FIVE QUESTIONS DEBATE
ON *HAMDAN V. RUMSFELD*
UPDATED WITH REBUTTALS JULY 18, 2006

Below, two experts pose and then answer questions about *Hamdan v. Rumsfeld,* a case that deals with the President's executive powers during wartime. The Supreme Court issued its decision in this case on June 29, 2006. The complete debate, including rebuttals, is posted below.

Professor John Baker, Jr. is a Dale E. Bennett Professor of Law at the Louisiana State University Law School.

Mr. Timothy Lynch is the Director of the Project on Criminal Justice at the Cato Institute.

ROUND ONE

Q1. BAKER: Tim, these first two questions that I ask you focus on the extent to which we agree and disagree on certain premises. Identifying those points should sharpen the debate we will have about the particulars of the decision that comes down in *Hamdan*.

Federalist No. 70, in arguing against those Anti-federalists who (like supporters of modern parliamentary systems) wanted a weaker Executive, contends that an energetic Executive is essential to good government (a), and that that principle dictates, *inter alia*, concentrating power in the Executive in order to protect liberty (b). To what extent do you agree or disagree with the statements from *The Federalist* quoted in the footnotes?

> (A). There is an idea, which is not without its advocates, that a vigorous Executive is inconsistent with the genius of republican government. … Energy in the Executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks; it is not less essential to the steady administration of the law; to the protection of property against those irregular and high-handed combinations which sometimes interrupt the ordinary course of justice; to the security of liberty against the enterprises and assaults of ambition, of faction, and of anarchy.
>
> (B). That unity is conducive to energy will not be disputed. Decision, activity, secrecy, and dispatch will generally characterize the proceedings of one man in a much more eminent degree than the proceedings of any greater number; …
> This unity may be destroyed in two ways: either by vesting the power in two or more magistrates of equal dignity and authority; or by vesting it ostensibly in one man, subject, in whole or in part, to the control and co-operation of others, in the capacity of counselors to him.

A1. LYNCH: I agree that Alexander Hamilton contends that an energetic Executive is essential to good government, but the quotations do not answer the critical question at

issue in the *Hamdan* case, which is whether the Executive can unilaterally decide who is to be tried in civilian court and who may be tried before a military tribunal.

Hamilton was probably the most outspoken proponent of executive power at the constitutional convention, but he soon recognized that he could not convince enough delegates to adopt his own views. Hamilton nevertheless believed the proposed Constitution was an improvement over the Articles of Confederation, so he pushed hard for ratification. To make the case for ratification, Hamilton spoke of energy in the executive, but he also spoke of limits on power. In the *Federalist*, No. 78, Hamilton said that he agreed with Montesquieu that "there is no liberty if the power of judging be not separated from the legislative *and executive powers"* (emphasis added). In the *Federalist*, No. 83, he wrote: "The friends and adversaries of the [proposed constitution], if they agree in nothing else, concur at least in the value they set upon the trial by jury; or if there is any difference between them it consists in this: the former regard it as a valuable safeguard to liberty; the latter represent it as the very palladium of free government." Those quotations lend support to the idea that the Executive may not establish his own courts to try prisoners, but, again, they do not specifically address the critical question in *Hamdan*.

Let me make this point another way. Conservatives know that honesty and impartiality are desirable qualities in judges, but that does not help us to know whether a judge is confusing his or her will for the law. Similarly, the issue in *Hamdan* is not whether energy is desirable in the Executive. Rather, the issue is what powers have been assigned to the Executive by the Constitution—and whether the President has confused his will for the law.

Q1. LYNCH: The Bush administration maintains that the president has the "inherent authority to convene military commissions to try and punish captured enemy combatants in wartime—*even in the absence of any statutory authorization."* (Brief for United States, *Hamdan v. Rumsfeld,* p. 8, emphasis added). Do you agree with that proposition?

A1. BAKER: The question does not distinguish between citizens and non-citizens or between detention inside and outside the United States. Hamdan is unlike Hamdi or Padilla—Americans detained within the United States. Hamdan is an alien captured in Afghanistan and held at Guantanamo. As to Hamdan and aliens similarly situated, the President does have "inherent authority to convene military commissions to try and punish captured enemy combatants in wartime – even in the absence of any statutory authorization." Congress, however, can limit the President through its authorization of war.

