SUPREME COURT OF THE UNITED STATES

No. 05–184

SALIM AHMED HAMDAN, PETITIONER *v.* DONALD H. RUMSFELD, SECRETARY OF DEFENSE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[June 29, 2006]

JUSTICE THOMAS, with whom JUSTICE SCALIA joins, and with whom JUSTICE ALITO joins in all but Parts I, II–C–1, and III–B–2, dissenting.

For the reasons set forth in JUSTICE SCALIA's dissent, it is clear that this Court lacks jurisdiction to entertain petitioner's claims, see *ante*, at 1–11. The Court having concluded otherwise, it is appropriate to respond to the Court's resolution of the merits of petitioner's claims because its opinion openly flouts our well-established duty to respect the Executive's judgment in matters of military operations and foreign affairs. The Court's evident belief that *it* is qualified to pass on the "[m]ilitary necessity," *ante*, at 48, of the Commander in Chief's decision to employ a particular form of force against our enemies is so antithetical to our constitutional structure that it simply cannot go unanswered. I respectfully dissent.

I

Our review of petitioner's claims arises in the context of the President's wartime exercise of his commander-in-chief authority in conjunction with the complete support of Congress. Accordingly, it is important to take measure of the respective roles the Constitution assigns to the three branches of our Government in the conduct of war.

As I explained in *Hamdi* v. *Rumsfeld,* 542 U. S. 507

(2004), the structural advantages attendant to the Executive Branch—namely, the decisiveness, "'activity, secrecy, and dispatch'" that flow from the Executive's "'unity,'" *id.*, at 581 (dissenting opinion) (quoting The Federalist No. 70, p. 472 (J. Cooke ed. 1961) (A. Hamilton))—led the Founders to conclude that the "President ha[s] primary responsibility—along with the necessary power—to protect the national security and to conduct the Nation's foreign relations." 542 U. S., at 580. Consistent with this conclusion, the Constitution vests in the President "[t]he executive Power," Art. II, §1, provides that he "shall be Commander in Chief" of the Armed Forces, §2, and places in him the power to recognize foreign governments, §3. This Court has observed that these provisions confer upon the President broad constitutional authority to protect the Nation's security in the manner he deems fit. See, *e.g.*, *Prize Cases,* 2 Black 635, 668 (1863) ("If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force . . . without waiting for any special legislative authority"); *Fleming* v. *Page,* 9 How. 603, 615 (1850) (acknowledging that the President has the authority to "employ [the Nation's Armed Forces] in the manner he may deem most effectual to harass and conquer and subdue the enemy").

Congress, to be sure, has a substantial and essential role in both foreign affairs and national security. But "Congress cannot anticipate and legislate with regard to every possible action the President may find it necessary to take or every possible situation in which he might act," and "[s]uch failure of Congress . . . does not, 'especially . . . in the areas of foreign policy and national security,' imply 'congressional disapproval' of action taken by the Executive." *Dames & Moore* v. *Regan,* 453 U. S. 654, 678 (1981) (quoting *Haig* v. *Agee,* 453 U. S. 280, 291 (1981)). Rather, in these domains, the fact that Congress has provided the President with broad authorities does not imply—and the

Judicial Branch should not infer—that Congress intended to deprive him of particular powers not specifically enumerated. See *Dames & Moore*, 453 U. S., at 678 ("[T]he enactment of legislation closely related to the question of the President's authority in a particular case which evinces legislative intent to accord the President broad discretion may be considered to invite measures on independent presidential responsibility" (internal quotation marks omitted)).

When "the President acts pursuant to an express or implied authorization from Congress," his actions are "'supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion . . . rest[s] heavily upon any who might attack it.'" *Id.*, at 668 (quoting *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U. S. 579, 637 (1952) (Jackson, J., concurring)). Accordingly, in the very context that we address today, this Court has concluded that "the detention and trial of petitioners—ordered by the President in the declared exercise of his powers as Commander in Chief of the Army in time of war and of grave public danger—are not to be set aside by the courts without the clear conviction that they are in conflict with the Constitution or laws of Congress constitutionally enacted." *Ex parte Quirin,* 317 U. S. 1, 25 (1942).

Under this framework, the President's decision to try Hamdan before a military commission for his involvement with al Qaeda is entitled to a heavy measure of deference. In the present conflict, Congress has authorized the President "to use all necessary and appropriate force against those nations, organizations, or persons *he determines* planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001 . . . in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." Authorization for Use of Military Force

(AUMF) 115 Stat. 224, note following 50 U. S. C. §1541 (2000 ed., Supp. III) (emphasis added). As a plurality of the Court observed in *Hamdi*, the "capture, detention, and *trial* of unlawful combatants, by 'universal agreement and practice,' are 'important incident[s] of war,'" *Hamdi*, 542 U. S., at 518 (quoting *Quirin, supra*, at 28, 30; emphasis added), and are therefore "an exercise of the 'necessary and appropriate force' Congress has authorized the President to use." *Hamdi,* 542 U. S., at 518; *id*., at 587 (THOMAS, J., dissenting). *Hamdi*'s observation that military commissions are included within the AUMF's authorization is supported by this Court's previous recognition that "[a]n important incident to the conduct of war is the adoption of measures by the military commander, not only to repel and defeat the enemy, but to seize and subject to disciplinary measures those enemies who, in their attempt to thwart or impede our military effort, have violated the law of war." *In re Yamashita,* 327 U. S. 1, 11 (1946); see also *Quirin*, *supra*, at 28–29; *Madsen* v. *Kinsella,* 343 U. S. 341, 354, n. 20 (1952) ("'[T]he military commission . . . is an institution of the greatest importance in the period of war and should be preserved'" (quoting S. Rep. No. 229, 63d Cong., 2d Sess., 53 (1914) (testimony of Gen. Crowder))).

Although the Court concedes the legitimacy of the President's use of military commissions in certain circumstances, *ante,* at 28, it suggests that the AUMF has no bearing on the scope of the President's power to utilize military commissions in the present conflict, *ante,* at 29–30. Instead, the Court determines the scope of this power based exclusively on Article 21 of the Uniform Code of Military Justice (UCMJ), 10 U. S. C. §821, the successor to Article 15 of the Articles of War, which *Quirin* held "authorized trial of offenses against the law of war before [military] commissions." 317 U. S., at 29. As I shall discuss below, Article 21 alone supports the use of commissions here. Nothing in the language of Article 21, how-

ever, suggests that it outlines the entire reach of congressional authorization of military commissions in all conflicts—quite the contrary, the language of Article 21 presupposes the existence of military commissions under an independent basis of authorization.[1] Indeed, consistent with *Hamdi*'s conclusion that the AUMF itself authorizes the trial of unlawful combatants, the original sanction for military commissions historically derived from congressional authorization of "the initiation of war" with its attendant authorization of "the employment of all necessary and proper agencies for its due prosecution." W. Winthrop, Military Law and Precedents 831 (2d ed. 1920) (hereinafter Winthrop). Accordingly, congressional authorization for military commissions pertaining to the instant conflict derives not only from Article 21 of the UCMJ, but also from the more recent, and broader, authorization contained in the AUMF.[2]

I note the Court's error respecting the AUMF not because it is necessary to my resolution of this case—Hamdan's military commission can plainly be sustained solely under Article 21—but to emphasize the complete congressional sanction of the President's exercise of his commander-in-chief authority to conduct the present war. In such circumstances, as previously noted, our duty to

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[1] As previously noted, Article 15 of the Articles of War was the predecessor of Article 21 of the UCMJ. Article 21 provides as follows: "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." 10 U. S. C. §821.

[2] Although the President very well may have inherent authority to try unlawful combatants for violations of the law of war before military commissions, we need not decide that question because Congress has authorized the President to do so. Cf. *Hamdi* v. *Rumsfeld*, 542 U. S. 507, 587 (2004) (THOMAS, J., dissenting) (same conclusion respecting detention of unlawful combatants).

defer to the Executive's military and foreign policy judgment is at its zenith; it does not countenance the kind of second-guessing the Court repeatedly engages in today. Military and foreign policy judgments

> "'are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.'" *Hamdi*, *supra*, at 582–583 (THOMAS, J., dissenting) (quoting *Chicago & Southern Air Lines, Inc.* v. *Waterman S. S. Corp.,* 333 U. S. 103, 111 (1948)).

It is within this framework that the lawfulness of Hamdan's commission should be examined.

II

The plurality accurately describes some aspects of the history of military commissions and the prerequisites for their use. Thus, I do not dispute that military commissions have historically been "used in three [different] situations," *ante*, at 31–32, and that the only situation relevant to the instant case is the use of military commissions "'to seize and subject to disciplinary measures those enemies who . . . have violated the law of war,'" *ante*, at 32 (quoting *Quirin, supra*, at 28–29). Similarly, I agree with the plurality that Winthrop's treatise sets forth the four relevant considerations for determining the scope of a military commission's jurisdiction, considerations relating to the (1) time and (2) place of the offense, (3) the status of the offender, and (4) the nature of the offense charged. Winthrop 836–840. The Executive has easily satisfied these considerations here. The plurality's contrary conclusion rests upon an incomplete accounting and an unfaithful application of those considerations.

A

The first two considerations are that a law-of-war military commission may only assume jurisdiction of "offences committed within the field of the command of the convening commander," and that such offenses "must have been committed within the period of the war." See *id.*, at 836, 837; *ante*, at 33. Here, as evidenced by Hamdan's charging document, the Executive has determined that the theater of the present conflict includes "Afghanistan, Pakistan and other countries" where al Qaeda has established training camps, App. to Pet. for Cert. 64a, and that the duration of that conflict dates back (at least) to Usama bin Laden's August 1996 "*Declaration of Jihad Against the Americans*," *ibid*. Under the Executive's description of the conflict, then, every aspect of the charge, which alleges overt acts in "Afghanistan, Pakistan, Yemen and other countries" taking place from 1996 to 2001, satisfies the temporal and geographic prerequisites for the exercise of law-of-war military commission jurisdiction. *Id.*, at 65a–67a. And these judgments pertaining to the scope of the theater and duration of the present conflict are committed solely to the President in the exercise of his commander-in-chief authority. See *Prize Cases,* 2 Black, at 670 (concluding that the President's commander-in-chief judgment about the nature of a particular conflict was "a question to be decided *by him*, and this Court must be governed by the decisions and acts of the political department of the Government to which this power was entrusted").

