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Military Commissions Are Governed by Military and International Law: *Hamdan v. Rumsfeld*

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Military Commissions Are Governed by Military and International Law: *Hamdan v. Rumsfeld*

MILITARY COMMISSIONS — EXECUTIVE POWER — INTERNATIONAL LAW — FEDERAL JURISDICTION — HABEAS CORPUS — WAR AND NATIONAL EMERGENCY — The Supreme Court of the United States held that military commission procedures to try Guantanamo Bay detainees must be consistent with both court-martial proceedings and the Geneva Conventions, insofar as practicable.

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

Petitioner, Salim Ahmed Hamdan, a Guantanamo Bay detainee, was granted habeas corpus relief in a federal court on the grounds that the procedures of the military commission by which he was being tried were illegal.[1] Respondent, the United States Government, won on appeal, and the United States Supreme Court granted certiorari to decide the issue.[2]

In November 2001, Hamdan was captured by militia forces in Afghanistan and turned over to United States Armed Forces for his suspected connection to the terrorist group al Qaeda.[3] On November 13, 2001, President George W. Bush issued an executive order authorizing trial by military commission for non-citizens alleged to have terrorist ties.[4]

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1. Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2761-62 (2006). A writ of habeas corpus is commonly filed in order to bring a party in front of a court to determine the legality of a party's imprisonment or detention. BLACK'S LAW DICTIONARY 728 (8th ed. 2004).

2. *Hamdan*, 126 S. Ct. at 2762.

3. *Id.* at 2759-60. After the terrorist attacks on the World Trade Center and the Pentagon by al Qaeda on September 11, 2001, Congress passed a Joint Resolution authorizing the President to use any necessary means and appropriate force against "those nations, organizations, or persons he determines planned, authorized, committed or aided the terrorist attacks." *Id.* at 2760 (quoting Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001)).

4. Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57833 (Nov. 13, 2001). The military order stated that any person subject to the order, including members of al Qaeda, shall "be tried by [a] military commission for any and all offenses triable by [a] military commission that such individual is alleged to have committed." *Id.* at 57834(4)(a). In June 2002, Hamdan was transported to an American naval base in Guantanamo Bay, Cuba, where he awaited charges. *Hamdan*, 126 S. Ct. at 2759. Over a year later, the President declared that Hamdan and five other detainees were subject to the order. *Id.* at 2760. Military counsel was appointed to represent Hamdan in December 2003, for still unspecified charges. *Id.* Two months later, counsel filed demands for charges and for a speedy trial; the applications were denied. *Id.*

While the military tribunal was underway, Hamdan filed petitions for writs of habeas corpus and mandamus in the United States District Court for the Western District of Washington.[5] After the writs were filed, the Government formally charged Hamdan with conspiracy.[6] Meanwhile, a Combatant Status Review Tribunal decided that Hamdan's continued detention at Guantanamo Bay was justified, and proceedings before the military commission began.[7]

The United States District Court for the District of Columbia granted Hamdan's petition for habeas corpus while staying the military commission's proceedings.[8] The Court of Appeals for the District of Columbia reversed the district court, finding that the Geneva Conventions were not enforceable, Hamdan was not entitled to the protections of the Geneva Conventions, and abstention was inappropriate.[9]

Hamdan submitted a petition for certiorari to the United States Supreme Court, and certiorari was granted to decide: (1) whether the military commission convened to try Hamdan was authorized to do so, and (2) whether Hamdan may rely upon the Geneva Conventions.[10] The Supreme Court reversed and remanded, finding

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

6. *Id.* at 2960-61. After the Government charged Hamdan, the United States District Court for the Western District of Washington transferred the writs to the United States District Court for the District of Columbia. *Id.* at 2761.

7. *Id.* at 2761.

8. *Id.* The district court found that the President may establish military commissions only to try offenses that are against the laws of war, that Hamdan was subject to the protections provided by the Geneva Conventions, and that the military commission violated both the Uniform Code of Military Justice (UCMJ) and the Geneva Conventions. *Id.*

The UCMJ is a model code governing military justice proceedings. 10 U.S.C. § 801 (1989). The Geneva Conventions of 1949 are "four international agreements dealing with the protection of wounded members of the armed forces, the treatment of prisoners of war, and the protection of civilians during international armed conflicts." BLACK'S LAW DICTIONARY 707 (8th ed. 2004).

9. *Hamdan*, 126 S. Ct. at 2762. *See* Hamdan v. Rumsfeld, 415 F.3d 33 (D.C. Cir. 2005).

10. *Hamdan*, 126 S. Ct. at 2762. On December 30, 2005, a little over a month after the Supreme Court granted certiorari to hear Hamdan's case, Congress passed the Detainee Treatment Act of 2005 (DTA). Pub. L. No. 109-148, 119 Stat. 2680, 2739. Two months later, the Government filed a motion to dismiss the certiorari based on lack of jurisdiction under the DTA. *Hamdan*, 126 S. Ct. at 2762. The Court found that the DTA did not repeal the Court's jurisdiction, and denied the Government's motion to dismiss. *Id.* at 2769. The Court, relying on *Lindh v. Murphy*, 521 U.S. 320 (1997), found that under ordinary principles of statutory construction, a negative inference may be drawn from Congress' failure to include § 1005(e)(1) of the DTA within the scope of § 1005(h)(2) of the DTA. *Hamdan*, 126 S. Ct. at 2764-65. Additionally, the Court found that the legislative history showed that Congress intentionally excluded paragraph (1) from the scope of § 1005(h)(2). *Id.* at 2769. The Court also rejected the Government's argument that it should rely upon the principle that civilian courts should await the final outcome of ongoing military proceedings before

that the military commission may not proceed because its structure and procedure violated both the Uniform Code of Military Justice (UCMJ) and the four Geneva Conventions signed in 1949.[11]

