Congress, the Commander-in-Chief, and the Separation of Powers After *Hamdan*

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> "[I]t is doubtless both futile and perhaps dangerous to find any epigrammatical explanation of how this country has been governed."[1]

I. INTRODUCTION

Depending on whom you ask, the Supreme Court's June 2006 decision in *Hamdan v. Rumsfeld*[2] was either a decisive, landmark, and unprecedented victory for civil libertarians,[3] a disturbing example of both judicial activism and of marked disrespect for the proper deference owed to the President during wartime,[4] or, in some cases, both.[5] To those with the former view of *Hamdan*'s hyperbole, the decision is the modern *Youngstown*,[6] and the most important constitutional law decision in the half-century since the Court rejected President Truman's seizure of the steel mills.[7] To those with the

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[1] Dames & Moore v. Regan, 453 U.S. 654, 660 (1981) (Rehnquist, J.).

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

[3] *See, e.g.*, Erwin Chemerinsky, *The Kennedy Court*, 9 GREEN BAG 2d 335 (2006); Erwin Chemerinsky, *The Assault on the Constitution: Executive Power and the War on Terrorism*, 40 U.C. DAVIS L. REV. 1 (2006); Walter Dellinger, *A Supreme Court Conversation*, SLATE, June 29, 2006, http://www.slate.com/id/2144476/entry/2144825; 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; Eric R. Haren, *From Steel Mills to Military Commissions: Congressional Responsibility under* Youngstown *and* Hamdan, 1 HARV. L. & POL'Y REV. (Online) (Nov. 16, 2006), http://www.hlpronline.com/2006/07/haren_01.html; *see also* Neal Kumar Katyal, Comment, Hamdan v. Rumsfeld*: The Legal Academy Goes to Practice*, 120 HARV. L. REV. 65 (2006).

[4] John Yoo, *An Imperial Judiciary at War:* Hamdan v. Rumsfeld, 2006 CATO SUP. CT. REV. 83; Julian Ku & John Yoo, Hamdan v. Rumsfeld*: The Functional Case for Foreign Affairs Deference to the Executive Branch*, 23 CONST. COMMENT. 179 (2006).

[5] *Cf.* Patrick O. Gudridge, *The Anti-Authoritarian Constitution: Four Notes*, 91 MINN. L. REV. (forthcoming 2007) (manuscript on file with author); Cass Sunstein, *Clear Statement Principles and National Security:* Hamdan *and Beyond*, 2006 SUP. CT. REV. (forthcoming) (manuscript on file with author).

[6] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

[7] *See* Posting of Jack M. Balkin to BALKINIZATION (June 29, 2006), http://balkin.blogspot.com/2006/06/hamdan-as-democracy-forcing-decision.html. At least initially, I had a similar reaction to the decision, suggesting that "[t]he analogy is imperfect, but only slightly: We have our modern *Youngstown*." Posting of Karl Blanke to SCOTUSBLOG (June 29, 2006), http://www.scotusblog.com/movabletype/archives/2006/06/after_hamdan_re_1.html (quoting Steve Vladeck).

latter view, *Hamdan* was a disastrously myopic usurpation of judicial power, necessitating a strong and swift reaction from the political branches[8] (which came, of course, in the form of the Military Commissions Act of 2006).[9] Although they manifest diametrically opposite viewpoints, what these two views have in common is a unified and mutually reinforcing sense of *Hamdan*'s doctrinal, political, and even social importance.[10]

This Article takes a somewhat different position. To be sure, *Hamdan* was immensely important. But the Court's decision was important not because it was unprecedented, but because it was precedented. In holding that the military tribunals established by the Bush Administration to try suspected "enemy combatants" detained at Guantánamo Bay, Cuba,[11] failed to comport with various procedural and substantive requirements imposed by the Uniform Code of Military Justice (UCMJ)[12] and the Geneva Conventions,[13] and that the tribunals were therefore unlawful,[14] *Hamdan* necessarily concluded that the President could not disregard valid substantive limitations that Congress placed upon his authority during wartime. As Justice Stevens wrote for the majority, "[w]hether 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."[15] In so holding, *Hamdan* arguably reaffirmed (rather than invented)

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[8] *See, e.g.*, John Yoo, *Congress to Courts: "Get Out of the War on Terror,"* WALL ST. J., Oct. 19, 2006, at A18. *But see* Marty Lederman, *John Yoo on Court-Stripping*, BALKINIZATION, Oct. 19, 2006, http://balkin.blogspot.com/2006/10/john-yoo-on-court-stripping.html (responding to Yoo).

[9] Pub. L. No. 109-366, 120 Stat. 2600 (2006) (codified in scattered sections of 10 and 18 U.S.C.).

[10] To be fair, a third view of *Hamdan* suggests that the Military Commissions Act (MCA) renders *Hamdan* almost entirely irrelevant, or worse—that, after the MCA, *Hamdan* was a Pyrrhic victory for civil libertarians, the reaction to which left the American legal system worse off than it was before the litigation commenced. I vehemently dispute this reading, especially with respect to the separation-of-powers principles that I explore in this Article in detail, and address the significance of the MCA in the Conclusion.

[11] *See* Military Order of November 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 FED. REG. 57,833 (Nov. 16, 2001) (to be codified at 14 C.F.R. pt. 39).

[12] 10 U.S.C. § 801-946 (2000).

[13] Geneva Convention Relative to Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

[14] *See* Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2786 (2006) ("The UCMJ conditions the President's use of military commissions on compliance not only with the American common law of war, but also with the rest of the UCMJ itself, insofar as applicable, and with the 'rules and precepts of the law of nations'—including, *inter alia*, the four Geneva Conventions signed in 1949. The procedures that the Government has decreed will govern Hamdan's trial by commission violate these laws." (internal citations omitted)). *See generally id.* at 2786-98 (analyzing the tribunals in light of the UCMJ and Geneva Conventions).

[15] *Id.* at 2774 n.23 (citing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)). The two concurring opinions were even more blunt on this point. *See,*

a straightforward conception of the proper separation of war powers that is almost as old as the Republic itself, dating back to Chief Justice Marshall's opinion in *Little v. Barreme*,[16] one of the so-called "Quasi-War"[17] cases.[18]

In *Little*, Chief Justice Marshall was emphatic in distinguishing between unilateral presidential power in the face of congressional silence, and presidential authority in the face of countervailing statutory limitations. Thus, Marshall held unlawful U.S. Navy Captain George Little's seizure of a Danish vessel sailing *from* a French port during the Quasi-War because Congress had only authorized seizures of vessels sailing *to* French ports:

> It is by no means clear that the president of the United States whose high duty it is to "take care that the laws be faithfully executed," and who is commander in chief of the armies and navies of the United States, might not, without any special authority for that purpose, in the then existing state of things, have empowered the officers commanding the armed vessels of the United States, to seize and send into port for adjudication, American vessels which were forfeited by being engaged in this illicit commerce. But when it is observed that . . . the 5th section [of the 1799 Non-Intercourse Act][19] gives a special authority to seize on the high seas, and limits that authority to the seizure of vessels bound or sailing *to* a French port, the legislature seems to have prescribed that the manner in which this law shall be carried into execution, was to *exclude* a seizure of any vessel not bound to a French port.[20]

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e.g., *id.* at 2799 (Breyer, J., concurring) ("Congress has denied the President the legislative authority to create military commissions of the kind at issue here. Nothing prevents the President from returning to Congress to seek the authority he believes necessary."); *see also id.* (Kennedy, J., concurring in part) ("Congress, in the proper exercise of its powers as an independent branch of government, and as part of a long tradition of legislative involvement in matters of military justice, has considered the subject of military tribunals and set limits on the President's authority.").

[16] Little v. Barreme, 6 U.S. (2 Cranch) 170 (1804).

[17] The term "Quasi-War" is widely used to describe a series of discrete naval conflicts between the United States and France from 1797 to 1801. For what remains the authoritative historical account of the "war," see ALEXANDER DE CONDE, THE QUASI-WAR: THE POLITICS AND DIPLOMACY OF THE UNDECLARED WAR WITH FRANCE, 1797-1801 (1966).

[18] For a survey, see J. Gregory Sidak, *The Quasi-War Cases—and Their Relevance to Whether "Letters of Marque and Reprisal" Constrain Presidential War Powers*, 28 HARV. J.L. & PUB. POL'Y 465 (2005).

[19] Act of Feb. 9, 1799, ch. 2, § 5, 1 Stat. 613, 615 (expired 1800).

[20] *Little*, 6 U.S. (2 Cranch) at 177-78 (emphasis added; original emphasis omitted). For background, see LOUIS FISHER, PRESIDENTIAL WAR POWER 23-26 (2d ed., rev., 2004). *See also* Sidak, *supra* note 18, at 490-93.

At first blush, this framework may sound familiar, evoking the distinctions seized upon by Justice Jackson in his canonical and celebrated concurrence in *Youngstown* (which Justice Stevens cited in the critical footnote in *Hamdan* to support the enforceability of congressional limitations on the war power).[21] Yet Jackson's typology has proven largely ineffective for resolving cases where the constitutional authority of both Congress *and* the President are implicated—and overlap—as is true in most war powers cases. Nor does Jackson's concurrence resolve the question of *when* presidential power might "disable" legislative interference. Thus, Jackson's concurrence neither explicitly supports nor rejects the "Commander-in-Chief override"—a theory of executive power that has gained prominence in the aftermath of September 11.[22] The "Commander-in-Chief override" maintains that statutes otherwise purporting to limit the President's exercise of his "war powers" cannot do so without unconstitutionally infringing upon the Commander-in-Chief Clause.[23] To the extent that both the President and Congress could claim constitutional authority in areas implicating the "override," Jackson's concurrence provides virtually no guidance in assessing which must yield—the statute or the President.