Nevertheless, the plurality concludes that the legality of the charge against Hamdan is doubtful because "Hamdan is charged not with an overt act for which he was caught redhanded in a theater of war . . . but with an *agreement* the inception of which long predated . . . the [relevant armed conflict]." *Ante*, at 48 (emphasis in original). The plurality's willingness to second-guess the Executive's judgments in this context, based upon little more than its un-

supported assertions, constitutes an unprecedented departure from the traditionally limited role of the courts with respect to war and an unwarranted intrusion on executive authority. And even if such second-guessing were appropriate, the plurality's attempt to do so is unpersuasive.

As an initial matter, the plurality relies upon the date of the AUMF's enactment to determine the beginning point for the "period of the war," Winthrop 836, thereby suggesting that petitioner's commission does not have jurisdiction to try him for offenses committed prior to the AUMF's enactment. *Ante*, at 34–36, 48. But this suggestion betrays the plurality's unfamiliarity with the realities of warfare and its willful blindness to our precedents. The starting point of the present conflict (or indeed any conflict) is not determined by congressional enactment, but rather by the initiation of hostilities. See *Prize Cases, supra,* at 668 (recognizing that war may be initiated by "invasion of a foreign nation," and that such initiation, and the President's response, usually *precedes* congressional action). Thus, Congress' enactment of the AUMF did not mark the beginning of this Nation's conflict with al Qaeda, but instead authorized the President to use force in the midst of an ongoing conflict. Moreover, while the President's "war powers" may not have been activated until the AUMF was passed, *ante*, 35, n. 31, the date of such activation has never been used to determine the scope of a military commission's jurisdiction.[3] Instead, the traditional

[3] Even if the formal declaration of war were generally the determinative act in ascertaining the temporal reach of the jurisdiction of a military commission, the AUMF itself is inconsistent with the plurality's suggestion that such a rule is appropriate in this case. See *ante*, at 34–36, 48. The text of the AUMF is backward looking, authorizing the use of "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001." Thus, the President's decision to try Hamdan by military commission—a use of force authorized by the AUMF—for Hamdan's

rule is that "[o]ffenses committed before a formal declaration of war or before the declaration of martial law may be tried by military commission." Green, The Military Commission, 42 Am. J. Int'l L. 832, 848 (1948) (hereinafter Green); see also C. Howland, Digest of Opinions of the Judge-Advocates General of the Army 1067 (1912) (hereinafter Howland) ("A military commission . . . exercising . . . jurisdiction . . . under the laws of war . . . may take cognizance of offenses committed, during the war, *before* the initiation of the military government or martial law" (emphasis in original));[4] cf. *Yamashita*, 327 U. S., at 13 ("The extent to which the power to prosecute violations of the law of war shall be exercised before peace is declared rests, not with the courts, but with the political branch of the Government"). Consistent with this principle, on facts virtually identical to those here, a military commission tried Julius Otto Kuehn for conspiring with Japanese officials to betray the United States Fleet to the Imperial Japanese Government prior to its attack on Pearl Harbor. Green 848.[5]

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involvement with al Qaeda prior to September 11, 2001, fits comfortably within the framework of the AUMF. In fact, bringing the September 11 conspirators to justice is the *primary point* of the AUMF. By contrast, on the plurality's logic, the AUMF would not grant the President the authority to try Usama bin Laden himself for his involvement in the events of September 11, 2001.

[4]The plurality suggests these authorities are inapplicable because nothing in its "analysis turns on the admitted absence of either a formal declaration of war or a declaration of martial law. Our focus instead is on the . . . AUMF." *Ante,* at 35, n. 31. The difference identified by the plurality is purely semantic. Both Green and Howland confirm that the date of the enactment that establishes a legal basis for forming military commissions—whether it be a declaration of war, a declaration of martial law, *or* an authorization to use military force—does not limit the jurisdiction of military commissions to offenses committed after that date.

[5]The plurality attempts to evade the import of this historical example by observing that Kuehn was tried before a martial law commission for

Moreover, the President's determination that the present conflict dates at least to 1996 is supported by overwhelming evidence. According to the State Department, al Qaeda *declared war* on the United States as early as August 1996. See Dept. of State Fact Sheet: Usama bin Ladin (Aug. 21, 1998); Dept. of State Fact Sheet: The Charges against International Terrorist Usama Bin Laden (Dec. 20, 2000); cf. *Prize Cases*, 2 Black, at 668 (recognizing that a state of war exists even if "the declaration of it be *unilateral*" (emphasis in original)). In February 1998, al Qaeda leadership issued another statement ordering the indiscriminate—and, even under the laws of war as applied to legitimate nation-states, plainly illegal—killing of American civilians and military personnel alike. See Jihad Against Jews and Crusaders: World Islamic Front

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a violation of federal espionage statutes. *Ibid.* As an initial matter, the fact that Kuehn was tried before a martial law commission for an offense committed prior to the establishment of martial law provides strong support for the President's contention that he may try Hamdan for offenses committed prior to the enactment of the AUMF. Here the AUMF serves the same function as the declaration of martial law in Hawaii in 1941, establishing legal authority for the constitution of military commissions. Moreover, Kuehn was not tried and punished "by statute, but by the laws and usages of war." *United States* v. *Bernard Julius Otto Kuehn*, Board of Review 5 (Office of the Military Governor, Hawaii 1942). Indeed, in upholding the imposition of the death penalty, a sentence "not authorized by the Espionage statutes," *ibid*., Kuehn's Board of Review explained that "[t]he fact that persons may be tried and punished . . . by a military commission for committing acts defined as offenses by . . . federal statutes does not mean that such persons are being tried for violations of such . . . statutes; they are, instead, being tried for acts made offenses only by orders of the . . . commanding general." *Id*., at 6. Lastly, the import of this example is not undermined by *Duncan* v. *Kahanamoku,* 327 U. S. 304 (1946). The question before the Court in that case involved only whether "loyal civilians in loyal territory should have their daily conduct governed by military orders," *id*., at 319; it did "not involve the well-established power of the military to exercise jurisdiction over . . . enemy belligerents," *id*., at 313.

Statement 2 (Feb. 23, 1998), in Y. Alexander & M. Swetnam, Usama bin Laden's al-Qaida: Profile of a Terrorist Network, App. 1B (2001) ("The ruling to kill the Americans and their allies—civilians and military—is an individual duty for every Muslim who can do it in any country in which it is possible to do it"). This was not mere rhetoric; even before September 11, 2001, al Qaeda was involved in the bombing of the World Trade Center in New York City in 1993, the bombing of the Khobar Towers in Saudi Arabia in 1996, the bombing of the U. S. Embassies in Kenya and Tanzania in 1998, and the attack on the U. S. S. *Cole* in Yemen in 2000. See *id.*, at 1. In response to these incidents, the United States "attack[ed] facilities belonging to Usama bin Ladin's network" as early as 1998. Dept. of State Fact Sheet: Usama bin Ladin (Aug. 21, 1998). Based on the foregoing, the President's judgment—that the present conflict substantially predates the AUMF, extending at least as far back as al Qaeda's 1996 declaration of war on our Nation, and that the theater of war extends at least as far as the localities of al Qaeda's principal bases of operations—is beyond judicial reproach. And the plurality's unsupportable contrary determination merely confirms that "'the Judiciary has neither aptitude, facilities nor responsibility'" for making military or foreign affairs judgments. *Hamdi*, 542 U. S., at 585 (THOMAS, J., dissenting) (quoting *Chicago & Southern Air Lines*, 333 U. S., at 111).

B

The third consideration identified by Winthrop's treatise for the exercise of military commission jurisdiction pertains to the persons triable before such a commission, see *ante*, at 33; Winthrop 838. Law-of-war military commissions have jurisdiction over "'individuals of the enemy's army who have been guilty of illegitimate warfare or other offences in violation of the laws of war,'" *ante*, at 33-34

(quoting Winthrop 838). They also have jurisdiction over "[i]rregular armed bodies or persons not forming part of the organized forces of a belligerent" "who would not be likely to respect the laws of war." *Id.*, at 783, 784. Indeed, according to Winthrop, such persons are not "within the protection of the laws of war" and were "liable to be shot, imprisoned, or banished, either summarily where their guilt was clear or upon trial and conviction by military commission." *Id.*, at 784. This consideration is easily satisfied here, as Hamdan is an unlawful combatant charged with joining and conspiring with a terrorist network dedicated to flouting the laws of war. 344 F. Supp. 2d 152, 161 (DC 2004); App. to Pet. for Cert. 63a–67a.

C

The fourth consideration relevant to the jurisdiction of law-of-war military commissions relates to the nature of the offense charged. As relevant here, such commissions have jurisdiction to try "'[v]iolations of the laws and usages of war cognizable by military tribunals only,'" *ante*, at 34 (quoting Winthrop 839). In contrast to the preceding considerations, this Court's precedents establish that judicial review of "whether any of the acts charged is an offense against the law of war cognizable before a military tribunal" is appropriate. *Quirin*, 317 U. S., at 29. However, "charges of violations of the law of war triable before a military tribunal need not be stated with the precision of a common law indictment." *Yamashita*, 327 U. S., at 17. And whether an offense is a violation of the law of war cognizable before a military commission must be determined pursuant to "the system of common law applied by military tribunals." Q*uirin*, *supra*, at 30; *Yamashita*, *supra*, at 8.

The common law of war as it pertains to offenses triable by military commission is derived from the "experience of our wars" and our wartime tribunals, Winthrop 839, and

"the laws and usages of war as understood and practiced by the civilized nations of the world," 11 Op. Atty. Gen. 297, 310 (1865). Moreover, the common law of war is marked by two important features. First, as with the common law generally, it is flexible and evolutionary in nature, building upon the experience of the past and taking account of the exigencies of the present. Thus, "[t]he law of war, like every other code of laws, declares what shall not be done, and does not say what may be done. The legitimate use of the great power of war, or rather the prohibitions upon the use of that power, increase or diminish as the necessity of the case demands." *Id*., at 300. Accordingly, this Court has recognized that the "jurisdiction" of "our common-law war courts" has not been "prescribed by statute," but rather "has been adapted in each instance to the need that called it forth." *Madsen*, 343 U. S., at 346–348. Second, the common law of war affords a measure of respect for the judgment of military commanders. Thus, "[t]he commander of an army in time of war has the same power to organize military tribunals and execute their judgments that he has to set his squadrons in the field and fight battles. His authority in each case is from the law and usage of war." 11 Op. Atty. Gen., at 305. In recognition of these principles, Congress has generally "'left it to the President, and the military commanders representing him, to employ the commission, *as occasion may require*, for the investigation and punishment of violations of the law of war.'" *Madsen, supra*, at 347, n. 9 (quoting Winthrop 831; emphasis added).

