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NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

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HAMDAN *v.* RUMSFELD, SECRETARY OF DEFENSE, ET AL.

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

No. 05–184. Argued March 28, 2006—Decided June 29, 2006

Pursuant to Congress' Joint Resolution authorizing the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed or aided" the September 11, 2001, al Qaeda terrorist attacks (AUMF), U. S. Armed Forces invaded Afghanistan. During the hostilities, in 2001, militia forces captured petitioner Hamdan, a Yemeni national, and turned him over to the U. S. military, which, in 2002, transported him to prison in Guantanamo Bay, Cuba. Over a year later, the President deemed Hamdan eligible for trial by military commission for then-unspecified crimes. After another year, he was charged with conspiracy "to commit . . . offenses triable by military commission." In habeas and mandamus petitions, Hamdan asserted that the military commission lacks authority to try him because (1) neither congressional Act nor the common law of war supports trial by this commission for conspiracy, an offense that, Hamdan says, is not a violation of the law of war; and (2) the procedures adopted to try him violate basic tenets of military and international law, including the principle that a defendant must be permitted to see and hear the evidence against him.

The District Court granted habeas relief and stayed the commission's proceedings, concluding that the President's authority to establish military commissions extends only to offenders or offenses triable by such a commission under the law of war; that such law includes the Third Geneva Convention; that Hamdan is entitled to that Convention's full protections until adjudged, under it, not to be a prisoner of war; and that, whether or not Hamdan is properly classified a prisoner of war, the commission convened to try him was established in

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violation of both the Uniform Code of Military Justice (UCMJ), 10 U. S. C. §801 *et seq.*, and Common Article 3 of the Third Geneva Convention because it had the power to convict based on evidence the accused would never see or hear. The D. C. Circuit reversed. Although it declined the Government's invitation to abstain from considering Hamdan's challenge, cf. *Schlesinger* v. *Councilman,* 420 U. S. 738, the appeals court ruled, on the merits, that Hamdan was not entitled to relief because the Geneva Conventions are not judicially enforceable. The court also concluded that *Ex parte Quirin,* 317 U. S. 1, foreclosed any separation-of-powers objection to the military commission's jurisdiction, and that Hamdan's trial before the commission would violate neither the UCMJ nor Armed Forces regulations implementing the Geneva Conventions.

Held: The judgment is reversed, and the case is remanded.

415 F. 3d 33, reversed and remanded.

JUSTICE STEVENS delivered the opinion of the Court, except as to Parts V and VI–D–iv, concluding:

1. The Government's motion to dismiss, based on the Detainee Treatment Act of 2005 (DTA), is denied. DTA §1005(e)(1) provides that "no court . . . shall have jurisdiction to hear or consider . . . an application for . . . habeas corpus filed by . . . an alien detained . . . at Guantanamo Bay." Section 1005(h)(2) provides that §§1005(e)(2) and (3)—which give the D. C. Circuit "exclusive" jurisdiction to review the final decisions of, respectively, combatant status review tribunals and military commissions—"shall apply with respect to any claim whose review is . . . pending on" the DTA's effective date, as was Hamdan's case. The Government's argument that §§1005(e)(1) and (h) repeal this Court's jurisdiction to review the decision below is rebutted by ordinary principles of statutory construction. A negative inference may be drawn from Congress' failure to include §1005(e)(1) within the scope of §1005(h)(2). Cf., *e.g., Lindh* v. *Murphy,* 521 U. S. 320, 330. "If . . . Congress was reasonably concerned to ensure that [§§1005(e)(2) and (3)] be applied to pending cases, it should have been just as concerned about [§1005(e)(1)], unless it had the different intent that the latter [section] not be applied to the general run of pending cases." *Id.,* at 329. If anything, the evidence of deliberate omission is stronger here than it was in *Lindh*. The legislative history shows that Congress not only considered the respective temporal reaches of §§1005(e)(1), (2), and (3) together at every stage, but omitted paragraph (1) from its directive only after having *rejected* earlier proposed versions of the statute that would have included what is now paragraph (1) within that directive's scope. Congress' rejection of the very language that would have achieved the result the Government urges weighs heavily against the Government's interpreta-

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tion. See *Doe* v. *Chao,* 540 U. S. 614, 621–623. Pp. 7–20.