In *Little*, however, Chief Justice Marshall provided his own answer to that question: so long as the statute imposing limits upon the President's war powers is a valid exercise of Congress's powers, the limits are binding and enforceable, and the President lacks inherent constitutional authority to act in contravention thereof.[24] Moreover, up until *Youngstown*, there were absolutely no decisions by the Supreme Court disavowing or otherwise expressing even implicit disagreement with the theory underlying *Little*. Even in *Youngstown* itself, *Little* was not forgotten; we need look no further than the completely overlooked and neglected opinion of the completely overlooked and neglected Justice, Tom C. Clark.

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[21] *See* Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2774 n.23 (2006) (citing *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring)).

[22] Although the override theory has surfaced in many of the challenges to the Bush Administration's conduct of (and in) the war on terrorism, the most pronounced invocation (and defense) of the theory came in the Department of Justice's defense of the President's warrantless wiretapping program, informally known as the "NSA White Paper." *See* U.S. DEP'T OF JUSTICE, LEGAL AUTHORITIES SUPPORTING THE ACTIVITIES OF THE NATIONAL SECURITY AGENCY DESCRIBED BY THE PRESIDENT (Jan. 19, 2006), http://fl1.findlaw.com/news.findlaw.com/hdocs/docs/nsa/dojnsa11906wp.pdf [hereinafter NSA White Paper]; *see also* Memorandum from Jay S. Bybee, Assistant Attorney Gen., Office of Legal Counsel, U.S. Dep't of Justice, to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002), *in* THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB 172, 200-07 (Karen J. Greenberg & Joshua L. Dratel eds., 2005). *See generally* David Cole & Martin S. Lederman, *The National Security Agency's Domestic Spying Program: Framing the Debate*, 81 IND. L.J. 1355 (2006) (collecting and summarizing documents).

[23] *See, e.g.*, NSA White Paper, *supra* note 22.

[24] *See Little*, 6 U.S. (2 Cranch) at 177-78.

Concurring in the judgment, Justice Clark began by invoking Chief Justice Marshall's opinion in *Little*.[25] After noting that "the Constitution does grant to the President extensive authority in times of grave and imperative national emergency,"[26] Clark, who had served as Attorney General under President Truman, echoed Marshall's focus on the enforceability of substantive congressional limitations:

> I conclude that where Congress has laid down specific procedures to deal with the type of crisis confronting the President, he must follow those procedures in meeting the crisis; but that in the absence of such action by Congress, the President's independent power to act depends upon the gravity of the situation confronting the nation. I cannot sustain the seizure in question because here, as in *Little* v. *Barreme*, Congress had prescribed methods to be followed by the President in meeting the emergency at hand.[27]

Although many have since read Justice Clark's opinion as expressly embracing theories of inherent presidential emergency power,[28] the first clause of the above passage is perhaps even more important than the second, for it suggests, in stronger terms than Justice Jackson's far-more-scrutinized concurrence, that congressional limitations on presidential war powers are enforceable so long as they are valid.[29] Two of the other overlooked concurrences in *Youngstown*—Justice Frankfurter's and Justice Burton's—were to similar effect.[30] *Hamdan*, in relying upon a theory of the separation of war powers that has its origins in *Little v. Barreme*, might thus be best understood as the vindication of these forgotten *Youngstown* concurrences, and as the repudiation of the half-century-long "drift" that may well have been the unintended result of Justice Jackson's far more celebrated opinion in the same case. On the *Little v. Barreme*/Clark/Burton view of the

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[25] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 660 (1952) (Clark, J., concurring in the judgment).

[26] *Id.* at 662.

[27] *Id.* (citation omitted).

[28] *See, e.g.*, Raoul Berger, *War-Making by the President*, 121 U. PA. L. REV. 29 (1972); Michael Stokes Paulsen, *The Constitution of Necessity*, 79 NOTRE DAME L. REV. 1257, 1295 n.81 (2005); *see also* Michael J. LeRoy, *Presidential Regulation of Private Employment: Constitutionality of Executive Order 12,954 Debarment of Contractors Who Hire Permanent Striker Replacements*, 37 B.C. L. Rev. 229, 298 n.426 (1996); Christopher J. Schmidt, *Could a CIA or FBI Agent Be Quartered in Your House During a War on Terrorism, Iraq or North Korea?*, 48 ST. LOUIS U. L.J. 587, 610 n.162 (2004).

[29] In a way, there is an amusing analogy to the rule of *Hanna v. Plumer*, 380 U.S. 460 (1965), that the Federal Rules of Civil Procedure trump state procedural rules in any case wherein they apply, so long as they are valid. *See, e.g., id.* at 464-74.

[30] *Youngstown*, 343 U.S. at 593-614 (Frankfurter, J., concurring); *id.* at 655-60 (Burton, J., concurring).

separation of powers, the Commander-in-Chief override is patently unjustifiable and facially invalid, and cannot survive *Hamdan*.

But can it really be that easy?

Scholars have long debated—and many have emphatically rejected—this conception of Congress's "disabling" power: the idea that Congress can disable a President from acting simply by enacting a statutory prohibition that is within the scope of its constitutional authority.[31] How, then, are we to reconcile the elegant simplicity of this theory of the separation of powers, which is thematically at the heart of the *Hamdan* opinions of Justices Stevens, Kennedy, and Breyer, with the far more complicated reality manifested in contemporary constitutional jurisprudence and literature? The answer, I suggest, is to look at the specific congressional powers at issue in each case.

In many ways, *Little v. Barreme* is the paradigmatic case for Congress's disabling power because it turns on a statute that falls unmistakably within Congress's power to "make Rules concerning Captures on Land and Water."[32] So, too, is *Hamdan*, where the power to establish and impose procedural and substantive requirements on military commissions can be readily traced to Congress's power "[t]o define and punish . . . Offences against the Law of Nations."[33] *Youngstown*, to be sure, is a bit harder. Moreover, Justice Jackson's concurrence therein, by recognizing the possibility that Congress can be disabled even when the President's power is at its lowest ebb, is completely unhelpful. Thus, this Article concludes that, while *Hamdan* may exemplify the applicability of the disabling theory, it does not necessarily sound the death knell for anti-disabling arguments such as that enmeshed within the Commander-in-Chief override. Rather, the Article suggests that more attention must be paid, going forward, to the specific sources of congressional power at issue in each case, and to the difficulty posed in cases where *neither* political branch has an obvious constitutional basis for its actions.

To make this argument, Part II begins with the "disabling" theory, as embodied in *Little v. Barreme* and in Justice Clark's *Youngstown* concurrence. After summarizing *Little*, Justice Clark wrote, "I know of no

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[31] For a telling recent exchange that also serves as a useful bibliography of previous iterations of the debate, compare Saikrishna Prakash, *Regulating Presidential Powers*, 91 CORNELL L. REV. 215 (2005) (reviewing HAROLD J. KRENT, PRESIDENTIAL POWERS (2005)), with Harold J. Krent, *The Lamentable Notion of Indefeasible Presidential War Powers: A Reply to Professor Prakash*, 91 CORNELL L. REV. 1383 (2006). Although Professor Krent concedes an enormous amount of intellectual ground to Professor Prakash in his reply, he was writing before *Hamdan*, which, as this Article suggests, actually vindicates a strong view of Congress's power, at least in some areas.

[32] U.S. CONST. art. I, § 8, cl. 11.

[33] *Id.* cl. 10.

subsequent holding of this Court to the contrary."[34] Although Clark might have been correct at the time, Part II suggests that Justice Jackson's concurrence in the same case, and the Court's later application of that opinion in *Dames & Moore v. Regan*,[35] constituted two significant rejections of the "disabling" theory, and thereby paved the way for the viability of the Commander-in-Chief override. Part III turns to the override theory, which might also be characterized as an "anti-disabling" theory, tracing both its origins and its most sustained defense in a January 2006 Department of Justice white paper.

Finally, Part IV attempts to juxtapose these two seemingly divergent doctrinal strands in light of *Hamdan*. It would be too simplistic to read *Hamdan* as the evisceration of the post-*Youngstown* approach to the separation of powers—as putting "right" what many argue once went wrong. Rather, Part IV suggests, there are more nuanced distinctions to be made in these cases as between differing sources of congressional authority, distinctions wholly unrecognized by the Court in *Hamdan* or by participants in the ever-ongoing academic debate. Thus, *Hamdan*, like *Little*, is an easy case because the Constitution makes a clear textual commitment of the disputed authority to the legislative branch. As Justice Kennedy suggested in the opening lines of his concurrence in *Hamdan*:

> Where a statute provides the conditions for the exercise of governmental power, its requirements are the result of a deliberative and reflective process engaging both of the political branches. Respect for laws derived from the customary operation of the Executive and Legislative Branches gives some assurance of stability in time of crisis. The Constitution is best preserved by reliance on standards

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[34] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 574, 661 (1952) (Clark, J., concurring in the judgment). What is slightly misleading about Justice Clark's statement is the extent to which the Court, especially during World War II, often approved executive action by adopting fairly loose and flexible interpretations of congressionally-mandated procedures. *See, e.g.*, *In re* Yamashita, 327 U.S. 1 (1946); *Ex parte* Quirin, 317 U.S. 1 (1942). And Justice Jackson, at the outset of his concurrence in *Youngstown*, famously suggested that

> [a] judge, like an executive adviser, may be surprised at the poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves. . . . A century and a half of partisan debate and scholarly speculation yields no net result but only supplies more or less apt quotations from respected sources on each side of any question. They largely cancel each other. And court decisions are indecisive because of the judicial practice of dealing with the largest questions in the most narrow way.

Youngstown, 343 U.S. at 634-35 (Jackson, J., concurring); *see also id.* at 634 n.1 ("A Hamilton may be matched against a Madison. Professor Taft is counterbalanced by Theodore Roosevelt. It even seems that President Taft cancels out Professor Taft." (citations omitted)).

