

## The Virtues of Abstention: Separation of Powers in Al-Nashiri II

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## NOTES

### THE VIRTUES OF ABSTENTION: SEPARATION OF POWERS IN *AL-NASHIRI II*

NICHOLAS A. DiMARCO<sup>†</sup>

#### INTRODUCTION

Abd Al-Rahim Hussein Muhammed al-Nashiri was a high level al Qaida operative, active off the Yemeni coast at the turn of the twentieth century. He targeted U.S. Navy vessels operating in the Port of Aden, including the USS *Cole* in an act of treachery that killed seventeen members of the ship's crew in October 2000.<sup>1</sup> Arrested by local authorities in Dubai a year later, al-Nashiri was transferred into U.S. custody and detained at a CIA black site.<sup>2</sup> Five years after his removal to Guantánamo Bay, Cuba in 2006, the Obama administration convened a military

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<sup>1</sup> Brief for the United States on Petition for a Writ of Mandamus to the Military Commission at 8–11, *In re Al-Nashiri*, 835 F.3d 110 (D.C. Cir. Aug. 30, 2016) (Nos. 15-1023, 15-5020), 2015 WL 9473946, at \*8–10 [hereinafter Government's Brief]. For a collection of government documents related to al-Nashiri's detention and the charges filed against him, see *The Guantánamo Docket: Abd al Rahim al Nashiri*, N.Y. TIMES, <http://projects.nytimes.com/guantanamo/detainees/10015-abd-al-rahim-al-nashiri> (last visited Dec. 19, 2017).

<sup>2</sup> *In re Al-Nashiri (Al-Nashiri II)*, 835 F.3d 110, 140 (D.C. Cir. 2016) (Tatel, J., dissenting) *reh'g denied, cert. denied*, 138 S. Ct. 354 (2017). The black sites were secretive interrogation cells operated by the CIA in various countries, such as Poland. For a charged, at times chilling, report on the program, see generally SENATE SELECT COMM. ON INTELLIGENCE, 113TH CONG., COMM. STUDY OF THE CENTRAL INTELLIGENCE AGENCY'S DETENTION AND INTERROGATION PROGRAM (Comm. Print 2014).

commission to try al-Nashiri on charges related to his attack on the USS *Cole* and other vessels.<sup>3</sup> The President did so under the 2009 Military Commissions Act (“2009 MCA”), the final product of an extended dialogue among the President, Congress, and the Supreme Court about the shape these commissions would take.

In the most recent round of litigation to reach a federal court,<sup>4</sup> counsel for al-Nashiri filed a habeas petition in the District Court for the District of Columbia that collaterally attacked the commission convened to try him.<sup>5</sup> Seeking a preliminary injunction that would bring commission proceedings to a halt until resolution of his habeas petition, al-Nashiri argued that the commission lacked jurisdiction to try him for his crimes because they were not committed in the context of hostilities.<sup>6</sup> Chief Judge Richard W. Roberts denied the injunction and declined to exercise equitable jurisdiction over the habeas petition during the pendency of the military commission trial.<sup>7</sup>

On appeal, the United States Court of Appeals for the District of Columbia took a deferential posture to al-Nashiri's habeas petition. In a split decision, the panel applied *Councilman* abstention doctrine to the military commissions convened under the MCA, clearing the way for al-Nashiri's oft-delayed trial.<sup>8</sup> The decision to abstain, while consistent with

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<sup>3</sup> *Al-Nashiri II*, 835 F.3d at 113. Al-Nashiri also funded and directed the attempted attack on the USS *The Sullivans* in January 2000, and the successful bombing of the *MV Limburg*, a French supertanker, in October 2002. *Id.* at 113–14.

<sup>4</sup> On a separate issue, al-Nashiri sought a writ of mandamus from the District Court for the District of Columbia in late 2014 to challenge the constitutionality of the appointment of two military judges on his Court of Military Commission Review (“CMCR”) appellate panel. *In re Al-Nashiri (Al-Nashiri I)*, 791 F.3d 71, 75 (D.C. Cir. 2015). The District Court denied the petition because al-Nashiri had not shown that he was clearly and indisputably entitled to mandamus relief. *Id.* at 85–86. In any event, the court reasoned that the President and Senate could “put to rest any Appointments Clause questions regarding the CMCR’s military judges” by nominating and confirming them. *Id.* at 86. The President and Senate did just that in April 2016.

<sup>5</sup> *Al-Nashiri v. Obama*, 76 F. Supp. 3d 218, 221 (D.D.C. 2014).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 223.

<sup>8</sup> *Al-Nashiri II*, 835 F.3d at 118; see also Peter Margulies, *DC Circuit in Al-Nashiri: All Clear for Military Commission Trial*, LAWFARE (Aug. 31, 2016, 9:30 AM), <https://lawfareblog.com/dc-circuit-al-nashiri-all-clear-military-commission-trial> (approving the result). For an expert discussion of the decision, listen to *The Lawfare Podcast: Geeking Out on Al-Nashiri with Michel Paradis and Bob Loeb*, LAWFARE (Sept. 3, 2016), <https://lawfareblog.com/lawfare-podcast-geeking-out-al-nashiri>.

recent decisions by lower federal courts, contrasts markedly with *Hamdan v. Rumsfeld*,<sup>9</sup> decided ten years earlier. There, the United States Supreme Court showed little deference to the executive, declined to take the path of abstention and instead issued a wide-ranging opinion that validated the military commission mechanism but invalidated the system as employed by the Bush administration. Why does *Councilman* abstention apply now but not before? What was missing in 2006, when *Hamdan* was decided, that has since led federal courts to defer to the military commissions? And is judicial deference—in particular abstention—the appropriate response to the military commission system currently in place at Guantánamo?

This Note investigates those questions. Part I examines various scholarly approaches to judicial deference, then considers deference in the context of military commissions. In Part II, the history of military commissions in the United States is examined, paying particular attention to the extended dialogue among the coordinate federal branches that created the system currently in operation. The decision in *Al-Nashiri II*<sup>10</sup> not to adjudicate a collateral attack on one of these commissions is the focus of Part III. That Part embraces the underlying jurisdictional challenge at stake in *Al-Nashiri II*, the development of abstention doctrine generally and as applied to the current commissions, as well as the role judicial deference played in the panel's decision. Finally, in Part IV, this Note argues that the path of abstention had many virtues in this case and as a rule of law, because it furthered sound separation of powers principles by respecting the considered judgments of Congress and successive Presidents. Part IV first categorizes the type of deference the panel engaged in by abstaining. Next, it considers the effect the decision will have on future collateral attacks on commission proceedings, as federal courts will now review military commission final judgments, just as Congress and the President intended, rather than intervening indiscriminately. This Note argues that this

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Michel-Paradis and Bob-Loeb. For a discussion of abstention doctrine, see *infra* Part III.B.

<sup>9</sup> 548 U.S. 557 (2006).

<sup>10</sup> This Note follows the majority of commentators in referring to the most recent D.C. Circuit decision as *Al-Nashiri II*. See, e.g., Stephen Vladeck, *Al-Nashiri II: Comity, Legitimacy, and the Military Commissions*, LAWFARE (Aug. 31, 2016, 12:20 AM), <https://www.lawfareblog.com/al-nashiri-ii-comity-legitimacy-and-military-commissions>.

effect will, in turn, preserve the commission system created by Congress—the branch best suited to weigh the intricate national security considerations involved in prosecuting and bringing to justice those who, in their attempt to thwart our military effort, violate the laws of war.

### I. JUDICIAL DEFERENCE: THEORY AND PRACTICE

Although chronicling every instance of judicial deference is beyond the scope of this Note, a brief review will bring into greater focus what is meant by the term here.<sup>11</sup> Because characterizing a judicial decision as “deferential” often involves a value judgment, scholars have developed a variety of approaches to defining deference. In the national security context, however, judicial deference implicates separation of powers principles and the balance to be reached among the coordinate branches when it comes to decisions about the nation’s defense and security.

Professors Samuel Issacharoff and Richard Pildes say that balance historically has been achieved through a process-based approach that courts employ in extreme security contexts.<sup>12</sup> This approach shifts responsibility to Congress and the President, the most democratic branches of government.<sup>13</sup> The judiciary’s willingness to limit its role in national security decision making when there is bilateral institutional action aligns with Justice Robert H. Jackson’s categorization of presidential power in the *The Steel Seizure Case*,<sup>14</sup> which is widely accepted as the guide to modern analysis of separation of powers.<sup>15</sup> The historical pattern

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<sup>11</sup> Instances where federal courts defer to the political branches are sundry, but this Note focuses on the deference in the national security context, leaving aside *Chevron* deference, for example. For a discussion of the application of *Chevron* deference to foreign affairs, see Curtis A. Bradley, *Chevron Deference and Foreign Affairs*, 86 VA. L. REV. 649 (2000); see also Cass R. Sunstein, *Minimalism at War*, 2004 SUP. CT. REV. 47, 60–66 (canvassing decisions in which courts deferred to the executive on national security issues).

<sup>12</sup> Samuel Issacharoff & Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime*, 5 THEORETICAL INQUIRIES IN LAW 1, 5 (2004). Professors Issacharoff and Pildes distinguish this process-based approach from “civil libertarianism” on the one end, and “executive unilateralism” on the other.

<sup>13</sup> *Id.*

<sup>14</sup> *Youngstown Sheet & Tube Co. v. Sawyer (The Steel Seizure Case)*, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring).

<sup>15</sup> See Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259, 1274 (2003) (referencing Justice

Professors Issacharoff and Pildes discern can be summarized as follows: “Where both legislature and executive endorse a particular tradeoff between liberty and security, the courts have accepted that judgment,” that is, deferred.<sup>16</sup> On the other hand, “Where the executive has acted in the face of legislation policies or without legislative approval, the courts have invalidated executive action, even during wartime, or scrutinized it more closely.”<sup>17</sup>

Professor John Yoo takes issue with the latter part of this pattern.<sup>18</sup> Professor Yoo has provided a formal and functional case for judicial deference to executive interpretations of foreign affairs laws, described by scholars as the “executive unilateral approach.”<sup>19</sup> Recognizing the well-settled doctrine requiring deference to reasonable executive interpretations of ambiguous statutes,<sup>20</sup> he has argued courts should be all the more willing to defer to executive action where the president’s constitutional powers as the Commander-in-Chief are implicated.<sup>21</sup> In addition, he points out that courts have historically deferred to reasonable executive interpretations of treaties and customary international law.<sup>22</sup> But the more fundamental rationale for judicial deference to the executive in this context is functional, not doctrinal. From an institutional standpoint, courts lack the information-gathering capabilities that place the executive—with its own “institutional experts and a wide global network of contacts” uncontrolled by rules of evidence and discovery—in the superior position to achieve national goals in international relations.<sup>23</sup>

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Jackson’s “three now-canonical categories that guide modern analysis of separation of powers”).

<sup>16</sup> Issacharoff & Pildes, *supra* note 12, at 44.

<sup>17</sup> *Id.*

<sup>18</sup> Julian Ku & John Yoo, *Hamdan v. Rumsfeld: The Functional Case for Foreign Affairs Deference to the Executive Branch*, 23 CONST. COMMENT. 179, 180 (2006).

<sup>19</sup> *Id.* At least in the context of military commissions, Professor Yoo argues that scholars have failed to articulate why congressional sanction of the commissions is a necessary precondition for the executive to employ them. *Id.* at 212–13. Even the Court in *Hamdan* declined to reach the constitutional question of whether the president could convene a military commission without congressional approval in cases of “controlling necessity.” *Hamdan v. Rumsfeld*, 548 U.S. 557, 592 (2006). Because Congress has expressly authorized the military commissions at Guantánamo, the question is largely academic and will not be discussed in this Note.

<sup>20</sup> Ku & Yoo, *supra* note 18, at 195 (discussing *Chevron* deference).

<sup>21</sup> *Id.* at 195–96.

<sup>22</sup> *Id.* at 196–99.

<sup>23</sup> *Id.* at 199–201.

Moreover, the executive is politically accountable to the body politic, which has the power to eventually change undesirable interpretations and strategies.<sup>24</sup> None of this is to say that courts should abdicate their responsibilities in the face of executive branch assertions, but the case for judicial caution where the “[e]xecutive’s competence is maximal” and the judiciary’s is “virtually nonexistent” is worth considering, especially when the nation’s safety is at stake.<sup>25</sup>

Another approach, articulated by Professor Cass Sunstein, advises that the judiciary proceed “cautiously and narrowly when national security is at risk.”<sup>26</sup> The characteristics of this “minimalist alternative”<sup>27</sup> are to (1) require that Congress authorize any executive branch interference with constitutionally protected interests, (2) ensure any deprivations of liberty are accompanied by minimally fair procedures, and (3) issue narrow and incompletely theorized decisions.<sup>28</sup> The minimalist approach to conflicts between civil liberty and national security has been endorsed in prominent wartime decisions<sup>29</sup> and has the advantage of ensuring that the federal judiciary plays a role that is best-suited to its institutional strengths and weaknesses.<sup>30</sup>

Finally, Professor David Rudenstine believes that since the end of World War II, the Supreme Court has employed various legal doctrines to insulate executive action from meaningful judicial review in cases the executive asserts implicate national security.<sup>31</sup> These doctrines include the state secrets privilege, standing requirements, the quasi-immunity defense, as well as

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<sup>24</sup> *Id.* at 201.