Congress can either solemnly declare war or less formally authorize the use of force, the latter labeled "imperfect war" (*Bas v. Tingy,* 1800). Congress can limit how imperfect wars are conducted (*see Id.).* Congress has not done so in its post-9/11 "Authorization for Use of Military Force" (AUFM). Rather, Congress' "Detainee Treatment Act of

2005" (DTA) recognizes military commissions created by the President for alien detainees at Guantanamo and blocks federal judicial interference (*see Baker's Answer 2).*

Historically, generals and presidents have on their own authority created military commissions. General George Washington's appointment of military officers to try British major John Andre as a spy was known to the Constitution's Framers. The practice continued during the Mexican and Civil Wars without congressional authorization. In 1863 the War Department first reduced the rules of war to writing, a document replaced in 1914 by the army field manual. Until the current conflict, it has been clear "that the laws of war are part of the law of the United States, and that they may be enforced against both soldiers and civilians, including enemy personnel, by general courts-martial, *military commissions, or other military or international tribunals"* (Telford Taylor, *Nuremberg and Vietnam*, 1970, p. 23, emphasis added). This understanding was the basis for the international war crimes trials at Nuremberg, as well as the 1600 trials in Europe by American military commissions (*Id.,* pp. 17, 20-28*).*

The World War II Congress did not create military tribunals, but urged the President to punish war crimes (*see* William Bosch, *Judgment on Nuremberg,* 1970, pp. 67-71). Indeed, the international charter establishing the Nuremberg tribunal was considered an executive agreement, rather than a treaty subject to Senate ratification (Blakesley, et. al, *The International Legal System,* 2001, p. 1262, n.a).

Attempts to limit the President's power over military commissions come not from Congress, but from lawyers pushing federal court oversight of military matters.

ROUND TWO

Q2. BAKER: Both the Federalists and Anti-federalists considered separation of powers the principal protection for liberty (*Federalist* No. 47), but the Federalists contended that separation of powers does not work in a republic, which by nature makes the Legislature the most powerful and therefore the most dangerous to liberty (*Federalist* No. 48), unless the Executive and the Judiciary are strengthened (*Federalist* No. 51). The President's position as Commander-in-Chief gives him powers in external matters of war and foreign affairs (*U.S. v. Curtis-Wright*) that he does not possess in internal matters, even during war, unless supported by congressional action (*The Steel Seizure ca*se). Do you agree with a) the clear law prior to *Rasul v. Bush* (2004), that the President is free from federal court review in waging war outside the United States (*Johnson v. Eisentrager*); or b) the contention that the Bill of Rights (and therefore federal court jurisdiction) should follow the Executive wherever he acts in the world (Justice Ginsburg, "Beyond Our Borders," 40 *Idaho L. Rev*., 2003, pp. 1, 7)?

A2. LYNCH: I do not believe the president has a blank check to wage war outside of the United States.

Since this question mentions *Johnson v. Eisentrager*, 339 U.S. 763 (1950), let me briefly summarize that case for the benefit of readers who may not be familiar with it.

Eisentrager and 20 other men were civilian employees of the German government working in China during World War II. During the pertinent time period in 1945, Japanese Military Forces controlled the Chinese cities in which they were located. After Japan surrendered to the U.S., these German nationals were arrested and charged with war crimes. The gist of their offense was that they continued to engage in military activity against the U.S. even after the surrender of Germany in May, 1945. These prisoners were transferred to Landsberg Prison in Germany where they were subsequently tried and convicted by a military commission. The prisoners challenged the constitutionality of their conviction by seeking *habeas corpus* review in federal district court.

Once the *habeas* litigation got started, the courts were all over the map. The district court dismissed the action for want of jurisdiction (the prisoners were overseas). The court of appeals reversed and held that any person deprived of his liberty by an official of the U.S. government in violation of constitutional prohibitions had a substantive right to a writ of *habeas corpus*. The Supreme Court granted *certiorari* and reversed. By a 6-3 vote, the Court held "that the Constitution does not confer a right of personal security or an immunity from military trial and punishment upon an alien enemy engaged in the hostile service of a government at war with the United States."

Justice Hugo Black filed a dissenting opinion. Here is an excerpt:

> "If the [majority] opinion thus means, and it apparently does, that these petitioners are deprived of the privilege of *habeas corpus* solely because they were convicted and imprisoned overseas, the Court is adopting a broad and dangerous principle. … Perhaps, as some nations believe, there is merit in leaving the administration of criminal laws to executive and military agencies free from judicial scrutiny. Our Constitution has emphatically expressed a contrary policy. … *Habeas corpus*, as an instrument to protect against illegal imprisonment, is written into the Constitution."

Returning now to the question posed, I believe that *Johnson v. Eisentrager* was incorrectly decided. Justice Black's analysis of the case was more persuasive.

Q2. LYNCH: President Bush issued his controversial military order concerning military tribunals on November 13, 2001. Section 7(b)(2) of that order provides "the individual shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on the individual's behalf, in (i) any court of the United States, or any State thereof." That provision seems to be a deliberate attempt to thwart judicial review via *habeas corpus*. On your reading of the Constitution, do you think the judiciary ought to follow the terms of section 7(b)(2) and summarily dismiss any *habeas* petition arising from military tribunal proceedings—or

should the judiciary ignore 7(b)(2) and hear constitutional controversies in full and on the merits?