2. The Government argues unpersuasively that abstention is appropriate under *Councilman,* which concluded that, as a matter of comity, federal courts should normally abstain from intervening in pending courts-martial against service members, see 420 U. S., at 740. Neither of the comity considerations *Councilman* identified weighs in favor of abstention here. First, the assertion that military discipline and, therefore, the Armed Forces' efficient operation, are best served if the military justice system acts without regular interference from civilian courts, see *id.,* at 752, is inapt because Hamdan is not a service member. Second, the view that federal courts should respect the balance Congress struck when it created "an integrated system of military courts and review procedures" is inapposite, since the tribunal convened to try Hamdan is not part of that integrated system. Rather than *Councilman,* the most relevant precedent is *Ex parte Quirin*, where the Court, far from abstaining pending the conclusion of ongoing military proceedings, expedited its review because of (1) the public importance of the questions raised, (2) the Court's duty, in both peace and war, to preserve the constitutional safeguards of civil liberty, and (3) the public interest in a decision on those questions without delay, 317 U. S, at 19. The Government has identified no countervailing interest that would permit federal courts to depart from their general duty to exercise the jurisdiction Congress has conferred on them. Pp. 20–25.

3. The military commission at issue is not expressly authorized by any congressional Act. *Quirin* held that Congress had, through Article of War 15, sanctioned the use of military commissions to try offenders or offenses against the law of war. 317 U. S., at 28. UCMJ Art. 21, which is substantially identical to the old Art. 15, reads: "The jurisdiction [of] courts-martial shall not be construed as depriving military commissions . . . of concurrent jurisdiction in respect of offenders or offenses that by statute or by the law of war may be tried by such . . . commissions." 10 U. S. C. §821. Contrary to the Government's assertion, even *Quirin* did not view that authorization as a sweeping mandate for the President to invoke military commissions whenever he deems them necessary. Rather, *Quirin* recognized that Congress had simply preserved what power, under the Constitution and the common law of war, the President already had to convene military commissions—with the express condition that he and those under his command comply with the law of war. See 317 U. S., at 28–29. Neither the AUMF nor the DTA can be read to provide specific, overriding authorization for the commission convened to try Hamdan. Assuming the AUMF activated the President's war powers, see *Hamdi* v. *Rumsfeld*, 542 U. S. 507, and that those powers include

authority to convene military commissions in appropriate circumstances, see, *e.g., id.*, at 518, there is nothing in the AUMF's text or legislative history even hinting that Congress intended to expand or alter the authorization set forth in UCMJ Art. 21. Cf. *Ex parte Yerger,* 8 Wall. 85, 105. Likewise, the DTA cannot be read to authorize this commission. Although the DTA, unlike either Art. 21 or the AUMF, was enacted after the President convened Hamdan's commission, it contains no language authorizing that tribunal or any other at Guantanamo Bay. Together, the UCMJ, the AUMF, and the DTA at most acknowledge a general Presidential authority to convene military commissions in circumstances where justified under the Constitution and laws, including the law of war. Absent a more specific congressional authorization, this Court's task is, as it was in *Quirin*, to decide whether Hamdan's military commission is so justified. Pp. 25–30.

4. The military commission at issue lacks the power to proceed because its structure and procedures violate both the UCMJ and the four Geneva Conventions signed in 1949. Pp. 49–72.

(a) The commission's procedures, set forth in Commission Order No. 1, provide, among other things, that an accused and his civilian counsel may be excluded from, and precluded from ever learning what evidence was presented during, any part of the proceeding the official who appointed the commission or the presiding officer decides to "close." Grounds for closure include the protection of classified information, the physical safety of participants and witnesses, the protection of intelligence and law enforcement sources, methods, or activities, and "other national security interests." Appointed military defense counsel must be privy to these closed sessions, but may, at the presiding officer's discretion, be forbidden to reveal to the client what took place therein. Another striking feature is that the rules governing Hamdan's commission permit the admission of *any* evidence that, in the presiding officer's opinion, would have probative value to a reasonable person. Moreover, the accused and his civilian counsel may be denied access to classified and other "protected information," so long as the presiding officer concludes that the evidence is "probative" and that its admission without the accused's knowledge would not result in the denial of a full and fair trial. Pp. 49–52.

(b) The Government objects to this Court's consideration of a procedural challenge at this stage on the grounds, *inter alia,* that Hamdan will be able to raise such a challenge following a final decision under the DTA, and that there is no basis to presume, before the trial has even commenced, that it will not be conducted in good faith and according to law. These contentions are unsound. First, because

Hamdan apparently is not subject to the death penalty (at least as matters now stand) and may receive a prison sentence shorter than 10 years, he has no automatic right to federal-court review of the commission's "final decision" under DTA §1005(e)(3). Second, there *is* a basis to presume that the procedures employed during Hamdan's trial will violate the law: He will be, and *indeed already has been*, excluded from his own trial. Thus, review of the procedures in advance of a "final decision" is appropriate. Pp. 52–53.