The commission's procedures denied Hamdan the right to be present at trial, allowing him to be convicted on evidence that he had neither seen nor heard.[12] The procedures also barred Hamdan and his attorney from viewing evidence used against Hamdan, and prohibited Hamdan's attorney from discussing certain evidence with him.[13] Additionally, the procedures allowed any evidence that had probative value to a reasonable person to be admitted, including hearsay and unsworn live testimony.[14] Finally, the procedures required that appeals be heard exclusively by the Executive Branch.[15]

Justice Stevens delivered the opinion of the Court.[16] The majority found that the UCMJ required the procedures of military commissions to be the same as those in court-martial and criminal proceedings insofar as practicable.[17] The procedures of Hamdan's

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staying those proceedings. *Id.* The Court found that the ruling in *Schlesinger v. Councilman*, 420 U.S. 738 (1975), the decision upon which the Government's argument relied, applied only to military discipline involving service members, and not to Hamdan. *Hamdan*, 126 S. Ct. at 2770. *See Ex parte* Quirin, 317 U.S. 1 (1942).

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

12. *Id.* at 2786.

13. *Id.*

14. *Id.*

15. *Id.* at 2787.

16. *Hamdan*, 126 S. Ct. at 2758. Justice Stevens was joined by Justices Kennedy, Souter, Ginsburg, and Breyer. *Id.* Chief Justice Roberts did not participate. *Id.* Justice Kennedy did not join in Parts V and VI-D-iv. *Id.* (plurality opinion). Justice Breyer filed a concurring opinion in which Justices Kennedy, Souter, and Ginsburg joined. *Hamdan*, 126 S. Ct. at 2758. Justice Kennedy authored a concurring opinion in which Justices Souter, Ginsburg, and Breyer joined in Parts I and II. *Id.* Justice Scalia authored a dissenting opinion in which Justices Thomas and Alito joined. *Id.* Justice Thomas also wrote a dissenting opinion in which Justice Scalia joined, and Justice Alito joined except as to Parts I, II-C-i, and III-B-ii. *Id.* Justice Alito wrote a dissenting opinion in which Justices Scalia and Thomas joined in Parts I-III. *Id.*

Article 2 of the UCMJ states: "(a) The following persons are subject to [the UCMJ] . . . (12) . . . persons within an area leased by . . . the United States." 10 U.S.C. § 802(a)(12)(1989). The Court found that Hamdan was subject to the provisions of the UCMJ because he was detained at Guantanamo Bay, an area leased by the United States. *Hamdan*, 126 S. Ct. at 2789 n.47.

17. *Hamdan*, 126 S. Ct. at 2790. Article 36 of the UCMJ states:

> (a) . . . procedures, including modes of proof, for cases . . . triable in courts-martial, . . . military commissions and other military tribunals . . . may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts . . . .

10 U.S.C. § 836(a).

trial deviated substantially from those of a court-martial proceeding.[18] The Court also found that the Government offered no evidence suggesting that uniform court-martial procedures were impracticable, justifying the commission's deviation.[19] Therefore, the Court concluded the military commission's procedures were illegal.[20]

Disagreeing with the decision of the court of appeals, Justice Stevens found that Hamdan was entitled to the protections of the Geneva Conventions and that the military commission procedures were in violation of Article 3 of that treaty (hereinafter "Common Article 3").[21] The court of appeals agreed with the Government that the Geneva Conventions were not applicable in this case because the conflict in which Hamdan was captured was between the United States and al Qaeda and not between nation-states.[22] Overruling the court of appeals, the Supreme Court found that, even if the conflict was not characterized as "international," Hamdan was entitled to the protections of Common Article 3, which provides protections to individuals captured in non-international conflicts.[23]

The majority interpreted the phrase "all the judicial guarantees which are recognized as indispensable by civilized peoples" in Common Article 3 to be the same judicial guarantees provided by an ordinary court-martial proceeding governed by the UCMJ.[24] Justice Stevens concluded that, because the procedures of the military commission deviated from the procedures of an ordinary court-martial, the commission was in violation of the Geneva Conventions.[25]

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18. *Hamdan*, 126 S. Ct. at 2790.

19. *Id.* at 2792.

20. *Id.* at 2793.

21. *Id.* Geneva Convention Relative to the Treatment of Prisoners of War, art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 3318, 75 U.N.T.S. 135 (hereinafter "Common Article 3"). Common Article 3 prohibits "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples." *Id.*

22. *Hamdan*, 126 S. Ct. at 2794-95. *See* Convention Relative to the Protection of Civilian Persons in Time of War, art. 2, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287. Article 2 of the Geneva Conventions renders the full protections applicable only to "all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties." *Id.* at 3518. *See* Hamdan v. Rumsfeld, 415 F.3d 33 (D.C. Cir. 2005).

23. *Hamdan*, 126 S. Ct. at 2795-96. Common Article 3 applies to non-combatants, combatants who have put down their arms, and combatants who are unable to fight due to wounds or detention. Common Article 3, *supra* note 21, at 3320.

24. *Hamdan*, 126 S. Ct. at 2796-97.

25. *Id.* at 2798.

In Part V of the opinion, the Court addressed Hamdan's conspiracy charge and found that conspiracy was not a crime triable by a military commission.[26] The Court examined the history of the common law governing military commissions and reasoned that alleged offenses must have been committed both in a theater of war and during the conflict.[27] Hamdan was charged with conspiracy for acts related to terrorist activity occurring before the conflict between the United States and al Qaeda began.[28] Additionally, the crime of conspiracy was not recognized by any international sources as a war crime.[29] For these reasons, the Court found that the charge of conspiracy was not triable by a military commission.[30]

Justice Kennedy wrote a concurring opinion which further discussed the history of the common law of war, agreeing with the Court that the military commission violated the UCMJ.[31] Having reached this initial conclusion, Justice Kennedy found no reason to address whether Common Article 3 necessarily required that

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26. *Id.* at 2785 (plurality opinion). The opinion in Part V was a plurality opinion agreed upon by Justices Stevens, Souter, Ginsburg, and Breyer; Justice Kennedy did not join. *Id.* at 2758 (majority opinion).