<sup>25</sup> *Hamdan v. Rumsfeld*, 548 U.S. 557, 677 (2006) (Scalia, J., dissenting).

<sup>26</sup> Sunstein, *supra* note 11, at 77.

<sup>27</sup> Professor Sunstein places minimalism in contradistinction to two other competing approaches: national security maximalism and liberty maximalism. National security maximalists believe the Constitution requires a highly deferential role for the judiciary when the nation’s security is threatened. *Id.* at 49–50. Conversely, liberty maximalists “insist that in times of war, at least as much as in times of peace, federal judges must protect constitutional liberty.” *Id.* On this spectrum, judicial minimalism lies somewhere in the middle.

<sup>28</sup> *Id.* at 77.

<sup>29</sup> Professor Sunstein argues the following cases illustrate his minimalist approach to decision making during war time: *Kent v. Dulles*, 357 U.S. 116 (1958); *The Steel Seizure Case*, 343 U.S. 579 (1952); and *Ex parte Endo*, 320 U.S. 81 (1943). Sunstein, *supra* note 11, at 79–83.

<sup>30</sup> Sunstein, *supra* note 11, at 109.

<sup>31</sup> DAVID RUDENSTINE, *THE AGE OF DEFERENCE: THE SUPREME COURT, NATIONAL SECURITY, AND THE CONSTITUTIONAL ORDER* 3–4 (2016).

heightened pleading rules. All of these, Rudenstine argues, combine to deny judicial relief to individuals whose rights may have been violated, immunize controversial executive conduct from judicial review, and permit excess secrecy in judicial proceedings.<sup>32</sup> According to Rudenstine, this “age of deference” has diminished transparency and undermined the nation’s commitment to rule of law and checks and balances.<sup>33</sup>

Professor Rudenstine is careful to note that judicial deference is not a reaction to the attacks on September 11, 2001, and the cases he describes span the twentieth century. That said, in the aftermath of September 11, judges have deferred to executive designations of foreign organizations as terrorist organizations,<sup>34</sup> limited Freedom of Information Act requests when they have implicated national security concerns,<sup>35</sup> and respected joint executive-legislative fact-findings when interpreting the statute prohibiting material support for terrorists.<sup>36</sup> This hardly seems surprising, as these issues would appear to involve precisely the type of national security decisions that federal judges would leave to the political branches.<sup>37</sup>

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<sup>32</sup> *Id.* at 4.

<sup>33</sup> *Id.* at 7, 9.

<sup>34</sup> *People’s Mojahedin Org. of Iran v. U.S. Dep’t of State*, 182 F.3d 17, 23 (D.C. Cir. 1999) (quoting *Chi. & S. Air Lines, Inc. v. Waterman Steamship Corp.*, 333 U.S. 103, 111 (1948)) (holding the question of whether the terrorist activity of the organization threatens the security of U.S. nationals or the national security of the United States a nonjusticiable question because questions concerning the foreign policy decisions of the executive branch present political judgments, “decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and have long been held to belong in the domain of political power not subject to judicial intrusion or inquiry”) (internal citations omitted).

<sup>35</sup> *Ctr. for Nat’l Sec. Studies v. Dep’t of Justice*, 331 F.3d 918, 932 (D.C. Cir. 2003) (“[I]n undertaking a deferential review we simply recognize the different roles underlying the constitutional separation of powers. It is within the role of the executive to acquire and exercise the expertise of protecting national security. It is not within the role of the courts to second-guess executive judgments made in furtherance of that branch’s proper role.”); *see also* *ACLU v. Dep’t of Justice*, 321 F. Supp. 2d 24, 35 (D.D.C. 2004) (deferring to government judgment that requested information should be exempted from Freedom of Information Act request).

<sup>36</sup> *Holder v. Humanitarian Law Project*, 561 U.S. 1, 33–34 (2010) (“That evaluation of the facts by the Executive, like Congress’s assessment, is entitled to deference. This litigation implicates sensitive and weighty interests of national security and foreign affairs.”).

<sup>37</sup> LAWRENCE J. MORRIS, *MILITARY JUSTICE: A GUIDE TO THE ISSUES* 176–77 (2010) [hereinafter *MILITARY JUSTICE*]; Statement of Daniel J. Dell’Orto, Principal Deputy General Counsel Department of Defense, *reprinted in* 76 *TERRORISM: DOCUMENTS OF INTERNATIONAL AND LOCAL CONTROL* 215 (2007).



Nonetheless, the only Supreme Court decision to squarely address the legality of the military commissions convened by the George W. Bush administration to try alleged terrorists was anything but deferential.<sup>38</sup> To explain why, Part II of this Note provides a history of military commissions, focusing specifically on the development of the current system in operation at Guantánamo Bay.

## II. MILITARY COMMISSIONS IN THE UNITED STATES

As long as there are armed conflicts, there will likely be military commissions in one form or another.<sup>39</sup> This Part chronicles the history of military commissions in the United States from the Mexican-American War to the aftermath of September 11, 2001. Next, it examines the Supreme Court's decision in *Hamdan v. Rumsfeld* to strike down the military commissions as constituted under the Bush administration. Finally, this Part describes Congress's response to the *Hamdan* decision, as well as the current system of military commissions under the Military Commissions Act of 2009, paying specific attention to their composition and appellate review structure.

### A. *Commissions through Early American History*

A military commission is convened as an “incident to the conduct of war” in order “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.”<sup>40</sup> It is

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<sup>38</sup> See generally *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

<sup>39</sup> Gary D. Solis, *Contemporary Law of War and Military Commissions*, in *GUANTÁNAMO AND BEYOND: EXCEPTIONAL COURTS AND MILITARY COMMISSIONS IN COMPARATIVE PERSPECTIVE* 73, 73 (Fionnuala Ní Aoláin & Oren Gross eds., 2013) (outlining the evolution of military commissions); see also *Hamdan*, 548 U.S. at 590 (“The military commission . . . was born of military necessity”); *Madsen v. Kinsella*, 343 U.S. 341, 346–47 (1952) (“Since our nation’s earliest days, [military] commissions have been constitutionally recognized agencies for meeting many urgent governmental responsibilities related to war.”). But see Carol L. Chomsky, *Military Commissions in Historical Perspective: Lessons from the United States – Dakota War Trials*, in *GUANTÁNAMO AND BEYOND: EXCEPTIONAL COURTS AND MILITARY COMMISSIONS IN COMPARATIVE PERSPECTIVE*, *supra*, at 55, 55 (“Throughout American history, military commissions had been used irregularly and rarely . . .”).

<sup>40</sup> *Hamdan*, 548 U.S. at 596 (internal quotations omitted) (quoting *Ex parte Quirin*, 317 U.S. 1, 28–29 (1942)). This type of commission is distinct from those commissions used in place of civilian courts when martial law has been declared,

generally accepted that General Winfield Scott convened the first military commissions in the United States in 1847 to maintain order during America's occupation of Mexico in the little-discussed Mexican War.<sup>41</sup> Their use was expanded during the Civil War, and even "flourished."<sup>42</sup> Although more than 2,000 commissions were convened during the Civil War, the two cases that attracted the most public attention involved northerners who were sympathetic to the Confederacy but did not take up arms against the government.<sup>43</sup> In *United States v. Vallandigham*,<sup>44</sup> the Court reviewed a commission convened by Union General Ambrose Burnside to try Clement Vallandigham, a former Congressman from Ohio, for expressing sympathy for the South.<sup>45</sup> The Supreme Court indirectly upheld Vallandigham's conviction, holding the military commissions

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and those in operation during a military occupation. *Id.* at 595–96. It is also distinct from courts-martial.

<sup>41</sup> See David Glazier, Note, *Kangaroo Court or Competent Tribunal?: Judging the 21st Century Military Commission*, 89 VA. L. REV. 2005, 2027 (2003) ("It is generally agreed that the real origin of the military commission dates from the Mexican War of 1846–1848.") (citing WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 832–33 (2d ed. rev. 1920)); *MILITARY JUSTICE*, *supra* note 37, at 179–83; LOUIS FISHER, *MILITARY TRIBUNALS AND PRESIDENTIAL POWER: AMERICAN REVOLUTION TO THE WAR ON TERRORISM* 32–35 (2005) [hereinafter *MILITARY TRIBUNALS*]. There were instances predating the Mexican War where military commissions were convened, most notably by George Washington to determine whether Major Andre, alleged to be a British spy, was guilty of espionage, and by General Andrew Jackson during the War of 1812 in New Orleans and during the First Seminole War. See *MILITARY JUSTICE*, *supra* note 37, at 179; *MILITARY TRIBUNALS*, *supra*, at 27–33.

<sup>42</sup> See Solis, *supra* note 39, at 76–77. The military commissions employed by the Lincoln administration were not based on the General Scott's model, but rather the "versatile Missouri model" crafted by Henry Halleck in the critical border state of Missouri to combat anti-union insurgents at the onset of the Civil War. Gideon M. Hart, *Military Commissions and the Lieber Code: Toward a New Understanding of the Jurisdictional Foundations of Military Commissions*, 203 MIL. L. REV. 1, 8–22 (2010). Halleck expanded the jurisdiction of the commissions to include all of those offenses constituting violations of the laws of war. *Id.* The Department of War built on Halleck's innovation and more fully delineated the laws of war in the Lieber Code. *Id.* Today's military commissions are a descendent of the Civil War-era Lieber Code. See Solis, *supra* note 39, at 76. For a discussion of the Lieber Code and its imprint on military commissions in the United States and beyond, see *MILITARY TRIBUNALS*, *supra* note 41, at 75–80.

<sup>43</sup> *MILITARY JUSTICE*, *supra* note 37, at 183.

<sup>44</sup> 68 U.S. 243 (1863).

<sup>45</sup> *MILITARY TRIBUNALS*, *supra* note 41, at 56. Vallandigham was an experienced trial lawyer, and he was given the opportunity to call witnesses, cross-examine the witnesses for the prosecution, had the assistance of counsel, and called a witness on his own behalf. *Id.* (citing *Vallandigham*, 68 U.S. at 243, 244).

could not be reviewed by the ordinary federal appellate courts.<sup>46</sup> After the Civil War had ended, however, the Supreme Court concluded that military commissions could not try a U.S. citizen, Lamdin Milligan, for domestic offenses—in that case, conspiracy—when the civilian state courts were open and operating.<sup>47</sup>

### B. Commissions during World War II

Military commissions were not employed during World War I,<sup>48</sup> but World War II “saw hundreds of commissions convened in both the European and Pacific theaters.”<sup>49</sup> Again, two high-profile Supreme Court decisions stand out: *Ex parte Quirin*<sup>50</sup> and *In re Yamashita*.<sup>51</sup> In both, the Supreme Court relied upon explicit congressional authorization for trials by military tribunals.<sup>52</sup> *Quirin* involved the trial of eight German-born

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<sup>46</sup> MILITARY JUSTICE, *supra* note 37, at 184.

<sup>47</sup> *Ex parte Milligan*, 71 U.S. 2 (1866). The decision was unanimous, but four justices concurred in the opinion because they believed that commissions could be convened even when the ordinary courts were open, as “Congress had power, though not exercised, to authorize the military commission which was held in Indiana.” *Id.* at 87. The emphasis on congressional sanction is noteworthy, especially in light of the decisions in *Hamdan* and *Al-Nashiri II*. Notwithstanding the setback, military commissions continued to function in the South under martial law during Reconstruction. MILITARY TRIBUNALS, *supra* note 41, at 59.

<sup>48</sup> MILITARY JUSTICE, *supra* note 37, at 186 (discussing Attorney General Thomas Watt Gregory’s decision not to employ a commission to try Pable Waberski, a Russian national suspected of sabotage).

<sup>49</sup> *Id.* at 188.

<sup>50</sup> 317 U.S. 1 (1942).

<sup>51</sup> 327 U.S. 1 (1946).

<sup>52</sup> *See, e.g., Quirin*, 317 U.S. at 28 (“By the Articles of War, and especially Article 15, Congress has explicitly provided, so far as it may constitutionally do so, that military tribunals shall have jurisdiction to try offenders or offenses against the law of war in appropriate cases. Congress, in addition to making rules for the government of our Armed Forces, has thus exercised its authority to define and punish offenses against the law of nations by sanctioning, within constitutional limitations, the jurisdiction of military commissions to try persons for offenses which, according to the rules and precepts of the law of nations, and more particularly the law of war, are cognizable by such tribunals.”); *Yamashita*, 327 U.S. at 12 (“The war power, from which the commission derives its existence, is not limited to victories in the field, but carries with it the inherent power to guard against the immediate renewal of the conflict, and to remedy, *at least in ways Congress has recognized*, the evils which the military operations have produced.”) (emphasis added). The proposition that military commissions require express congressional authorization was picked up by the *Hamdan* Court, which noted the authority to establish and use penal tribunals, such as the current military

saboteurs who had been captured after landing on U.S. soil with plans to cause destruction.<sup>53</sup> In response to the agents' infiltration, President Franklin D. Roosevelt issued a proclamation<sup>54</sup> creating the military commission and supplemented it with a military order in which he appointed members of the tribunal, the prosecutors, and defense counsel.<sup>55</sup> The Supreme Court issued a short per curiam decision that allowed the commission to proceed, before rendering a full-throated opinion a few months later, unanimously upholding President Roosevelt's commission as valid—by then, three months had passed and six of the saboteurs had already been executed by electrocution.<sup>56</sup>

The United States continued to employ commissions even after the conflict ended, most notably to try General Tomoyuki Yamashita, a senior leader of Japan's Imperial Army.<sup>57</sup> The Supreme Court validated the commission convened to try Yamashita as an appropriate mechanism and rejected the defense's argument that the Geneva Conventions required Yamashita's trial to proceed through a court-martial.<sup>58</sup> Importantly, the Court deferred to the commission's factual findings, limiting its review to questions of law.<sup>59</sup>

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commissions, "can derive only from the powers granted jointly to the President and Congress in time of war." *Hamdan v. Rumsfeld*, 548 U.S. 557, 591 (2006).