(c) Because UCMJ Article 36 has not been complied with here, the rules specified for Hamdan's commission trial are illegal. The procedures governing such trials historically have been the same as those governing courts-martial. Although this uniformity principle is not inflexible and does not preclude all departures from courts-martial procedures, any such departure must be tailored to the exigency that necessitates it. That understanding is reflected in Art. 36(b), which provides that the procedural rules the President promulgates for courts-martial and military commissions alike must be "uniform insofar as practicable," 10 U. S. C. §836(b). The "practicability" determination the President has made is insufficient to justify variances from the procedures governing courts-martial. The President here has determined, pursuant to the requirement of *Art. 36(a),* that it is impracticable to apply the rules and principles of law that govern "the trial of criminal cases in the United States district courts" to Hamdan's commission. The President has not, however, made a similar official determination that it is impracticable to apply the rules for courts-martial. And even if subsection (b)'s requirements could be satisfied without an official practicability determination, that subsection's requirements are not satisfied here. Nothing in the record demonstrates that it would be impracticable to apply court-martial rules here. There is no suggestion, *e.g.,* of any logistical difficulty in securing properly sworn and authenticated evidence or in applying the usual principles of relevance and admissibility. It is not evident why the danger posed by international terrorism, considerable though it is, should require, in the case of Hamdan's trial, any variance from the courts-martial rules. The absence of any showing of impracticability is particularly disturbing when considered in light of the clear and admitted failure to apply one of the most fundamental protections afforded not just by the Manual for Courts-Martial but also by the UCMJ itself: The right to be present. See 10 U. S. C. A. §839(c). Because the jettisoning of so basic a right cannot lightly be excused as "practicable," the courts-martial rules must apply. Since it is undisputed that Commission Order No. 1 deviates in many significant respects from those rules, it necessarily violates Art. 36(b). Pp. 53–62.

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(d) The procedures adopted to try Hamdan also violate the Geneva Conventions. The D. C. Circuit dismissed Hamdan's challenge in this regard on the grounds, *inter alia,* that the Conventions are not judicially enforceable and that, in any event, Hamdan is not entitled to their protections. Neither of these grounds is persuasive. Pp. 62–68.

(i) The appeals court relied on a statement in *Johnson* v. *Eisentrager,* 339 U. S. 763, 789, n. 14, suggesting that this Court lacked power even to consider the merits of a Convention argument because the political and military authorities had sole responsibility for observing and enforcing prisoners' rights under the Convention. However, *Eisentrager* does not control here because, regardless of the nature of the rights conferred on Hamdan, cf. *United States* v. *Rauscher,* 119 U. S. 407, they are indisputably part of the law of war, see *Hamdi,* 542 U. S., at 520–521, compliance with which is the condition upon which UCMJ Art. 21 authority is granted. Pp. 63–65.

(ii) Alternatively, the appeals court agreed with the Government that the Conventions do not apply because Hamdan was captured during the war with al Qaeda, which is not a Convention signatory, and that conflict is distinct from the war with signatory Afghanistan. The Court need not decide the merits of this argument because there is at least one provision of the Geneva Conventions that applies here even if the relevant conflict is not between signatories. Common Article 3, which appears in all four Conventions, provides that, in a "conflict not of an international character occurring in the territory of one of the High Contracting Parties [*i.e.,* signatories], each Party to the conflict shall be bound to apply, as a minimum," certain provisions protecting "[p]ersons . . . placed *hors de combat* by . . . detention," including a prohibition on "the passing of sentences . . . without previous judgment . . . by a regularly constituted court affording all the judicial guarantees . . . recognized as indispensable by civilized peoples." The D. C. Circuit ruled Common Article 3 inapplicable to Hamdan because the conflict with al Qaeda is international in scope and thus not a "conflict not of an international character." That reasoning is erroneous. That the quoted phrase bears its literal meaning and is used here in contradistinction to a conflict between nations is demonstrated by Common Article 2, which limits its own application to any armed conflict between signatories and provides that signatories must abide by all terms of the Conventions even if another party to the conflict is a nonsignatory, so long as the nonsignatory "accepts and applies" those terms. Common Article 3, by contrast, affords some minimal protection, falling short of full protection under the Conventions, to individuals associated with neither a signatory nor even a nonsignatory who are involved in a conflict "in the

territory of" a signatory. The latter kind of conflict does not involve a clash between nations (whether signatories or not). Pp. 65–68.

