includes persons who are "part of the Taliban, al Qaeda, or associated forces" in its definition of "unlawful enemy combatant," which further narrows and likely eliminates the possibility of doubt that persons in those groups can be considered POWs. MCA, § 3(a)(1). But the possibility of doubt as to POW status remains for persons who are found not to be part of the Taliban, al Qaeda, or associated forces. As discussed above, a CSRT could determine that such persons are not "enemy combatants," but could not affirmatively designate such persons as POWs. *See supra* note 135 and accompanying text.

240. DTA, § 1005(e)(2)(C)(ii).

241. *Hamdan*, 126 S. Ct. at 2775.

to CSRTs. Accordingly, courts should consider the extent to which Congress has authorized or placed limitations upon CSRTs.

Hamdan held the AUMF did not modify pre-existing statutory authorization (and limitations) on the President's power to convene military commissions. While the AUMF authorized the President to detain particular persons, the AUMF does not specify the process through which the President is to determine combatant status. As such, the AUMF does not appear to authorize CSRTs with the clarity required in *Hamdan*.

The MCA indicates that Congress considers CSRTs "competent tribunals" where CSRTs have determined detainees to be "unlawful enemy combatants." However, the MCA did not modify the Reagan Defense Act's requirement that detainees be presumed POWs until adjudication of their legal status by a competent tribunal. Because CSRTs are precluded from considering possible POW status, CSRTs appear to violate the Reagan Defense Act. CSRTs may also violate the Reagan Defense Act's requirement that detainees be expeditiously processed because CSRT procedures do not provide for timely adjudication of detainees' legal status. Additionally, the DTA's references to the President's military commission were not considered sufficient to authorize the commission in *Hamdan*. Because the language in the DTA referencing CSRTs is nearly identical to its language referencing the President's commission, CSRTs are probably not authorized by the DTA with the specificity required in *Hamdan*.

Given the MCA's indication that a CSRT is a "competent tribunal" for at least some purposes, the question of whether CSRTs as a whole are authorized by Congress is likely closer than was the question of congressional authorization of the President's commission in *Hamdan*. But the MCA must be read in light of the limitations placed on CSRTs in the Reagan Defense Act and language in the DTA, which the *Hamdan* Court considered as "pointedly reserv[ing] judgment." If the full weight of *Hamdan*'s clear statement requirement and libertarian presumption are applied to the statutes touching upon CSRTs, CSRTs may be destined to the same end as the military commission in *Hamdan*.

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