[35] Dames & Moore v. Regan, 453 U.S. 654 (1981).

tested over time and insulated from the pressures of the moment.[36]

II. "DISABLING": FROM *LITTLE V. BARREME* TO *YOUNGSTOWN*

The history of the "disabling" theory in the U.S. Supreme Court is a short one, to be sure. For various reasons, direct conflicts between congressional statutes and executive assertions of power were relatively scarce in the first 150 years of the Republic.[37] That is not to say, however, that such conflicts never arose. Instead, the first such conflict to come before the Court materialized out of the "Quasi-War" with France, a series of disputes traceable to the United States' limited naval conflict with France between 1797 and 1801.[38]

A. Little *and the Quasi-War*

In response to escalating tension between the U.S. and French governments, largely a result of the 1794 Jay Treaty[39] with Great Britain and the "XYZ Affair,"[40] Congress in 1798 rescinded a series of 1778 treaties with France.[41] During the same session, it enacted the controversial Alien[42] and Sedition[43] Acts and the oft-neglected but still extant Alien Enemy Act.[44] The Fifth Congress also enacted statutes suspending commerce with France and otherwise providing for reprisals against French shipping for offenses against U.S. merchant ships.[45] President Adams did not request, nor did Congress

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[36] Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2799 (2006) (Kennedy, J., concurring in part).

[37] Part of the explanation for this point may be the general willingness on the part of early Presidents to comply with statutorily prescribed procedures, even during emergencies. *See, e.g.*, Stephen I. Vladeck, Note, *Emergency Power and the Militia Acts*, 114 YALE L.J. 149, 160-63 (2004) (summarizing President Washington's adherence to the 1792 Calling Forth Act in suppressing the 1794 Whiskey Rebellion).

[38] For what remains the authoritative historical account, see DE CONDE, *supra* note 17.

[39] Treaty of Amity, Commerce, and Navigation, U.S.-Gr. Brit., Nov. 19, 1794, 8 Stat. 116.

[40] *See* ALBERT BOWMAN, THE STRUGGLE FOR NEUTRALITY: FRANCO-AMERICAN DIPLOMACY DURING THE FEDERALIST ERA 306-33 (1974).

[41] Act of July 7, 1798, ch. 67, 1 Stat. 578 .

[42] Act of June 25, 1798, ch. 58, 1 Stat. 570 (expired 1800).

[43] Act of July 14, 1798, ch. 74, 1 Stat. 596 (expired 1801).

[44] Act of July 6, 1798, ch. 66, 1 Stat. 577 (codified as amended at 50 U.S.C. §§ 21-24 (2000)).

[45] *See, e.g.*, Act of June 13, 1798, ch. 53, 1 Stat. 565; Act of June 25, 1798, ch. 60, 1 Stat. 572; Act of June 28, 1798, ch. 62, 1 Stat. 574; Act of July 9, 1798, ch. 68, 1 Stat. 578; Act of July 16, 1798, ch. 88, 1 Stat. 611.

provide, a declaration of war.[46] Thus, the Quasi-War was America's first experience with the concept of "undeclared" or "imperfect" war.[47]

Consequently, in the first Supreme Court case arising out of the conflict, *Bas v. Tingy*,[48] the issue was whether France was an "enemy" within the meaning of a 1799 Non-Intercourse Act[49] at the time that the cargo ship *Eliza* was captured by the *Ganges*, an armed U.S. vessel, notwithstanding the absence of a formal declaration of war by the United States Congress.[50] In seriatim opinions,[51] the Court concluded that France was in fact an "enemy", triggering the recovery provided for by the 1799 statute.

The second Supreme Court case stemming from the Quasi-War was *Talbot v. Seeman*,[52] which concerned the authority of the U.S. Navy to capture *neutral* vessels that the Navy had probable cause to believe were in fact French ships.[53] Although no Act of Congress expressly authorized such captures, Chief Justice Marshall, in his first published opinion, traced implicit authority for the capture to the language of several of the Fifth Congress's non-intercourse statutes, suggesting that such authority must come from congressional statutes, as opposed to inherent executive power.[54]

By far the most important of the Quasi-War cases, at least for present purposes, was the last[55] of the trilogy—*Little v. Barreme*.[56] At issue in *Little* was the scope of a congressional non-intercourse statute, enacted on February 9, 1799, which empowered the President to authorize "the commanders of the public armed ships of the United States" to stop and

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[46] *See* Sidak, *supra* note 18, at 481.

[47] *See id.*

[48] Bas v. Tingy, 4 U.S. (4 Dall.) 37 (1800).

[49] *See* Act of Mar. 2, 1799, ch. 24, § 7, 1 Stat. 709, 716 (repealed 1800).

[50] *See Bas*, 4 U.S. at 37. For a summary of the background of this case, see Sidak, *supra* note 18, at 483-86.

[51] In *Bas*, separate opinions (reaching the same result) were filed by Justices Moore, Washington, Chase, and Paterson. *See id.* at 39-40 (Moore, J.); *id.* at 40-43 (Washington, J.); *id.* at 43-45 (Chase, J.); *id.* at 45-46 (Paterson, J.).

[52] Talbot v. Seeman, 5 U.S. (1 Cranch) 1 (1801).

[53] *See* Sidak, *supra* note 18, at 487-90 (summarizing the background to *Talbot*).

[54] *See Talbot*, 5 U.S. at 28.

[55] One curiosity concerning *Little* is the lengthy and heretofore unexplained (and unexplored) delay between when the case was argued—December 16 and 19, 1801—and when it was decided, February 27, 1804. Although the Supreme Court did not sit in 1802 per the terms of the 1802 Judiciary Act, *Little*, the only case argued at the December 1801 Term not decided during the same Term, was not handed down during the February 1803 Term (the Court's next sitting), either. *See* SUPREME COURT OF THE U.S., DATES OF SUPREME COURT DECISIONS AND ARGUMENTS: U.S. REPORTS, VOLUMES 2-107 (1791-1882), at 3-4 (2006), http://www.supremecourtus.gov/opinions/datesofdecisions.pdf.

[56] Little v. Barreme, 6 U.S. (2 Cranch) 170 (1804).

search ships suspected of carrying French goods and to seize any such ship "bound or sailing *to* any port or place within the territory of the French Republic."[57] The President, through the Secretary of the Navy, subsequently issued instructions authorizing seizures of vessels "bound to *or* from" French ports.[58] As Professor Sidak summarizes:

> Captain George Little commanded the U.S. frigate *Boston*. On December 2, 1799, the *Boston* captured *The Flying-Fish*, a Danish ship carrying Danish and neutral cargo, as it sailed from Jeremie to the Danish port of St. Thomas in the Virgin Islands. Little was acting under executive orders in enforcing the non-intercourse law that prohibited American vessels from journeying to French ports, a statute that Little suspected *The Flying-Fish* of violating. The district court ordered restoration of the ship and cargo, but declined to award damages for capture and detention. The circuit court reversed and awarded damages, on the rationale that the capture would have been unlawful even if *The Flying-Fish* had been an American vessel.[59]

Writing for a unanimous Court, Chief Justice Marshall affirmed, and held that Captain Little was liable for damages.[60] What commentators tend to overlook about Chief Justice Marshall's short but forceful opinion in *Little* is the extent to which he clearly understood the distinction between unilateral presidential power in the absence of congressional action and the scope of such authority in the face of countervailing congressional limitations, even illogical ones.[61] That is, Marshall plainly suggested that the issue might be different had Congress not interposed any limits on the Navy's authority to capture suspected French ships, but that the existence of a limit rendered unlawful any seizures in violation thereof.[62] Even Professor Sidak, whose recent survey of the Quasi-War cases argued forcefully against the broad interpretation of the trilogy advanced by opponents of inherent presidential power, conceded that "Chief Justice Marshall's statements indicate that, when Congress has spoken, the President must abide by congressional will."[63]

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[57] Act of Feb. 9, 1799, ch. 2, § 5, 1 Stat. 613, 615 (expired 1800) (emphasis added).

[58] Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1394 (2001) (discussing *Little*); *see also* FISHER, *supra* note 20, at 25.

[59] Sidak, *supra* note 18, at 490 (footnotes omitted).

[60] *Little*, 6 U.S. (2 Cranch) 170.

[61] *See id.* at 177-78.

[62] *Id.*

[63] Sidak, *supra* note 18, at 492; *see also* Geoffrey S. Corn, *Presidential War Power: Do the Courts Offer Any Answers?*, 157 MIL. L. REV. 180, 210 (1998). As Professor Corn notes:

> [T]he conclusion that Congress is vested with the authority to set limitations on the conduct of military operations during an undeclared war, limits not

B. Brown *and the War of 1812*

Academic analyses of the significance of the Quasi-War cases tend to overlook a later Marshall opinion that further bolstered the approach to the separation of powers typified in *Little*.[64] In 1814, in *Brown v. United States*,[65] the Court was asked to decide whether the U.S. government could condemn British property captured as a result of an embargo authorized by Congress during the War of 1812 that was not intended to act upon foreign property. After concluding that such seizures were not authorized by virtue of the Declaration of War against England,[66] and after finding no other statute authorizing the condemnation, the Court held that the confiscation at issue in *Brown* was unlawful. In Chief Justice Marshall's words: "There being no other act of congress which bears upon the subject, it is considered as proved that the legislature has not confiscated enemy property which was within the United States at the declaration of war, and that this sentence of condemnation cannot be sustained."[67]

In a rare dissent, Justice Story disagreed. Although Story agreed that the Declaration of War did not itself operate to authorize the confiscation of enemy property, he argued nonetheless that the President had independent authority, once war was declared, to seize enemy property:

> The act of 18th June, 1812, ch. 102, is in very general terms, declaring war against Great Britain, and authorizing the president to employ the public forces to carry it into effect.

> even the President may transgress, is undeniably significant. This conclusion is bolstered by the fact that Chief Justice Marshall actually acknowledged a broad scope of inherent presidential power to order military conduct absent any congressional authorization, but obviously felt that this authority ended when Congress spoke.

Id. (citation omitted).