In one key respect, the plurality departs from the proper framework for evaluating the adequacy of the charge against Hamdan under the laws of war. The plurality holds that where, as here, "neither the elements of the offense nor the range of permissible punishments is defined by statute or treaty, the precedent [establishing whether an offense is triable by military commission]

must be plain and unambiguous." *Ante*, at 38. This is a pure contrivance, and a bad one at that. It is contrary to the presumption we acknowledged in *Quirin*, namely, that the actions of military commissions are "not to be set aside by the courts without the *clear conviction* that they are" unlawful, 317 U. S., at 25 (emphasis added). It is also contrary to *Yamashita*, which recognized the legitimacy of that military commission notwithstanding a substantial disagreement pertaining to whether Yamashita had been charged with a violation of the law of war. Compare 327 U. S., at 17 (noting that the allegations were "adequat[e]" and "need not be stated with . . . precision"), with *id.*, at 35 (Murphy, J., dissenting) (arguing that the charge was inadequate). Nor does it find support from the separation of powers authority cited by the plurality. Indeed, Madison's praise of the separation of powers in The Federalist No. 47, quoted *ante*, at 38-39, if it has any relevance at all, merely highlights the illegitimacy of today's judicial intrusion onto core executive prerogatives in the waging of war, where executive competence is at its zenith and judicial competence at its nadir.

The plurality's newly minted clear-statement rule is also fundamentally inconsistent with the nature of the common law which, by definition, evolves and develops over time and does not, in all cases, "say what may be done." 11 Op. Atty. Gen., at 300. Similarly, it is inconsistent with the nature of warfare, which also evolves and changes over time, and for which a flexible, evolutionary common-law system is uniquely appropriate.[6] Though the charge

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[6] Indeed, respecting the present conflict, the President has found that "the war against terrorism ushers in a new paradigm, one in which groups with broad, international reach commit horrific acts against innocent civilians, sometimes with the direct support of states. Our Nation recognizes that this new paradigm—ushered in not by us, but by terrorists—requires new thinking in the law of war." App. 34–35. Under the Court's approach, the President's ability to address this "new

against Hamdan easily satisfies even the plurality's manufactured rule, see *supra*, at 16–28, the plurality's inflexible approach has dangerous implications for the Executive's ability to discharge his duties as Commander in Chief in future cases. We should undertake to determine whether an unlawful combatant has been charged with an offense against the law of war with an understanding that the common law of war is flexible, responsive to the exigencies of the present conflict, and deferential to the judgment of military commanders.

1

Under either the correct, flexible approach to evaluating the adequacy of Hamdan's charge, or under the plurality's new, clear-statement approach, Hamdan has been charged with conduct constituting two distinct violations of the law of war cognizable before a military commission: membership in a war-criminal enterprise and conspiracy to commit war crimes. The charging section of the indictment alleges both that Hamdan "willfully and knowingly joined an enterprise of persons who shared a common criminal purpose," App. to Pet. for Cert. 65a, and that he "conspired and agreed with [al Qaeda] to commit . . . offenses triable by military commission," *ibid*.[7]

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paradigm" of inflicting death and mayhem would be completely frozen by rules developed in the context of conventional warfare.

[7] It is true that both of these separate offenses are charged under a single heading entitled "CHARGE: CONSPIRACY," App. to Pet. for Cert. 65a. But that does not mean that they must be treated as a single crime, when the law of war treats them as separate crimes. As we acknowledged in *In re Yamashita*, 327 U. S. 1 (1946), "charges of violations of the law of war triable before a military tribunal need not be stated with the precision of a common law indictment." *Id.*, at 17; cf. W. Birkhimer, Military Government and Martial Law 536 (3d ed. 1914) (hereinafter Birkhimer) ("[I]t would be extremely absurd to expect the same precision in a charge brought before a court-martial as is required to support a conviction before a justice of the peace" (internal quotation marks omitted)).

The common law of war establishes that Hamdan's willful and knowing membership in al Qaeda is a war crime chargeable before a military commission. Hamdan, a confirmed enemy combatant and member or affiliate of al Qaeda, has been charged with willfully and knowingly joining a group (al Qaeda) whose purpose is "to support violent attacks against property and nationals (both military and civilian) of the United States." *Id.,* at 64a; 344 F. Supp. 2d, at 161. Moreover, the allegations specify that Hamdan joined and maintained his relationship with al Qaeda even though he "believed that Usama bin Laden and his associates were involved in the attacks on the U. S. Embassies in Kenya and Tazania in August 1998, the attack on the USS COLE in October 2000, and the

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Nevertheless, the plurality contends that Hamdan was "not actually charged," *ante*, at 37, n. 32 (emphasis deleted), with being a member in a war criminal organization. But that position is demonstrably wrong. Hamdan's charging document expressly *charges* that he "willfully and knowingly joined an enterprise of persons who shared a common criminal purpose." App. to Pet. for Cert. 65a. Moreover, the plurality's contention that we may only look to the label affixed to the charge to determine if the charging document alleges an offense triable by military commission is flatly inconsistent with its treatment of the Civil War cases—where it accepts as valid charges that did not appear in the heading or title of the charging document, or even the listed charge itself, but only in the supporting specification. See, *e.g., ante*, at 45–46 (discussing the military commission trial of Wirz). For example, in the Wirz case, Wirz was charged with conspiring to violate the laws of war, and that charge was supported with allegations that he personally committed a number of atrocities. The plurality concludes that military commission jurisdiction was appropriate in that case not based upon the charge of conspiracy, but rather based upon the allegations of various atrocities in the specification which were *not* separately charged. *Ante,* at 45. Just as these atrocities, not separately charged, were independent violations of the law of war supporting Wirz's trial by military commission, so too here Hamdan's membership in al Qaeda and his provision of various forms of assistance to al Qaeda's top leadership are independent violations of the law of war supporting his trial by military commission.

attacks on the United States on September 11, 2001." App. to Pet. for Cert. 65a. These allegations, against a confirmed unlawful combatant, are alone sufficient to sustain the jurisdiction of Hamdan's military commission.

For well over a century it has been established that "to unite with banditti, jayhawkers, guerillas, or any other unauthorized marauders is a high offence against the laws of war; *the offence is complete when the band is organized or joined. The atrocities committed by such a band do not constitute the offence, but make the reasons, and sufficient reasons they are, why such banditti are denounced by the laws of war*." 11 Op. Atty. Gen., at 312 (emphasis added).[8] In other words, unlawful combatants, such as Hamdan, violate the law of war merely by joining an organization, such as al Qaeda, whose principal purpose is the "killing [and] disabling . . . of peaceable citizens or soldiers." Winthrop 784; see also 11 Op. Atty. Gen., at 314 ("A bush-whacker, a jayhawker, a bandit, a war rebel, an assassin, being public enemies, may be tried, condemned, and executed as offenders against the laws of war"). This conclusion is unsurprising, as it is a "cardinal principle of the law of war . . . that the civilian population must enjoy complete immunity." 4 International Committee of Red Cross, Commentary: Geneva Convention Relative to the

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[8]These observations respecting the law of war were made by the Attorney General in defense of the military commission trial of the Lincoln conspirators'. As the foregoing quoted portion of that opinion makes clear, the Attorney General did not, as the Court maintains, "trea[t] the charge as if it alleged the substantive offense of assassination." *Ante*, at 40, n. 35. Rather, he explained that the conspirators "high offence against the laws of war" was "complete" when their band was "organized or joined," and did not depend upon "atrocities committed by such a band." 11 Op. Atty. Gen. 297, 312 (1865). Moreover, the Attorney General's conclusions specifically refute the plurality's unsupported suggestion that I have blurred the line between "those categories of 'offender' who may be tried by military commission . . . with the 'offenses' that may be so tried." *Ante*, at 37, n. 32.

Protection of Civilian Persons in Time of War 3 (J. Pictet ed. 1958). "Numerous instances of trials, for 'Violation of the laws of war,' of offenders of this description, are published in the General Orders of the years 1862 to 1866." Winthrop 784, and n. 57.[9] Accordingly, on this basis

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[9]The General Orders establishing the jurisdiction for military commissions during the Civil War provided that such offenses were violations of the laws of war cognizable before military commissions. See H. R. Doc. No. 65, 55th Cong., 3d Sess., 164 (1894) ("[P]ersons charged with the violation of the laws of war as spies, bridge-burners, marauders, &c., will . . . be held for trial under such charges"); *id*., at 234 ("[T]here are numerous rebels . . . that . . . furnish the enemy with arms, provisions, clothing, horses and means of transportation; [such] insurgents are banding together in several of the interior counties for the purpose of assisting the enemy to rob, to maraud and to lay waste to the country. *All such persons are by the laws of war in every civilized country liable to capital punishment*" (emphasis added)). Numerous trials were held under this authority. See, *e.g.*, U. S. War Dept., General Court-Martial Order No. 51, p. 1 (1866) (hereinafter G. C. M. O.). (indictment in the military commission trial of James Harvey Wells charged "[b]eing a guerrilla" and specified that he "willfully . . . [took] up arms as a guerrilla marauder, and did join, belong to, act and co-operate with guerrillas"); G. C. M. O. No. 108, Head-Quarters Dept. of Kentucky, p. 1 (1865) (indictment in the military commission trial of Henry C. Magruder charged "[b]eing a guerrilla" and specified that he "unlawfully, and of his own wrong, [took] up arms as a guerrilla marauder, and did join, belong to, act, and co-operate with a band of guerrillas"); G. C. M. O. No. 41, p. 1 (1864) (indictment in the military commission trial of John West Wilson charged that Wilson "did take up arms as an insurgent and guerrilla against the laws and authorities of the United States, and did join and co-operate with an armed band of insurgents and guerrillas who were engaged in plundering the property of peaceable citizens . . . in violation of the laws and customs of war"); G. C. M. O. No. 153, p. 1 (1864) (indictment in the military commission trial of Simeon B. Kight charged that defendant was "a guerrilla, and has been engaged in an unwarrantable and barbarous system of warfare against citizens and soldiers of the United States"); G. C. M. O. No. 93, pp. 3–4 (1864) (indictment in the military commission trial of Francis H. Norvel charged "[b]eing a guerrilla" and specified that he "unlawfully and by his own wrong, [took] up arms as an outlaw, guerrilla, and bushwhacker, against the lawfully constituted

alone, "the allegations of [Hamdan's] charge, tested by any reasonable standard, adequately allege a violation of the law of war." *Yamashita*, 327 U. S., at 17.