<sup>53</sup> MILITARY JUSTICE, *supra* note 37, at 187. The German saboteurs, two of whom were U.S. citizens, were charged with violating the law of war, the Articles of War, and conspiracy. See MILITARY TRIBUNALS, *supra* note 41, at 103–06 (discussing the charges).

<sup>54</sup> Proclamation 2561, 7 Fed. Reg. 5101 (July 7, 1942).

<sup>55</sup> MILITARY TRIBUNALS, *supra* note 41, at 99 (citing 7 Fed. Reg. 5103 (July 7, 1942)).

<sup>56</sup> *Id.* at 114. The Court's central holding in *Quirin* is that "lawful combatants" and "unlawful combatants" are "subject to capture and detention" for the duration of hostilities, but "unlawful combatants" are also "subject to trial and punishment" by military tribunals for acts which render their belligerency unlawful"; in this instance, for espionage, which is a violation of the laws of war. *Quirin*, 317 U.S. at 31. The Court also distinguished the case of the Nazi saboteurs from that of *Lamdin Milligan* who, unlike the saboteurs, had never joined the Confederates and therefore was not a part of a conventional military. *Id.* at 45.

<sup>57</sup> MILITARY JUSTICE, *supra* note 37, at 188.

<sup>58</sup> *In re Yamashita*, 327 U.S. 1, 24 (1946).

<sup>59</sup> *Id.* at 8; MILITARY TRIBUNALS, *supra* note 41, at 147.

The end of World War II brought about the Nuremberg Trials and immense changes in the international community's approach to the law of armed conflict.<sup>60</sup> These developments implicated the lawful use of military commissions, but because the United States did not employ military commissions during the Korean and Vietnam conflicts, these implications were not brought to bear until the conflicts in Iraq and Afghanistan.<sup>61</sup>

### C. *Military Commissions During the Bush Administration*

On September 11, 2001, agents of the al Qaida terrorist group hijacked commercial airplanes and attacked the World Trade Center in New York City and the Pentagon in Arlington, Virginia.<sup>62</sup> So began the longest war in American history.<sup>63</sup> In response to these tragic attacks, Congress passed the Authorization for the Use of Military Force ("AUMF"), which authorized the President to "use all necessary and appropriate force" against those "nations, organizations, or persons" that

<sup>60</sup> See Solis, *supra* note 39, at 81 ("The most significant innovation was the 1949 Geneva Conventions."). To be certain, the Nuremberg Trials were not military commissions. They were convened by an international coalition—rather than by the United States under its own sovereign authority—for the specific purpose of bringing to justice Nazi leaders. MILITARY JUSTICE, *supra* note 37, at 189.

<sup>61</sup> Solis, *supra* note 39, at 84.

<sup>62</sup> Hamdan v. Rumsfeld, 548 U.S. 557, 567–68 (2006). A fourth hijacked plane crashed near Shanksville, Pennsylvania.

<sup>63</sup> Jack Goldsmith & Matthew C. Waxman, *The Other Forever War*, TIME (Sept. 10, 2016), <http://time.com/4486572/forever-war-islamic-state-isis/>; Edmonds v. Dep't of Justice, 323 F. Supp. 2d 65, 82 n.7 (2004) ("[T]he imminent threat of terrorism will not be eliminated anytime in the foreseeable future, but is an endeavor that will consume our nation's attention indefinitely."). Perhaps the dreadful prospect of perpetual warfare is best expressed poetically:

What? War  
 as a living text? Cyberwar and permanent  
 war, Third Wave War, neocortical war,  
 Sixth Generation War, Fourth Epoch  
 War, pure war and war of computers  
 to process it, systems  
 to represent it, war of myth  
 and metaphor, of trope and assent,  
 war of hundreds of millions of televisions  
 assuring it, hundreds of billions  
 of dollars, a PK machine gun or two, a few  
 gunmen you can hire cheap, with their own  
 Kalashnikovs. Now . . . What now?

Lawrence Joseph, *Rubaiyat*, FSG WORK IN PROGRESS, <http://www.fsgworkinprogress.com/2015/04/rubaiyat/>.

orchestrated the September 11 attacks.<sup>64</sup> In addition, the AUMF served as the basis for the government's counterterrorism detention authority.<sup>65</sup> Pursuant to the AUMF, President Bush issued a Military Order<sup>66</sup> authorizing the military to detain "member[s] of the organization known as al Qaida" and those who assisted or harbored them.<sup>67</sup>

Pursuant to President Bush's order, Secretary of Defense Rumsfeld promulgated rules and procedures for the commissions. Defendants in these commissions received the following protections:

- "The right to military defense counsel upon being charged with a listed offense";
- "The right to civilian counsel of choice," to be paid for by the defendant;
- "The privilege against self-incrimination at trial",<sup>68</sup>

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<sup>64</sup> Pub. L. No. 107-40, 115 Stat. 224 (2001). The AUMF provides in full:

That the President is authorized 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, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

<sup>65</sup> See Adam R. Pearlman, *Meaningful Review and Process Due: How Guantanamo Detention Is Changing the Battlefield*, 6 HARV. NAT'L SECURITY J. 255, 270 (2015); see also *Obaydullah v. Obama*, 688 F.3d 784, 791 (2012) ("As this court has now repeatedly held, the AUMF gives the United States government the authority to detain a person who is found to have been part of al Qaeda or Taliban forces . . . and Congress has since affirmed that authority.") (internal citations omitted) (quoting *Al Alwi v. Obama* 653 F.3d 11, 16 (D.C. Cir. 2011)). The Obama administration relied on the AUMF as the President's sole source of power to detain enemy belligerents. See Walter E. Kuhn, *The Terrorist Detention Review Reform Act: Detention Policy and Political Reality*, 35 SETON HALL LEGIS. J. 221, 227 (2011).

<sup>66</sup> Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001). President Bush followed the precedent set by President Roosevelt in styling the order as a military order, which "was intended to emphasize that it came from the president as commander-in-chief, not merely as head of the executive branch." MILITARY JUSTICE, *supra* note 37, at 191.

<sup>67</sup> Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. at 57,834.

<sup>68</sup> The privilege was not extended to detainees before trial because the government maintained that it would inhibit intelligence gathering and would prove unworkable overseas. MILITARY JUSTICE, *supra* note 37, at 191. The rules did forbid a commission from drawing a negative inference from a decision not to testify, however, a prohibition not followed in some European countries. *Id.*

- “The right to a copy of all charges and supporting documents, translated to the accused’s native language”;
- and
- The right to a trial open to the public: Before closing any proceeding to the public, the government was required to make a showing to the presiding official that, for example, closed proceedings were necessary to protect against the dissemination of classified information.<sup>69</sup>

Moreover, and in line with military practice, the commissions required a two-thirds vote to convict in non-capital cases, and a unanimous vote to impose the death penalty.<sup>70</sup> The Department of Defense also promulgated a list of offenses,<sup>71</sup> provided for review panels,<sup>72</sup> and took care of other ancillary matters, such as defining the qualifications for defense counsel.<sup>73</sup> At first, the commissions did not provide appellate review in a federal court; nor were detainees thought to have access to the extraordinary relief of habeas corpus.<sup>74</sup>

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<sup>69</sup> This list is drawn from *MILITARY JUSTICE*, *supra* note 37, at 191–92. A consistent critique of the commissions is their lax rules of evidence, particularly hearsay evidence, and the commission’s ability to exclude the accused from proceedings and deny his access to evidence in certain circumstances. *See, e.g.*, *Hamdan v. Rumsfeld*, 548 U.S. 557, 613–16 (2006); Statement of Lt. Commander Charles Swift, Office of Chief Def. Counsel, Office of Military Comm’ns, U.S. Department of Defense, *reprinted in* 76 *TERRORISM: DOCUMENTS OF INTERNATIONAL AND LOCAL CONTROL* 330–34 (2007).

<sup>70</sup> *MILITARY JUSTICE*, *supra* note 37, at 191–92.

<sup>71</sup> *MILITARY TRIBUNALS*, *supra* note 41, at 181. In this regard, the commissions convened by President Bush resemble those convened by General Winfield Scott’s order of 1847: Both delineated the crimes over which the commission would have jurisdiction and limited the crimes to those that could not be tried in a court-martial and to punishments available in U.S. civilian courts. *MILITARY JUSTICE*, *supra* note 37, at 180.

<sup>72</sup> *MILITARY TRIBUNALS*, *supra* note 41, at 184–85.

<sup>73</sup> *Id.* at 184.

<sup>74</sup> Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833, 57,836 (Nov. 13, 2001). This presumption was not unfounded. *See, e.g.*, Pearlman, *supra* note 65, at 268 (“In light of this precedent, especially *Eisentrager*, and based on government arguments presented in court filings, when the first Operation Enduring Freedom detainees arrived at Guantánamo Bay in January 2002, it seems the government never expected that the detainees would be able to use U.S. federal courts to challenge the lawfulness of their detention.”); *Rasul v. Bush*, 542 U.S. 466, 506 (2004) (Scalia, J., dissenting) (“The Commander in Chief and his subordinates had every reason to expect that the internment of combatants at Guantanamo Bay would not have the consequence of bringing the cumbersome machinery of our domestic courts into military affairs.”). President Roosevelt, too, was intent on keeping the Nazi saboteurs out of the civilian court system, at one point telling his Attorney General Francis Biddle, “I won’t give them up. . . . I won’t hand them over to any United States marshal armed with a

This proved not to be the case.<sup>75</sup> In the face of several lawsuits, Congress made significant changes to the system in an attempt to shore up the commissions and insulate them from collateral review in federal court. With the Detainee Treatment Act of 2005 (“DTA”),<sup>76</sup> Congress amended the federal habeas statute to provide that “no court, justice, or judge shall have jurisdiction to hear or consider . . . an application for a writ of habeas corpus filed by or on behalf of an alien detained by the

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writ of habeas corpus. Understand?” MILITARY TRIBUNALS, *supra* note 41, at 99 (quoting FRANCIS BIDDLE, IN BRIEF AUTHORITY 331 (1962)).

<sup>75</sup> The Supreme Court first began to chip away at executive assertions of wartime authority to limit detainee access to the federal court system through habeas petitions in 2004 with its decisions in *Rasul v. Bush* and *Hamdi v. Rumsfeld*. In *Rasul*, the Court held that the federal habeas statute, 28 U.S.C. § 2241, extends to aliens detained by the United States in Guantánamo Bay, concluding, “[a]lliens held at the base, no less than American citizens, are entitled to invoke the federal court’s authority under § 2241.” 542 U.S. at 466, 481. In *Hamdi*, a plurality of the Court affirmed that through the AUMF, Congress had authorized the detention of those persons who joined supporting forces hostile to the United States in Afghanistan and who engaged in armed conflict against the United States. *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004). It described this power as a “fundamental and accepted . . . incident to war.” *Id.* However, when the government detains a U.S. citizen, the Court held that due process required more robust procedural protections in the determination of that individual’s status as an enemy combatant than the executive had provided. *Id.* at 533. Nevertheless, and in what has become a theme in the Court’s terrorism cases, the Court left the door open for Congress to fix the issue: “There remains the possibility that the standards we have articulated could be met by an appropriately authorized and properly constituted military tribunal.” *Id.* at 538. The Deputy Secretary of Defense took the *Hamdi* plurality’s cue and established Combatant Status Review Tribunals (“CSRTs”) to determine whether individuals detained at Guantánamo were in fact “enemy combatants” as defined by the Department. Memorandum from the Deputy Sec’y of Def. on Order Establishing Combatant Status Review Tribunal to the Sec’y of the Navy (July 7, 2004), [https://www.law.utoronto.ca/documents/Mackin/MuneerAhmad\\_ExhibitV.pdf](https://www.law.utoronto.ca/documents/Mackin/MuneerAhmad_ExhibitV.pdf). “A Combatant Status Review Tribunal . . . is a one-time administrative process designed to determine whether each detainee under the control of the Department of Defense at Guantanamo meets the criteria to be designated as an enemy combatant.” DEP’T OF DEF., COMBATANT STATUS REVIEW TRIBUNAL, (2006), <http://archive.defense.gov/news/Oct2006/d20061017CSRT.pdf>. The Government maintained that these procedures were designed to comply with the due process requirements identified by the plurality in *Hamdi*. See Pearlman, *supra* note 65, at 271.