[64] The most recent in-depth treatment of the cases is typical of this trend. *See* Sidak, *supra* note 18; *see also* John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167, 294 n.584 (1996). For the classic treatments of the cases to which Sidak's and Yoo's work responds, see LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 80-82 (1972); Charles A. Lofgren, *War-Making Under the Constitution: The Original Understanding*, 81 YALE L.J. 672, 695-97 (1972); Leonard G. Ratner, *The Coordinated Warmaking Power—Legislative, Executive, and Judicial Roles*, 44 S. CAL. L. REV. 461, 465 (1971); Abraham D. Sofaer, *The Presidency, War, and Foreign Affairs: Practice Under the Framers*, 40 LAW & CONTEMP. PROBS. 12, 27 (1976); and William Van Alstyne, *Congress, The President, and The Power to Declare War: A Requiem for Vietnam*, 121 U. PA. L. REV. 1, 18-19 (1972). *See also* JOHN HART ELY, WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH 3 (1993); HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR 81 (1990).

[65] 12 U.S. (8 Cranch) 110 (1814).

[66] *See* Act of June 18, 1812, ch. 102, 2 Stat. 755.

[67] *Brown*, 12 U.S. at 128. For a contemporary discussion of *Brown*'s significance, see Ingrid Brunk Wuerth, *The President's Power To Detain "Enemy Combatants": Modern Lessons from Mr. Madison's Forgotten War*, 98 NW. U. L. REV. 1567, 1597-607 (2004).

> Independent of such express authority, I think that, as the executive of the nation, he must, as an incident of the office, have a right to employ all the usual and customary means acknowledged in war, to carry it into effect. And there being no limitation in the act, it seems to follow that the executive may authorize the capture of all enemies' property, wherever, by the law of nations, it may be lawfully seized.[68]

What is telling about Justice Story's dissent is the extent to which it crystallizes the holding of Chief Justice Marshall's majority opinion—that President Madison lacked authority to capture enemy property within the United States because no Act of Congress authorized such action. Regardless of the contemporary vitality of such a view of the separation of powers, *Brown* therefore suggests that *Little* was not *sui generis*, and that Chief Justice Marshall was of the view that, where Congress was constitutionally empowered to act during wartime, the President's power would be defined by negative reference to legislative authority.

C. Youngstown *on Marshall's View: Justice Burton and Justice Clark*

Chief Justice Marshall's view of the separation of war powers received a rather forceful voice in the most important of separation-of-powers cases, *Youngstown Sheet & Tube Co. v. Sawyer*." Justice Black, in his majority opinion, saw the issue in stark terms, holding that President Truman's Executive Order to seize the steel mills was an exercise of the lawmaking power, and that the President could never constitutionally exercise such authority in the absence of explicit congressional authorization.[69] In separate opinions, Justice Frankfurter and Justice Burton both suggested that the issue was not whether the President could act in the *absence* of Congress, but only whether the President could act in contravention of procedures affirmatively established by Congress. As Justice Burton wrote:

> Does the President, in such a situation, have inherent constitutional power to seize private property which makes congressional action in relation thereto unnecessary? We find no such power available to him under the present circumstances. The present situation is not comparable to that of an imminent invasion or threatened attack. We do not face the issue of what might be the President's constitutional power to meet such catastrophic situations. Nor is it claimed that the current seizure is in the nature of a military command addressed by the President, as Commander-in-

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[68] *Brown*, 12 U.S. at 145 (Story, J., dissenting).

[69] *See, e.g., id.* at 587-89; *see also* Patrick O. Gudridge, *Ely, Black, Grotius, & Vattel*, 50 U. MIAMI L. REV. 81, 84-89 (1995) (contextualizing Black's analysis in *Youngstown*).

> Chief, to a mobilized nation waging, or imminently threatened with, total war.[70]

In a stanza that would be echoed by Justices Kennedy and Breyer in *Hamdan*, Burton concluded that

> The controlling fact here is that Congress, within its constitutionally delegated power, has prescribed for the President specific procedures, exclusive of seizure, for his use in meeting the present type of emergency. Congress has reserved to itself the right to determine where and when to authorize the seizure of property in meeting such an emergency. Under these circumstances, the President's order of April 8 invaded the jurisdiction of Congress. It violated the essence of the principle of the separation of governmental powers. Accordingly, the injunction against its effectiveness should be sustained.[71]

Whereas Justice Burton echoed Chief Justice Marshall's view on the separation of powers without citation, Justice Clark, in his concurrence, relied explicitly on Marshall's opinion in *Little*. Indeed, Clark's opinion *began* by invoking *Little*: "One of this Court's first pronouncements upon the powers of the President under the Constitution was made by Chief Justice John Marshall some one hundred and fifty years ago."[72] After summarizing *Little*, Justice Clark recounted the three statutory procedures available to President Truman to respond to the steel mill strikes, concluding that

> neither the Defense Production Act nor Taft-Hartley authorized the seizure challenged here, and the Government made no effort to comply with the procedures established by the Selective Service Act of 1948, a statute which expressly authorizes seizures when producers fail to supply necessary defense materiel.[73]

Beginning his opinion with Chief Justice Marshall and concluding with Justice Story,[74] Justice Clark suggested that, where Congress had properly acted to impose substantive and procedural limitations on executive action, the inquiry began and ended with the executive's adherence thereto.[75]

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[70] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 659-60 (1952) (Burton, J., concurring) (footnote omitted).

[71] *Id.*; *see also* Harold J. Krent, *Separating the Strands in Separation of Powers Controversies*, 74 VA. L. REV. 1253, 1295, 1295 n.177 (1988).

[72] *Youngstown*, 343 U.S. at 660 (Clark, J., concurring in the judgment).

[73] *Id.* at 665-66.

[74] *See id.* at 666-67 (citing The Orono, 18 F. Cas. 830, 830 (C.C.D. Mass. 1812) (No. 10,585) (Story, Circuit Justice)).

[75] *Id.* at 660 (Clark, J., concurring in the judgment).

D. Youngstown *on Jackson's View*

But we have long since forgotten both Justice Burton's and Justice Clark's resolution of the issue in *Youngstown*. Instead, generations of law students are taught Justice Jackson's concurrence (and its tripartite taxonomy for resolving conflicts between the political branches), as the *sine qua non* both of *Youngstown* specifically, and separation-of-powers law generally.

Rehashing briefly, Jackson classified separation-of-powers controversies into three categories. In the first, "When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate."[76] A court could invalidate presidential action falling into the first category only by holding that the federal government "as an undivided whole lacks power."[77] Jackson's second category, the "zone of twilight," includes those cases where the President acts in the face of congressional silence. Such "congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility."[78]

Finally, the third category, where the President's power "is at its lowest ebb,"[79] includes those cases where the President "takes measures incompatible with the expressed or implied will of Congress." In this field, Jackson concluded, "Courts can sustain exclusive Presidential control . . . only by disabling the Congress from acting upon the subject."[80]

Jackson's concurrence thus brushed away the simplicity of Chief Justice Marshall's approach in *Little* and *Brown*—and of Justice Burton's and Justice Clark's opinions in *Youngstown*—in favor of a more nuanced and sophisticated framework. First, in his second category, Jackson explicitly recognized that presidential claims to power often would prevail in the face of congressional silence.[81] Far more importantly, Jackson's third category implicitly suggested that there were cases where the President could act lawfully in contravention of congressional limitations.[82] Moreover, Jackson's suggestion that, in the third category, the President "can rely only upon his own constitutional powers minus any constitutional powers of Congress over

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[76] *Id.* at 635 (Jackson, J., concurring).

[77] *Id.* at 637.

[78] *Id.*

[79] *Id.*

[80] *Id.* at 637-38.

[81] *See id.* at 637.

[82] *Youngstown*, 343 U.S. at 637-38.

the matter,"[83] presupposes that, in cases where Congress lacks constitutional authority to regulate, the heightened scrutiny would not apply. That is, whereas Chief Justice Marshall and Justices Burton and Clark viewed the separation-of-powers problem in terms of Congress's authority to disable the President from acting, Jackson saw the issue entirely contrariwise—as going to the President's authority (with help from the courts) in some cases to disable Congress.[84]

Thus, although Jackson saw *Youngstown* as the paradigmatic case for his third category,[85] his methodological approach to the problem suggested that Chief Justice Marshall's approach was just too simplistic.[86] As we will shortly see, in so holding, Jackson may well have opened something of a Pandora's Box vis-à-vis the separation of powers, especially in cases involving claims to inherent presidential power.

E. Dames & Moore, Campbell v. Clinton, *and the Separation of Powers Before September 11*

Justice Jackson's trifurcation of separation-of-powers disputes did little to simplify judicial resolution of such conflicts. Thus, in 1981, in *Dames & Moore v. Regan*,[87] the Court adopted a somewhat strained interpretation of the International Emergency Economic Powers Act (IEEPA)[88] and the Hostage Act[89] in order to sustain President Carter's authority to enter into a deal for the release of the Iranian hostages.[90] In finding clear statutory acquiescence in President Carter's actions in a statute that was, at best, ambiguous, Justice Rehnquist effectively vitiated Jackson's taxonomy—or, at

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[83] *Id.* at 637.

[84] *See id.* at 637-38.

[85] Indeed, Jackson made quick work of any argument that Truman's seizure of the steel mills fell into his first or second categories. *See id.* at 638-39. Instead, he was clear that, "[i]n choosing a different and inconsistent way of his own, the President cannot claim that it is necessitated or invited by failure of Congress to legislate upon the occasions, grounds and methods for seizure of industrial properties." *Id.* at 639 (footnotes omitted).

[86] Although Jackson saw the seizure as implicating his third category, he did not view that conclusion as conclusive of its illegality, for he then proceeded to exhaustively analyze whether, even in the third category, the seizure could nevertheless be justified by reference to the President's inherent authority. *See id.* at 640-50.

[87] 453 U.S. 654 (1981).