The conclusion that membership in an organization whose purpose is to violate the laws of war is an offense triable by military commission is confirmed by the experience of the military tribunals convened by the United States at Nuremberg. Pursuant to Article 10 of the Charter of the International Military Tribunal (IMT), the United States convened military tribunals "to bring individuals to trial for membership" in "a group or organization . . . declared criminal by the [IMT]." 1 Trials of War Criminals Before the Nuernberg Military Tribunals, p. XII (hereinafter Trials). The IMT designated various components of four Nazi groups—the Leadership Corps, Gestapo, SD, and SS—as criminal organizations. 22 IMT, Trial of the Major War Criminals 505, 511, 517 (1948); see also T. Taylor, The Anatomy of the Nuremberg Trials: A Personal Memoir 584–585 (1992). "[A] member of [such] an organization [could] be . . . convicted of the crime of membership and be punished for that crime by death." 22 IMT, at 499. Under this authority, the United States Military Tribunal at Nuremberg convicted numerous individuals for the act of knowing and voluntary membership in these organizations. For example, in Military Tribunal Case No. 1, *United States* v. *Brandt,* Karl Brandt, Karl Gebhardt, Rudolf Brandt, Joachim

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authorities of the United States government"); *id.*, at 9 (indictment in the military commission trial of James A. Powell charged "[t]ransgression of the laws and customs of war" and specified that he "[took] up arms in insurrection as a military insurgent, and did join himself to and, in arms, consort with . . . a rebel enemy of the United States, and the leader of a band of insurgents and armed rebels"); *id.*, at 10–11 (indictment in the military commission trial of Joseph Overstreet charged "[b]eing a guerrilla" and specified that he "did join, belong to, consort and co-operate with a band of guerrillas, insurgents, outlaws, and public robbers").

Mrugowsky, Wolfram Sievers, Viktor Brack, and Waldemar Hoven, were convicted and sentenced to death for the crime of, *inter alia*, membership in an organization declared criminal by the IMT; Karl Genzken and Fritz Fischer were sentenced to life imprisonment for the same; and Helmut Poppendick was convicted of no other offense than membership in a criminal organization and sentenced to a 10-year term of imprisonment. 2 Trials 180–300. This Court denied habeas relief, 333 U. S. 836 (1948), and the executions were carried out at Landsberg prison on June 2, 1948. 2 Trials 330.

Moreover, the Government has alleged that Hamdan was not only a member of al Qaeda while it was carrying out terrorist attacks on civilian targets in the United States and abroad, but also that Hamdan aided and assisted al Qaeda's top leadership by supplying weapons, transportation, and other services. App. to Pet. for Cert. 65a–67a. These allegations further confirm that Hamdan is triable before a law-of-war military commission for his involvement with al Qaeda. See H. R. Doc. No. 65, 55th Cong., 3d Sess., 234 (1894) ("[T]here are numerous rebels . . . that . . . furnish the enemy with arms, provisions, clothing, horses and means of transportation; [such] insurgents are banding together in several of the interior counties for the purpose of assisting the enemy to rob, to maruad and to lay waste to the country. *All such persons are by the laws of war in every civilized country liable to capital punishment*" (emphasis added)); Winthrop 840 (including in the list of offenses triable by law-of-war military commissions "dealing with . . . enemies, or furnishing them with money, arms, provisions, medicines, &c").[10] Undoubtedly, the conclusion that such conduct

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[10] Even if the plurality were correct that a membership offense must be accompanied by allegations that the "defendant 'took up arms,'" *ante*, at 37, n. 32, that requirement has easily been satisfied here. Not

violates the law of war led to the enactment of Article 104 of the UCMJ, which provides that "[a]ny person who . . . aids, or attempts to aid, the enemy with arms, ammunition, supplies, money, or other things . . . shall suffer death or such other punishment as a court-martial or military commission may direct." 10 U. S. C. §904.

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Separate and apart from the offense of joining a contingent of "uncivilized combatants who [are] not . . . likely to respect the laws of war," Winthrop 784, Hamdan has been charged with "conspir[ing] and agree[ing] with . . . the al Qaida organization . . . to commit . . . offenses triable by military commission," App. to Pet. for Cert. 65a. Those offenses include "attacking civilians; attacking civilian objects; murder by an unprivileged belligerent; and terrorism." *Ibid.* This, too, alleges a violation of the law of war triable by military commission.

"[T]he experience of our wars," Winthrop 839, is rife with evidence that establishes beyond any doubt that conspiracy to violate the laws of war is itself an offense cognizable before a law-of-war military commission. World War II provides the most recent examples of the use of American military commissions to try offenses pertaining to violations of the laws of war. In that conflict, the orders establishing the jurisdiction of military commissions in various theaters of operation provided that conspiracy to violate the laws of war was a cognizable offense. See Letter, General Headquarters, United States Army Forces, Pacific (Sept. 24, 1945), Record in *Yamashita* v. *Styer*, O. T. 1945, No. 672, pp. 14, 16 (Exh. F) (Order respecting the "Regulations Governing the Trial of War

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only has Hamdan been charged with providing assistance to top al Qaeda leadership (itself an offense triable by military commission), he has also been charged with receiving weapons training at an al Qaeda camp. App. to Pet. for Cert. 66a–67a.

Criminals" provided that "participation in a common plan or conspiracy to accomplish" various offenses against the law of war was cognizable before military commissions); 1 United Nations War Crimes Commission, Law Reports of Trials of War Criminals 114–115 (1997) (hereinafter U. N. Commission) (recounting that the orders establishing World War II military commissions in the Pacific and China included "participation in a common plan or conspiracy" pertaining to certain violations of the laws of war as an offense triable by military commission). Indeed, those orders authorized trial by military commission of participation in a conspiracy to commit "murder . . . or other inhumane acts . . . against any civilian population," *id.*, at 114, which is precisely the offense Hamdan has been charged with here. And conspiracy to violate the laws of war was charged in the highest profile case tried before a World War II military commission, see *Quirin*, 317 U. S., at 23, and on numerous other occasions. See, *e.g.*, *Colepaugh* v. *Looney*, 235 F. 2d 429, 431 (CA10 1956); Green 848 (describing the conspiracy trial of Julius Otto Kuehn).

To support its contrary conclusion, *ante*, at 35–36, the plurality attempts to evade the import of *Quirin* (and the other World War II authorities) by resting upon this Court's failure to address the sufficiency of the conspiracy charge in the *Quirin* case, *ante*, at 41–43. But the common law of war cannot be ascertained from this Court's failure to pass upon an issue, or indeed to even mention the issue in its opinion;[11] rather, it is ascertained by the practice and usage of war. Winthrop 839; *supra*, at 11–12.

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[11] The plurality recounts the respective claims of the parties in *Quirin* pertaining to this issue and cites the United States Reports. *Ante*, at 41-42. But the claims of the parties are not included in the opinion of the Court, but rather in the sections of the Reports entitled "Argument for Petitioners," and "Argument for Respondent." See 317 U. S., at 6–17.

The Civil War experience provides further support for the President's conclusion that conspiracy to violate the laws of war is an offense cognizable before law-of-war military commissions. Indeed, in the highest profile case to be tried before a military commission relating to that war, namely, the trial of the men involved in the assassination of President Lincoln, the charge provided that those men had "combin[ed], confederat[ed], and conspir[ed] . . . to kill and murder" President Lincoln. G. C. M. O. No. 356 (1865), reprinted in H. R. Doc. No. 314, 55th Cong., 3d Sess., 696 (1899) (hereinafter G. C. M. O. No. 356).[12]

In addition to the foregoing high-profile example, Winthrop's treatise enumerates numerous Civil War military commission trials for conspiracy to violate the law of war. Winthrop 839, n. 5. The plurality attempts to explain these examples away by suggesting that the conspiracies listed by Winthrop are best understood as "a species of

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[12]The plurality concludes that military commission jurisdiction was appropriate in the case of the Lincoln conspirators because they were charged with "'maliciously, unlawfully, and traitorously murdering the said Abraham Lincoln,'" *ante*, at 40, n. 35. But the sole charge filed in that case alleged conspiracy, and the allegations pertaining to "maliciously, unlawfully, and traitorously murdering the said Abraham Lincoln" were not charged or labeled as separate offenses, but rather as overt acts "in pursuance of and in prosecuting said malicious, unlawful, and traitorous *conspiracy*. " G. C. M. O. No. 356, at ___ (emphasis added). While the plurality contends the murder of President Lincoln was charged as a distinct separate offense, the foregoing quoted language of the charging document unequivocally establishes otherwise. Moreover, though I agree that the allegations pertaining to these overt acts provided an independent basis for the military commission's jurisdiction in that case, that merely confirms the propriety of examining all the acts alleged—whether or not they are labeled as separate offenses—to determine if a defendant has been charged with a violation of the law of war. As I have already explained, Hamdan has been charged with violating the law of war not only by participating in a conspiracy to violate the law of war, but also by joining a war criminal enterprise and by supplying provisions and assistance to that enterprise's top leadership.

compound offense," namely, violations both of the law of war and ordinary criminal laws, rather than "stand-alone offense[s] against the law of war." *Ante*, at 44–45 (citing, as an example, murder in violation of the laws of war). But the fact that, for example, conspiracy to commit murder can at the same time violate ordinary criminal laws and the law of war, so that it is "a combination of the two species of offenses," Howland 1071, does not establish that a military commission would not have jurisdiction to try that crime solely on the basis that it was a violation of the law of war. Rather, if anything, and consistent with the principle that the common law of war is flexible and affords some level of deference to the judgments of military commanders, it establishes that military commissions would have the discretion to try the offense as (1) one against the law of war, or (2) one against the ordinary criminal laws, or (3) both.