27. *Hamdan*, 126 S. Ct. at 2777 (plurality opinion). *See In re* Yamashita, 327 U.S. 1 (1945); *Ex Parte* Quirin, 317 U.S. 1 (1942); *Ex parte* Milligan, 71 U.S. 2 (1866); *Ex parte* Vallandingham, 68 U.S. 243 (1863); G. DAVIS, A TREATISE ON THE MILITARY LAW OF THE UNITED STATES 308 (rev. 3d ed. 1915); WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 831 (rev. 2d ed. 1920).

28. *Hamdan*, 126 S. Ct. at 2761 (plurality opinion). Paragraph 12 of Hamdan's official charge stated "from on or about February 1996 to on or about November 24, 2001," Hamdan "willfully and knowingly joined an enterprise of persons who shared a common criminal purpose." Petition for Writ of Certiorari, *Hamdan*, 126 S. Ct. 2749 (No. 05-184). There were four specific acts listed in paragraph 13 of Hamdan's official charge:

> (1) he acted as Osama bin Laden's "bodyguard and personal driver," "believ[ing]" all the while that bin Laden "and his associates were involved in" terrorist acts prior to and including the attacks on September 11, 2001; (2) he arranged for the transportation of, and actually transported, weapons used by al Qaeda members and by bin Laden's bodyguards (Hamdan among them); (3) he "drove or accompanied [O]sama bin Laden to various al Qaeda-sponsored training camps, press conferences, or lectures," at which bin Laden encouraged attacks against Americans; and (4) he received weapons training at al Qaeda-sponsored camps.

Hamdan, 126 S. Ct. at 2761 (plurality opinion) (citing Petition for Writ of Certiorari, *Hamdan*, 126 S. Ct. 2749 (No. 05-184)). *See* Hamdan v. Rumsfeld, 415 F.3d 33 (D.C. Cir. 2005).

29. *Hamdan*, 126 S. Ct. at 2784-85 (plurality opinion).

30. *Id.*

31. *Id.* at 2799 (Kennedy, J., concurring). Justice Kennedy authored a concurring opinion in which Justices Souter, Ginsburg, and Breyer joined in Parts I and II. *Id.* Justice Breyer also wrote a brief concurring opinion in which Justices Kennedy, Souter, and Ginsburg joined. *Id.* Justice Breyer emphasized the importance of checks on presidential power, stating that "[t]he Court's conclusion ultimately rests upon a single ground: Congress has not issued the Executive a 'blank check.'" *Id.* (Breyer, J., concurring) (citing Hamdi v. Rumsfeld, 542 U.S. 507, 536 (2004) (plurality opinion)).

the accused be present at all stages of a military commission.[32] For these reasons, Justice Kennedy also found it unnecessary to address the validity of the conspiracy charge against Hamdan.[33]

Justice Thomas wrote a dissenting opinion in which he disagreed with the Court's rationale on the merits.[34] Justice Thomas found that the Court ignored common law precedent and that the President should decide the scope of war crimes.[35] Justice Thomas also argued that Hamdan's affiliation with al Qaeda, an organization whose purpose was to violate laws, was enough to constitute an offense triable by a military commission.[36] Additionally, Justice Thomas found that Article 36 of the UCMJ should have been interpreted as giving the President latitude in establishing military commissions, and not as a restriction on the President requiring him to explain his reasons for their establishment.[37] Finally, Justice Thomas disagreed with the majority and agreed with the reasoning of the court of appeals regarding the inapplicability and unenforceability of the Geneva Conventions.[38]

Justice Alito wrote a dissenting opinion in which he found no reason to agree with the Court's decision that a "regularly constituted court," as required by Common Article 3, necessarily needed to be of the exact structure and composition as a court-martial proceeding.[39] Justice Alito also found too severe the majority's classification of the military commission as illegal due to the possibility of improper procedures.[40] In his conclusion, Justice Alito

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32. *Id.* at 2808-09 (Kennedy, J., concurring).

33. *Id.* at 2809.

34. *Hamdan*, 126 S. Ct. at 2823 (Thomas, J., dissenting). Justice Scalia joined, and Justice Alito joined in all but Parts I, II-C-1, and III-B-2. *Id.* Justice Scalia also wrote a dissenting opinion in which he disputed the Court's determination that the DTA did not deprive it of jurisdiction. *Id.* at 2810 (Scalia, J., dissenting). Justice Scalia argued that common law precedent required that a statute repealing jurisdiction applies to cases pending at the time the statute takes effect. *Id.* *See* Bruner v. United States, 343 U.S. 112 (1952). Additionally, Justice Scalia argued that the Court should not have relied upon the legislative history of the DTA in making its determination because legislative history has no precedential value, and Senate floor debates should not be the stuff of which judicial interpretations are made. *Hamdan*, 126 S. Ct. at 2815 (Scalia, J., dissenting). Justice Scalia also disagreed with the majority regarding abstention, finding no reason to disregard the common law notion that civilian courts should await the final outcome of ongoing military proceedings before staying those proceedings. *Id.* at 2819-20.

35. *Hamdan*, 126 S. Ct. at 2826 (Thomas, J., dissenting).

36. *Id.* at 2832.

37. *Id.* at 2842.

38. *Id.* at 2849.

39. *Id.* at 2851 (Alito, J., dissenting). Justice Scalia and Justice Thomas joined in Parts I-III. *Id.* at 2849.