[88] 50 U.S.C. §§ 1701-06 (2000).

[89] 22 U.S.C §§ 1731-32.

[90] *See* Harold Hongju Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L.J. 1255, 1306-13 (1988) (summarizing, and harshly criticizing, Justice Rehnquist's treatment of *Youngstown* in *Dames & Moore*).

least, turned it on its head. As Harold Koh wrote, after *Dames & Moore* and *INS v. Chadha*,[91]

> a court may construe congressional inaction or legislation in a related area as implicit approval for a challenged executive action. . . . These rulings create a one-way "ratchet effect" that effectively redraws the categories described in Justice Jackson's *Youngstown* concurrence. For by treating all manner of ambiguous congressional action as "approval" for a challenged presidential act, a court can manipulate almost any act out of the lower two Jackson categories, where it would be subject to challenge, into Jackson Category One, where the President's legal authority would be unassailable. . . . These decisions have the net effect of dramatically narrowing Jackson Category Three to those very few foreign affairs cases in which the President both lacks inherent constitutional powers and is foolish enough to act contrary to congressional intent clearly expressed on the face of a statute.[92]

Thus, to whatever extent Justice Jackson's concurrence in *Youngstown* had provided the first express judicial departure from Chief Justice Marshall's view of Congress's disabling power, Justice Rehnquist in *Dames & Moore* exploited Jackson's rationale to limit Marshall's theory to only those cases where (1) Congress had explicitly prohibited the presidential action at issue; (2) no other Act of Congress called that prohibition into question; and (3) the President lacked inherent constitutional authority for his actions.

The sordid state in which *Dames & Moore* left separation-of-powers jurisprudence prior to September 11 is perhaps best manifested in the D.C. Circuit's 2000 decision in *Campbell v. Clinton*.[93] Thirty-one members of Congress sued seeking a declaratory judgment that the United States' participation in N.A.T.O. airstrikes on Kosovo without congressional authorization violated the War Powers Resolution.[94] Although the majority dismissed for lack of standing, each judge filed a separate concurrence explicating each of their views of the question of whether, by virtue of the War Powers Resolution, Congress's failure to authorize U.S. involvement in the airstrikes was enforceable as a rejection of President Clinton's authority thereto.[95] If, as two of the three opinions in *Campbell* effectively suggested,[96]

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[91] 462 U.S. 919 (1983).

[92] Koh, *supra* note 90, at 1311 (footnotes omitted).

[93] 203 F.2d 19 (D.C. Cir. 2000).

[94] 50 U.S.C. §§ 1541-48 (2000).

[95] *See Campbell*, 203 F.2d at 24-28 (Silberman, J., concurring); *id.* at 28-34 (Randolph, J., concurring in the judgment); *id.* at 37-41 (Tatel, J., concurring).

the War Powers Resolution was not an enforceable limit on the President's war powers, it is hard to conceive of a statute that would be.

III. "ANTI-DISABLING": THE COMMANDER-IN-CHIEF OVERRIDE

Although Congress enacted two significant statutes authorizing various aspects of President Bush's response to September 11 in the immediate aftermath of the attacks,[97] it otherwise remained largely silent in the ensuing months and years, as legal challenges to the Bush Administration's policies emerged.[98] Such challenges include the detention of U.S. citizens as "enemy combatants"; the detention and potential trial by military commission of non-citizen "enemy combatants" at Guantánamo Bay, Cuba; the maintenance of secret overseas prisons for terrorist suspects dubbed "black sites"; the mistreatment of prisoners at Abu Ghraib prison (and elsewhere); and various domestic countersurveillance measures, including the warrantless wiretapping program exposed by the *New York Times* and *Washington Post* in December 2005.[99]

Thus, in the face of a series of pre-9/11 statutes purporting to limit the President's authority, even during wartime, the Bush Administration's legal response looked for authority to either the vague and ambiguous language of

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[96] Both Judge Silberman and Judge Randolph would have concluded that the dispute was nonjusticiable even if the plaintiffs had standing.

[97] The two statutes, of course, are the Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, 115 Stat. 224 (2001), enacted on September 18, and the Uniting and Strengthening America by Providing Appropriate Tools Required To Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272, enacted on October 26.

[98] As the editorial board of the *Washington Post* noted in November 2003:

> One of the great problems with the legal response to 9/11 has been Congress's unwillingness to do its job and write law. Sure, it passed the USA Patriot Act in the immediate aftermath of the attacks. But since then it has played next to no role in developing the legal system under which the war on terrorism is actually fought. The questions that have arisen are myriad and profound: What changes will be required to ensure that complex terrorism cases can be tried in federal courts? What constraints, if any, should prevent the president from locking up Americans as enemy combatants? What access do such people have to the courts? Yet Congress has responded to all of these ultimately legislative questions with a bewildering silence. By inaction, it has left the resolution of such issues to a dialogue between the executive branch and the courts, one based on laws and precedents that simply are inadequate for an untraditional conflict against a shadowy, non-state enemy.

Editorial, *A New Approach*, WASH. POST, Nov. 30, 2003, at B6; *see also* Editorial, *The Moussaoui Law*, WASH. POST, Aug. 4, 2003, at A14 ("Congress has sat on the sidelines far too long as important decisions were made concerning the legal response to 9/11.").

[99] *See* James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1; Dan Eggen, *Bush Authorized Domestic Spying: Post-9/11 Order Bypassed Special Court*, WASH. POST, Dec. 16, 2005, at A1. *See generally* ACLU v. NSA, 438 F. Supp. 2d 754 (E.D. Mich. 2006).

the September 18, 2001 Authorization for Use of Military Force (AUMF)[100] or to theories of inherent executive power. Such claims to inherent presidential power were hardly new.[101] What was unprecedented was the argument that statutes imposing apparent barriers to numerous types of executive action were unconstitutional to the extent that they infringed upon the President's constitutional authority as "Commander in Chief."

A. The Debut of the Commander-in-Chief Override: Hamdi *and* Padilla

At least publicly, the Commander-in-Chief override made its first appearance in testimony by Attorney General Ashcroft at a July 2002 hearing of the Senate Judiciary Committee. The issue arose in response to a question from Senator Russell Feingold asking whether 18 U.S.C. § 4001(a) (which has since become known as the "Non-Detention Act")[102] prohibited the extrajudicial detention of U.S. citizens, including "enemy combatants," without express congressional authorization.[103] Attorney General Ashcroft's response suggested, first, that the statute did not apply to military detentions[104] and second, that, even if it did, the AUMF satisfied § 4001(a). Mischaracterizing a floor statement by Congressman Abner Mikva (one of the

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[100] Pub. L. No. 107-40, 115 Stat. 224 (2001). For a robust debate on the scope of the substantive authority enmeshed within the AUMF, compare Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047 (2005), and Curtis A. Bradley & Jack L. Goldsmith, *Rejoinder: The War on Terrorism, International Law, Clear Statement Requirements, and Constitutional Design*, 118 HARV. L. REV. 2683 (2005), with Ryan Goodman & Derek Jinks, *International Law, U.S. War Powers, and the Global War on Terrorism*, 118 HARV. L. REV. 2653 (2005), Cass R. Sunstein, *Administrative Law Goes to War*, 118 HARV. L. REV. 2663 (2005), and Mark Tushnet, *Controlling Executive Power in the War on Terrorism*, 118 HARV. L. REV. 2673 (2005).

[101] *See, e.g.*, David Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 HARV. C.R.-C.L. L. REV. 1 (2003).

[102] Section 4001(a), which provides that "[n]o citizen shall be imprisoned or otherwise detained except pursuant to an Act of Congress," was enacted in 1971 largely in response to the internment of U.S. citizens of Japanese descent during World War II. 18 U.S.C. § 4001(a)(2000). For detailed surveys of Section 4001(a) and its relationship to the *Hamdi* and *Padilla* cases, see Stephen I. Vladeck, Note, *The Detention Power*, 22 YALE L. & POL'Y REV. 153 (2004); Stephen I. Vladeck, Policy Comment, *A Small Problem of Precedent: 18 U.S.C. § 4001(a) and the Detention of U.S. Citizen "Enemy Combatants,"* 112 YALE L.J. 961 (2003).

[103] *Attorney General John Ashcroft Testifies Before the U.S. Judiciary Committee: Hearing Before the S. Comm. on the Judiciary*, 107th Cong., 2002 WL 1722725 (2002) [hereinafter *Ashcroft Testifies*] The hearing was held just over one month after Ashcroft had announced from Moscow that Jose Padilla had been taken into custody as an "enemy combatant."

[104] *See id.* Ashcroft's narrow reading of Section 4001(a) was arguably foreclosed by an earlier Supreme Court decision, *Howe v. Smith*, 452 U.S. 473 (1981), in which Chief Justice Burger had emphasized that "the plain language of § 4001(a) proscrib[es] detention *of any kind* by the United States, absent a congressional grant of authority to detain. If the petitioner is correct that [no] Act of Congress authorizes his detention by federal authorities, his detention would be illegal." *Id.* at 479 n.3.

co-sponsors of § 4001(a)),[105] Ashcroft then suggested that the President nevertheless has inherent authority pursuant to the Commander-in-Chief Clause to detain U.S. citizens as enemy combatants.[106] The Attorney General further suggested that § 4001(a), to the extent it required congressional authorization (and might bar such detentions in the absence thereof), unconstitutionally infringed upon that authority.[107]

Ultimately, the Supreme Court never confronted the Commander-in-Chief override argument in either of the cases challenging the detention of U.S. citizens as enemy combatants. In *Hamdi*, the plurality concluded that the AUMF did in fact satisfy § 4001(a), thereby avoiding the question of whether § 4001(a) unconstitutionally infringed upon the President's inherent power to detain U.S. citizens as enemy combatants.[108] In *Padilla*, although the Second Circuit and the U.S. District Court for the District of South Carolina both held that the AUMF did *not* satisfy § 4001(a), and that Padilla's detention was therefore unlawful,[109] the Supreme Court vacated the Second Circuit's decision on procedural grounds[110] and subsequently denied certiorari on Padilla's appeal from the Fourth Circuit (which had reversed the

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[105] The language invoked by the government was Mikva's suggestion that "nothing in the House bill . . . interferes with [the Commander-in-Chief] power, because obviously no act of Congress can derogate the constitutional power of a President." 117 CONG. REC. 31,555 (1971). But Mikva qualified his statement with the caveat that it was only true "[*i*]*f* there is any inherent [constitutional] power of the President . . . to authorize the detention of any citizen of the United States." *Id.* (emphasis added). Much of Mikva's speech suggests that he was skeptical that such power existed. *See id.* at 31,556.