A2. BAKER: Federal courts cannot constitutionally reach the merits of *habeas* petitions filed by alien detainees at Guantanamo because 1) an alien detained outside the territorial jurisdiction of the United States has no constitutional right to *habeas corpus* (*Johnson v. Eisentrager,* 1950), and 2) Congress, through the DTA, has withdrawn jurisdiction over alien detainees at Guantanamo from all federal courts, except for limited post-conviction review by the Court of Appeals for the D.C. Circuit, thereby prospectively annulling the statutory ruling of *Rasul v. Bush* (2004).

It is axiomatic that a federal court cannot remedy the violation of a constitutional right if the court lacks jurisdiction (*Marbury v. Madison)*. This principle applies also to petitions for *habeas corpus (Ex Parte McCardle*).

Without *habeas* relief, Hamdan can nevertheless receive due process. Military justice, applicable also to American soldiers, affords due process without the full panoply of constitutional rights. Convicted alien detainees can, under the DTA, have the D.C. Circuit consider whether the standards and procedures of the military commission have been followed and whether they are consistent with the Constitution and the laws of the United States, to the extent they are applicable.

Hamdan's situation is not unlike that of state criminal defendants. State prisoners can file federal *habeas* petitions **only** after exhausting state remedies from trial through appeal. Attempts to avoid this limitation by filing a federal civil rights action seeking injunctive and/or declaratory relief have been virtually eliminated (*see Younger v. Harris,* 1971).

The question as posed focuses not on jurisdiction, but on the President's statement in section 7(b)(2) that the courts should not intervene—asking whether "the judiciary ought to follow the terms of section 7(b)(2) . . . or should the judiciary ignore 7(b)(2)." Under a proper understanding of separation of powers, the federal judiciary should neither "follow" nor "ignore" the President's statement. Federal courts (hopefully) will follow the Constitution, which in *Hamdan* should mean the Court declines to reach the merits. As in *Marbury*, the Court can rule in favor of the President, without following him.

Separation of powers assumes that each of the branches will assert its own prerogatives and thereby defend our liberty (*The Federalist Papers,* no. 51). Mistakenly, too many American lawyers believe only federal courts defend liberty. With fundamental constitutional structures at stake, the President is right to remind federal judges that the conduct of war and the defense of liberty beyond our borders fall outside their constitutional competence.

THE FINAL THREE ROUNDS OF QUESTIONS AND ANSWERS WERE WRITTEN AFTER THE SUPREME COURT ISSUED ITS DECISION IN *HAMDAN V. RUMSFELD*

ROUND THREE

Q3. LYNCH: The civilian legal system cannot be neatly separated from the military justice system. For example, let us suppose that federal prosecutors have filed criminal charges against a woman for engaging in fundraising efforts for terrorist organizations, including Al-Qaeda. The woman asserts her innocence and wants to go to trial. Do you think it is legally permissible for the prosecutor to pressure this woman into a guilty plea by saying "we can always have you tried before a special military tribunal"?

A3. BAKER: This question has absolutely nothing to do with the issues before the Court in *Hamdan*. The question pertains to situations like *Padilla* (2004), or possibly *Hamdi* (2004), where the person is detained and/or charged within the United States. The problem posed might have been clarified had the Court actually reached the merits in *Padilla,* where an American citizen was arrested and charged with a crime in the U.S., but later moved out of the criminal justice system into military detention. The prosecutor's threat in this question might follow from the facts of *Padilla*, but the jurisprudential basis for making the threat would be an extrapolation from the Court's decision in *Hamdi*, a case with which I disagree. Justice Scalia's dissent in *Hamdi* rightly insists that American citizens (although captured abroad) who are not members of the U.S. military and who are held within the United States are entitled to the protections of the criminal justice system. Had Justice Scalia's opinion been that of the Court, there would be no legal authority for the prosecutorial threat postulated in this question.

The first sentence ("The legal system cannot be neatly separated from the military system") suggests the root of this irrelevant question. Lawyers who focus exclusively on the Bill of Rights, most of whose protections pertain to criminal procedure, sometimes mindlessly extend the criminal justice system into warfare. That extension blends the mostly separate worlds of law enforcement, which is internal to the U.S., and war against foreign enemies. In a terror-related case like *Padilla*, and possibly *Hamdi*, it may be difficult to "neatly separate" the military and the criminal justice systems. But even in those exceptional cases, a separation can be discerned. Generally, however, there is a fairly clear line between military and civilian matters, due to the fact that the military and its justice system are part of the Executive branch and the civilian criminal justice system is not. Certainly until recently, no knowledgeable person would have claimed that someone in Hamdan's position—a non-American captured during war and held outside the U.S.—has any right to access to the ordinary criminal justice system in the U.S. Not even *Hamdan* changes that.