40. *Hamdan*, 126 S. Ct. at 2853 (Alito, J., dissenting).

agreed that Hamdan is subject to the provisions of the Geneva Conventions, but did not agree that the military commission was in violation of them.[41]

A military commission is a court modeled after a court-martial proceeding that tries cases involving martial-law violations.[42] Military commissions, like court-martial proceedings, are not part of the federal judicial system, and are neither mentioned in the United States Constitution nor created by congressional statute.[43] Instead, military commissions are regulated by articles of war, army regulations, orders of the President, and military custom.[44]

Historically, military commissions have been used in three situations: (1) to try civilians in occupied enemy territory, or in territory regained from an enemy where civilian government is unable to function; (2) as a substitute for civilian courts when martial law has been declared; and (3) to try enemy combatants who have violated the laws of war.[45] Military commissions were first established during the Mexican War.[46] In 1847, General Winfield Scott, a United States commander of occupied Mexican territory, ordered a military commission to try American citizens for ordinary crimes committed in the occupied territory.[47] The original reason for establishing military commissions to try American civilians was that there were no civilian courts available in the occupied territory, and court-martial jurisdiction was limited to members of the United States Armed Forces.[48]

Less than twenty years later, the Union used military commissions during the Civil War to prosecute pro-Confederate guerillas.[49] Many of the cases tried before these commissions were controversial in the South, due to their highly irregular trial procedures, overzealous prosecutors, and exaggerated sentencing guidelines.[50] One of the most influential Supreme Court decisions on

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41. *Id.* at 2854.

42. BLACK'S LAW DICTIONARY 1013 (8th ed. 2004).

43. *Hamdan*, 126 S. Ct. at 2773. After *Hamdan*, Congress passed the Military Commissions Act of 2006, which governs the procedures of military commissions. *See infra* note 140.

44. Altmayer v. Sanford, 148 F.2d 161, 162 (5th Cir. 1945).

45. *Hamdan*, 126 S. Ct. at 2775-76.

46. *Id.* at 2773 (citing WINTHROP, *supra* note 27, at 832).

47. *Id.*

48. *See generally* DAVIS, *supra* note 27; WINTHROP, *supra* note 27.

49. Michal R. Bellknap, *A Putrid Pedigree: The Bush Administration's Military Tribunals in Historical Perspective*, 38 CAL. W. L. REV. 433, 452 (2002).

50. Carol Chomsky, *The United States — Dakota War Trials: A Study in Military Injustice*, 43 STAN. L. REV. 13, 59, 67-69 (1990). *See Ex parte* Vallandingham, 68 U.S. 243 (1863).

military commissions during the Civil War was rendered in *Ex parte Milligan*.[51]

In *Milligan*, the issue was whether Confederate sympathizers in Indiana could be tried for conspiracy before military commissions.[52] As tensions heightened between the North and South, President Abraham Lincoln issued an executive order that allowed those persons alleged to have rebel ties to be tried before military commissions; this order resulted in the suspension of habeas corpus for all those arrested.[53] Lambdin Milligan and four others were accused of conspiring to steal Union weapons and planning to invade Union prisoner-of-war camps.[54] They were sentenced to death by a military court in 1864, but their execution was not set until 1865.[55] They argued their case in front of the United States Supreme Court after the Civil War ended.[56]

Justice Davis, writing for the unanimous Court, determined that the military commissions were unconstitutional.[57] The majority found that the military commissions did not have the jurisdiction to try Milligan because he was a civilian and Indiana was not in the theater of war.[58] Additionally, the Court found that the executive order suspending habeas corpus was unconstitutional because a non-belligerent could not be tried before a military commission when federal courts were functioning.[59]

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51. 71 U.S. 2 (1866).

52. *Milligan*, 71 U.S. at 8. *See* Justice Frank Sullivan, Jr., *Indianapolis Judges and Lawyers Dramatize Ex Parte Milligan, A Historical Trial of Contemporary Significance*, 37 IND. L. REV. 661 (2004).

53. *Milligan*, 71 U.S. at 4.

54. Sullivan, *supra* note 52, at 662.

55. *Id.*

56. *Id.* Milligan filed a petition for habeas corpus in the United States District Court in Indianapolis. *Id.* The case was heard by a two-judge panel, and the judges disagreed. *Id.* According to the jurisdictional rules at the time, the split allowed the case to be resolved by the United States Supreme Court. *Id.*

57. *Milligan*, 71 U.S. at 107, 122-23.

58. *Id.*

59. Peter Margulies, *Beyond Absolutism: Legal Institutions in the War on Terror*, 60 U. MIAMI L. REV. 309, 322 (2006). In a famous passage, the *Milligan* Court held:

> Certainly no part of the judicial power of the country was conferred on [the military commission]; because the Constitution expressly vests it "in one supreme court and such inferior courts as the Congress may from time to time ordain and establish," and it is not pretended that the commission was a court ordained and established by Congress. They cannot justify on the mandate of the President; because he is controlled by law, and has his appropriate sphere of duty, which is to execute, not to make, the laws; and there is "no unwritten criminal code to which resort can be had as a source of jurisdiction."

Milligan, 71 U.S. at 121.

In a concurring opinion, Justice Samuel Chase agreed that the military commissions did not have jurisdiction but believed that the lack of jurisdiction was due to the absence of congressional authorization.[60] Justice Chase argued that it would not violate the Constitution for Congress to provide for trials by military commissions of persons accused of conspiracy.[61]

Despite their contentious character, military commissions continued to hear cases during World War I ("WWI") and World War II ("WWII").[62] Two Supreme Court cases arising from war crimes committed during WWII, *Ex parte Quirin*[63] and *In re Yamashita*,[64] outlined the scope of presidential authority to appoint military commissions.[65] The issue in *Quirin*, commonly called the "Nazi Sabateurs" case, was whether the military commission authorized by President Franklin Roosevelt to try eight German detainees violated the law of war and the Constitution.[66]

In June 1942, a German submarine left four German men on a beach in Long Island, New York.[67] Upon landing, the four men, clad in German Marine Infantry uniforms, stripped off their uniforms, buried them in the sand, changed into civilian clothing, and headed towards New York City carrying a supply of explosives.[68] In Ponte Vedra, Florida, four more German men came ashore in German Marine Infantry uniforms with explosives and instructions to bomb Jacksonville, Florida.[69] The eight men were captured by the Federal Bureau of Investigation, and on July 2, 1942, President Roosevelt issued an executive order initiating a military commission to try nationals of foreign enemies caught entering the United States for the purpose of sabotage.[70] All eight men were tried and sentenced to death.[71]