In any event, the plurality's effort to avoid the import of Winthrop's footnote through the smokescreen of its "compound offense" theory, *ante*, at 44–45, cannot be reconciled with the particular charges that sustained military commission jurisdiction in the cases that Winthrop cites. For example, in the military commission trial of Henry Wirtz, Charge I provided that he had been

> "[m]aliciously, willfully, and traitorously . . . *combining, confederating, and conspiring*, together [with various other named and unnamed co-conspirators], to injure the health and destroy the lives of soldiers in the military service of the United States, then held and being prisoners of war within the lines of the so-called Confederate States, and in the military prisons thereof, to the end that the armies of the United States might be weakened and impaired, *in violation of the laws and customs of war*." G. C. M. O. No. 607 (1865), reprinted in H. R. Doc. No. 314, at 785 (em-

phasis added).

Likewise, in the military commission trial of Lenger Grenfel, Charge I accused Grenfel of "*[c]onspiring, in violation of the laws of war*, to release rebel prisoners of war confined by authority of the United States at Camp Douglas, near Chicago, Ill." G. C. M. O. No. 452 (1865), reprinted in H. R. Doc. No. 314, at 724 (emphasis added)[13]; see also G. C. M. O. No. 41, at 20 (1864) (indictment in the military commission trial of Robert Louden charged "[c]onspiring with the rebel enemies of the United States to embarrass and impede the military authorities in the

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[13] The plurality's attempt to undermine the significance of these cases is unpersuasive. The plurality suggests the Wirz case is not relevant because the specification supporting his conspiracy charge alleged that he "*personally committed* a number of atrocities." *Ante*, at 45. But this does not establish that conspiracy to violate the laws of war, the very crime with which Wirz was charged, is not itself a violation of the law of war. Rather, at best, it establishes that in addition to conspiracy Wirz violated the laws of war by committing various atrocities, just as Hamdan violated the laws of war not only by conspiring to do so, but also by joining al Qaeda and providing provisions and services to its top leadership. Moreover, the fact that Wirz was charged with overt acts that are more severe than the overt acts with which Hamdan has been charged does not establish that conspiracy is not an offense cognizable before military commission; rather it merely establishes that Wirz's offenses may have been comparably worse than Hamdan's offenses.

The plurality's claim that the charge against Lenger Grenfel supports its compound offense theory is similarly unsupportable. The plurality does not, and cannot, dispute that Grenfel was charged with conspiring to violate the laws of war by releasing rebel prisoners—a charge that bears no relation to a crime "ordinarily triable in civilian courts." *Ante*, at 46, n. 37. Tellingly, the plurality does not reference or discuss this charge, but instead refers to the conclusion of Judge Advocate Holt that Grenfel also "'united himself with traitors and malefactors for the overthrow of our Republic in the interest of slavery.'" *Ibid.* (quoting H. R. Doc. No. 314, at 689). But Judge Advocate Holt's observation provides no support for the plurality's conclusion, as it does not discuss the charges that sustained military commission jurisdiction, much less suggest that such charges were not violations of the law of war.

suppression of the existing rebellion, by the burning and destruction of steamboats and means of transportation on the Mississippi river"). These examples provide incontrovertible support for the President's conclusion that the common law of war permits military commission trials for conspiracy to violate the law of war. And they specifically contradict the plurality's conclusion to the contrary, thereby easily satisfying its requirement that the Government "make a substantial showing that the crime for which it seeks to try a defendant by military commission is acknowledged to be an offense against the law of war." *Ante*, at 39-40.[14]

The plurality further contends, in reliance upon Win-

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[14] The plurality contends that international practice—including the practice of the IMT at Nuremberg—supports its conclusion that conspiracy is not an offense triable by military commission because "'[t]he Anglo-American concept of conspiracy was not part of European legal systems and arguably not an element of the internationally recognized laws of war.'" *Ante*, at 47 (quoting T. Taylor, Anatomy of the Nuremberg Trials: A Personal Memoir 36 (1992)). But while the IMT did not criminalize all conspiracies to violate the law of war, it did criminalize "participation in a common plan or conspiracy" to wage aggressive war. See 1 Trials, pp. XI–XII. Moreover, the World War II military tribunals of several European nations recognized conspiracy to violate the laws of war as an offense triable before military commissions. See 15 U. N. Commission 90–91 (noting that the French Military Tribunal at Marseilles found Henri Georges Stadelhofer "guilty of the crime of *association de malfaiteurs*," namely of "having formed with various members of the German Gestapo an association with the aim of preparing or committing crimes against persons or property, without justification under the laws and usages of war"); 11 *id.,* at 98 (noting that the Netherlands' military tribunals were authorized to try conspiracy to violate the laws of war). Thus, the European legal systems' approach to domestic conspiracy law has not prevented European nations from recognizing conspiracy offenses as violations of the law of war. This is unsurprising, as the law of war is derived not from domestic law but from the wartime practices of civilized nations, including the United States, which has consistently recognized that conspiracy to violate the laws of war is an offense triable by military commission.

throp, that conspiracy is not an offense cognizable before a law-of-war military commission because "it is not enough to intend to violate the law of war and commit overt acts in furtherance of that intention unless the overt acts either are themselves offenses against the law of war or constitute steps sufficiently substantial to qualify as an attempt." *Ibid.* But Winthrop does not support the plurality's conclusion. The passage in Winthrop cited by the plurality states only that "the jurisdiction of the military commission should be restricted to cases of offence consisting in *overt acts*, *i.e.* in unlawful commissions or actual attempts to commit, and not in intentions merely." Winthrop 841 (emphasis in original). This passage would be helpful to the plurality if its subject were "conspiracy," rather than the "jurisdiction of the military commission." Winthrop is not speaking here of the requirements for a conspiracy charge, but of the requirements for *all* charges. Intentions do not suffice. An unlawful act—such as committing the crime of conspiracy—is necessary. Winthrop says nothing to exclude either conspiracy or membership in a criminal enterprise, both of which go beyond "intentions merely" and "consis[t] of *overt acts, i.e.* . . . unlawful commissions or actual attempts to commit," and both of which are *expressly* recognized by Winthrop as crimes against the law of war triable by military commissions. *Id.*, at 784; *id.*, at 839, and n. 5, 840. Indeed, the commission of an *"overt ac[t]"* is the traditional requirement for the completion of the crime of conspiracy, and the charge against Hamdan alleges numerous such overt acts. App. to Pet. for Cert. 65a. The plurality's approach, unsupported by Winthrop, requires that any overt act to further a conspiracy must *itself* be a completed war crime *distinct from conspiracy*—which merely begs the question the plurality sets out to answer, namely, whether conspiracy itself may constitute a violation of the law of war. And, even the plurality's unsupported standard is satisfied

here. Hamdan has been charged with the overt acts of providing protection, transportation, weapons, and other services to the enemy, *id.*, at 65a–67a, acts which in and of themselves are violations of the laws of war. See *supra*, at 20–21; Winthrop 839–840.

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Ultimately, the plurality's determination that Hamdan has not been charged with an offense triable before a military commission rests not upon any historical example or authority, but upon the plurality's raw judgment of the "inability on the Executive's part here to satisfy the most basic precondition . . . for establishment of military commissions: military necessity." *Ante*, at 48. This judgment starkly confirms that the plurality has appointed itself the ultimate arbiter of what is quintessentially a policy and military judgment, namely, the appropriate military measures to take against those who "aided the terrorist attacks that occurred on September 11, 2001." AUMF §2(a), 115 Stat. 224. The plurality's suggestion that Hamdan's commission is illegitimate because it is not dispensing swift justice on the battlefield is unsupportable. *Ante*, at 43. Even a cursory review of the authorities confirms that law-of-war military commissions have wide-ranging jurisdiction to try offenses against the law of war in exigent and nonexigent circumstances alike. See, *e.g.,* Winthrop 839–840; see also *Yamashita*, 327 U. S., at 5 (military commission trial after the cessation of hostilities in the Philippines); *Quirin*, 317 U. S. 1 (military commission trial in Washington, D. C.). Traditionally, retributive justice for heinous war crimes is as much a "military necessity" as the "demands" of "military efficiency" touted by the plurality, and swift military retribution is precisely what Congress authorized the President to impose on the September 11 attackers in the AUMF.

Today a plurality of this Court would hold that conspir-

acy to massacre innocent civilians does not violate the laws of war. This determination is unsustainable. The judgment of the political branches that Hamdan, and others like him, must be held accountable before military commissions for their involvement with and membership in an unlawful organization dedicated to inflicting massive civilian casualties is supported by virtually every relevant authority, including all of the authorities invoked by the plurality today. It is also supported by the nature of the present conflict. We are not engaged in a traditional battle with a nation-state, but with a worldwide, hydra-headed enemy, who lurks in the shadows conspiring to reproduce the atrocities of September 11, 2001, and who has boasted of sending suicide bombers into civilian gatherings, has proudly distributed videotapes of beheadings of civilian workers, and has tortured and dismembered captured American soldiers. But according to the plurality, when our Armed Forces capture those who are plotting terrorist atrocities like the bombing of the Khobar Towers, the bombing of the U. S. S. *Cole,* and the attacks of September 11—even if their plots are advanced to the very brink of fulfillment—our military cannot charge those criminals with any offense against the laws of war. Instead, our troops must catch the terrorists "redhanded," *ante*, at 48, in the midst of *the attack itself*, in order to bring them to justice. Not only is this conclusion fundamentally inconsistent with the cardinal principal of the law of war, namely protecting non-combatants, but it would sorely hamper the President's ability to confront and defeat a new and deadly enemy.

After seeing the plurality overturn longstanding precedents in order to seize jurisdiction over this case, *ante*, at 2–4 (SCALIA, J., dissenting), and after seeing them disregard the clear prudential counsel that they abstain in these circumstances from using equitable powers, *ante,* at 19–24, it is no surprise to see them go on to overrule one

after another of the President's judgments pertaining to the conduct of an ongoing war. Those Justices who today disregard the commander-in-chief's wartime decisions, only 10 days ago deferred to the judgment of the Corps of Engineers with regard to a matter much more within the competence of lawyers, upholding that agency's wildly implausible conclusion that a storm drain is a tributary of the waters of the United States. See *Rapanos* v. *United States*, 547 U. S. ___(2006). It goes without saying that there is much more at stake here than storm drains. The plurality's willingness to second-guess the determination of the political branches that these conspirators must be brought to justice is both unprecedented and dangerous.