Q3. BAKER: Can you honestly defend the majority's contorted construction of the Detention Treatment Act (DTA) against Justice Scalia's argument that, through the DTA, Congress has "clearly and constitutionally eliminated jurisdiction over this case?"

A3. LYNCH: Well, to be honest, I am much less familiar with this area of the law than I am with the Supreme Court's tribunal precedents. Based upon the give-and-take in the *Hamdan* opinions, however, I agree that Justice Scalia seems to have the better argument with respect to statutory interpretation, if not abstention.

Since Professor Baker and I agree on this point, let me invite readers to take a broader view of this subject. Let us assume that Justice Scalia had the correct reading of the DTA. It does not follow that the DTA was the best course to take as a matter of policy. Yes, that is a separate issue. And yes, that was a policy call for the president and members of Congress to make. All true, but let's consider it still.

President Bush has unfortunately been receiving legal advice that has been more clever than wise. All too often, the policies and legal arguments that have been advanced by the Department of Justice have a certain "win-at-all-costs" quality that ought to give Federalists pause.

Recall the "eleventh-hour" transfer of Jose Padilla from military custody to civilian custody while his petition for *certiorari* was pending before the Supreme Court? That move prompted Judge Luttig to opine that "the rule of law is best served by allowing Supreme Court consideration of the case in the ordinary course" so as not to "further a perception that dismissal may have been sought for the purpose of avoiding consideration by the Supreme Court." *Padilla v. Hanft,* 432 F.3d 582, 587 (2005).

For similar reasons, one can agree with Justice Scalia on the law but still have grave misgivings about the DTA as a matter of policy. That is because the DTA seemed designed, at least in part, to retroactively remove a case that was pending before the Supreme Court. It gave rise to yet another appearance that the administration lacked confidence in the legality of its tribunal policy and therefore sought to avoid prompt judicial review by the Supreme Court.

With respect to *Hamdan*, the case would have come out differently had Justice Scalia garnered a majority on DTA grounds, but the merits of the broader tribunal issue would have been put off until a post-trial appeal, following a conviction of a prisoner.

ROUND FOUR

Q4. LYNCH: Ten years from now, the U.S. military may be engaged in another war with a nation state. This enemy state captures some of our soldiers and accuses them of war crimes. Our government tries to negotiate their release, but the efforts fail. Suppose the enemy government plans to convene a special military tribunal for the case. What

safeguards would you be looking for to ensure fairness for our military people? Have you seen anything in the *Hamdan* opinions, for example, that might set a worrisome precedent for other countries to follow?

A4. BAKER: Relations between nation-states have always been between the representatives of each Sovereign. For the U.S., that is the President. Among nation-states, no World Supreme Court exists to settle disputes as the U.S. Supreme Court settles disputes between our states. Our Supreme Court and the system of law it enforces exist only by virtue of being part of a sovereign state, the United States of America. Unlike our domestic law, international "law" is the product of custom and agreement among nations. (Originally, the law of nations appertained only to "civilized" nations and assumed their actions were to be based on reason.) National legislatures and courts do not make "law" among nations—even though Congress has the power to define for our courts offenses against the law of nations and the federal courts have the duty of applying, within limits, the "law of nations."

When negotiating treaties, American presidents rightly understand that, once ratified, they interpret and decide whether to adhere to a treaty. Presidents have unchecked discretion to abrogate treaties. When the Senate ratifies a treaty, it can and often does limit or interpret it. Nations that sign multilateral treaties sometimes disagree with how the Congress and/or the President condition or interpret a treaty. That is not at all uncommon.

The fundamental principle of all relationships among nation-states is that of reciprocity. That is, states should treat other states and their citizens as they themselves would want to be treated. Reciprocity is the basis for the Geneva Conventions.

The question does not identify the "enemy state" as a signatory to the Geneva Conventions. Assuming it is a signatory (and that the U.S. soldiers were wearing uniforms and therefore entitled to prisoner of war status), the Geneva Convention requires trying them in "a regularly constituted court," which as Justice Alito explains, can include "properly constituted, non-political military courts." If the enemy state establishes a special military court—one which does not comply with the Geneva Conventions—our soldiers cannot resort to some court, somewhere, which can do anything for them. They, and we as a nation, are left with only two options: appealing to the "court of world opinion" and/or relying on the Commander in Chief to use military force.

Members of al-Qaeda are entitled to due process as a matter of fundamental justice, regardless of any treaty. They are not entitled to prisoner-of-war status and the special protections of the Geneva Conventions to which the signatories have bound themselves by agreement as a matter of reciprocity.