The condemned men petitioned the United States District Court for the District of Columbia for a writ of habeas corpus, which was

60. *Milligan*, 71 U.S. at 141-42 (Chase, J., concurring).
61. *Id.*
62. Bellknap, *supra* note 49, at 469-72.
63. 317 U.S. 1 (1942).
64. 327 U.S. 1 (1945).
65. Bellknap, *supra* note 49, at 469-72.
66. *Quirin*, 317 U.S. at 18.
67. *Id.* at 21.
68. *Id.*
69. *Id.*
70. *Id.* at 22.
71. *Quirin*, 317 U.S. at 41-44. *See* Bellknap, *supra* note 49, at 474.

denied.[72] The Supreme Court granted certiorari on the issue of whether the military commission violated the laws of war and unanimously found that the commission was legal.[73] Chief Justice Stone, who delivered the opinion of the Court, began by carefully examining the President's power to issue the July 2 order under Article I, Section 8 of the Constitution and the President's executive powers under Article II.[74]

The majority first found that the Articles of War were an appropriate constitutional exercise of power by Congress.[75] Specifically, the Court characterized Article of War 15 as congressional authorization for military commissions, finding the article fully provided for the trial of enemy spies by military tribunal.[76] The Court concluded that the July 2 order was a valid implementation of the Articles of War.[77]

Counsel for the Germans argued that the Sixth Amendment guaranteed trial by jury in all cases in which the death penalty might be applied.[78] The Court disagreed, finding that the Sixth Amendment was intended to preserve the right to jury in all circumstances where it had been guaranteed by the common law, but not for military commissions where trial by jury was not a right.[79] Additionally, the majority found that United States citizenship did

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72. *Quirin*, 317 U.S. at 18.

73. *Id.* at 48.

74. *Id.* at 24-29.

75. *Id.* at 29. The Articles of War are "the rules and regulations that govern the activities of an army and navy" and are "[t]he body of laws and procedures that governed the U.S. military until replaced in 1951 by the Uniform Code of Military Justice." BLACK'S LAW DICTIONARY 120 (8th ed. 2004).

76. Matthew Sutter, *Bush's Executive Order Establishing September 11 Military Commissions and the Doctrine of Separation of Powers: Can a Postmodern Vantage Refine the Discussion?*, 36 UWLA L. REV. 117 n.45 (2005). After the codification of the UCMJ, Article of War 15 became Article 21 of the UCMJ. *Id.*

77. *Quirin*, 317 U.S. at 30. Chief Justice Stone wrote:

> By universal agreement and practice the law of war draws a distinction between . . . those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.

Id.

78. *Id.* at 38-46.

79. *Id.* at 39. The Court noted that military tribunals are "not courts in the sense of the Judiciary Article . . . and . . . in the natural course of events are usually called upon to function under conditions precluding resort to [civil] procedures." *Id.*

not entitle one of the men, who was a United States citizen, to different treatment under the military commission.[80]

Finally, the Germans argued that the military commission under the July 2 order violated particular procedural requirements mandated by the Articles of War.[81] Specifically, counsel argued that the secrecy of the proceedings was improper because it would hamper an appeal.[82] Although the Court unanimously rejected this argument, the Justices did not unanimously agree upon a reason for rejection.[83]

In summary, the Court held that the charge of violating the laws of war was one properly tried by military tribunal, that the July 2 order and the military tribunal organized under it were constitutional, and that the Germans were not entitled to habeas corpus relief.[84]

Three years later, the Supreme Court once again considered the legality of military tribunals when it rendered an opinion in the case of *In re Yamashita*.[85] After the Japanese surrendered in WWII, accused Japanese war criminals were tried by military or civil courts of individual countries.[86] General Tomoyuki Yamashita, a commander of Japanese troops in the Philippines, was charged with failing to supervise his men properly and was prosecuted by a United States military commission located there.[87] Yamashita was served with notice of additional charges relating to crimes committed under his command on the day his trial began, but he was denied additional time to prepare his defense against the new allegations.[88]

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80. *Id.* at 37. Chief Justice Stone stated, "[c]itizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful because in violation of the law of war." *Id.*

81. *Id.* at 46.

82. *Quirin*, 317 U.S. at 47.

83. *Id.* Chief Justice Stone noted:

> Some members of the Court are of opinion that Congress did not intend the Articles of War to govern a Presidential military commission convened for the determination of questions relating to admitted enemy invaders and that the context of the Articles makes clear that they should not be construed to apply in that class of cases. Others are of the view that — even though this trial is subject to whatever provisions of the Articles of War Congress has in terms made applicable to "commissions" — the particular Articles in question, rightly construed, do not foreclose the procedure prescribed by the President . . . .

Id.

84. *Id.* at 48.

85. 327 U.S. 1 (1945).

86. Bellknap, *supra* note 49, at 449-50.

87. *Yamshita*, 327 U.S. at 5.