[106] *See Ashcroft Testifies*, *supra* note 103.

[107] *See id.*

[108] *See* Hamdi v. Rumsfeld, 542 U.S. 507, 516-24 (2004) (plurality). *But see id.* at 542-52 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment) (arguing that the AUMF did not authorize Hamdi's detention, and that the detention therefore violated § 4001(a)); *id.* at 573-77 (Scalia, J., dissenting) (arguing that Congress *could not* authorize extrajudicial detention of U.S. citizens without suspending habeas corpus).

[109] *See* Padilla v. Rumsfeld, 352 F.3d 695 (2d Cir. 2003), *rev'd on other grounds*, 542 U.S. 426 (2004); Padilla v. Hanft, 389 F. Supp. 2d 678 (D.S.C. 2005), *rev'd*, 423 F.3d 386 (4th Cir. 2005), *cert. denied*, 126 S. Ct 1649 (2006). *See also* Padilla v. Hanft, 432 F.3d 582 (4th Cir. 2005) (denying the government's motion to transfer Padilla upon the filing of criminal charges against him).

[110] *See Padilla*, 542 U.S. 426. It bears noting that Justice Stevens, joined by Justices Souter, Ginsburg, and Breyer, was at pains in his *Padilla* dissent to emphasize that, "[c]onsistent with the judgment of the Court of Appeals, I believe that the Non-Detention Act, 18 U.S.C. § 4001(a), prohibits—and the [AUMF] does not authorize—the protracted, incommunicado detention of American citizens arrested in the United States." *Id.* at 464 n.8.

If one assumes that Justice Scalia's dissent in *Hamdi* would have applied *a fortiori* to the detention of U.S. citizens captured on U.S. soil, then there appeared to be five votes on the merits to hold that § 4001(a) prohibited Padilla's detention as an "enemy combatant." *See Hamdi*, 542 U.S. 507. Such a decision, had the government not avoided it by transferring Padilla to civilian criminal custody while his second petition for certiorari was pending, would have itself necessarily rejected the override theory.

South Carolina district court) after Padilla had been indicted by a federal grand jury in Miami and transferred to civilian custody.[111]

B. *The Commander-in-Chief Override Defended: The NSA White Paper*

As suggested above, the Commander-in-Chief override made its post-9/11 debut in the detention cases. Yet its most prominent assertion—and, to date, its most substantial defense—came after the disclosure of the federal government's domestic wiretapping program in December 2005.[112] On January 19, 2006, Attorney General Alberto Gonzalez transmitted to Congress a forty-two page memorandum prepared by the Department of Justice providing an elaborate and sustained legal defense of the wiretapping program.[113] Although the NSA White Paper argued that the President possessed both constitutional and statutory authority to conduct domestic warrantless wiretapping, the Paper also responded to the suggestion that the Foreign Intelligence Surveillance Act necessarily denied the President the authority to conduct surveillance unauthorized by the Act.

The crux of the separation-of-powers problem implicated in the wiretapping debate is 50 U.S.C. § 1811, part of the Foreign Intelligence Surveillance Act of 1978 (FISA),[114] which provides that "[n]otwithstanding any other law, the President, through the Attorney General, may authorize electronic surveillance without a court order under this subchapter to acquire foreign intelligence information for a period not to exceed fifteen calendar days following a declaration of war by the Congress."[115] The negative implication of § 1811, as many have argued,[116] is that Congress only authorized *warrantless* wiretapping, even under the unorthodox and deferential FISA procedures, for fifteen days after the outset of a war. After those fifteen days, the President would need either a judicial warrant or a

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[111] As Justice Kennedy explained in his concurrence in the denial of certiorari (joined by Chief Justice Roberts and Justice Stevens): "That Padilla's claims raise fundamental issues respecting the separation of powers, including consideration of the role and function of the courts, also counsels against addressing those claims when the course of legal proceedings has made them, at least for now, hypothetical. This is especially true given that Padilla's current custody is part of the relief he sought, and that its lawfulness is uncontested." *Padilla*, 126 S. Ct. at 1650 (Kennedy, J., concurring in the denial of certiorari).

[112] *See, e.g.*, Cole, *supra* note 101.

[113] *See* NSA White Paper, *supra* note 22.

[114] 50 U.S.C. §§ 1801-71 (2000). FISA also amended several provisions of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, tit. III, 82 Stat. 197, most notably 18 U.S.C. § 2511.

[115] 50 U.S.C. § 1811.

[116] *See, e.g.*, Cole & Lederman, *supra* note 22; see *also* Letter from Curtis A. Bradley et al. to Members of Congress (July 14, 2006), *available at* http://www.law.duke.edu/publiclaw/pdf/lettertocongress7-14.pdf (arguing that *Hamdan* reaffirms the analysis contained in the two earlier letters summarized by Cole and Lederman, and reprinted therein).

new Act of Congress to continue to conduct such surveillance. In addition, such a reading of § 1811 is bolstered by two other provisions, 18 U.S.C. § 2511(2)(f), which provides that the "procedures in . . . [two provisions of Title 18 and in FISA] shall be the exclusive means by which electronic surveillance, as defined in section 101 of such Act, and the interception of domestic wire, oral, and electronic communications may be conducted,"[117] and 50 U.S.C. § 1809(a)(1), which prohibits "electronic surveillance under color of law except as authorized by statute."[118] Thus, if Chief Justice Marshall's theory of the separation of powers—as reflected in *Little* and *Brown*, and in Justices Frankfurter and Burton's concurrences in *Youngstown*—has any modern force, these three statutes, when read together, would seem to vitiate claims of inherent presidential authority in the field.

The NSA White Paper, however, argued vehemently to the contrary. After noting that "courts and the Executive Branch typically construe a general statute, even one that is written in unqualified terms, to be implicitly limited so as not to infringe on the President's Commander in Chief powers,"[119] the memo evoked the specter of constitutional conflict:

> Reading FISA to prohibit the NSA activities would raise two serious constitutional questions, both of which must be avoided if possible: (1) whether the signals intelligence collection the President determined was necessary to undertake is such a core exercise of Commander in Chief control over the Armed Forces during armed conflict that Congress cannot interfere with it at all and (2) whether the particular restrictions imposed by FISA are such that their application would impermissibly impede the President's exercise of his constitutionally assigned duties as Commander in Chief.[120]

At the time FISA was enacted, many questioned its constitutionality on Fourth Amendment individual rights grounds.[121] The NSA White Paper, however, advanced the unprecedented contention that FISA might be unconstitutional as an infringement upon Article II's Commander-in-Chief

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[117] 18 U.S.C. § 2511(2)(f).

[118] 50 U.S.C. § 1809(a)(1).

[119] *Id.* at 29.

[120] *Id.*

[121] *See, e.g.*, Nola K. Breglio, Note, *Leaving FISA Behind: The Need To Return to Warrantless Foreign Intelligence Surveillance*, 113 YALE L.J. 179 (2003); Gregory E. Birkenstock, Note, *The Foreign Intelligence Surveillance Act and Standards of Probable Cause: An Alternative Analysis*, 80 GEO. L.J. 843 (1992). *But see In re* Sealed Case, 310 F.3d 717 (FISA Ct. Rev. 2002) (upholding FISA's constitutionality on Fourth Amendment grounds).

Clause.[122] As such, although the three statutory provisions noted above appeared to explicitly deny the President the authority he claimed for the NSA wiretapping program, which would have placed the conflict in Justice Jackson's third, "lowest ebb" category,[123] the Administration responded that the statutes were unconstitutional as so construed.[124] A situation arose with which Justice Jackson's otherwise canonical opinion had not expressly grappled.

Implicitly, however, we might well trace the origins of the override theory to Justice Jackson. After all, it was in his description of his third category that he concluded that "[c]ourts can sustain exclusive Presidential control in such a case only by disabling the Congress from acting upon the subject."[125] The override theory adds substantive content to Jackson's statement, suggesting that where the war powers are implicated, it is the Commander-in-Chief Clause that "disabl[es] Congress from acting upon the subject," and that courts need only enforce the constitutional text. The problem arises from the absence of a clear stopping point. Because the Commander-in-Chief Clause speaks only in general terms, it is unclear why the Clause *would* disable congressional action in some cases, but not in others. Would the Non-Detention Act run afoul of the Clause? Would 50 U.S.C. § 1811?

It would be difficult indeed to come up with Acts of Congress that more explicitly provide for the exclusivity of procedures that the legislature had authorized than statutes prohibiting executive action "except as authorized by Congress." Yet, Justice Jackson's concurrence provided absolutely no help in resolving this question, or even in identifying which standard of review courts were to apply.

C. The Commander-in-Chief Override Extended: Military Commissions

Less obviously than in *Hamdi* and *Padilla*, the Commander-in-Chief override was also an important facet of the legal arguments arising out of the challenge to President Bush's Military Order of November 13, 2001, pursuant to which military tribunals were established at Guantánamo Bay to try suspected "enemy combatants" for war crimes.[126] In *Ex parte Quirin*[127] and *In*

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[122] *See, e.g.*, NSA White Paper, *supra* note 21, at 30 ("There are certainly constitutional limits on Congress's ability to interfere with the President's power to conduct foreign intelligence searches, consistent with the Constitution, within the United States.").