Our military justice system, including military commissions, does provide due process. *Hamdan* does not say otherwise. The term "due process" does not include a jury trial and certain other provisions of our Bill of Rights. Under *Hamdan*, Guantanamo detainees can

be tried by the same military commissions if Congress agrees. The case does not hold that Congress needs to change the process provided by the President.

The question asks what is "worrisome" about *Hamdan*? The answer is that other nations will think the U.S. President has been weakened in his dealings with war and foreign affairs. Given that no other nation can match our military force, many foreign leaders will feel that they have gained vis-à-vis the U.S. because a majority of the Supreme Court has bowed to the "force" of the "court of world opinion." Weakening the President in this way makes the U.S. more vulnerable to our enemies abroad.

Q4. BAKER: Justice Thomas' dissent begins by invoking *Federalist* #70, as did my first question. Your response to my first question says that quotations from *Federalist* #70 concerning an energetic Executive do not answer the issue in *Hamdan*. Your response to that question, however, does not say how you would answer the issue in *Hamdan*. In answer to my second question, you begin simply by saying the President should not have a "blank check to wage war outside the United States." Justice Breyer's concurring opinion (joined by all in the majority, except Justice Stevens who authored the majority opinion) uses the same "blank check" metaphor in summarizing the case holding as follows: "The Court's conclusion ultimately rests upon a single ground: Congress has not issued the Executive a 'blank check.'" Ultimately, the *Hamdan* holding requires the President to act pursuant to congressional legislation—either by following the procedures of ordinary courts-martial under the Uniform Code of Military Justice or by getting new legislation approving the President's military commissions. Given your quotation in your first answer of *Federalist* #83's discussion of the importance of jury trials (which applies to Article III courts and not military courts), I wonder whether you are satisfied with the holding in *Hamdan* because it does not allow for trial in ordinary courts. So tell me, will you be satisfied if, pursuant to *Hamdan*, Congress validates the President's "blank check" with a "rubber stamp" that legislatively approves his military commissions?

A4. LYNCH: When all is said and done, the holding in *Hamdan* concerns statutory construction, not constitutional law. The Supreme Court essentially kicked the "constitutional can" down the road, as it so often does.

Congress may well accept the Court's invitation and "codify" or "ratify" President Bush's proposed system of military tribunals. And such a legislative enactment will likely pass muster, given certain Supreme Court precedents (*Quirin, Yamashita*). Professor Baker wonders whether such an extension of military jurisdiction can be reconciled with the constitutional text and first principles. In my view, it cannot.

Professor Baker cautions against taking civilian legal procedures into warfare. Generally speaking, I quite agree. The battlefield is no place for judges, clerks, and their law books. Thus, I do not agree with the civil liberties lawyers who say that the 500 prisoners at Guantanamo must be "charged or released." POW-style camps are a lawful and appropriate way for our government to deal with the enemy.

However, when the U.S. government wants to go beyond detention and seeks punishment—up to and including the death penalty—a separate set of legal principles comes to the fore. Article III, Section 2 provides, "The trial of all Crimes, except in Cases of Impeachment; shall be by jury." Some may say that section is for peacetime, not wartime. Sounds plausible, but examine the constitutional text more closely. Article III, Section 3 sets forth special rules for the offense of treason. Here is an example of where the Constitution fully anticipates offenses that involve "levying war" against the United States. But instead of lowering the constitutional bar, the Framers *heightened* the standard of proof for federal prosecutors. This provision suggests that when the Framers wished to vary trial procedures, they did so.

Congress does have the power "To make Rules for the Government and Regulation of the land and naval Forces." The Uniform Code of Military Justice rests upon that provision—and properly so. It does not follow, however, that Congress can expand the class of persons who shall be subject to military justice beyond actual members of the armed forces. Because President Bush tried to claim the power to arrest, detain, and try any person in the world as an enemy combatant, the issue now is whether Congress can extend American military jurisdiction to prosecute any non-American. A liberal theorist might argue that our Constitution needs to evolve in light of changed circumstances, but it is hard to believe that such a sweeping expansion of the military jurisdiction is consistent with the original understanding. After all, the Framers sought to *limit* the jurisdiction of the military.

Professor Baker advances the argument that constitutional limitations on the U.S. government do not apply to non-Americans that are overseas. Again, that is generally true, but it is not obvious that it holds in every circumstance. For example, Article I, Section 9 of the Constitution provides, "No Bill of Attainder … shall be passed." Now, if there was ever a great candidate for a bill of attainder, it would have to be Osama bin Laden (non-American and overseas). And yet, the constitutional prohibition does not leave room for any exceptions.

I hasten to add that civilian court is not the only option open to our policymakers. The al-Qaeda leadership might be tried in another country that has been attacked. Further, the Allied Nations prosecuted Nazi war criminals in Nuremberg following World War II. Thus, a temporary, *ad hoc*, tribunal based upon Nuremberg principles is another possibility.