<sup>76</sup> Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act of 2005, Pub. L. No. 109-148, 119 Stat. 2680; see also Stephen I. Vladeck, *Exceptional Courts and the Structure of American Military Justice*, in GUANTÁNAMO AND BEYOND: EXCEPTIONAL COURTS AND MILITARY COMMISSIONS IN COMPARATIVE PERSPECTIVE, *supra* note 39, at 163, 172 (“It was the Court’s grant of certiorari in *Hamdan* . . . that precipitated [the DTA].”).



Department of Defense at Guantanamo Bay, Cuba . . . .”<sup>77</sup> Instead, the statute provided statutory appeal to the D.C. Circuit in certain instances, including appeal as of right in capital cases or where the detainee was sentenced to a prison term of ten years or more.<sup>78</sup> When the legality of the Bush military commissions was finally before the Supreme Court in *Hamdan v. Rumsfeld*, the Court was unimpressed with this last-minute addition to the commission’s appellate review procedures,<sup>79</sup> ruling instead by a slim 5-to-4 majority that the commission convened to try Hamdan lacked the power to proceed. The decision provoked an aggressive response from Congress.

#### D. *Hamdan v. Rumsfeld*

The *Hamdan* decision is noteworthy if for no other reason than for the number of issues on which the Court divided.<sup>80</sup> Justice Stevens’ majority found no constitutional defect with the

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<sup>77</sup> Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006, Pub. L. No. 109-148, § 1005, 119 Stat. 2680 (codified as amended at 28 U.S.C. § 2241(e) (2006)), *invalidated by* *Boumediene v. Bush*, 553 U.S. 723 (2008). The act also addressed certain detainee-related issues. For example, it placed restrictions on the treatment and interrogation of detainees in U.S. custody. *Hamdan v. Rumsfeld*, 548 U.S. 557, 572 (2006).

<sup>78</sup> 28 U.S.C. § 2241(e) (2012), *invalidated by* *Boumediene v. Bush*, 553 U.S. 723 (2008). Review was left to the discretion of the D.C. Circuit and was itself circumscribed, limited to:

Whether the final decision was consistent with the standards and procedures specified in the military order referred to in subparagraph (A); and

The extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to reach the final decision is consistent with the Constitution and laws of the United States.

*Id.*

<sup>79</sup> *Hamdan*, 548 U.S. at 616 (“[B]ecause Hamdan apparently is not subject to the death penalty (at least as matters now stand) and may receive a sentence shorter than 10 years’ imprisonment, he has no automatic right to review of the commission’s ‘final decision.’”); *id.* at 650 (Kennedy, J., concurring) (“It is no answer that, at the end of the day, the [DTA] affords military-commission defendants the opportunity for judicial review in federal court. As the Court is correct to observe, the scope of that review is limited.”).

<sup>80</sup> “The Justices divided over (1) the Court’s jurisdiction (5–3); (2) abstention (5–3); (3) the legality of using military commissions to try a conspiracy charge (4–3); (4) the legality of using a military commission lacking the rules and procedures of courts-martial (5–3); (5) the enforceability of the Geneva Conventions (5–2); (6) the applicability of Common Article 3 to the war with al Qaeda (5–2); and (7) the meaning of Common Article 3 (5–3).” Cass R. Sunstein, *Clear Statement Principles and National Security: Hamdan and Beyond*, 2006 SUP. CT. REV. 1, 23.

military commissions; its decision to invalidate the commissions was based solely on its interpretation of federal statutes and international treaties. The Court read these statutes as an expression of Congress placing limitations on the President's ability to convene military commissions, thus presenting a "conflict between Presidential and congressional action."<sup>81</sup> Consequently, the Court acknowledged that congressional authorization could cure the defects it identified and invited legislative action.<sup>82</sup>

*Hamdan v. Rumsfeld* involved the trial of Salim Ahmed Hamdan, a Yemeni national who served as bodyguard and personal driver to Osama bin Laden, and who was selected for trial by military commission in 2003 for his alleged conspiracy.<sup>83</sup> His appeal reached the Supreme Court in 2006.<sup>84</sup> First, the Court dodged the DTA's jurisdiction stripping provision, holding that Subsection (e) of § 1005 of the DTA did not apply to cases pending when the DTA was enacted.<sup>85</sup> The Court reasoned that it retained jurisdiction, because Hamdan's petition had been filed and left unresolved before the DTA's enactment.<sup>86</sup> After dealing with the jurisdictional question, the Court rejected the Government's request that it abstain from adjudicating Hamdan's petition for writ of habeas corpus until the military commission had rendered its final judgment.<sup>87</sup> It then moved to the merits.

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<sup>81</sup> *Hamdan*, 548 U.S. at 639 (Kennedy, J., concurring) (arguing the case falls within Justice Jackson's third category in *The Steel Seizure Case*); *id.* at 636 (Breyer, J., concurring) ("Congress has denied the President the legislative authority to create military commissions of the kind at issue here.").

<sup>82</sup> *Hamdan*, 548 U.S. at 636 (Breyer, J., concurring) ("Nothing prevents the President from returning to Congress to seek the authority he believes necessary."); Stephen I. Vladeck, *Congress, the Commander-in-Chief, and the Separation of Powers after Hamdan*, 16 *TRANSNAT'L L. & CONTEMP. PROBS.* 933, 961 (2007) ("In the three opinions supporting the [*Hamdan*] result, the one constant was the emphasis on empowering Congress.").

<sup>83</sup> *Hamdan*, 548 U.S. at 569–70.

<sup>84</sup> *Id.* at 570.

<sup>85</sup> *Id.* at 575–76.

<sup>86</sup> *Id. But see id.* at 672 (Scalia, J., dissenting) (finding the Constitution's Exceptions Clause (Art. III, § 2) "permits exactly what Congress had done here" with the DTA).

<sup>87</sup> The *Hamdan* abstention decision will be scrutinized more closely in the following Part, but it is worth pausing to consider Professor Sunstein's remarks on the question of abstention: "In view of the novelty and delicacy of the underlying questions, a great deal can be said on behalf of a genuinely minimalist course: abstention." Sunstein, *supra* note 80, at 34. This approach would have avoided

The Court first concluded that neither the AUMF nor the DTA provided specific, congressional authorization for the military commissions at issue.<sup>88</sup> As a result, the Court turned to the Uniform Code of Military Justice (“UCMJ”) and determined that the President’s use of military commissions is conditioned on compliance with the UCMJ itself, in addition to the American common law of war, and the Geneva Conventions.<sup>89</sup> Having set forth this rule of law, the Court determined that the current system of military commissions violated all three.<sup>90</sup>

First, the Court concluded that the President promulgated rules of procedure that departed from those used in courts-martial without adequately demonstrating why the court-martial rules would be impracticable under the circumstances.<sup>91</sup> The Court viewed the rules of procedures that permitted commissions to exclude the accused from proceedings, denied him access to evidence in certain circumstances, and deviated from evidentiary rules used in courts-martial, such as those governing hearsay, as particularly problematic because they were inconsistent with the UCMJ.<sup>92</sup> Focusing on two provisions in the UCMJ, Articles 36(a) and 36(b),<sup>93</sup> the Court concluded that the former required the

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thorny questions surrounding the AUMF, the UCMJ, and the Geneva Conventions. *Id.* Furthermore, had the Court abstained, “it would have had an opportunity to resolve the central questions after a trial, and thus after learning about the actual (rather than hypothesized) nature of the particular procedures.” *Id.* at 35. In light of this, “the course of abstention would have had many virtues.” *Id.* at 36.

<sup>88</sup> *Hamdan*, 548 U.S. at 593–94. This reading is “an extremely cramped and unworkable interpretation of the expansive authorization that Congress gave the President in the AUMF,” according to the former United States Solicitor General Theodore Olson. Testimony of Theodore B. Olson, Former U.S. Solicitor General, reprinted in 76 TERRORISM: DOCUMENTS OF INTERNATIONAL AND LOCAL CONTROL, 221 (2007) [hereinafter Testimony of Theodore B. Olson]. Because the Court already construed the AUMF as authorizing the President to exercise his war powers, see *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004), a “rational and reasonable reading of the AUMF is that it endorsed the President’s . . . establishment of the military commissions.” Testimony of Theodore B. Olson, *supra*.

<sup>89</sup> *Hamdan*, 548 U.S. at 584–85.

<sup>90</sup> Justice Stevens lost Justice Kennedy on whether trying enemy combatants for conspiracy was a violation of the American common law of war.

<sup>91</sup> *Hamdan*, 548 U.S. at 620.

<sup>92</sup> *Id.* at 621–22. For a helpful chart comparing procedural rights in courts-martial, the Bush military commissions, the Nuremberg Trials, and the ad-hoc tribunals in the former Yugoslavia and Rwanda, see 76 TERRORISM: DOCUMENTS OF INTERNATIONAL AND LOCAL CONTROL 255–75 (2007); see also *supra* note 69.

<sup>93</sup> The two provisions read as follows:

(a) Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military

President to determine that it would be impracticable to apply in the military commission the rules and principles of law that govern trial in federal district courts, and the latter required an additional impracticability judgment regarding the application of court-martial rules in the military commission setting.<sup>94</sup> Because the Court was unsatisfied with the President's showing of impracticability, the Court concluded that the commissions violated the uniformity principle codified in Article 36(b) of the UCMJ.<sup>95</sup>

The Court also found that Article 21 of the UCMJ required the commissions to comply with the laws of war, which it concluded incorporated the Geneva Conventions and the Hague Convention, overturning the contrary conclusion by the Court of Appeals.<sup>96</sup> The Court first determined that Common Article 3 of the Geneva Conventions applied to agents of al Qaida, a stateless terrorist group.<sup>97</sup> This conclusion triggered Common Article 3's requirement that Hamdan be tried in a "regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples."<sup>98</sup> Circling back to its assessment of the commissions as violative of the UCMJ, the

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commissions and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, *so far as he considers practicable*, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not, except as provided in chapter 47A of this title, be contrary to or inconsistent with this chapter.

(b) All rules and regulations made under this article shall be uniform *insofar as practicable*, except insofar as applicable to military commissions established under chapter 47A of this title.

10 U.S.C. § 836 (2012) (emphasis added).

<sup>94</sup> *Hamdan*, 548 U.S. at 622–23; *id.* at 639–40 (Kennedy, J., concurring).

<sup>95</sup> *Id.* at 624 (majority opinion). Specifically, the Court found the President did not make a satisfactory determination that it would be impracticable to apply the rules for courts-martial, violating subsection (b). *Id.* at 623.

<sup>96</sup> *Id.* at 625–26.

<sup>97</sup> *Id.* at 631–32. *But see* Statement of Steven G. Bradbury, Acting Assistant Attorney General, Office of Legal Counsel, Department of Justice, *reprinted in* 76 TERRORISM: DOCUMENTS OF INTERNATIONAL AND LOCAL CONTROL 211 (2007) ("The United States has never before applied common Article 3 in the context of an armed conflict with international terrorists. When the Geneva Conventions were concluded in 1949, of course, the drafters of the Conventions certainly did not anticipate, and did not agree to cover, armed conflicts with international terrorist organizations such as al Qaeda.").

<sup>98</sup> *Hamdan*, 548 U.S. at 631–32 (2006) (quoting Article 3 of the Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, (1955) 6 U.S.T. 3316, 3318, T.I.A.S. No. 3364).

Court explained that the commissions could only be considered “regularly constituted court[s]” if they followed the standards of military justice set forth in the court-martial process.<sup>99</sup> Adopted without sufficient explanation from the President, the Court reiterated the structural and procedural deficiencies it had found and held that the commission convened to try Hamdan did not meet the requirements of Common Article 3 of the Geneva Conventions.<sup>100</sup>

The *Hamdan* decision was a significant defeat for the Bush administration. It did not, of course, find that military commissions are unconstitutional as a general matter, only that the ones employed by the Bush administration to prosecute terrorists were in conflict with congressional statutes limiting their use. Interestingly, this putative conflict between congressional concerns and the executive’s actions did not reflect on-the-ground realities in 2006. Congress responded rapidly to *Hamdan* by passing the Military Commissions Act of 2006 (“2006 MCA”),<sup>101</sup> which undid much of the *Hamdan* holding and took the unusually aggressive step of completely eliminating the Court’s jurisdiction to hear habeas petitions from Guantánamo detainees.<sup>102</sup>

*E. The Military Commissions Acts and Commissions Under the Obama Administration*

The *Hamdan* decision was issued on June 29, 2006; the House Armed Services Committee commenced hearings on the subject on July 12, 2006.<sup>103</sup> Before the year had ended, Congress passed the 2006 MCA, which President Bush signed into law in October.<sup>104</sup>

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<sup>99</sup> *Id.* at 632–34. *But see id.* at 715 (Thomas, J., dissenting).

<sup>100</sup> *Id.* at 634 (majority opinion). *But see id.* at 725 (Alito, J., dissenting).

<sup>101</sup> Military Commissions Act, Pub. L. No. 109-366, 120 Stat. 2600 (2006) (codified as amended in scattered sections in 10, 18, and 28 U.S.C.).