[123] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring.)

[124] *See* NSA White Paper, *supra* note 22, at 30-31.

[125] *Youngstown*, 343 U.S. at 637-38 (Jackson, J., concurring). Jackson's lengthy discussion of the Commander-in-Chief Clause, while rejecting the Truman Administration's resort thereto, arguably gave it a far broader substantive scope than it had ever previously received in the *U.S. Reports*. *Id.*

[126] Military Order of November 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 FED. REG. 57,833 (Nov. 16, 2001).

re Yamashita,[128] a pair of significant precedents from World War II, the Supreme Court relied upon the existence of specific congressional authorization for trial by military tribunals. Thus, authorization, as of September 11, was codified in Article 21 of the Uniform Code of Military Justice (UCMJ):

> The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals.[129]

Similarly, Article 36 of the UCMJ requires that military commission procedures effectively mirror those established by the UCMJ for courts-martial.[130] Although *Quirin* and *Yamashita* avoided reaching the constitutionality of military tribunals absent congressional authorization, they both focused on the extent to which the military tribunals at issue adhered to the procedures Congress had enacted.

As such, the applicability of the override theory vis-à-vis President Bush's military tribunals was implicit: if *Quirin* and *Yamashita* were to be taken at face value, then the tribunals established pursuant to the November 13, 2001 Military Order could only be lawful if (1) they adhered to the UCMJ, which they did not; or (2) adherence to statutorily-imposed standards was unnecessary.

IV. *HAMDAN* AND THE SEPARATION OF POWERS

A. Hamdan

Relying upon the Supreme Court's celebrated 1866 decision in *Ex parte Milligan*,[131] civil liberties groups from the outset cast the debate over military tribunals as whether such *ad hoc* courts could ever be constitutional where the civilian courts were open and functioning. However, *Hamdan* was litigated from the outset on the supposition that Congress could, in some cases, provide authorization. The argument at the heart of *Hamdan* was only that Congress had not so provided, either before or after September 11.[132]

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[127] 317 U.S. 1 (1942).

[128] 327 U.S. 1 (1946).

[129] 10 U.S.C. § 821 (2000).

[130] *Id.* § 836.

[131] 71 U.S. (4 Wall.) 2 (1866).

[132] *See generally* Katyal, *supra* note 3.

Thus, whereas many saw *Hamdan* as the chance for the Supreme Court to revisit its controversial (and often discredited) decisions in *Quirin* and *Yamashita*, Hamdan's best arguments actually relied upon the two World War II-era cases, which had both looked to the former Article 15 of the Articles of War (Article 21 of today's UCMJ) for congressional authorization for military tribunals. As Chief Justice Stone observed in *Quirin*:

> By the Articles of War, and especially Article 15, Congress has explicitly provided, so far as it may constitutionally do so, that military tribunals shall have jurisdiction to try offenders or offenses against the law of war in appropriate cases. Congress, in addition to making rules for the government of our Armed Forces, has thus exercised its authority to define and punish offenses against the law of nations by sanctioning, within constitutional limitations, the jurisdiction of military commissions to try persons for offenses which, according to the rules and precepts of the law of nations, and more particularly the law of war, are cognizable by such tribunals.[133]

Thus, *Quirin* avoided the question of whether President Roosevelt would have had inherent constitutional authority to try the Nazi saboteurs via military tribunal by finding authorization for such proceedings, however controversially, in an Act of Congress—the 1916 Articles of War. Hamdan's challenge to President Bush's military tribunals thus invoked the negative inference of *Quirin*'s rationale: If the tribunals did not comport with Article 21 (the modern descendant of Article 15), if the procedures did not comport with Article 36, and if no other express authorization could be found in an Act of Congress (which would otherwise override Articles 21 and 36), then the tribunals were unauthorized, and therefore unlawful. *Hamdan* thus squarely raised the question of whether congressional limits on presidential authority were enforceable, for it would not matter if the tribunals created by the Bush Administration did not comport with Articles 21 and 36, or were not otherwise authorized by Congress, if the UCMJ could not constitutionally limit the President's authority.

So construed, the complicated logic of Justice Stevens's majority opinion appears more compelling. After dispensing with the jurisdictional issue in Part II and the abstention issue in Part III, in Part IV the Court proceeded to analyze whether either the AUMF or the Detainee Treatment Act of 2005 provided authorization for Hamdan's military tribunal.[134] Concluding that neither were sufficient, Justice Stevens turned, in Part V, to determine whether the tribunals created pursuant to the November 13, 2001 Military Order nonetheless complied with Articles 21 and 36, and with Common

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[133] *Quirin*, 317 U.S. at 28.

[134] Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2774-75 (2006).

Article 3 of the Geneva Conventions.[135] As such, the majority in *Hamdan* never decided any direct constitutional question concerning either the facial legality of the military tribunals, the separation of powers as between Congress and the President, or the constitutional rights owed to tribunal defendants.[136]

Instead, the majority's analysis focused on whether the commissions were consistent with the procedures specified by the UCMJ,[137] whether they were consistent with the requirements of the Geneva Conventions,[138] and, as a plurality, whether the offense with which Hamdan was charged—conspiracy—was even recognized under the laws of war as an offense triable by military commission.[139] Answering all of these questions in the negative, the majority ultimately concluded that the military tribunals established pursuant to the November 13, 2001 Military Order were unlawful.[140] As to why failure to adhere to the substantive and procedural requirements by Congress was dispositive of the tribunal's legality, the majority offered only a footnote, suggesting that its disarmingly simplistic conception of the separation of powers was beyond question:

> 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. See *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 637,

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[135] As Justice Stevens wrote:

> Together, the UCMJ, the AUMF, and the DTA at most acknowledge a general Presidential authority to convene military commissions in circumstances where justified under the 'Constitution and laws,' including the law of war. Absent a more specific congressional authorization, the task of this Court is, as it was in *Quirin*, to decide whether Hamdan's military commission is so justified. It is to that inquiry we now turn.

Id. at 2775.

[136] In that regard, the decision in *Hamdan* might well be analogized to Chief Justice Chase's long-neglected concurring opinion in *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866). Although the majority in *Milligan*, per Justice Davis, rejected the possibility that military tribunals could *ever* be constitutional when the civilian courts were open and functioning, Chief Justice Chase, writing for himself and three other Justices, argued that the defect in the military tribunal that had tried Milligan was that it had not been properly authorized by *Congress*. *See id.* at 136 ("[T]he opinion which has just been read . . . asserts not only that the military commission held in Indiana was not authorized by Congress, but that it was not in the power of Congress to authorize it . . . . We cannot agree to this."). Indeed, the *Hamdan* majority expressly invoked Chase's opinion from *Milligan* in several places. *See Hamdan*, 126 S. Ct. at 2773-74, 2776.

[137] *Id.* at 2785.

[138] *Id.* at 2793.

[139] *Id.* at 2775-86.

[140] *Id.* at 2759.

> 72 S.Ct. 863, 96 L.Ed. 1153 (1952) (Jackson, J., concurring). The Government does not argue otherwise.[141]

The two concurring opinions—by Justices Breyer and Kennedy—only reaffirmed the separation-of-powers logic implicit throughout Justice Stevens's majority opinion.[142] Justice Kennedy in particular, whose arguably controlling concurrence painstakingly compared the procedures of the proposed military commissions with the requirements provided by Congress for courts-martial under the UCMJ,[143] concluded his analysis by noting that,

> as presently structured, Hamdan's military commission exceeds the bounds Congress has placed on the President's authority in §§ 836 and 821 of the UCMJ. Because Congress has prescribed these limits, Congress can change them, requiring a new analysis consistent with the Constitution and other governing laws. At this time, however, we must apply the standards Congress has provided. By those standards the military commission is deficient.[144]

In short, *Hamdan*'s central contribution was in turning *Quirin* and *Yamashita* back upon themselves. Whereas both of those cases had adopted creative interpretations of statutory requirements for military tribunals to avoid the lurking question of the tribunals' legitimacy absent adherence to such statutes, *Hamdan* assumed their logical inverse—that, in the absence of compliance with congressional procedures, military tribunals would be unlawful,[145] without ever deciding as much. In effect, *Hamdan* held that the inverse of *Quirin* and *Yamashita* followed directly from those two cases, which is, of course, a logical fallacy.

Putting aside *Hamdan*'s shortcomings in that respect, it was also a profoundly odd choice of case in which to stake out such a strong view of Congress's power vis-à-vis the Commander in Chief. Unlike in *Hamdi* and *Padilla*, or in the context of the NSA wiretapping program, there was less

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[141] *Id.* at 2774 n.23. To say that "[t]he Government does not argue otherwise" is entirely misleading, for the government's entire theory of the case was that the UCMJ procedures were not exhaustive.

[142] *See id.* at 2799-801.

[143] In these two parts of his concurrence, Justice Kennedy was joined by Justices Souter, Ginsburg, and Breyer. *Id.* at 2799.

[144] *Id.* at 2808 (Kennedy, J., concurring in part).

[145] In a fascinating recent study of Justice Rutledge, Craig Green suggests that *Hamdan* "overruled" *Yamashita*. *See* Craig Green, *Wiley Rutledge, Executive Detention, and Judicial Conscience at War*, 84 WASH. U. L. REV. 99, 114 (2006). But *Hamdan* did no such thing. *Hamdan* certainly *did* adopt a far more rigorous and stringent interpretation of the procedural requirements imposed by Congress upon trials by military commission than *Yamashita* did, but *Hamdan* no more overruled the 1946 decision—and its affirmation of the constitutionality of military tribunals—than it overruled *Ex parte Quirin*. We need look no further than the Military Commissions Act of 2006, which I discuss shortly in the Conclusion, for proof of that.

explicit statutory evidence in the context of military tribunals (although there *were* significant implicit indications) that the procedures specified by Congress were meant to be exhaustive. Yet regardless of where one comes down on *Hamdan*'s significance, or on the underlying rationale for such a result, there can be little question that that is precisely what the majority concluded.