ROUND FIVE

Q5. LYNCH: Justice Thomas's opinion in *Hamdan* stresses the importance of "deference" to the Executive. Should the courts defer to the Executive's judgment when there is little or no connection to the war against Al-Qaeda? Suppose the police arrest a man for smuggling cigarettes and there's evidence that he sends that money to Hezbolla.

Can the president have him designated as an enemy combatant and tried before a military tribunal?

A5. BAKER: For exactly the same reasons as stated in answer to question #3, this question has absolutely nothing to do with the issues before the Court in *Hamdan*. Indeed, the hypothetical is essentially the same as that in Question #3. Following the answer to Question #3, the President might claim the Court's decision in *Hamdi* basis for sending the person to a military tribunal. Again, with Justice Scalia, I would disagree that the President has that authority.

Other than part of question #4, the three questions just posed fail to advance a serious debate over the monumental separation-of-powers issues raised by *Hamdan.* These issues are the following: 1) the Court's failure to adhere to Congress' clear and constitutional withdrawal of jurisdiction by the Detainee Treatment Act over Guantanamo; 2) its incursion into military matters constitutionally left to the Executive and Congress; and 3) its erosion of the sovereignty-based distinction between constitutional law and multi-national treaties, such as the Geneva Conventions. Hopefully, these issues will be confronted by the answers to the very pointed, separation-powers questions posed to Mr. Lynch.

Q5. BAKER: In Section D of Part VI of its opinion (supported by a majority, except for subsection iv), the Supreme Court reversed the Court of Appeals and held that the Geneva Conventions are judicially enforceable. The Court tied this part of its ruling to Article 21 of the UCMJ, which ties the President's use of military commissions to observance of the law of war—including the Geneva Conventions. In footnotes 57 and 58, however, Justice Stevens hints that the Geneva Conventions may be judicially enforceable by the defendant, quite apart from the UCMJ or other congressional legislation. This may explain why Justice Stevens did not join in Justice Breyer's opinion, which refers only to congressional limitation on the President's actions. (*See Question #4)*. Do you agree with those who argue that federal courts, even absent congressional legislation, should apply international treaties in disputes between individuals and the U.S. government, whereas at least until now treaties have only been enforceable by the representative of the Sovereign in international relations, *i.e.,* the President?

A5. LYNCH: *Hamdan v. Rumsfeld* runs 188 pages, with separate opinions by Stevens (for the majority), Kennedy, Breyer, Scalia, Thomas, and Alito. These turgid opinions touch upon domestic law, military law, and international law. I'm afraid I am not sufficiently familiar with international law to offer a firm answer to this aspect of the case.

I will take this opportunity to say something about Article 5 of the Geneva Convention—so that readers can better appreciate part of the controversy that has arisen since the U.S. military began operations in Afghanistan. Before I begin, I must stress that that Article 5 is not a part of the *Hamdan* ruling.

The Bush administration notes that Al-Qaeda is not a signatory to the Geneva Convention. The administration also points out that Al-Qaeda terrorists do not abide by the laws of war. For these reasons, it is argued, members of Al-Qaeda are not eligible for protection under the Geneva Convention.

But particular cases raise problems. It is one thing for an American military patrol to capture two men who surrender during the battle of Tora Bora, but it quite another for the military to take two men off the streets of Rome on the word of some confidential informer. In the latter case, can the military take the two men to Guantanamo Bay for indefinite confinement? The answer of the Bush administration has been "yes" because "terrorists do not qualify for protection under Geneva."

It is true that Geneva itself contemplates situations where certain prisoners will fall outside of the umbrella of its protection. However, Article 5 establishes a procedure to follow for the situations in which the status of the prisoner is "in doubt." The doubts are to be resolved by what the Geneva Convention calls a "competent tribunal." Such screening tribunals have been used by the U.S. military in the past, including in the first Gulf War.

What does all of this have to do with the question that was posed? Well, my hypothetical can help to show how these treaty provisions come into play when a case comes before the federal judiciary.

Suppose a lawyer is assigned to represent one of the men picked up in Rome. This lawyer meets with his client at Guantanamo and is told by his client that he is not a terrorist and that the informer lied. The lawyer then files a writ of *habeas corpus* challenging the detention. Among other arguments, the lawyer notes that the Bush administration never brought his client before a "competent tribunal" to resolve his doubtful status.

Now to the crux: Is an international treaty, such as Geneva, judicially enforceable in the *habeas* proceeding? The Bush administration responds by pointing out that Geneva does not spell out the character of the "competent tribunal" that it mentions and ultimately argues that the President can assume the role of the tribunal to resolve the doubtful status of each prisoner. Thus, President Bush argues, there is no role for the judiciary with respect to applying or enforcing Geneva.