<sup>102</sup> The jurisdiction-stripping provision that resulted from *Hamdan* ended with the Supreme Court’s decision in *Boumediene v. Bush*, where the Court held that the provision operated as an unconstitutional suspension of the writ of habeas corpus. 553 U.S. 723 (2008).

<sup>103</sup> Linda Greenhouse, *Supreme Court Blocks Guantánamo Tribunals*, N.Y. TIMES (June 29, 2006), <http://www.nytimes.com/2006/06/29/washington/29cnd-scot-us.html>.

<sup>104</sup> Statement by President George W. Bush upon Signing S. 3930, 2006 U.S.C.C.A.N. S61 (Oct. 17, 2006) (“[T]he Supreme Court ruled that the military

Taking the *Hamdan* Court's cue, Congress patterned the military commissions under the 2006 MCA after courts-martial under the UCMJ.<sup>105</sup> That said, the 2006 MCA largely exempted commissions from the requirements of the UCMJ—notably, the speedy trial requirements<sup>106</sup>—and the Geneva Conventions.<sup>107</sup> The statute also provided for more robust appellate review and enhanced evidentiary rules in favor of the accused.<sup>108</sup> It authorized the Secretary of Defense to establish an intermediate appellate tribunal, the Court of Military Commission Review (“CMCR”), whose decisions were to be reviewed by the United States Court of Appeals for the District of Columbia.<sup>109</sup> Moreover, the statute aligned the rules governing hearsay with those used in courts-martial, providing the accused with an opportunity to prove that hearsay evidence, not otherwise admissible in courts-martial, should be excluded because it is “unreliable or lacking in probative value.”<sup>110</sup> Finally, Congress incorporated a slightly modified version of the Classified Information Procedures Act (“CIPA”) to govern the handling of classified information and the procedures governing closed sessions.<sup>111</sup>

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commissions needed to be explicitly authorized by the United States Congress. And so I asked Congress for that authority, and they have provided it.”).

<sup>105</sup> MILITARY JUSTICE, *supra* note 37, at 193; Vladeck, *supra* note 76, at 165.

<sup>106</sup> 10 U.S.C. § 948b(d)(1)(A) (2012).

<sup>107</sup> *Id.* § 948b(g).

<sup>108</sup> *Id.* § 950c.

<sup>109</sup> *Id.* § 950g(a). This procedure was similar to the courts-martial appeals process. Commission convictions would be automatically reviewable by CMCR, just as courts-martial decisions are reviewable by the Courts of Criminal Appeals of the Armed Forces. MILITARY JUSTICE, *supra* note 37, at 193. CMCR decisions could then be appealed through the United States District Court for the District of Columbia, and then to the D.C. Circuit Court of Appeals, and finally by petition to the Supreme Court. *Id.*

<sup>110</sup> 10 U.S.C. § 949a(b)(2)(E) (2012). Additionally, the Government was required to produce exculpatory documents. *Cf.* Statement of Lt. Commander Charles Swift, Office of Chief Def. Counsel, Office of Military Comm'ns, U.S. Department of Defense, *reprinted in* 76 TERRORISM: DOCUMENTS OF INTERNATIONAL AND LOCAL CONTROL 331 (2007) (arguing that under the Bush administration commission rules, “the Prosecution had no obligation to disclose evidence from other government agencies suggesting the defendant was innocent”).

<sup>111</sup> MILITARY JUSTICE, *supra* note 37, at 193; *see also* 10 U.S.C. § 949d(c) (2012).

When Barack Obama assumed office in 2008, the future of the military commissions at Guantánamo became uncertain, given the new President's oft-stated opposition to Guantánamo.<sup>112</sup> But after initially promising to close the detention facility at Guantánamo Bay indefinitely, President Obama sought to reform and utilize the military commissions rather than dismantle them.<sup>113</sup> Congress obliged and revised the 2006 MCA in 2009.<sup>114</sup> The amendments added several procedural protections for enemy combatants, expanded the availability of appellate review,<sup>115</sup> and altered the structure of the CMCR, requiring it to be composed of both military and civilian judges who are appointed by the president with the advice and consent of the Senate.<sup>116</sup> It also enhanced the rights of an accused in certain ways, such as by more closely defining hearsay.<sup>117</sup> The

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<sup>112</sup> See Exec. Order No. 13,492, 74 Fed. Reg. 4897, 4899 (Jan. 22, 2009) (temporarily suspending the operations of the Guantánamo Bay military commissions).

<sup>113</sup> See Editorial, *The Prison that Won't Go Away*, N.Y. TIMES (Mar. 8, 2011), <http://www.nytimes.com/2011/03/09/opinion/09wed2.html>. Indeed, President Obama cleared military prosecutors at Guantánamo in 2011 to try five detainees. See Charlie Savage, *In a Reversal, Military Trials for 9/11 Cases*, N.Y. TIMES (Apr. 4, 2011), <http://www.nytimes.com/2011/04/05/us/05gitmo.html>. The change of policy was never a change of heart, of course, and President Obama never stopped calling for Guantánamo's closure. Jens David Ohlin, *One More Time All Together: Obama Wants To Close Gitmo*, OPINIO JURIS (Feb. 23, 2016, 11:01 AM), <http://opiniojuris.org/2016/02/23/32410/>. In fairness, the former President's political statements regarding Guantánamo do little justice to his views on the use of military commissions, which are nuanced. See, e.g., President Barack Obama, Remarks by the President on National Security, WHITEHOUSE.GOV (May 21, 2009, 10:28 AM), <https://obamawhitehouse.archives.gov/the-press-office/remarks-president-national-security-5-21-09> ("Military commissions have a history in the United States dating back to George Washington and the Revolutionary War. They are an appropriate venue for trying detainees for violations of the laws of war. They allow for the protection of sensitive sources and methods of intelligence-gathering; they allow for the safety and security of participants; and for the presentation of evidence gathered from the battlefield that cannot always be effectively presented in federal courts.").

<sup>114</sup> National Defense Authorization Act for Fiscal Year 2010 Pub. L. No. 111-84, 123 Stat. 2190, 2574-614 (2009).

<sup>115</sup> Vladeck, *supra* note 76, at 174.

<sup>116</sup> 10 U.S.C. § 950f (2012).

<sup>117</sup> See Solis, *supra* note 39, at 89. The 2009 MCA also prohibited the use of statements made under torture or cruel, inhuman or degrading treatment. *Id.*

ultimate result of the 2009 amendments was “to produce a structure that closely (and intentionally) mirrors the current structure for direct and collateral review of courts-martial.”<sup>118</sup>

In short, the congressional response in the form of the MCA provided the express legislative sanction of military commissions that the *Hamdan* Court requested and provided for a robust appeals process to federal court. These changes set the stage for *Al-Nashiri II*, where a panel of judges deferred to the military commissions, arguing that “[m]uch has changed since *Hamdan*.”<sup>119</sup> As the foregoing makes clear, “[t]he current system of military commissions at Guantanamo Bay ‘is the product of an extended dialogue among the President, the Congress, and the Supreme Court.’”<sup>120</sup> That dialogue is on full display in the recent decision by the D.C. Circuit in *Al-Nashiri II*.

### III. AL-NASHIRI II

In the present round of litigation,<sup>121</sup> al-Nashiri argued that the offenses for which he has been charged<sup>122</sup> are not “triable” by a military commission under the MCA because they were not

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<sup>118</sup> Vladeck, *supra* note 76, at 175; *see also* Glazier, *supra* note 41, at 2024 (“[H]istorical analysis and the writings of military justice commentators reveal an original practice of close conformity between the procedures of [courts-martial and military commissions].”).

<sup>119</sup> *Al-Nashiri II*, 835 F.3d 110, 120 (D.C. Cir. 2016).

<sup>120</sup> *Id.* at 114 (quoting *Al-Nashiri I*, 791 F.3d 71, 73 (D.C. Cir. 2015)); *see also* Ori Aronson, *In/visible Courts: Military Tribunals as Other Spaces*, in *SECRECY, NATIONAL SECURITY AND THE VINDICATION OF CONSTITUTIONAL LAW* 229, 232 (David Cole et al. eds., 2013) (“The decade since [September 11, 2001] has witnessed an ongoing inter-branch process of recalibration of the procedural, institutional, and constitutional elements of the reinvented military commissions system, including several rounds of legislation, judicial review, and executive policy adjustments.”).

<sup>121</sup> *See* discussion *supra* note 4.

<sup>122</sup> Al-Nashiri has been charged with the following:

- (1) using treachery or perfidy
- (2) murder in violation of the law of war
- (3) attempted murder in violation of the law of war
- (4) terrorism
- (5) conspiracy
- (6) intentionally causing serious bodily injury
- (7) attacking civilians
- (8) attacking civilian objects
- (9) hijacking or hazarding a vessel or aircraft.

Charge Sheet at 3–5, 10, 12, *United States v. al-Nashiri*, Charge Sheet (Mil. Comm’n’s Trial Judiciary Sept. 28, 2011), [http://www.mc.mil/Portals/0/pdfs/alNashiri2/Al%20Nashiri%20II%20\(Referred%20Charges\).pdf](http://www.mc.mil/Portals/0/pdfs/alNashiri2/Al%20Nashiri%20II%20(Referred%20Charges).pdf). “The government is seeking the death penalty.” *Al-Nashiri II*, 835 F.3d at 114.



“committed in the context of . . . hostilities,” which is a prerequisite for the military commission’s exercise of jurisdiction under the 2009 MCA.<sup>123</sup> The court did not reach the jurisdictional question, however, opting to apply *Councilman* abstention to the military commission convened to try al-Nashiri. Before evaluating the court’s extension of *Councilman* to the military commissions, the next Section outlines the underlying jurisdictional question raised by counsel for al-Nashiri.

#### A. *The Underlying Jurisdictional Question*

As Judge Griffith noted at the beginning of his analysis, *Al-Nashiri II* presented a relatively narrow question.<sup>124</sup> The petitioner did not challenge “the structural or procedural features of the military commissions created by Congress,” nor did he claim that the “commissions are unconstitutional” or that he was improperly classified as an “alien unprivileged enemy belligerent.”<sup>125</sup> Instead, al-Nashiri’s petition<sup>126</sup> challenged only the commission’s authority to try him for the crimes he is alleged to have committed before September 11, 2001.

The 2009 MCA authorizes the President “to establish military commissions . . . for offenses triable by military commission.”<sup>127</sup> Offenses are triable by military commission “only if the offense is committed in the context of and associated with hostilities.”<sup>128</sup> The statute further defined hostilities as “any conflict subject to the laws of war.”<sup>129</sup> The jurisdiction question turns, then, on how the court will define the “context of

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<sup>123</sup> *Al-Nashiri II*, 835 F.3d at 116. A military judge denied the same arguments on a motion to dismiss in 2012, reasoning that “the existence of hostilities was a mixed question of law and fact” to be proven by the government at trial. *Id.* For a critique of the commission’s jurisdictional decision, authored by Judge Pohl, see Keven Jon Heller, *Judge Pohl: The US and AQ Were Engaged in Hostilities in 1775*, OPINIO JURIS (Jan. 16, 2013, 7:57 PM), <http://opiniojuris.org/2013/01/16/judge-pohl-the-us-and-aq-were-engaged-in-hostilities-in-1775/> (providing a link to the commission decision).

<sup>124</sup> *Al-Nashiri II*, 835 F.3d at 116.

<sup>125</sup> *Id.*

<sup>126</sup> Al-Nashiri also sought mandamus relief, asking the court to dissolve the military commission convened to try him on the ground that his alleged acts were not committed in the context of hostilities. *Id.* at 117.

<sup>127</sup> 10 U.S.C. § 948b(b) (2012).

<sup>128</sup> *Id.* § 950p(c) (2012).

<sup>129</sup> *Id.* § 948a(9) (2012).

hostilities.”<sup>130</sup> In other words, when did the war with al Qaida begin? Judge Griffith framed the disagreement between the parties over how to answer this question as follows:

Should the existence of hostilities be determined based on the totality of the circumstances, or only on the understanding of the political branches? And may it be based on a retrospective analysis or only on what decisionmakers believed at the time of the events? Al-Nashiri and amici believe that the judgments of the political branches at the time are what matters; the Government takes a broader view.<sup>131</sup>

The court did not decide this weighty issue, however. Instead, it extended *Councilman* abstention to the military commission context and declined to adjudicate al-Nashiri’s jurisdictional challenge, which will now be resolved by the military commission in the first instance.<sup>132</sup> The following Section turns to the court’s abstention decision.

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<sup>130</sup> The “context of hostilities” question has attracted scholarly attention and is beyond the scope of this Note. See, e.g., Laurie Blank & Benjamin Farley, *Determining When the Armed Conflict with Al-Qaeda Started*, JUST SECURITY (Mar. 11, 2016, 9:35 AM), <https://www.justsecurity.org/29898/determining-armed-conflict-al-qaeda-started/>; Laurie Blank & Benjamin R. Farley, *Identifying the Start of Conflict: Conflict Recognition, Operational Realities and Accountability in the Post 9/11 World*, 36 MICH. J. INT’L L. 467 (2015). By charging several detainees, including al-Nashiri, Khalid Sheikh Mohammed and other 9/11 attackers, with war crimes for conduct dating back to 1996, the United States has adopted the position that the armed conflict with al Qaida began before 9/11. *Id.* at 491. The existence of an armed conflict triggers the application of the law of armed conflict (“LOAC”), with its attendant obligations. *Id.* at 469.