88. *Id.*

Yamashita filed a writ of habeas corpus with the Supreme Court of the Philippine Islands, but the writ was denied.[89] Like the German spies in *Quirin*, Yamashita then filed a petition for habeas corpus with the United States Supreme Court, and certiorari was granted.[90] Relying heavily on *Quirin*, the Court held that the military tribunal was properly constituted and acted under constitutional and legal authority.[91]

The majority, addressing an unresolved issue in *Quirin*, found that the procedural protections set forth in the Articles of War were not available to enemy combatants, unless they were being tried for acts committed when they were already prisoners of war.[92] The Court found that Yamashita's status did not entitle him to any protection under the Articles of War or the Geneva Convention of 1929, because he was neither a person made subject to the Articles of War by Article 2, nor a protected prisoner of war being tried for crimes committed during his detention.[93]

Two justices, Justice Murphy and Justice Rutledge, wrote strong dissents.[94] Justice Murphy argued that the Fifth Amendment guarantee of due process was universal and applied to enemy combatants.[95] He also argued that the validity of the charge against Yamashita was supported by neither United States military common law nor international law.[96]

In his dissent, Justice Rutledge rejected the Government's argument that deviation from evidentiary rules similar to those used in court-martial proceedings was justified out of military necessity.[97] He agreed with Justice Murphy that the Fifth Amendment

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89. *Id.* at 6.
90. *Id.* at 4.
91. *Id.* at 20. The Court wrote:
> By thus recognizing military commissions in order to preserve their traditional jurisdiction over enemy combatants unimpaired by the Articles [of War], Congress gave sanction, as we held in *Ex parte Quirin*, to any use of the military commission contemplated by the common law of war.

Id.
92. *Yamashita*, 327 U.S. at 24.
93. *Id.* at 63.
94. *Id.* at 4.
95. *Id.* at 28 (Murphy, J., dissenting).
96. *Id.* at 29. Justice Murphy opined:
> If we are ever to develop an orderly international community based upon a recognition of human dignity it is of the utmost importance that the necessary punishment of those guilty of atrocities be as free as possible from the ugly stigma of revenge and vindictiveness.

Id.
97. *Yamashita*, 327 U.S. at 42-46 (Rutledge, J., dissenting).

guarantees applied to Yamashita.[98] Justice Rutledge concluded his dissent with a quote from Thomas Paine: "[h]e that would make his own liberty secure must guard even his enemy from oppression; for if he violates this duty he establishes a precedent that will reach to himself."[99]

Yamashita's trial generated much criticism, and in 1951, Congress passed the Uniform Code of Military Justice (UCMJ).[100] The UCMJ governs military law in the United States, and as the title suggests, the purpose of the code was to make military justice consistent among the armed forces.[101] Article 36 of the UCMJ, entitled "President May Prescribe Rules," governs trial procedures and provides that the Executive Branch may mandate the rules of a military commission as long as those rules are consistent with court-martial proceedings, insofar as practicable, and are not in violation of other provisions of the UCMJ.[102]

More recently, the Supreme Court considered the legality of the military commissions used to try suspected terrorists belonging to al Qaeda in *Hamdi v. Rumsfeld*.[103] Hamdi was an American citizen whom the Government classified as an "enemy combatant"[104] for allegedly taking up arms with the Taliban during the 2001 conflict between the United States and Afghanistan.[105] Upon learning that Hamdi was an American citizen, the Government

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98. *Id.* at 79. Justice Rutledge warned:

> Not heretofore has it been held that any human being is beyond its universally protecting spread in the guaranty of a fair trial in the most fundamental sense. That door is dangerous to open. I will have no part in opening it. For once it is ajar, even for enemy belligerents, it can be pushed back wider for others, perhaps ultimately for all.

Id.

99. *Id.* at 81.

100. Uniform Code of Military Justice, 10 U.S.C. § 801 (1951).

101. *Id.*

102. *Id.* § 836(a).

103. 542 U.S. 507 (2004).

104. *Hamdi*, 542 U.S. at 510. At the time of Hamdi's trial, the term "enemy combatant" was ambiguous; it was not recognized by domestic or international law and was not defined in the UCMJ. Joanna Woolman, *The Legal Origins of the Term "Enemy Combatant" Do Not Support Its Present Day Use*, 7 J. L. & SOC. CHALLENGES 145, 160 (2005). The term "unlawful enemy combatant" was later defined on October 17, 2006, by the Military Commission Act of 2006 as being "a person who has engaged in hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces.)" Pub. L. No. 109-366, § 948(a)(1)(A)(i), 120 Stat. 2600, 2601 (2006).

105. *Hamdi*, 542 U.S. at 510. The terrorist group al Qaeda attacked the World Trade Center and the Pentagon on September 11, 2001. *Id.* In response to the attacks, President George W. Bush ordered United States Armed Forces to invade Afghanistan in order to subdue the Taliban regime, which had supported al Qaeda. *Id.*

transferred him from Guantanamo Bay, Cuba, to a naval brig in Charleston, South Carolina.[106]

Hamdi's father filed a writ of habeas corpus with the United States District Court for the Eastern District of Virginia, claiming that his son's detention violated his due process rights under the Fifth and Fourteenth Amendments to the Constitution.[107] The district court ordered production of additional material regarding Hamdi's status, and the Government petitioned for interlocutory review.[108] The Fourth Circuit Court of Appeals, relying on *Quirin*, reversed and remanded.[109] The Supreme Court granted certiorari, reversed and remanded.[110]

Justice O'Connor, writing for the plurality, found that the Fifth Amendment Due Process Clause required that a citizen held in the United States as an "enemy combatant" be given a "meaningful opportunity" to contest the factual basis for the detention before a "neutral decision maker."[111] Relying on *Quirin*, the Court held that the Government may hold a United States citizen as an "enemy combatant," but decided that the Government may not hold a citizen indefinitely.[112]

Justice Scalia dissented, arguing that, based upon legal precedent, the Government had only two options to justify detaining Hamdi: (1) Congress could suspend the right to habeas corpus, or (2) Hamdi could be tried under ordinary criminal law.[113] In his dissent, Justice Thomas agreed completely with the Government, placing great emphasis on the importance of national security during times of war.[114]

Indeed, national security is imperative during times of war. Equally essential, however, is maintaining the balance of powers envisioned by the Constitution. As Justice Kennedy noted,

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106. *Id.*
107. *Id.* at 511.
108. *Id.* at 513-14.
109. Hamdi v. Rumsfeld, 316 F.3d 450, 477 (4th Cir. 2003). The court of appeals wrote:
> The privilege of citizenship entitles Hamdi to a limited judicial inquiry into his detention, but only to determine its legality under the war powers of the political branches. At least where it is undisputed that he was present in a zone of active combat operations, we are satisfied that the Constitution does not entitle him to a searching review of the factual determinations underlying his seizure there.