I may well agree with President Bush and Professor Baker on this legal point, but, if so, I will have learned along the way how thin the Geneva Convention can be for our own military people who end up captured by enemy states. Wouldn't we all be suspicious of a foreign head of state who accused an American of a war crime and declared himself to be the "tribunal" contemplated by the Geneva Convention?

REBUTTALS

MR. LYNCH'S REBUTTALS

REBUTTAL TO A1. BAKER: Prof. Baker apparently believes that the Bush administration overreached in the *Hamdan* litigation since its legal brief failed to "distinguish between citizens and non-citizens or between detention inside and outside the United States."

For purposes of prosecution before a military tribunal, it is not clear why Prof. Baker considers the place of trial to be pivotal, at least according to first principles. Suppose a suspected terrorist is arrested by the FBI in Knoxville, Tennessee. The suspect turns out to be Australian. If the prisoner is to be tried on American soil, Prof. Baker seems to say the case belongs in civilian court. But if the government wishes to try the prisoner before a military tribunal, all it needs to do is fly him to Guantanamo?

REBUTTAL TO A2. BAKER: Section 7(b)(2) is plainly an illegal attempt to suspend the Great Writ of *habeas corpus*. *Habeas* can be suspended, but Congress must take that drastic step, not the Executive acting alone. Some people say that Lincoln and FDR made moves to suspend habeas, but that does not make Mr. Bush's order a lawful exercise of power.

Prof. Baker cites *other* legal authorities (*Eisentrager*, DTA) to make an argument that non-citizens at Guantanamo have little or no *habeas* rights. The question is about Section 7(b)(2), which is an *executive* order.

Prof. Baker's answer has the effect of distracting readers with scenarios where a court might lack jurisdiction for some reason. In the end, he returns from his own diversion ("The question as posed focuses not on jurisdiction …") and says the courts should just "follow the Constitution." That seems to be an oblique way of saying that the courts should not give effect to an unconstitutional executive decree, such as Section 7(b)(2).

REBUTTAL TO A3. BAKER: Prof. Baker wants readers to believe that this question is irrelevant, but he then breezily admits, albeit indirectly, that this prosecutorial threat is now permissible under existing law! This is because Justice Scalia's opinion in *Hamdi* was joined only by Justice Stevens. If a parallel system of military justice is to be created, shouldn't judges, policymakers, and scholars consider all of the implications, including this type of prosecutorial coercion?

Prof. Baker assumed (not unfairly) that the woman in the hypothetical is an American who is arrested in the U.S. That is one possible situation. Here's another: Suppose she is a German who is extradited to the U.S.? My only purpose in adding a twist to the hypothetical is to show the complexities that are involved in this conflict, which everyone acknowledges, is international in scope.

REBUTTAL TO A4. BAKER: Under the proposed tribunal procedures, the defendant can be accused of war crimes by confidential informers, but it will be very difficult to confront the accusers. The government can prevent the defendant from hearing the testimony, seeing the accuser's face, or even learning his or her name. This is the type of worrisome precedent that I, for one, fear might come back to hurt our own soldiers who end up captured and tried in foreign courts.

Prof. Baker fears that "other nations will think the U.S. President has been weakened." What other nations draw from our Supreme Court rulings is beyond our control. However, to the extent that other countries are paying attention to this, they might learn something about how a constitutional republic operates. I bet Prof. Baker would concede that the Supreme Court did the right thing when it checked President Truman when he attempted to seize the steel mills during the Korean War—even if Joseph Stalin drew the conclusion that an American president had just been "weakened."

REBUTTAL TO A5. BAKER: Prof. Baker presumes to declare what points in this debate have been "knowledgeable," "honest," and "serious." I am confident that readers will come to their own conclusions. Here, Prof. Baker is simply mistaken when he says this question has "absolutely nothing to do with the issues before the Court." Readers do not have to accept that assertion or my counter-assertion. Instead, just check Justice Thomas's dissent in *Hamdan*, which questions the capacity of the courts to "second-guess" (slip opinion, at 5-6) the Executive when he makes decisions about who may be tried before military tribunals.

It is indisputably appropriate for this question to probe this legal doctrine of deference to the Executive. (In contrast, **Q.2 LYNCH** probes the possible interaction between the civilian and military legal systems). Prof. Baker evidently believes that both the Bush administration and Justice Thomas hold a view of Executive power that is *not* consistent with the original understanding of the Constitution. Prof. Baker says this obliquely by associating himself with Justice Scalia's opinion in the *Hamdi* case. In that case, Justice Scalia repudiated the arguments for judicial deference that were advanced by both President Bush and Justice Thomas. See *Hamdi v. Rumsfeld,* 542 U.S. 507, 554-579 (2004) (Scalia, J., dissenting).