<sup>131</sup> *Al-Nashiri II*, 835 F.3d 110, 137 (D.C. Cir. 2016). Put simply, if hostilities did not “exist” until after September 11, 2001, then al-Nashiri’s crimes, committed in October 2000, are not triable by the military commissions under the 2009 MCA. The Government takes a different view of the hostilities question, responding that the existence of hostilities is established by considering the totality of the circumstances, and that the *Cole* attack was part of al Qaida’s strategy to wage war against the United States. *Id.* at 136. To the contrary, al-Nashiri asserts that hostilities exist only when the political branches say so in a “contemporaneous public act”; al-Nashiri is quick to note that President Clinton’s public statement in response to the *Cole* bombing made clear that the nation was not at war. *Id.* But this position puts al-Nashiri in an awkward situation when it comes to the argument that the court should not abstain, because for al-Nashiri, joint action by Congress and the President is *not sufficient* for the court to abstain, Oral Argument at 14:30, *Al-Nashiri II*, 835 F.3d 110 (2016), [https://www.cadc.uscourts.gov/recordings/recordings2016.nsf/77A3A67AD3EF915385257F5C006765E1/\\$file/15-1023.mp3](https://www.cadc.uscourts.gov/recordings/recordings2016.nsf/77A3A67AD3EF915385257F5C006765E1/$file/15-1023.mp3), but joint action by the political branches, in the form of a public statement or act of Congress, *is necessary* to trigger the existence of hostilities.

<sup>132</sup> Pursuant to the MCA, “[a] military commission is a competent tribunal to make a finding sufficient for jurisdiction.” 10 U.S.C. § 948d (2012).

### B. Abstention Doctrine

The court's abstention analysis involves a two-step inquiry: (1) Does abstention doctrine apply to the military commissions generally? And if so, (2) Do any of the exceptions identified in abstention jurisprudence apply to al-Nashiri's unique circumstances?<sup>133</sup> To understand the court's answer to both questions, a review of abstention doctrine is in order.

The doctrine of abstention first arose in the context of criminal prosecutions as an exception to the "strict duty" that federal courts have to exercise the jurisdiction conferred upon them by Congress.<sup>134</sup> The general rule is that so long as the defendant has an adequate remedy in the form of a trial and direct appeal, federal courts should not exercise their equitable discretion<sup>135</sup> to enjoin ongoing state criminal proceedings.<sup>136</sup> In *Younger v. Harris*,<sup>137</sup> the United States Supreme Court established the current standard for applying abstention to state criminal prosecutions by articulating two considerations that favored abstention in the face of ongoing state criminal proceedings: (1) the traditional rule that courts of equity should not enjoin criminal prosecutions where an adequate remedy at law exists,<sup>138</sup> and (2) interests of comity, or "federalism," that ward against interference in ongoing state proceedings because it would disrupt the careful balance between state and federal power.<sup>139</sup>

Grounding its decision in *Younger*, the Court in *Schlesinger v. Councilman* extended abstention doctrine to courts-martial.<sup>140</sup> *Councilman* involved a court-martial convened to try an Army officer for allegedly selling and possessing marijuana.<sup>141</sup> The case reached the Supreme Court after the defendant filed suit in a

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<sup>133</sup> Cf. *Hamdan v. Rumsfeld*, 548 U.S. 557, 589 n.20 (2006).

<sup>134</sup> *Al-Nashiri II*, 835 F.3d at 118 (quoting *Quackenbush v. Allstate Ins.*, 517 U.S. 706, 716 (1996)).

<sup>135</sup> The court describes the practice of abstaining as "a basic doctrine of equity jurisprudence." *Id.* at 118 (quoting *Jarkesy v. SEC*, 803 F.3d 9, 26 (D.C. Cir. 2015)); see also *Schlesinger v. Councilman*, 420 U.S. 738, 754 (1975) (describing abstention as a "federal equity power").

<sup>136</sup> *Al-Nashiri II*, 835 F.3d at 118 (citing *Jarkesy*, 803 F.3d at 26).

<sup>137</sup> 401 U.S. 37 (1971).

<sup>138</sup> *Id.* at 43–44.

<sup>139</sup> *Id.* at 44–45.

<sup>140</sup> *Councilman*, 420 U.S. at 757.

<sup>141</sup> *Id.* at 741.

federal district court to enjoin the court-martial proceeding on the ground that the alleged offense was not “service connected,” and as a result could not be tried in a court-martial.<sup>142</sup>

The Court acknowledged that the second consideration outlined in *Younger*, that is, the interests of federalism, did not apply to a court-martial proceeding, but further explained that two “factors equally compelling” led to the conclusion that abstention was proper.<sup>143</sup> First, “military discipline” is best served when the federal judicial system refrains from interfering in the military justice system.<sup>144</sup> Second, federal courts ought to respect the balance that Congress struck between military preparedness and fairness to individual service members when it “created an integrated system of military courts and review procedures.”<sup>145</sup> An important component of this “respect” is the assumption that the scheme Congress created will adequately protect the constitutional rights of servicepersons.<sup>146</sup> This assumption makes clear that whether to abstain does not hinge on an examination of the “on-the-ground performance of the system that Congress and the Executive have established.”<sup>147</sup>

Nearly three decades later, the Court in *Hamdan* considered whether to extend the principles set forth in *Councilman* to the military commissions. It concluded that “neither of the comity considerations identified in *Councilman* weighs in favor of abstention in this case.”<sup>148</sup> Dismissing the concern for “military discipline,” the Court noted that Hamdan was not a member of the armed forces.<sup>149</sup> Turning to the second consideration, the Court determined that unlike the court-martial convened to try the serviceman in *Councilman*, “the tribunal convened to try Hamdan is not part of the integrated system of military courts, complete with independent review panels, that Congress has

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<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 757.

<sup>144</sup> *Id.* at 743, 757.

<sup>145</sup> *Id.* at 757–58.

<sup>146</sup> *Id.* at 758 (“[I]mplicit in the congressional scheme embodied in the [UCMJ] is the view that the military court system generally is adequate to and responsibly will perform its assigned task. We think this congressional judgment must be respected and that it must be assumed that the military court system will vindicate servicemen’s constitutional rights.”).

<sup>147</sup> *Al-Nashiri II*, 835 F.3d 110, 123 (D.C. Cir. 2016) (citing *Councilman*, 420 U.S. at 758).

<sup>148</sup> *Hamdan v. Rumsfeld*, 548 U.S. 557, 587 (2006).

<sup>149</sup> *Id.*

established.”<sup>150</sup> In declining to abstain, the Court explained that the government had not identified any “important countervailing interest” to justify abstention.<sup>151</sup> As a result, it concluded that *Ex parte Quirin*, where the Court intervened in an ongoing military commission, was the most relevant precedent.<sup>152</sup>

Nevertheless, the *Hamdan* Court narrowed its abstention holding by declining to “foreclose the possibility that abstention may be appropriate in some cases seeking review of ongoing military commission proceedings. . . .”<sup>153</sup> This language left an opening for lower courts<sup>154</sup> reviewing habeas petitions from Guantánamo in the wake of *Hamdan*, and, in due course, for the D.C. Circuit in *Al-Nashiri II*.

### C. *Extending Councilman to the Military Commission Context*

Having examined the Supreme Court’s abstention jurisprudence, the court in *Al-Nashiri II* concluded that the District Court had appropriately extended the principles announced in *Councilman* to al-Nashiri’s case.<sup>155</sup> First, Judge Griffith pointed out that “[m]uch has changed since *Hamdan*.”<sup>156</sup> Specifically, the enhanced procedural protections and rigorous review mechanisms the *Hamdan* Court found lacking were established when Congress passed the MCA, thus giving the executive explicit authority to try enemy combatants by military commission.<sup>157</sup> Seeking guidance from *Councilman*’s “equally

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<sup>150</sup> *Id.* The Court pointed out specifically that *Hamdan* had no right to appeal his conviction to a panel comprised of civilian judges who would be insulated from military influence. *Id.*

<sup>151</sup> *Id.* at 589. Justice Scalia’s dissenting opinion also addressed the government’s abstention argument, concluding abstention was appropriate. *Id.* at 672–78 (Scalia, J., dissenting). Contrary to the majority’s conclusion, Justice Scalia found the “two considerations of comity” identified in *Councilman*—“the closest analogue in our jurisprudence”—as well as a third consideration “all cut in favor of abstention.” *Id.* at 673. He reasoned that the federal court system should avoid “direct conflict with the Executive in an area where the Executive’s competence is maximal and ours is virtually nonexistent,” a principle, grounded in “considerations of *interbranch* comity,” that should have led the Court to abstain. *Id.* at 676–77.

<sup>152</sup> *Id.* at 588–89 (majority opinion).

<sup>153</sup> *Id.* at 590.

<sup>154</sup> *See, e.g.,* *Hamdan v. Gates*, 565 F. Supp. 2d 130, 136–37 (D.D.C. 2008); *Al-Nashiri v. MacDonald*, No. 11-5907 RJB, 2012 WL 1642306, at \*11 (W.D. Wash. May 10, 2012) (“[U]nder the principles of abstention announced in *Councilman*, the court should not exercise equitable jurisdiction.”).

<sup>155</sup> *Al-Nashiri II*, 835 F.3d 110, 118 (D.C. Cir. 2016).

<sup>156</sup> *Id.* at 120.

<sup>157</sup> *Id.* at 121.

compelling” factors, the court evaluated the two comity considerations in *Councilman* and distilled the following rule: For *Councilman* abstention to apply, courts must “be assured of both the *adequacy* of the alternative system” in protecting a defendant’s rights, and the “*importance* of the interests served by allowing that system to proceed uninterrupted by federal courts.”<sup>158</sup>

Having crafted that rule, the court articulated two questions that would guide its application: (1) Whether the system enacted to adjudicate al-Nashiri’s guilt would adequately protect his rights; and (2) Whether an “important countervailing interest” justified the district court’s decision to avoid adjudicating a pretrial challenge to the subject matter jurisdiction of a military commission created under the 2009 MCA.<sup>159</sup>

#### 1. Whether the MCA Will Adequately Protect Detainee Rights

The court was “convinced” of the adequacy of the 2009 MCA’s review structure given its similarity to the review system for courts-martial approved by *Councilman*.<sup>160</sup> Judge Griffith first listed the similarities: the composition and commission of the military commissions “closely mirror[s]” that of a court-martial<sup>161</sup> and “the structure of appellate review is virtually identical across the two systems.”<sup>162</sup> Harkening back to Justice Scalia’s argument

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<sup>158</sup> *Id.* (emphasis in original). The court explained further that this approach “made sense in light of its abstention jurisprudence.” *Id.* The adequacy prong was derived from the *Councilman* Court’s decision not to “evaluate the on-the-ground performance of courts-martial” proceedings, but rather to assume “the sufficiency of the structure Congress created . . .” *Id.* As to the importance prong, the Court reasoned that *Councilman* believed abstention would serve the vital interest of military discipline, which would be stymied by federal court intrusion. *Id.*

<sup>159</sup> *Id.* at 122.

<sup>160</sup> *Id.*; see also *Hamdan v. Rumsfeld*, 548 U.S. 557, 672–78 (2006) (Scalia, J., dissenting).

<sup>161</sup> *Al-Nashiri II*, 835 F.3d at 122. Both have twelve members in capital cases and a presiding military judge. *Id.* Moreover, the MCA aligned the rules of evidence used in commissions with those used in courts-martial, 10 U.S.C. § 949a(a) (2012), which is particularly important in the context of hearsay, 10 U.S.C. § 949a(b)(3)(D) (2012). Finally, Congress incorporated a slightly modified version of the Classified Information Procedures Act (“CIPA”) to govern the handling of classified information and the procedures governing closed sessions. 10 U.S.C. § 949d(c) (2012).

<sup>162</sup> *Al-Nashiri II*, 835 F.3d at 122. The MCA authorized the Secretary of Defense to establish an intermediate appellate tribunal, the CMCR, whose decisions were to be reviewed by the United States Court of Appeals for the District of Columbia with the possibility of review by writ of certiorari to the Supreme Court. 10 U.S.C. § 950g(a)–(e) (2012).

in *Hamdan*, the majority contended that the review structure under the 2009 MCA is arguably “more insulated from military influence than is the [review] structure for courts-martial.”<sup>163</sup>

Notwithstanding the evidentiary and procedural differences between courts-martial proceedings and military commissions under the 2009 MCA,<sup>164</sup> the court concluded that the 2009 MCA is “sufficiently adequate to point in favor of abstention.”<sup>165</sup> Al-Nashiri’s claims to the contrary were unavailing because they asked the court to “determine whether pretrial intervention is warranted by examining the on-the-ground performance of the system Congress and the Executive [had] established,” which is

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<sup>163</sup> *Al-Nashiri II*, 835 F.3d at 123 (citing *Hamdan*, 548 U.S. at 675–76 (Scalia, J., dissenting)). Whereas the Court of Appeals for the Armed Forces serves as the ultimate review body for courts-martial proceedings under the UCMJ, the defendant in a military commission under the 2009 MCA can appeal the CMCR’s ultimate decision to the D.C. Circuit court, whose judges have Article III’s guarantees of life tenure and salary protection. *Id.* at 122–23.