III

The Court holds that even if "the Government has charged Hamdan with an offense against the law of war cognizable by military commission, the commission lacks power to proceed" because of its failure to comply with the terms of the UCMJ and the four Geneva Conventions signed in 1949. *Ante*, at 49. This position is untenable.

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As with the jurisdiction of military commissions, the procedure of such commissions "has [not] been prescribed by statute," but "has been adapted in each instance to the need that called it forth." *Madsen*, 343 U. S., at 347–348. Indeed, this Court has concluded that "[i]n the absence of attempts by Congress to limit the President's power, it appears that, as Commander in Chief of the Army and Navy of the United States, he may, in time of war, establish and prescribe the jurisdiction and procedure of military commissions." *Id.*, at 348. This conclusion is consistent with this Court's understanding that military commissions are "our common-law war courts." *Id.*, at

346–347.[15] As such, "[s]hould the conduct of those who compose martial-law tribunals become [a] matter of judicial determination subsequently before the civil courts, those courts will give great weight to the opinions of the officers as to what the customs of war in any case justify and render necessary." Birkhimer 534.

The Court nevertheless concludes that at least one provision of the UCMJ amounts to an attempt by Congress to limit the President's power. This conclusion is not only

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[15] Though it does not constitute a basis for any holding of the Court, the Court maintains that, as a "general rule," "the procedures governing trials by military commission historically have been the same as those governing courts-martial." *Ante*, at 54, 53. While it is undoubtedly true that military commissions have invariably employed most of the procedures employed by courts-martial, that is not a requirement. See Winthrop 841 ("[M]ilitary commissions . . . are commonly conducted according to the rules and forms governing courts-martial. These war-courts are indeed more summary in their action than are the courts held under the Articles of war, and . . . their proceedings . . . will not be rendered *illegal* by the omission of details required upon trials by courts-martial" (emphasis in original; footnotes omitted)); 1 U. N. Commission 116–117 ("The [World War II] Mediterranean Regulations (No. 8) provide that Military Commissions shall conduct their proceedings as may be deemed necessary for full and fair trial, having regard for, *but not being bound by*, the rules of procedure prescribed for General Courts Martial" (emphasis added)); *id.*, at 117 ("In the [World War II] European directive it is stated . . . that Military Commissions shall have power to make, as occasion requires, such rules for the conduct of their proceedings consistent with the powers of such Commissions, and with the rules of procedure . . . as are deemed necessary for a full and fair trial of the accused, having regard for, without being bound by, the rules of procedure and evidence prescribed for General Courts Martial"). Moreover, such a requirement would conflict with the settled understanding of the flexible and responsive nature of military commissions and the President's wartime authority to employ such tribunals as he sees fit. See Birkhimer 537–538 ("[M]ilitary commissions may so vary their procedure as to adapt it to any situation, and may extend their powers to any necessary degree. . . . The military commander decides upon the character of the military tribunal which is suited to the occasion . . . and his decision is final").

contrary to the text and structure of the UCMJ, but it is also inconsistent with precedent of this Court. Consistent with *Madsen*'s conclusion pertaining to the common-law nature of military commissions and the President's discretion to prescribe their procedures, Article 36 of the UCMJ authorizes the President to establish procedures for military commissions "which shall, *so far as he considers practicable*, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter." 10 U. S. C. §836(a) (emphasis added). Far from constraining the President's authority, Article 36 recognizes the President's prerogative to depart from the procedures applicable in criminal cases whenever *he alone* does not deem such procedures "practicable." While the procedural regulations promulgated by the Executive must not be "contrary to" the UCMJ, only a few provisions of the UCMJ mention "military commissions," see *ante*, at 58, n. 49, and there is no suggestion that the procedures to be employed by Hamdan's commission implicate any of those provisions.

Notwithstanding the foregoing, the Court concludes that Article 36(b) of the UCMJ, 10 U. S. C. §836(b), which provides that "'[a]ll rules and regulations made under this article shall be uniform insofar as practicable,'" *ante,* at 57, requires the President to employ the same rules and procedures in military commissions as are employed by courts-martial *"insofar as practicable." Ante*, at 59. The Court further concludes that Hamdan's commission is unlawful because the President has not explained why it is not practicable to apply the same rules and procedures to Hamdan's commission as would be applied in a trial by court martial. *Ante*, at 60.

This interpretation of §836(b) is unconvincing. As an initial matter, the Court fails to account for our cases interpreting the predecessor to Article 21 of the UCMJ—

Article 15 of the Articles of War—which provides crucial context that bears directly on the proper interpretation of Article 36(b). Article 15 of the Articles of War provided that:

> "The provisions of these articles conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions, provost courts, or other military tribunals of concurrent jurisdiction in respect of offenders or offences that by statute or by the law of war may be triable by such military commissions, provost courts, or other military tribunals."

In *Yamashita*, this Court concluded that Article 15 of the Articles of War preserved the President's unfettered authority to prescribe military commission procedure. The Court explained, "[b]y thus recognizing military commissions in order to preserve their traditional jurisdiction over enemy combatants unimpaired by the Articles, Congress gave sanction . . . to *any use* of the military commission contemplated by the common law of war." 327 U. S., at 20 (emphasis added)[16]; see also *Quirin*, 317 U. S., at 28; *Madsen*, 343 U. S., at 355. In reaching this conclusion, this Court treated as authoritative the congressional testimony of Judge Advocate General Crowder, who testi-

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[16]The Court suggests that Congress' amendment to Article 2 of the UCMJ, providing that the UCMJ applies to "persons within an area leased by or otherwise reserved or acquired for the use of the United States," 10 U. S. C. §802(a)(12), deprives *Yamashita*'s conclusion respecting the President's authority to promulgate military commission procedures of its "precedential value." *Ante*, at 56. But this merely begs the question of the scope and content of the remaining provisions of the UCMJ. Nothing in the additions to Article 2, or any other provision of the UCMJ, suggests that Congress has disturbed this Court's unequivocal interpretation of Article 21 as preserving the common-law status of military commissions and the corresponding authority of the President to set their procedures pursuant to his commander-in-chief powers. See *Quirin*, 317 U. S., at 28; *Yamashita*, 327 U. S., at 20; *Madsen* v. *Kinsella*, 343 U. S. 341, 355 (1952).

fied that Article 15 of the Articles of War was enacted to preserve the military commission as "'our common-law war court.'" *Yamashita, supra*, at 19, n. 7. And this Court recognized that Article 15's preservation of military commissions as common-law war courts preserved the President's commander-in-chief authority to both "establish" military commissions and to "prescribe [their] procedure[s]." *Madsen*, 343 U. S., at 348; *id.*, at 348–349 (explaining that Congress had "refrain[ed] from legislating" in the area of military commission procedures, in "contras[t] with its traditional readiness to . . . prescrib[e], with particularity, the jurisdiction and procedure of United States courts-martial"); cf. Green 834 ("The military commission exercising jurisdiction under common law authority is usually appointed by a superior military commander and is limited in its procedure only by the will of that commander. Like any other common law court, in the absence of directive of superior authority to the contrary, the military commission is free to formulate its own rules of procedure").

Given these precedents, the Court's conclusion that Article 36(b) requires the President to apply the same rules and procedures to military commissions as are applicable to courts-martial is unsustainable. When Congress codified Article 15 of the Articles of War in Article 21 of the UCMJ it was "presumed to be aware of . . . and to adopt" this Court's interpretation of that provision as preserving the common-law status of military commissions, inclusive of the President's unfettered authority to prescribe their procedures. *Lorillard* v. *Pons,* 434 U. S. 575, 580 (1978). The Court's conclusion that Article 36(b) repudiates this settled meaning of Article 21 is not based upon a specific textual reference to military commissions, but rather on a one-sentence subsection providing that "[a]ll rules and regulations made under this article shall be uniform insofar as practicable." 10 U. S. C. §836(b).

This is little more than an impermissible repeal by implication. See *Branch* v. *Smith,* 538 U. S. 254, 273 (2003). ("We have repeatedly stated . . . that absent a clearly expressed congressional intention, repeals by implication are not favored" (citation and internal quotation marks omitted)). Moreover, the Court's conclusion is flatly contrary to its duty not to set aside Hamdan's commission "without the *clear* conviction that [it is] in conflict with the . . . laws of Congress constitutionally enacted." *Quirin, supra*, at 25 (emphasis added).

Nothing in the text of Article 36(b) supports the Court's sweeping conclusion that it represents an unprecedented congressional effort to change the nature of military commissions from common-law war courts to tribunals that must presumptively function like courts-martial. And such an interpretation would be strange indeed. The vision of uniformity that motivated the adoption of the UCMJ, embodied specifically in Article 36(b), is nothing more than uniformity across the separate branches of the armed services. See ch. 169, 64 Stat. 107 (preamble to the UCMJ explaining that the UCMJ is an act "[t]o unify, consolidate, revise, and codify the Articles of War, the Articles for the Government of the Navy, and the disciplinary laws of the Coast Guard"). There is no indication that the UCMJ was intended to require uniformity in procedure between courts-martial and military commissions, tribunals that the UCMJ itself recognizes are different. To the contrary, the UCMJ expressly recognizes that different tribunals will be constituted in different manners and employ different procedures. See 10 U. S. C. §866 (providing for three different types of courts-martial—general, special, and summary—constituted in different manners and employing different procedures). Thus, Article 36(b) is best understood as establishing that, so far as practicable, the rules and regulations governing tribunals convened by the Navy must be uniform with the rules

and regulations governing tribunals convened by the Army. But, consistent with this Court's prior interpretations of Article 21 and over a century of historical practice, it cannot be understood to require the President to conform the procedures employed by military commissions to those employed by courts-martial.[17]

Even if Article 36(b) could be construed to require procedural uniformity among the various tribunals contemplated by the UCMJ, Hamdan would not be entitled to relief. Under the Court's reading, the President is entitled to prescribe different rules for military commissions than for courts-martial when he determines that it is not "practicable" to prescribe uniform rules. The Court does not resolve the level of deference such determinations would be owed, however, because, in its view, "[t]he President has not . . . [determined] that it is impracticable to apply the rules for courts-martial." *Ante*, at 60. This is simply not the case. On the same day that the President issued Military Commission Order No. 1, the Secretary of Defense explained that "the president decided to establish