(iii) While Common Article 3 does not define its "regularly constituted court" phrase, other sources define the words to mean an "ordinary military cour[t]" that is "established and organized in accordance with the laws and procedures already in force in a country." The regular military courts in our system are the courts-martial established by congressional statute. At a minimum, a military commission can be "regularly constituted" only if some practical need explains deviations from court-martial practice. No such need has been demonstrated here. Pp. 69–70.

(iv) Common Article 3's requirements are general, crafted to accommodate a wide variety of legal systems, but they are *requirements* nonetheless. The commission convened to try Hamdan does not meet those requirements. P. 72.

(d) Even assuming that Hamden is a dangerous individual who would cause great harm or death to innocent civilians given the opportunity, the Executive nevertheless must comply with the prevailing rule of law in undertaking to try him and subject him to criminal punishment. P. 72.

JUSTICE STEVENS, joined by JUSTICE SOUTER, JUSTICE GINSBURG, and JUSTICE BREYER, concluded in Parts V and VI–D–iv:

1. The Government has not charged Hamdan with an "offense . . . that by the law of war may be tried by military commission," 10 U. S. C. §821. Of the three sorts of military commissions used historically, the law-of-war type used in *Quirin* and other cases is the only model available to try Hamdan. Among the preconditions, incorporated in Article of War 15 and, later, UCMJ Art. 21, for such a tribunal's exercise of jurisdiction are, *inter alia,* that it must be limited to trying offenses committed within the convening commander's field of command, *i.e.,* within the theater of war, and that the offense charged must have been committed during, not before or after, the war. Here, Hamdan is not alleged to have committed any overt act in a theater of war or on any specified date after September 11, 2001. More importantly, the offense alleged is not triable by law-of-war military commission. Although the common law of war may render triable by military commission certain offenses not defined by statute, *Quirin,* 317 U. S., at 30, the precedent for doing so with respect to a particular offense must be plain and unambiguous, cf., *e.g., Loving* v. *United States,* 517 U. S. 748, 771. That burden is far from satisfied here. The crime of "conspiracy" has rarely if ever been tried as such in this country by any law-of-war military commission not exercising some other form of jurisdiction, and does not appear in either the Geneva Conventions or the Hague Conventions—the major trea-

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ties on the law of war. Moreover, that conspiracy is not a recognized violation of the law of war is confirmed by other international sources, including, *e.g.,* the International Military Tribunal at Nuremberg, which pointedly refused to recognize conspiracy to commit war crimes as such a violation. Because the conspiracy charge does not support the commission's jurisdiction, the commission lacks authority to try Hamdan. Pp. 30–49.

2. The phrase "all the guarantees . . . recognized as indispensable by civilized peoples" in Common Article 3 of the Geneva Conventions is not defined, but it must be understood to incorporate at least the barest of the trial protections recognized by customary international law. The procedures adopted to try Hamdan deviate from those governing courts-martial in ways not justified by practical need, and thus fail to afford the requisite guarantees. Moreover, various provisions of Commission Order No. 1 dispense with the principles, which are indisputably part of customary international law, that an accused must, absent disruptive conduct or consent, be present for his trial and must be privy to the evidence against him. Pp. 70–72.

JUSTICE KENNEDY, agreeing that Hamdan's military commission is unauthorized under the Uniform Code of Military Justice, 10 U. S. C. §§836 and 821, and the Geneva Conventions, concluded that there is therefore no need to decide whether Common Article 3 of the Conventions requires that the accused have the right to be present at all stages of a criminal trial or to address the validity of the conspiracy charge against Hamdan. Pp. 17–19.

STEVENS, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I through IV, VI through VI–D–iii, VI–D–v, and VII, in which KENNEDY, SOUTER, GINSBURG, and BREYER, JJ., joined, and an opinion with respect to Parts V and VI–D–iv, in which SOUTER, GINSBURG, and BREYER, JJ., joined. BREYER, J., filed a concurring opinion, in which KENNEDY, SOUTER, and GINSBURG, JJ., joined. KENNEDY, J., filed an opinion concurring in part, in which SOUTER, GINSBURG, and BREYER, JJ., joined as to Parts I and II. SCALIA, J., filed a dissenting opinion, in which THOMAS and ALITO, JJ., joined. THOMAS, J., filed a dissenting opinion, in which SCALIA, J., joined, and in which ALITO, J., joined as to all but Parts I, II–C–1, and III–B–2. ALITO, J., filed a dissenting opinion, in which SCALIA and THOMAS, JJ., joined as to Parts I through III. ROBERTS, C. J., took no part in the consideration or decision of the case.