<sup>164</sup> See Denny LeBoeuf, *Executing the Evidence*, ACLU: CAPITAL PUNISHMENT PROJECT (Jan. 20, 2011, 12:23 PM), <https://www.aclu.org/blog/speakeasy/executing-evidence?redirect=blog/capital-punishment-national-security/executing-evidence> (arguing the military commissions are plagued by “unfairly lax rules for allowing evidence, admission of coerced testimony, and censorship of evidence of the torture of prisoners”). *But see* Solis, *supra* note 39, at 75 (“In keeping with their utilitarian in-the-field-nature, [military commissions] have employed less stringent rules of procedure and evidence than are found in either domestic courts or courts-martial.”). Relatedly, Al-Nashiri has claimed that his 2007 confession to USS *Cole* bombing was coerced through five years of torture. Gabriel Haboubi, *Guantanamo Detainee Says Torture Prompted Confession to USS Cole Bombing*, JURIST: PAPERCHASE (Mar. 30, 2007, 3:42 PM), <http://www.jurist.org/paperchase/2007/03/guantanamo-detainee-says-torture.php>. Nevertheless, the *Al-Nashiri II* court believed that al-Nashiri’s trial will include “a number of significant procedural and evidentiary safeguards,” including “the right to be represented by counsel, 10 U.S.C. § 949c, be presumed innocent, *id.* § 949l, obtain and offer exculpatory evidence, *id.* § 949j . . . and challenge for cause any of the members of the military commission and the military judge, *id.* § 949f.” *Al-Nashiri II*, 835 F.3d at 123. Importantly, al-Nashiri did not challenge the ability of the military commission and its various appellate bodies to fully adjudicate his defense. *Id.*

<sup>165</sup> *Al-Nashiri II*, 835 F.3d at 123. Another Comment analyzing the *Al-Nashiri II* decision questions this conclusion. Recent Case, *In re Al-Nashiri*, 835 F.3d 110 (D.C. Cir. 2016), 130 Harv. L. Rev. 1249 (2017) [hereinafter Harvard Comment]. Focusing on the fact that the MCA, unlike the rules for courts-martial, does not guarantee prompt appellate review, the author argues that the possibility of undue delay renders the commission system inadequate for the purposes of abstention. *Id.* at 1252–53. But the court addressed al-Nashiri’s claims of unreasonable delay and found that he was complicit in the delay. *Al-Nashiri II*, 835 F.3d at 135 (“We decline to label unreasonable or excessive a delay Al-Nashiri has not contested.”). Although the court was “troubled” by the prospective delay, it reasoned soundly that al-Nashiri did not come with clean hands. *Id.*

exactly what *Councilman* declined to do.<sup>166</sup> Just as such a scrupulous review was unwarranted when examining the congressionally established court-martial system in *Councilman*, it is also unwarranted when examining the congressionally established military commission system.<sup>167</sup> The court concluded that, absent a showing of unlawfulness or inability to fully defend himself, al-Nashiri must proceed through the process Congress created in the 2009 MCA.<sup>168</sup>

## 2. Whether an “Important Countervailing Interest” Warrants Abstention

Unlike the Supreme Court in *Hamdan*, the *Al-Nashiri II* court identified an “important countervailing interest” to support its decision to abstain: “the need for federal courts to avoid exercising their equitable powers in a manner that would unduly impinge on the prerogatives of the political branches in the sensitive realm of national security.”<sup>169</sup> The court understood the provision for direct Article III review of al-Nashiri’s jurisdictional challenge on appeal as an implicit instruction from Congress and the President that judicial review should await the outcome of the military commission proceeding.<sup>170</sup> Further, because the executive and legislative judgment providing for delayed Article III review “was made out of concern for national security needs,” the court concluded it must defer to that judgment.<sup>171</sup>

In short, the President sought authority from Congress to convene military commissions he deemed necessary, and Congress gave it to him in the Military Commissions Acts, which delay Article III review until the military commission has issued a final decision.<sup>172</sup> Unwilling to disturb executive-legislative cooperation on a core strategic component of warmaking—prosecuting the enemy—the *Al-Nashiri II* court deferred to the

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<sup>166</sup> *Al-Nashiri II*, 835 F.3d at 123 (citing *Schlesinger v. Councilman*, 420 U.S. 738, 758 (1975) (concluding Congress’ judgment that the military court system is adequate to perform its assigned task must be respected)).

<sup>167</sup> *But see* Vladeck, *supra* note 10.

<sup>168</sup> *Al-Nashiri II*, 835 F.3d at 123.

<sup>169</sup> *Id.* at 124.

<sup>170</sup> *Id.* at 125.

<sup>171</sup> *Id.* at 124.

<sup>172</sup> *Id.*



political branches' instruction as to the timing of Article III review and decided *Councilman* abstention doctrine was appropriately extended to the military commissions.<sup>173</sup>

#### D. Judge Tatel's Dissent

Al-Nashiri argued that, even if *Councilman* applied, the "unique" features of his case qualified him for the "extraordinary circumstances" exception to the abstention doctrine.<sup>174</sup> Under this exception, a federal court may intervene where a plaintiff demonstrates that his circumstances present the "threat of 'great and immediate' injury and render the alternative tribunal 'incapable of fairly and fully adjudicating the federal issues before it.'" <sup>175</sup> Although the majority found that al-Nashiri's asserted harm was only "attendant to resolution of his case in the military court system,"<sup>176</sup> the dissent took issue with this conclusion in light of the "years of brutal detention and interrogation tactics" to which al-Nashiri was subjected.<sup>177</sup> Judge Tatel went on to chronicle the chilling details of al-Nashiri's treatment,<sup>178</sup> concluding that the harms al-Nashiri will suffer

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<sup>173</sup> *Id.* at 125–26.

<sup>174</sup> *Id.* at 128. Al-Nashiri made two additional arguments that were unavailing. First, he argued that allowing the commission to proceed would violate his constitutional and statutory "right not to be tried." *Id.* at 131–35. Second, he argued that the court should intervene because his commission proceedings have been plagued by unreasonable delays. *Id.* at 135–36.

<sup>175</sup> *Id.* (quoting *Kugler v. Helfant*, 421 U.S. 117, 123–24 (1975)).

<sup>176</sup> *Id.* (quoting *Schlesinger v. Councilman*, 420 U.S. 738, 758 (1975)).

<sup>177</sup> *Id.* at 140 (Tatel, J., dissenting).

<sup>178</sup> Denny LeBoeuf provides a poignant description of the enhanced interrogation tactics to which al-Nashiri was subjected:

U.S. officials waterboarded al-Nashiri. They bent him over backwards in a stress position until one of his interrogators worried that his arms would become dislocated. He was naked, hooded, shackled, and deprived of sleep. His "debriefers" blew smoke in his face, stood on his ankle shackles, and scrubbed his naked body with a stiff wire brush. His torturers hung him from the ceiling by his arms, while they were tied behind his back. And if these medieval torments were not enough to render a subsequent capital trial problematic, his torturers also revved a power drill next to his naked, hooded body. And racked a handgun near his head. "Once or twice."

Denny LeBoeuf, *supra* note 164; see also Richard Esposito & Jason Ryan, *CIA Chief: We Waterboarded*, ABC NEWS (Feb. 5, 2008), <http://abcnews.go.com/Blotter/TheLaw/story?id=4244423&page=1>. But see Memorandum from Scott W. Muller to John Yoo on the Legal Principles Applicable to CIA Detention and Interrogation of Captured Al-Qa'ida Personnel (Apr. 28, 2003), <https://www.aclu.org/sites/default/files/torturefoia/released/082409/olcremand/2004olc17.pdf> (stating that the foregoing

from the government's prosecution of him in a military commission are "a far cry from the ordinary burdens . . . that individuals endure in the course of defending against criminal prosecutions."<sup>179</sup>

Sympathetic to the dissent's argument, Judge Griffith remained unconvinced that the extraordinary circumstances exception applied.<sup>180</sup> Because al-Nashiri failed to show that the military commission would not provide him a fair trial, and out of a concern for reshaping the scope of the exception to "create a novel free-floating exception for psychological harm," the majority decided the District Court correctly extended and applied *Councilman* abstention to al-Nashiri's petition.<sup>181</sup> The next Part evaluates this conclusion and examines its consequences for ongoing military commission proceedings.

#### IV. THE VIRTUES OF ABSTENTION

This Part sets out to assess the different outcomes in *Hamdan* and *Al-Nashiri II*, focusing on the role deference played in the latter decision and clarifying the separation of powers argument underlying the result. This Part also articulates the decision's consequences for future collateral attacks on commission proceedings.

##### A. *Deference and Separation of Powers: Assessing the Different Outcomes in Hamdan and Al-Nashiri II*

Under the 2009 MCA, Congress decided that federal courts should be limited to exercising post-trial review of the final judgments of military commissions. Applying *Councilman* abstention to military commissions under the 2009 MCA ensures that legislative prerogative is carried out.<sup>182</sup> The *Hamdan* Court made clear that congressional involvement in crafting the military commissions would resolve the deficiencies it had identified; following that guidance, the *Al-Nashiri II* court deferred where *Hamdan* did not. The vehicle for this deferential posture was abstention, which allowed the court to defer to the

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interrogation "techniques . . . violate neither Federal criminal law nor the Fifth, Eighth, or Fourteenth Amendments").

<sup>179</sup> *Al-Nashiri II*, 835 F.3d at 140.

<sup>180</sup> *Id.* at 129 (majority opinion).

<sup>181</sup> *Id.* at 130.

<sup>182</sup> Margulies, *supra* note 8.

judgment of the political branches that prosecuting some enemy detainees in a military commission is in the nation's best interest, and that those commissions should be left undisturbed until they issue a final ruling. The benefits of this deferential approach are twofold: First, it will inform and narrow eventual Article III review of the commission's decision, as well as congressional review of the military commission system generally. Second, it provides guidance for lower courts that will ensure uniform adjudication of habeas petitions from Guantánamo.

Before discussing the decision's impact, it is important to clarify what the *Al-Nashiri II* court deferred to, and what it did not. The panel deferred to the considered, measured judgment of Congress that military commissions are the appropriate forum for trying some enemy detainees, and that Article III courts should review the final judgments of these commissions. The panel did not defer to the military commissions themselves, as the dissent contended and some commentators have suggested.<sup>183</sup> Counsel for al-Nashiri did not claim that the military commission convened to try him suffered from a structural or procedural defect. Nor did he assert that the commission itself was unconstitutional. Had there been a showing of either, then deference would have been inappropriate.<sup>184</sup> But because the only argument put forth by al-Nashiri—that the commission lacked jurisdiction to try him—is a question that Congress expressly authorized the commission to determine, the court respected that judgment.<sup>185</sup>

The court emphasized that it would not base its abstention decision on the on-the-ground performance of the military commissions, which has been unimpressive at best.<sup>186</sup> But this is a byproduct of the court's deference to the congressionally sanctioned military commission system in the first place. The

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<sup>183</sup> Vladeck, *supra* note 10 (“[C]an anyone actually argue with a straight face that the track record of the commissions to date *justifies* the deference and respect at the heart of the D.C. Circuit’s decision to abstain?”); *Al-Nashiri II*, 835 F.3d at 139 (Tatel, J., dissenting) (“The notion that federal courts should delay exercising their habeas jurisdiction out of respect for a system of rarely used and temporary tribunals strikes me as rather odd.”).

<sup>184</sup> *Al-Nashiri II*, 835 F.3d at 123.

<sup>185</sup> *Id.* at 125.

<sup>186</sup> In fifteen years, the commissions have handed down only eight convictions. Vladeck, *supra* note 10.

legitimacy of military commissions derives from joint congressional-executive action expressly authorizing their use as a tool to fight terrorism; their track record is immaterial.<sup>187</sup> To consider the commissions' track record when deciding to abstain, and therefore defer, would prove unworkable. What, precisely, would be a track record meriting deference? Would it be based on the number of convictions? The number of convictions later overturned by federal courts? Or would each commission have to earn respect individually, based on the performance of the individual military judge discharging his or her duty? Whatever on-the-ground problems the military commissions may encounter will be sorted out by them in the first instance, with the possibility for federal court review of those issues once a final judgment has been issued in the proceeding.<sup>188</sup> This is the process Congress and the President prescribed, and the process that *Al-Nashiri II* respected.

The decision to defer in *Al-Nashiri II* was based on principled separation of powers considerations, not a policy judgment on the effectiveness of the current system. The panel opted to defer to the military commissions only when there was bilateral support from the political branches. The theoretical framework for judicial deference articulated by Professors Pildes, Issacharoff, and Sunstein appears best capable of describing the court's separation of powers rationale, then. With the MCA in place, the executive is now convening military commissions whose appellate structure and composition was considered, crafted, and enacted by Congress. The *Al-Nashiri II* court accepted that joint executive-legislative judgment. Additionally, the decision has the features of the "minimalist alternative" introduced by Professor Sunstein. Rather than decide prematurely the difficult jurisdiction question, the court issued a narrow and incompletely theorized decision that will sharpen eventual Article III review of the question on appeal.