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[17] It bears noting that while the Court does not hesitate to cite legislative history that supports its view of certain statutory provisions, see *ante*, at 14–15, and n. 10, it makes no citation of the legislative history pertaining to Article 36(b), which contradicts its interpretation of that provision. Indeed, if it were authoritative, the *only* legislative history relating to Article 36(b) would confirm the obvious—Article 36(b)'s uniformity requirement pertains to uniformity between the three branches of the Armed Forces, and no more. When that subsection was introduced as an amendment to Article 36, its author explained that it would leave the three branches "enough leeway to provide a different provision where it is absolutely necessary" because "there are some differences in the services." Hearings on H. R. 2498 before the Subcommittee No. 1 of the House Committee on Armed Services, 81st Cong., 1st Sess., 1015 (1949). A further statement explained that "there might be some slight differences that would pertain as to the Navy in contrast to the Army, but at least [Article 36(b)] is an expression of the congressional intent that we want it to be as uniform as possible." *Ibid.*

military commissions because he wanted the option of a process that is different from those processes which we already have, namely the federal court system . . . and the military court system," Dept. of Defense News Briefing on Military Commissions (Mar. 21, 2002) (remarks of Donald Rumsfeld), available at http://www.dod.gov/transcrips/2002/t03212002_t0321sd.html (as visited June 26, 2006, and available in Clerk of Court's case file) (hereinafter News Briefing), and that "[t]he commissions are intended to be different . . . because the [P]resident recognized that there had to be differences to deal with the unusual situation we face and that a different approach was needed." *Ibid.* The President reached this conclusion because

> "we're in the middle of a war, and . . . had to design a procedure that would allow us to pursue justice for these individuals while at the same time prosecuting the war most effectively. And that means setting rules that would allow us to preserve our intelligence secrets, develop more information about terrorist activities that might be planned for the future so that we can take action to prevent terrorist attacks against the United States. . . . [T]here was a constant balancing of the requirements of our war policy and the importance of providing justice for individuals . . . and *each* deviation from the standard kinds of rules that we have in our criminal courts was motivated by the desire to strike the balance between individual justice and the broader war policy." *Ibid.* (remarks of Douglas J. Feith, Under Secretary of Defense for Policy (emphasis added)).

The Court provides no explanation why the President's determination that employing court-martial procedures in the military commissions established pursuant to Military Commission Order No. 1 would hamper our war effort is in any way inadequate to satisfy its newly minted "practica-

bility" requirement. On the contrary, this determination is precisely the kind for which the "Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.'" *Chicago & Southern Air Lines, Inc.* v. *Waterman S. S. Corp.,* 333 U. S. 103, 111 (1948). And, in the context of the present conflict, it is exactly the kind of determination Congress countenanced when it authorized the President to use all necessary and appropriate force against our enemies. Accordingly, the President's determination is sufficient to satisfy any practicability requirement imposed by Article 36(b).

The plurality further contends that Hamdan's commission is unlawful because it fails to provide him the right to be present at his trial, as recognized in 10 U. S. C. A. §839(c) (Supp. 2006). *Ante*, at 61. But §839(c) applies to courts-martial, not military commissions. It provides:

> "When the members of a court-martial deliberate or vote, only the members may be present. All other proceedings, including any other consultation of the members of the court with counsel or the military judge, shall be made a part of the record and shall be in the presence of the accused, the defense counsel, the trial counsel, and, in cases in which a military judge has been detailed to the court, the military judge."

In context, "all other proceedings" plainly refers exclusively to "other proceedings" pertaining to a court-martial.[18] This is confirmed by the provision's subsequent reference to "members of the *court*" and to "cases in which a military

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[18] In addition to being foreclosed by the text of the provision, the Court's suggestion that 10 U. S. C. A. §839(c) (Supp. 2006) applies to military commissions is untenable because it would require, in military commission proceedings, that the accused be present when the members of the commission voted on his guilt or innocence.

judge has been detailed to the *court*." It is also confirmed by the other provisions of §839, which refer only to courts-martial. See §§839(a)(1)–(4) ("[A]ny time after the service of charges which have been referred for trial to a court-martial composed of a military judge and members, the military judge may . . . call the court into session without the presence of the members for the purpose of," hearing motions, issuing rulings, holding arraignments, receiving pleas, and performing various procedural functions). See also §839(b) ("Proceedings under subsection (a) shall be conducted in the presence of the accused"). Section 839(c) simply does not address the procedural requirements of military commissions.

B

The Court contends that Hamdan's military commission is also unlawful because it violates Common Article 3 of the Geneva Conventions, see *ante*, at 65–72. Furthermore, Hamdan contends that his commission is unlawful because it violates various provisions of the Third Geneva Convention. These contentions are untenable.

1

As an initial matter, and as the Court of Appeals concluded, both of Hamdan's Geneva Convention claims are foreclosed by *Johnson* v. *Eisentrager,* 339 U. S. 763 (1950). In that case the respondents claimed, *inter alia*, that their military commission lacked jurisdiction because it failed to provide them with certain procedural safeguards that they argued were required under the Geneva Conventions. *Id*., at 789–790. While this Court rejected the underlying merits of the respondents' Geneva Convention claims, *id*., at 790, it also held, in the alternative, that the respondents could "not assert . . . that anything in the Geneva Convention makes them immune from prosecution or punishment for war crimes," *id*., at 789. The Court explained:

> "We are not holding that these prisoners have no right which the military authorities are bound to respect. The United States, by the Geneva Convention of July 27, 1929, 47 Stat. 2021, concluded with forty-six other countries, including the German Reich, an agreement upon the treatment to be accorded captives. These prisoners claim to be and are entitled to its protection. It is, however, the obvious scheme of the Agreement that responsibility for observance and enforcement of these rights is upon political and military authorities. Rights of alien enemies are vindicated under it only through protests and intervention of protecting powers as the rights of our citizens against foreign governments are vindicated only by Presidential intervention." *Id.*, at 789, n. 14.

This alternative holding is no less binding than if it were the exclusive basis for the Court's decision. See *Massachusetts* v. *United States,* 333 U. S. 611, 623 (1948). While the Court attempts to cast *Eisentrager*'s unqualified, alternative holding as footnote dictum, *ante*, at 63–64, it does not dispute the correctness of its conclusion, namely, that the provisions of the 1929 Geneva Convention were not judicially enforceable because that Convention contemplated that diplomatic measures by political and military authorities were the exclusive mechanisms for such enforcement. Nor does the Court suggest that the 1949 Geneva Conventions departed from this framework. See *ante*, at 64 ("We may assume that 'the obvious scheme' of the 1949 Conventions is identical in all relevant respects to that of the 1929 Convention").

Instead, the Court concludes that petitioner may seek judicial enforcement of the provisions of the Geneva Conventions because "they are . . . part of the law of war. And compliance with the law of war is the condition upon which the authority set forth in Article 21 is granted."

Ante, at 65 (citation omitted). But Article 21 authorizes the use of military commissions; it does not purport to render judicially enforceable aspects of the law of war that are not so enforceable of their own accord. See *Quirin*, 317 U. S., at 28 (by enacting Article 21, "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"). The Court cannot escape *Eisentrager*'s holding merely by observing that Article 21 mentions the law of war; indeed, though *Eisentrager* did not specifically consider the Court's novel interpretation of Article 21, *Eisentrager* involved a challenge to the legality of a World War II military commission, which, like all such commissions, found its authorization in Article 15 of the Articles of War, the predecessor to Article 21 of the UCMJ. Thus, the Court's interpretation of Article 21 is foreclosed by *Eisentrager*.

In any event, the Court's argument is too clever by half. The judicial nonenforceability of the Geneva Conventions derives from the fact that those Conventions have exclusive enforcement mechanisms, see *Eisentrager*, *supra*, at 789, n. 14, and this, too, is part of the law of war. The Court's position thus rests on the assumption that Article 21's reference to the "laws of war" selectively incorporates only those aspects of the Geneva Conventions that the Court finds convenient, namely, the substantive requirements of Common Article 3, and not those aspects of the Conventions that the Court, for whatever reason, disfavors, namely the Conventions' exclusive diplomatic enforcement scheme. The Court provides no account of why the *partial* incorporation of the Geneva Conventions should extend only so far—and no further—because none is available beyond its evident preference to adjudicate those matters that the law of war, through the Geneva Conventions, consigns exclusively to the political branches.

Even if the Court were correct that Article 21 of the

UCMJ renders judicially enforceable aspects of the law of war that are not so enforceable by their own terms, Article 21 simply cannot be interpreted to render judicially enforceable the particular provision of the law of war at issue here, namely Common Article 3 of the Geneva Conventions. As relevant, Article 21 provides that "[t]he provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions . . . of concurrent jurisdiction with respect to *offenders or offenses* that by statute *or by the law of war* may be tried by military commissions." 10 U. S. C. §821 (emphasis added). Thus, to the extent Article 21 can be interpreted as authorizing judicial enforcement of aspects of the law of war that are not otherwise judicially enforceable, that authorization only extends to provisions of the law of war that relate to whether a particular "offender" or a particular "offense" is triable by military commission. Common Article 3 of the Geneva Conventions, the sole provision of the Geneva Conventions relevant to the Court's holding, relates to neither. Rather, it relates exclusively to the particulars of the tribunal itself, namely, whether it is "regularly constituted" and whether it "afford[s] all the judicial guarantees which are recognized as indispensable by civilized peoples." Third Geneva Convention, Art. 3, ¶1*(d),* Relative to the Treatment of Prisoners of War, Aug. 12, 1949, [1955] 6 U. S. T. 3316, 3320, T. I. A. S No. 3364.