B. Hamdan *as* Youngstown

In the crucial footnote 23, the only part of the majority opinion where Justice Stevens even attempted to recognize the existence of a significant constitutional question in *Hamdan*, the sole citation is to Justice Jackson's *Youngstown* concurrence, and to page 637, where Jackson outlines all of the second category of separation-of-powers conflicts and the beginnings of the third.[146] It is an odd choice, though, given that even in category three cases, where the President's power was to be at its "lowest ebb," there remained a residual question about "disabling" Congress, the very question raised by the Commander-in-Chief override.

Indeed, through the lens of Justice Jackson's *Youngstown* concurrence, the logic of *Hamdan* grows only more obfuscated. Was the majority disavowing any and all claims to inherent executive power in the field of trying enemy combatants by military commission? If so, was it overruling a series of cases upholding such tribunals even where congressional authorization was questionable?[147] Was it reading the UCMJ as manifesting clear (and valid) congressional intent to oust independent executive regulation? Suffice it to say, if Justice Stevens meant to decide *Hamdan* on the strength of Justice Jackson's *Youngstown* concurrence, he skipped a few steps, for he did not even attempt to undertake the question—to which Jackson had devoted over a dozen pages—of whether the President's inherent constitutional authority might trump congressional restrictions in such a case.

Instead, the logic of the *Hamdan* majority and concurrences seems at first glance much more in line with the Frankfurter, Burton, and Clark concurrences in *Youngstown*, each of which saw the issue as almost entirely resolved by the existence of statutory procedures and by President Truman's failure to comport therewith. Viewed through the lens of those opinions and of Chief Justice Marshall's contributions in *Little* and *Brown*, *Hamdan*'s unrelenting obedience to the substantive and procedural requirements imposed by Congress through the UCMJ comes into sharp relief. So construed, the issue in *Hamdan* was not the President's unilateral authority

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[146] *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

[147] *See, e.g.*, Madsen v. Kinsella, 343 U.S. 341 (1952).

to conduct military tribunals absent *any* action from Congress. Rather, Congress, by enacting the Articles of War (and later the UCMJ), had occupied the field, and had therefore ousted independent presidential authority. In terms as straightforward as Chief Justice Marshall's interpretation of the 1799 Non-Intercourse Act, if not more so, *Hamdan* saw the separation-of-powers question at the heart of the dispute as black and white.

C. The Limits of "Democracy-Forcing": Distinguishing Congress's Power

In response, *Hamdan* was hailed in its immediate aftermath as a "democracy-forcing" decision.[148] As Jack Balkin explained,

> [w]hat the Court has done is not so much countermajoritarian as *democracy forcing*. It has limited the President by forcing him to go back to Congress to ask for more authority than he already has, and if Congress gives it to him, then the Court will not stand in his way. It is possible, of course, that with a Congress controlled by the Republicans, the President might get everything he wants. However this might be quite unpopular given the negative publicity currently swirling around our detention facilities at Guantanamo Bay. By forcing the President to ask for authorization, the Court does two things. First, it insists that both branches be on board with what the President wants to do. Second, it requires the President to ask for authority when passions have cooled somewhat, as opposed to right after 9/11, when Congress would likely have given him almost anything.... Third, by requiring the President to go to Congress for authorization, it gives Congress an opportunity and an excuse for oversight, something which it has heretofore been rather loathe to do on its own motion.[149]

Balkin's views were widely shared,[150] and with good reason. In the three opinions supporting the result, the one constant was the emphasis on empowering Congress. Of the three authoring Justices, Justice Breyer put it most bluntly:

> Congress has denied the President the legislative authority to create military commissions of the kind at issue here. Nothing

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[148] *See* Posting of Jack M. Balkin to BALKINIZATION (June 29, 2006), http://balkin.blogspot.com/2006/06/hamdan-as-democracy-forcing-decision.html.

[149] *Id.*

[150] *See, e.g.*, Posting of Randy Barnett to THE VOLOKH CONSPIRACY, June 29, 2006, http://volokh.com/posts/1151626992.shtml (discussing Jack Balkin on *Hamdan*); Posting of Dave Hoffman to CONCURRING OPINIONS, June 30, 2006, http://www.concurringopinions.com/archives/2006/06/green_on_hamdan.html.

> prevents the President from returning to Congress to seek the authority he believes necessary.
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> Where, as here, no emergency prevents consultation with Congress, judicial insistence upon that consultation does not weaken our Nation's ability to deal with danger. To the contrary, that insistence strengthens the Nation's ability to determine—through democratic means—how best to do so. The Constitution places its faith in those democratic means. Our Court today simply does the same.[151]

Yet the broad consensus supporting resort to the democratic process overlooks a vital question: Is *Hamdan* actually significant? Does *Hamdan* establish, as a constitutional principle, the presumptive enforceability of congressional limitations upon the war powers? Does it thereby establish, perhaps conclusively, the unconstitutionality of the NSA's warrantless wiretapping program and various other Bush Administration initiatives defended largely on the basis of the "Commander-in-Chief override"?[152] It would be tempting to answer these questions in the affirmative. Perhaps too tempting. Although *Hamdan* was an important decision, it is hard to find within its 177 pages any evidence of an intent to do away with a half-century of more nuanced separation-of-powers jurisprudence. Thus, while it might be appealing to characterize *Hamdan* as "Justice Clark's vindication," or something in a similar vein, such a characterization ultimately proves too much.

An alternate theory, and one that adds helpful context to our understanding of the separation of powers after *Hamdan*, would consider the source of congressional power implicated in such cases. Where Congress is acting pursuant to clear and unambiguous constitutional grants of authority, arguments in favor of Congress's power to interpose substantive limitations upon the Executive are more compelling, for the executive's structural claim to power in those fields is eaiser to rebut. Thus, in the context of military tribunals, Congress's power to provide substantive and procedural requirements can readily be traced to its constitutional authority "[t]o define and punish . . . Offences against the Law of Nations"[153] and "[t]o make Rules for the Government and Regulation of the land and naval Forces."[154] In *Little v. Barreme*, Congress's power to draw such a specific distinction between capturing ships going *to* French ports and capturing ships coming *from*

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[151] Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2799 (2006) (Breyer, J., concurring).

[152] For one variation on this argument, see Sunstein, *supra* note 5.

[153] U.S. CONST. art. I, § 8, cl. 10.

[154] *Id.* cl. 14.

French ports can be directly linked to its authority "[t]o . . . make Rules concerning Captures on Land and Water."[155]

Perhaps the real issue in assessing the viability of the Commander-in-Chief override is the specific source of legislative power that the Commander-in-Chief Clause arguably disables. Where Congress is acting pursuant to a direct textual grant of authority, to conclude that the President may nevertheless disable Congress from regulating his conduct is to subvert the most fundamental structural principles of constitutional law.[156] What *Hamdan* does not resolve is whether the converse is true: Where the President is acting in a field where Congress's authority is less well established or less clearly textually committed to the legislature, e.g., foreign affairs, those may well be the cases where the executive prevails even in Jackson's "lowest ebb" category.

V. CONCLUSION

Hamdan's immediate practical significance was heavily undermined by the Military Commissions Act of 2006,[157] which, in sweepingly broad terms, authorized all that the Bush Administration had argued for in *Hamdan* and more. Regardless of where one comes down on the Military Commissions Act as a policy measure, it is the very embodiment of the separation-of-powers principles that were at stake in *Hamdan*, and that the Bush Administration, in the Supreme Court's view, had so callously neglected. As Alex Bickel famously noted, "[s]ingly, either the President or Congress can fall into bad errors . . . So they can together too, but that is somewhat less likely, and in any event, together they are all we've got."[158]

In short, *Hamdan* accomplishes one of two substantive results with respect to the separation of powers: either it restores and reaffirms Chief Justice Marshall's straightforward "disabling" approach in *Little v. Barreme* and *Brown v. United States*, and, in so doing, dismisses sub silentio a half-century's worth of jurisprudence and scholarship on the question of how to

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[155] *Id.* cl. 11.

[156] Thus, the grant of authority to Congress in Article I "[t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions," *id.* cl. 15, empowers Congress to place substantive restrictions on the President's domestic emergency power. *See generally* Stephen I. Vladeck, *The Calling Forth Clause and the Domestic Commander-in-Chief*, 29 CARDOZO L. REV. (forthcoming 2008) (suggesting that the Calling Forth Clause resolves beyond question any suggestion that Congress cannot place substantive limits on the domestic use of military force).

[157] Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified in scattered sections of 10 and 18 U.S.C.).

[158] ELY, *supra* note 64, at 9 (quoting *Hearings on War Powers, Libya, and State-Sponsored Terrorism Before the Subcomm. on Arms Control, International Security and Science of the H. Comm. on Foreign Affairs*, 99th Cong. (1986) (statement of J. Brian Atwood, Director, National Democratic Institute) (quoted by J. Brian Atwood)).

resolve separation-of-powers conflicts when the President's power and Congress's authority overlaps, or it does not. If the latter is true, the question of *Hamdan*'s significance going forward is far murkier, especially when viewed alongside the Commander-in-Chief override. What this Article suggests is that by focusing on the constitutional source of congressional power in individual cases, as opposed to the source of executive power, we might begin to get at this question's underlying and potentially elusive answer. It is hardly a new idea, after all, that Congress's various powers have different degrees of force vis-à-vis the coordinate components of our federal system.[159]

[159] As just one prominent recent example, the Supreme Court held shortly before *Hamdan* that Congress has authority under the Bankruptcy Clause of Article I, U.S. CONST. art. I, § 8, cl. 4, to abrogate the sovereign immunity of the states, even though a decade of case law had rejected Congress's power to do so pursuant to the Commerce Clause, the Patent Clause, and a host of other Article I provisions. *See* Cent. Va. Comm. Coll. v. Katz, 546 U.S. 356 (2006).