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<sup>187</sup> None of this is to suggest that the track record of the current commission system should not be a concern for congressional leaders charged with making policy decisions on how the nation should bring to justice those who commit crimes like the ones allegedly committed by al-Nashiri. The point here is that the commissions' track record has little bearing on the question of abstention.

<sup>188</sup> See *Hamdan v. Gates*, 565 F. Supp. 2d 130, 137 (D.D.C. 2008) ("If the Military Commission judge gets it wrong, his error may be corrected by the CMCR. If the CMCR gets it wrong, it may be corrected by the D.C. Circuit. And if the D.C. Circuit gets it wrong, the Supreme Court may grant a writ of *certiorari*.").

It was one thing for federal courts to intervene into the ongoing trial of a military commission when it lacked explicit congressional authorization;<sup>189</sup> it is quite another for federal judges to disregard congressional policy decisions regarding the timing of federal court review. By deferring to the joint actions of the political branches in an area rife with national security concerns—the prosecution and punishment of enemy belligerents—the D.C. Circuit appropriately weighed the separation of powers considerations underlying abstention doctrine. Because the establishment of military commissions has been traditionally within the “pattern of cooperation between the President and Congress in war and national security affairs,”<sup>190</sup> and because “in the realm of national security, the expertise of the political branches is at its apogee,”<sup>191</sup> deference in this context furthers sound separation of powers principles.<sup>192</sup>

*B. The Consequences of Al-Nashiri Abstention for Article III Review of Commissions*

The D.C. Circuit’s *Al-Nashiri II* decision has several important consequences. First, it lends appellate approval to the numerous district court decisions that abstained from intervening into ongoing military commission proceedings after Congress expressly approved of their use. Second, it permits the application of military expertise in deciding complex law of war issues, just as Congress intended. Finally, it allows for more informed congressional review of the military commission system as a whole.

*Al-Nashiri II* lends appellate approval to the growing number of district courts that had applied *Councilman* abstention to collateral attacks on ongoing commission

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<sup>189</sup> Issacharoff & Pildes, *supra* note 12, at 44 (noting “[where] the executive has acted . . . without legislative approval, the courts have invalidated executive action, even during wartime . . .”).

<sup>190</sup> Ku & Yoo, *supra* note 18, at 207.

<sup>191</sup> *Al-Nashiri II*, 835 F.3d 110, 126 (D.C. Cir. 2016) (citing *Hamad v. Gates*, 732 F.3d 990, 1006 (9th Cir. 2013) (“Congress’s decisions with respect to [Guantánamo] detainees are at the core of Congress’s authority with respect to ‘the conduct of foreign relations [and] the war power.’”) (quoting *Mathews v. Diaz*, 426 U.S. 67, 81 n.17 (1976))).

<sup>192</sup> See discussion *supra* notes 12–17.

proceedings in *Hamdan*'s wake.<sup>193</sup> For example, in *Khadr v. Bush*,<sup>194</sup> the court found judicial "respect for a congressionally-authorized military court system that includes independent review by civilian judges" warranted abstention.<sup>195</sup> Because the claims in *Khadr*'s habeas petition "have been, will be, or, at the very least, can be raised in the military commission proceeding and the subsequent appeals process," the court declined to intervene.<sup>196</sup> In a second habeas petition requesting a federal court enjoin *Khadr*'s ongoing commission proceeding, the court again abstained and reiterated the reasoning of the earlier decision.<sup>197</sup> Perhaps the best indicator that much has changed since *Hamdan* is that in a later habeas petition brought by *Hamdan* himself, the district court found that *Councilman*'s "central rationale is applicable here."<sup>198</sup> The court recognized that congressional involvement in the 2006 MCA had changed the abstention equation: "Hamdan is to face a military . . . commission designed by a Congress that . . . act[ed] according to guidelines laid down by the Supreme Court."<sup>199</sup> In a nod to judicial modesty, the court noted, "Article III judges do not have a monopoly on justice, or on constitutional learning."<sup>200</sup> Relatedly, the recent D.C. Circuit decision in *Bahlul* recognized that congressional involvement has fortified military commissions from dissection in a federal court.<sup>201</sup> In extending *Councilman* abstention to the military commissions under the MCA, lower courts have recognized the proper role each branch

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<sup>193</sup> See, e.g., *Al-Nashiri v. MacDonald*, No. 11-5907 RJB, 2012 WL 1642306, at \*11 (W.D. Wash. May 10, 2012) ("[U]nder the principles of abstention announced in *Councilman*, the Court should not exercise equitable jurisdiction."). Indeed, as another D.C. Circuit military commission abstention case makes clear, "abstention is surely not appropriate where . . . a trial before a military commission is only a possibility and only at some unspecified time in the future." *Obaydullah v. Obama*, 609 F.3d 444, 448 (D.C. Cir. 2010).

<sup>194</sup> 587 F. Supp. 2d 225 (D.D.C. 2008).

<sup>195</sup> *Id.* at 231.

<sup>196</sup> *Id.* at 230–31.

<sup>197</sup> *Khadr v. Obama*, 724 F. Supp. 2d 61, 64–68 (D.D.C. 2010).

<sup>198</sup> *Hamdan v. Gates*, 565 F. Supp. 2d 130, 136 (D.D.C. 2008).

<sup>199</sup> *Id.* (quoting *Hamdan v. Rumsfeld*, 464 F. Supp. 2d 9, 18 (D.D.C. 2006)).

<sup>200</sup> *Id.* at 137.

<sup>201</sup> See *Bahlul v. United States*, 840 F.3d 757, 759 (D.C. Cir. 2016) ("Pursuant to congressional authorization, Presidents throughout U.S. history have employed military commissions to try enemy war criminals for conspiracy to commit war crimes.").

of government plays in this context: Congress creates the commissions, the executive conducts them, and the judiciary reviews their judgments.<sup>202</sup>

By requiring al-Nashiri to follow the MCA's thorough review procedures, rather than allow him to "jump the line" and short-circuit the carefully designed process, the court ensured that military judges will have the opportunity to apply their expertise to the complex law of war questions before them. Al-Nashiri's jurisdictional challenge requires the court to decide when hostilities began with al Qaida. Resolving the extent to which an armed conflict existed when al-Nashiri's actions were committed will benefit from the application of military expertise. The question involves "the military nature of violent acts" as well as the "military nature of al-Nashiri's conduct."<sup>203</sup> Of course, a federal district court could order discovery on these questions, but as was pointed out at oral argument, there is a difference between having all the facts and having the expertise to draw conclusions from those facts.<sup>204</sup> Just because a federal district court judge has the same facts in front of her does not mean that she has the "singularly relevant" expertise to resolve the fact-bound jurisdictional question at issue.<sup>205</sup> None of this is to question the capacity of the federal district courts to resolve complicated issues in a wide range of subject matter areas.<sup>206</sup> But when Congress passed the MCA, which delays Article III review until the commission has rendered a judgment, and two successive administrations opted to prosecute detainees in a commission proceeding, the political branches gave responsibility to military judges to decide in the first instance questions like the one al-Nashiri has raised. It is unclear what benefit short-circuiting the military commission's role in trying al-Nashiri

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<sup>202</sup> Al-Nashiri v. MacDonald, No. 11-5907 RJB, 2012 WL 1642306, at \*11 (W.D. Wash. May 10, 2012).

<sup>203</sup> Oral Argument at 24:30, Al-Nashiri II, 835 F.3d 110 (2016), [https://www.cadc.uscourts.gov/recordings/recordings2016.nsf/77A3A67AD3EF915385257F5C006765E1/\\$file/15-1023.mp3](https://www.cadc.uscourts.gov/recordings/recordings2016.nsf/77A3A67AD3EF915385257F5C006765E1/$file/15-1023.mp3); Government's Brief, *supra* note 1, at \*49.

<sup>204</sup> Oral Argument at 25:50, Al-Nashiri II, 835 F.3d 110 (2016), [https://www.cadc.uscourts.gov/recordings/recordings2016.nsf/77A3A67AD3EF915385257F5C006765E1/\\$file/15-1023.mp3](https://www.cadc.uscourts.gov/recordings/recordings2016.nsf/77A3A67AD3EF915385257F5C006765E1/$file/15-1023.mp3).

<sup>205</sup> Schlesinger v. Councilman, 420 U.S. 738, 760 (1975).

<sup>206</sup> Indeed, a corollary of this respect is that respect should be given to military judges who faithfully discharge their duties as well. *Cf.* Hamdan v. Rumsfeld, 548 U.S. 557, 587 (2006).

would bring, but the drawbacks, such as duplicative proceedings<sup>207</sup> and needless conflict with policy-makers, are readily discernible.

Further, there is historical support for delaying Article III review until the military commission has issued a final judgment. In *Ex parte Vallandigham*, *Ex parte Milligan*, and *In re Yamashita*, the military commission had already tried and sentenced the defendant before a federal court became involved.<sup>208</sup> Obviously this was not the case in either *Ex parte Quirin* or *Hamdan v. Rumsfeld*, but the passage of the MCA casts doubt on those cases as precedent for federal court intervention.

Not only did abstention ensure that eventual Article III review will be informed by military judge expertise and narrowed, it also will ensure that eventual *congressional* review of the military commission system will be informed by the actual, rather than hypothesized, proceedings of the commissions.<sup>209</sup> If the commission convened to try al-Nashiri proves incapable of fairly and efficiently deciding his jurisdictional challenge, then policy-makers should consider that failure when revising legal systems aimed at trying terrorists for war crimes. If a federal court intervenes and bails out the military commission, then the commissions' shortcomings will not come to light. In this regard, abstaining lends legitimacy to the current military commission system without insulating them from eventual congressional review of their effectiveness.

#### CONCLUSION

As Justice Jackson noted in *Johnson v. Eisentrager*, "Modern American law has come a long way since the time when outbreak of war made every enemy national an outlaw, subject to both

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<sup>207</sup> Peter Margulies, *supra* note 8. To demonstrate the point, suppose the panel decided abstention was improper. Presumably, it would remand the case to the district court to conduct a "mini trial" on the question of when an armed conflict with al Qaida began. Resolving the issue would be complex, and if the district court determined an armed conflict existed—a determination that would surely be appealed—the military commission would still have to revisit the issue in its own proceeding. Abstention is aimed at avoiding precisely such duplicative proceedings.

<sup>208</sup> *Ex parte Vallandigham*, 68 U.S. 243 (1863); *Ex parte Milligan*, 71 U.S. 2 (1866); *In re Yamashita*, 327 U.S. 1 (1946).

<sup>209</sup> *Cf.* Sunstein, *supra* note 80, at 35.



public and private slaughter, cruelty and plunder.”<sup>210</sup> With some unfortunate exceptions,<sup>211</sup> U.S. military commissions historically have exceeded the international norms of their day.<sup>212</sup> This truth makes the current system’s shortcomings all the more unfortunate, and make no mistake, these shortcomings are on full display in the prosecution of al-Nashiri.<sup>213</sup> But these shortcomings are no pretext for judicial immodesty. When Congress and the President act jointly on a matter touching on national security, longstanding separation of powers principles demand that their judgments receive judicial deference. Having asked, the Supreme Court received express congressional authorization of the military commissions, which empowered federal courts to review commission decisions at a specific point. The *Al-Nashiri II* court followed the system’s order of operations and left policy-making to the nation’s legislature. Going forward, the military commissions will be allowed to proceed uninterrupted until they issue a final judgment, provided the commission does not suffer from a constitutional defect, just as Congress intended. Thus, as Judge Bryan noted in another al-Nashiri decision, “While the use of military commissions . . . is subject to debate and criticism, their existence is for the people to decide through Congress consistent with the Constitution.”<sup>214</sup>

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<sup>210</sup> Johnson v. Eisentrager, 339 U.S. 763, 768–69 (1950).

<sup>211</sup> See Chomsky, *supra* note 39, at 55.

<sup>212</sup> See David Glazier, *The Development of an Exceptional Court: The History of the American Military Commission*, in GUANTÁNAMO AND BEYOND: EXCEPTIONAL COURTS AND MILITARY COMMISSIONS IN COMPARATIVE PERSPECTIVE, *supra* note 39, at 37, 37.

<sup>213</sup> In just one example, al-Nashiri’s counsel estimated in his briefing that his trial will not commence until 2018, and further estimated in rebuttal at oral argument that appellate review of al-Nashiri’s claims will not occur until 2024; the government did not challenge this estimate at oral argument. *Al-Nashiri II*, 835 F.3d at 135. The troubles have continued. See Amy Davidson Sorkin, *At Guantánamo, Are Even the Judges Giving Up?*, NEW YORKER (Feb. 20, 2018), <https://www.newyorker.com/news/daily-comment/at-guantanamo-are-even-the-judges-giving-up>.

<sup>214</sup> *Al-Nashiri v. MacDonald*, No. 11-5907 RJB, 2012 WL 1642306, at \*11 (W.D. Wash. May 10, 2012).