Id. at 475.
110. *Hamdi*, 542 U.S. at 516.
111. *Id.* at 509 (plurality opinion).
112. *Id.* at 533.
113. *Id.* at 556-61 (Scalia, J., dissenting).
114. *Id.* at 579 (Thomas, J., dissenting).

"[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb."[115] In codifying the UCMJ, Congress set forth the governing principles for military courts, and the *Hamdan* Court correctly found that the President is bound by them.

Article 36 of the UCMJ outlines the scope of the President's role in implementing the procedures of Hamdan's military commission.[116] Justice Thomas argued that the proper interpretation of Article 36 allows the President much latitude in determining what the procedures of a particular military commission should be, and that the President was not obligated to explain the necessity for their implementation.[117]

This argument is fundamentally flawed, and the findings of the majority are more persuasive. If the President is *not* required to explain his justification for the implementation of nonstandard military commission procedures, then Article 36 of the UCMJ is meaningless. The President could employ procedures wholly different than those prescribed by ordinary criminal trials on the grounds that he found ordinary procedures impracticable, without ever having to prove their infeasibility.

Instead, it is more likely that Article 36 *requires* military commissions to have uniform procedures *unless* the President can demonstrate that such procedures are impracticable under the circumstances. Any other interpretation of the clause ignores the plain meaning of the statute and the overall intention of the UCMJ. Even if the Court had interpreted Article 36 to give greater deference to the President, it would have been hard-pressed to find that affording Hamdan the right to be present at his hearing was impracticable, requiring a deviation in procedure.[118]

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115. Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2800 (2006) (Kennedy, J., concurring) (citing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)).

116. 10 U.S.C. § 836(a)(1986). Article 36 of the UCMJ states: "procedures . . . for military commissions . . . may be prescribed by the President by regulations which shall, *so far as he considers practicable*, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts." *Id.* (emphasis added).

117. *Hamdan*, 126 S. Ct. 2840 (Thomas, J., dissenting).

118. *Id.* at 2756 (majority opinion). The Court wrote: "[t]he absence of any showing of impracticability is particularly disturbing when considered in light of the clear and admitted failure to apply one of the most fundamental protections afforded not just by the Manual for Courts-Martial but also by the UCMJ itself — the right to be present." *Id.*

Justice Rutledge rightly warned that when a government denies due process to its enemies, it "opens the door" to denying due process to its own citizens.[119] It is important to stress that the UCMJ, codified after *Yamashita*, is controlling in this case. Throughout history, the President has been afforded an enormous amount of power to establish military commissions, becoming the executor, legislator, and adjudicator all in one.[120] Congress passed the UCMJ partly in recognition that uniformity of procedures is critical in curbing executive abuse of power. Therefore, the UCMJ, and not the decisions in *Quirin* and *Yamashita*, should control the scope of the President's power to create military commissions.

As argued by Hamdan's attorney, Neal Katyal, "[Hamdan's trial was] a military commission that [was] literally unbounded by the laws, Constitution, and treaties of the United States."[121] Had the Supreme Court ruled in favor of the Government, President George W. Bush would have had an unprecedented arrogation of power. As Justice Breyer remarked, *Hamdan* stands for the proposition that the President does not have a "blank check" in creating military commissions.[122]

Hamdan may be significant in future cases questioning the limits of presidential power during times of war and national emergency. Specifically, *Hamdan* may help undermine President Bush's legal arguments for domestic wiretapping by the National Security Agency without warrants as required by the Foreign Intelligence Surveillance Act.[123] *Hamdan* may also be important in cases involving the Executive Branch's authorization of war-time torture.[124]

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119. *In re* Yamashita, 327 U.S. 1, 79 (1945) (Rutledge, J., dissenting).

120. *See* Hamdi v. Rumsfeld, 542 U.S. 507 (2004); *In re* Yamashita, 327 U.S. 1 (1945); *Ex parte* Quirin, 317 U.S. 1 (1942); *Ex parte* Milligan, 71 U.S. 2 (1866).

121. Transcript of Oral Argument of Petitioner at 12, *Hamdan*, 126 S. Ct. 2749 (2006) (No. 05-184).

122. *Hamdan*, 126 S. Ct. at 2799 (Breyer, J., concurring) (citing Hamdi v. Rumsfeld, 542 U.S. 507, 536 (2004) (plurality opinion)).

123. *See* Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. § 1801 (1978); David Allen Jordan, *Decrypting the Fourth Amendment: Warrantless NSA Surveillance and the Enhanced Expectation of Privacy Provided by Encrypted Voice Over Internet Protocol*, 47 B.C. L. REV. 505 (2006) (arguing that President Bush's domestic wiretapping program violated the Fourth Amendment); Katherine Wong, *The NSA Terrorist Surveillance Program*, 43 HARV. J. ON LEGIS. 517 (2006) (arguing that the Authorization for Use of Military Force did not provide the Executive Branch the proper authority to implement a secret domestic wiretapping program).

124. *See* Christopher A. Britt, *The Commissioning Oath and the Ethical Obligation of Military Officers to Prevent Subordinates from Committing Acts of Torture*, 19 GEO. J.

While the Court was correct in finding that Hamdan's military commission was in violation of the UCMJ, it erred in its reasoning when it determined that the commission also violated the Geneva Conventions. The Court found that Hamdan's commission was in violation of Common Article 3 because its procedures were inconsistent with court-martial procedures.[125] The better argument is that the military commission violated the Geneva Conventions because it denied Hamdan a fundamental right recognized as indispensable by "civilized people" — the right to be present at trial.[126] The other procedural inconsistencies in Hamdan's trial, such as relaxed hearsay rules and the admission of evidence that would normally be inadmissible in a United States criminal court,[127] should have been considered individually in determining whether they violated Common Article 3.