2

In addition to being foreclosed by *Eisentrager*, Hamdan's claim under Common Article 3 of the Geneva Conventions is meritless. Common Article 3 applies to "armed conflict not of an international character occurring in the territory of one of the High Contracting Parties." 6 U. S. T., at 3318. "Pursuant to [his] authority as Commander in Chief and Chief Executive of the United States," the President has "accept[ed] the legal conclusion of the Department of

Justice . . . that common Article 3 of Geneva does not apply to . . . al Qaeda . . . detainees, because, among other reasons, the relevant conflicts are international in scope and common Article 3 applies only to 'armed conflict not of an international character.'" App. 35. Under this Court's precedents, "the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight." *Sumitomo Shoji America, Inc.* v. *Avagliano,* 457 U. S. 176, 184–185 (1982); *United States* v. *Stuart,* 489 U. S. 353, 369 (1989). Our duty to defer to the President's understanding of the provision at issue here is only heightened by the fact that he is acting pursuant to his constitutional authority as Commander in Chief and by the fact that the subject matter of Common Article 3 calls for a judgment about the nature and character of an armed conflict. See generally *United States* v. *Curtiss-Wright Export Corp.,* 299 U. S. 304, 320 (1936).

The President's interpretation of Common Article 3 is reasonable and should be sustained. The conflict with al Qaeda is international in character in the sense that it is occurring in various nations around the globe. Thus, it is also "occurring in the territory of" more than "one of the High Contracting Parties." The Court does not dispute the President's judgments respecting the nature of our conflict with al Qaeda, nor does it suggest that the President's interpretation of Common Article 3 is implausible or foreclosed by the text of the treaty. Indeed, the Court concedes that Common Article 3 is principally concerned with "furnish[ing] minimal protection to rebels involved in . . . a civil war," *ante*, at 68, precisely the type of conflict the President's interpretation envisions to be subject to Common Article 3. Instead, the Court, without acknowledging its duty to defer to the President, adopts its own, admittedly plausible, reading of Common Article 3. But where, as here, an ambiguous treaty provision ("not of an

international character") is susceptible of two plausible, and reasonable, interpretations, our precedents require us to defer to the Executive's interpretation.

3

But even if Common Article 3 were judicially enforceable and applicable to the present conflict, petitioner would not be entitled to relief. As an initial matter, any claim petitioner has under Common Article 3 is not ripe. The only relevant "acts" that "are and shall remain prohibited" under Common Article 3 are "the *passing of sentences* and the *carrying out of executions* without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples." Art. 3, ¶1*(d)*, 6 U. S. T., at 1318, 1320 (emphases added). As its terms make clear, Common Article 3 is only violated, as relevant here, by the act of "passing of sentenc[e]," and thus Hamdan will only have a claim *if* his military commission convicts him and imposes a sentence. Accordingly, as Hamdan's claim is "contingent [upon] future events that may not occur as anticipated, or indeed may not occur at all," it is not ripe for adjudication. *Texas* v. *United States,* 523 U. S. 296, 300 (1998) (internal quotation marks omitted).[19] Indeed, even if we assume he will be convicted and sentenced, whether his trial will be conducted in a manner

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[19] The Court does not dispute the conclusion that Common Article 3 cannot be violated unless and until Hamdan is convicted and sentenced. Instead, it contends that "the Geneva Conventions d[o] not direct an accused to wait until sentence is imposed to challenge the legality of the tribunal that is to try him." *Ante*, at 62, n. 55. But the Geneva Contentions do not direct defendants to enforce their rights through litigation, but through the Conventions' exclusive diplomatic enforcement provisions. Moreover, neither the Court's observation respecting the Geneva Conventions nor its reference to the equitable doctrine of abstention bears on the *constitutional* prohibition on adjudicating unripe claims.

so as to deprive him of "the judicial guarantees which are recognized as indispensable by civilized peoples" is entirely speculative. And premature adjudication of Hamdan's claim is especially inappropriate here because "reaching the merits of the dispute would force us to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional." *Raines* v. *Byrd,* 521 U. S. 811, 819–820 (1997).

In any event, Hamdan's military commission complies with the requirements of Common Article 3. It is plainly "regularly constituted" because such commissions have been employed throughout our history to try unlawful combatants for crimes against the law of war. This Court has recounted that history as follows:

> "'By a practice dating from 1847 and renewed and firmly established during the Civil War, military commissions have become adopted as authorized tribunals in this country in time of war. . . . Their competency has been recognized not only in acts of Congress, but in executive proclamations, in rulings of the courts, and in the opinions of the Attorneys General.'" *Madsen*, 343 U. S., at 346, n. 8.

Hamdan's commission has been constituted in accordance with these historical precedents. As I have previously explained, the procedures to be employed by that commission, and the Executive's authority to alter those procedures, are consistent with the practice of previous American military commissions. See *supra*, at 30–34 , and n. 15.

The Court concludes Hamdan's commission fails to satisfy the requirements of Common Article 3 not because it differs from the practice of previous military commissions but because it "deviate[s] from [the procedures] governing courts-martial." *Ante*, at 71. But there is neither a statutory nor historical requirement that military commissions conform to the structure and practice of

courts-martial. A military commission is a different tribunal, serving a different function, and thus operates pursuant to different procedures. The 150-year pedigree of the military commission is itself sufficient to establish that such tribunals are "regularly constituted court[s]." Art. 3, ¶1*(d),* 6 U. S. T., at 3320.

Similarly, the procedures to be employed by Hamdan's commission afford "all the judicial guarantees which are recognized as indispensable by civilized peoples." Neither the Court nor petitioner disputes the Government's description of those procedures.

> "Petitioner is entitled to appointed military legal counsel, 32 C.F.R. 9.4(c)(2), and may retain a civilian attorney (which he has done), 32 C.F.R. 9.4(c)(2)(iii)(B). Petitioner is entitled to the presumption of innocence, 32 C.F.R. 9.5(b), proof beyond a reasonable doubt, 32 C.F.R. 9.5(c), and the right to remain silent, 32 C.F.R. 9.5(f). He may confront witnesses against him, 32 C.F.R. 9.5(i), and may subpoena his own witnesses, if reasonably available, 32 C.F.R. 9.5(h). Petitioner may personally be present at every stage of the trial unless he engages in disruptive conduct or the prosecution introduces classified or otherwise protected information for which no adequate substitute is available and whose admission will not deprive him of a full and fair trial, 32 C.F.R. 9.5(k); Military Commission Order No. 1 (Dep't of Defense Aug. 31, 2005) §6(B)(3) and (D)(5)(b). If petitioner is found guilty, the judgment will be reviewed by a review panel, the Secretary of Defense, and the President, if he does not designate the Secretary as the final decisionmaker. 32 C.F.R. 9.6(h). The final judgment is subject to review in the Court of Appeals for the District of Columbia Circuit and ultimately in this Court. See DTA §1005(e)(3), 119 Stat. 2743; 28 U. S. C. 1254(1)." Brief for Re-

spondents 4.

Notwithstanding these provisions, which in my judgment easily satisfy the nebulous standards of Common Article 3,[20] the plurality concludes that Hamdan's commission is unlawful because of the possibility that Hamdan will be barred from proceedings and denied access to evidence that may be used to convict him. *Ante*, at 70–72. But, under the commissions' rules, the Government may not impose such bar or denial on Hamdan if it would render his trial unfair, a question that is clearly within the scope of the appellate review contemplated by regulation and statute.

Moreover, while the Executive is surely not required to offer a particularized defense of these procedures prior to their application, the procedures themselves make clear that Hamdan would only be excluded (other than for disruption) if it were necessary to protect classified (or classifiable) intelligence, Dept. of Defense, Military Commission Order No. 1, §6(B)(3) (Aug. 31, 2005), including the sources and methods for gathering such intelligence. The Government has explained that "we want to make sure that these proceedings, which are going on in the middle of the war, do not interfere with our war effort and . . . because of the way we would be able to handle interrogations and intelligence information, may actually assist us in promoting our war aims." News Briefing (remarks of Douglas J. Feith, Under Secretary of Defense for Policy). And this Court has concluded, in the very context of a

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[20] Notably, a prosecutor before the *Quirin* military commission has described these procedures as "a substantial improvement over those in effect during World War II," further observing that "[t]hey go a long way toward assuring that the trials will be full and fair." National Institute of Military Justice, Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism, p. x (2002) (hereinafter Procedures for Trials) (foreword by Lloyd N. Cutler).

threat to reveal our Nation's intelligence gathering sources and methods, that "[i]t is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation," *Haig*, 453 U. S., at 307 (quoting *Aptheker* v. *Secretary of State,* 378 U. S. 500, 509 (1964)), and that "[m]easures to protect the secrecy of our Government's foreign intelligence operations plainly serve these interests," *Haig*, *supra*, at 307. See also *Snepp* v. *United States,* 444 U. S. 507, 509, n. 3 (1980) *(per curiam)* ("The Government has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service"); *Curtiss-Wright,* 299 U. S., at 320. This interest is surely compelling here. According to the Government, "[b]ecause al Qaeda operates as a clandestine force relying on sleeper agents to mount surprise attacks, one of the most critical fronts in the current war involves gathering intelligence about future terrorist attacks and how the terrorist network operates—identifying where its operatives are, how it plans attacks, who directs operations, and how they communicate." Brief for United States in No. 03–4792, *United States* v. *Moussaoui* (CA4), p. 9. We should not rule out the possibility that this compelling interest can be protected, while at the same time affording Hamdan (and others like him) a fair trial.

In these circumstances, "civilized peoples" would take into account the context of military commission trials against unlawful combatants in the war on terrorism, including the need to keep certain information secret in the interest of preventing future attacks on our Nation and its foreign installations so long as it did not deprive the accused of a fair trial. Accordingly, the President's understanding of the requirements of Common Article 3 is entitled to "great weight." See *supra*, at 43.

In addition to Common Article 3, which applies to conflicts "not of an international character," Hamdan also claims that he is entitled to the protections of the Third Geneva Convention, which applies to conflicts between two or more High Contracting Parties. There is no merit to Hamdan's claim.

Article 2 of the Convention provides that "the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties." 6 U. S. T., at 1318. "Pursuant to [his] authority as Commander in Chief and Chief Executive of the United States," the President has determined that the Convention is inapplicable here, explaining that "none of the provisions of Geneva apply to our conflict with al Qaeda in Afghanistan or elsewhere throughout the world, because, among other reasons, al Qaeda is not a High Contracting Party." App. 35. The President's findings about the nature of the present conflict with respect to members of al Qaeda operating in Afghanistan represents a core exercise of his commander-in-chief authority that this Court is bound to respect. See *Prize Cases,* 2 Black, at 670.

* * *

For these reasons, I would affirm the judgment of the Court of Appeals.