The Court's argument began with the assertion that the military commission's procedures were different than the procedures of an ordinary court-martial.[128] Among other deviations, the procedures governing Hamdan's trial allowed any evidence, including hearsay and unsworn testimony, to be admitted if it could be considered by a reasonable person to have probative value.[129] The Court held that, since the commission's procedures deviated from those of an ordinary court-martial proceeding, the commission was in violation of both the UCMJ *and* the Geneva Conventions.[130] This conclusion is much too sweeping.

The language of Common Article 3 is broad; it does not require any *specific* procedural guarantees. The only requirement of Common Article 3 is that guarantees "recognized as indispensable by civilized people" must be afforded.[131] Instead of generally equating the phrase "judicial guarantees recognized as indispensable by civilized people" to Article 36 of the UCMJ, the Court should have considered each procedural deviation individually. As Justice Alito argued, evidentiary rules vary widely across nations, and most of the world does not follow aspects of admissibility or

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LEGAL ETHICS 551 (2006); Marcy Strauss, *The Lessons of Abu Ghraib*, 66 OHIO ST. L.J. 1269 (2005).

125. *Hamdan*, 126 S. Ct. at 2792.

126. Common Article 3, *supra* note 21, at 3320. Common Article 3 required trial "by a regularly constituted court affording all the judicial guarantees which are recognized as *indispensable by civilized people*." *Id.* (emphasis added).

127. *Hamdan*, 126 S. Ct. at 2786.

128. *Id.* at 2790.

129. *Id.* at 2787.

130. *Id.* at 2798.

131. Common Article 3, *supra* note 21, at 3320.

hearsay rules governing trial procedures within the United States.[132] Contrary to the Court's determination, variations in evidence rules do not automatically violate Common Article 3; the Geneva Conventions allow more latitude than that.

Justice Alito's argument falls short, however, on the issue of Hamdan's right to be present at his trial. In denying Hamdan the right to be present, the President did not merely alter a procedural requirement; he violated a universally recognized fundamental right.[133] The Supreme Court has recognized this fundamental right in criminal trials.[134] The Confrontation Clause of the Sixth Amendment gives the accused the right to be present at all stages of a trial where "fundamental fairness might be thwarted by his absence."[135] Regardless of whether Hamdan is entitled to Sixth Amendment protections, he *is* guaranteed the right to be present, since the Geneva Conventions also require fundamental fairness. It is for this reason that the military commission's procedures violated the Geneva Conventions.

Finally, the plurality rightly found that conspiracy is not a war crime.[136] The last time conspiracy was associated with war crimes was in the 1945 London Charter of the Nuremberg International Military Tribunal.[137] The provision, however, was quickly abandoned by the Nuremberg judges.[138] Conspiracy is not recognized as a war crime by any international sources, as it does not satisfy the threshold requirements of a war crime; namely that the crime must be committed both in the theater of war and during the conflict.[139] The majority correctly found that conspiracy does not fit those requirements, and is therefore not a war crime.

In response to *Hamdan*, Congress passed the Military Commissions Act of 2006 on October 17, 2006.[140] Among other provisions, the Military Commissions Act provides the President the authority to interpret the meaning and application of the Geneva Con-

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132. *Hamdan*, 126 S. Ct. at 2798 (Alito, J., dissenting).

133. *See* Steven Kiernan, *Extradition of a Convicted Killer: The Ira Einhorn Case*, 24 SUFFOLK TRANSNAT'L L. REV. 353, 382 (2001) (stating that the European Convention has declared an individual's right to be present at trial a fundamental right).

134. Faretta v. California, 422 U.S. 806, 816 (1975).

135. *Faretta*, 422 U.S. at 816.

136. *Hamdan*, 126 S. Ct. at 2785 (plurality opinion).

137. George P. Fletcher, *The Hamdan Case and Conspiracy as a War Crime: A New Beginning for International Law in the U.S.*, 4 J. INT'L CRIM. JUST. 442, 445 (2006).

138. *Id.*

139. *Hamdan*, 126 S. Ct. at 2777 (plurality opinion).

140. Pub. L. No. 109-366, 120 Stat. 2600 (2006).

ventions.[141] The Act also denies alien unlawful combatants the ability to invoke the Geneva Conventions as a source of rights.[142] Additionally, the Act prohibits "grave breaches" of the Geneva Conventions, which it defines to include acts such as torture, rape, biological experiments, and cruel and inhuman treatment.[143]

The Act requires that a defendant being tried by a military commission have access to any evidence given to a jury.[144] The Act also allows hearsay evidence.[145] Finally, the Act suspends the writ of habeas corpus for unlawful enemy combatants protesting arrest or detainment.[146]

What impact the Military Commissions Act will have on the precedential value of *Hamdan* is up for debate. It is likely that certain provisions of the Act, specifically those granting the President sole authority to interpret the Geneva Conventions and suspending habeas corpus relief for aliens detained at Guantanamo Bay, will be deemed unconstitutional in future cases.

Hamdan is not just a decision regarding the fate of Guantanamo Bay detainees; it impacts the scope of executive war powers, the integrity of international treaties, and the definition of war crimes. Justice Rutledge's concluding remark in his dissent in *Yamashita* is worth repeating: "[h]e that would make his own liberty secure must guard even his enemy from oppression; for if he violates this duty he establishes a precedent that will reach to himself."[147] *Hamdan* brings the United States one step closer to securing its own liberty during an unprecedented war against a state-less enemy.

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141. *Id.* § 6(a)(3)(A).
142. *Id.* § 948(b)(g).
143. *Id.* § 6(d)(1).
144. *Id.* § 949(j).
145. Military Commissions Act of 2006, Pub. L. No. 109-366, § 949(a), 120 Stat. 2600, 2608 (2006).
146. *Id.* § 7(e)(1).
147. *In re* Yamashita, 327 U.S. 1, 81 (1945) (Rutledge, J., dissenting).