PROFESSOR BAKER'S REBUTTALS

Tim: Your candor is commendable. You acknowledge your lack of familiarity with Congress' powers to limit the jurisdiction of federal courts, see Answer #3; and also with international law, see Answer #5. Unlike some who take the same side as you on *Hamdan,* you are attempting **not** to manipulate the law to reach a result, but only to interpret the Constitution as you understand it. Still, respectfully, I must say that this lack

of knowledge inhibits your understanding of the monumental separation of powers issues presented by *Hamdan.*

In answer to the first question, you say you agree with *The Federalist* concerning the need for energy in the Executive, but you dismiss *The Federalist* as not answering the specific question in *Hamdan*. The Constitution itself does not specifically answer many questions the way a statutory code would; rather, it divides and structures sovereign powers. *See McCulloch v. Maryland*. The Constitution clearly sets out which branch has what powers. In matters of external affairs, the Constitution gives the President primacy and makes him most powerful when he acts as Commander-in-Chief.

In stating in answer #1 that the issue is "whether the President has confused his will for the law," you miss the point that under the Constitution "the law" is a matter of separation of powers. As per *Federalist* 51, separation of powers only works in practice if each of the branches is strong-willed in its own defense. *The Federalist* says that unity is among the most essential characteristics of an energetic Executive, particularly in matters of warfare. Our Constitution—as opposed to a European-style constitution which many law professors would prefer—makes it possible for presidents to be strong-willed in defense of the country. See *Eisentrager.*

Per *Federalist* #34, the power of the federal government to defend the nation cannot be limited. Congress has some power to check the President's actions outside the U.S., namely through the powers to declare war and to set budgets for the military. Whatever the precise division between the two political branches, these are matters for the two political branches to struggle over – against the backdrop of public opinion. Prior to *Rasul* and *Hamdan,* the Supreme Court had never claimed any power to settle such inherently political matters.

Hamdan blurs the internal-external distinction about powers which is inherent in the Constitution. See Baker Question #2. The Constitution creates a government which protects liberty inside the U.S. by dividing and checking power, rather than allowing for the consolidation of powers on domestic matters. *See Federalist* #47-51. This structure slows down government processes in order to protect individual citizens and others within our borders. On matters external to the U.S., namely military and foreign affairs, the Constitution goes in the opposite direction. It unifies power in a strong Executive in order to protect our liberty as a nation. This is the area of international "law," which is not within U.S. jurisdiction, nor governed – as far as other countries are concerned – by our Constitution.

Reflecting this blurring of internal and external spheres of action, your answers to questions 2, 3, and 4 fail to distinguish between domestic crimes and war-related offenses. Thus in Answer #2, you quote Justice Black's dissent in *Eisentrager*, which speaks about "administration of criminal law." Answer 3 discusses *Padilla*, involving an American arrested in the U.S., who should have been maintained in the criminal justice system, rather than being transferred to military custody. In Answer #4, you agree that "the battlefield is no place for judges" and that constitutional limitations generally do not

apply to non-Americans overseas. Nevertheless, in arguing for some exceptions, you cite constitutional language on impeachment, treason and Bills of Attainder. None of these provisions, however, has any application to *Hamdan*. Impeachment applies only to "officers" of the United States. Treason covers only U.S. citizens, over whom the U.S. government necessarily has jurisdiction to prosecute. Yes, U.S. citizens who make war against the U.S. are entitled to the protections of the criminal justice system, including a jury trial on charges of treason. See Justice Scalia's dissent in *Hamdi*. Bills of Attainder have nothing to do with laws of war. Congress might abuse its power and pass a Bill of Attainder, if it were not for the prohibition in the Constitution. Without the prohibition, the Executive would be obligated to execute the attainder as an exercise of domestic law enforcement. Congress is not the source of laws of war. Congress can govern our citizens and soldiers regarding the conduct of war. Creation of the law of war, however, involves customs and treaties among nations.

At the end of the answer #5, you say you may well agree with President Bush and myself on the legal point that the Geneva Convention is not judicially enforceable. You add, however, that you "have learned along the way how thin the Geneva Convention can be for our own military people who end up captured by enemy states." Yes, that is correct. Treaties are agreements among Sovereigns. They are contracts which create a kind of obligation that is enforceable only by the parties themselves, if at all. Classic positivists do not consider such "contracts" to be "law" because they are not enforceable by courts, backed by executive power. Non-positivists may consider treaties "law" because they involve moral obligations. Until relatively recently, however, neither positivists nor non-positivists would have thought that treaties were judicially enforceable against a Sovereign. Judiciaries are subordinate to the Sovereign in most nations, and part of the Sovereign under the U.S. Constitution.

Contemporary American lawyers, trained to equate the "rule of law" with the "rule of judges," tend to think that all matters must be subject to the jurisdiction of some court. Although the Framers understood that judicial review as essential to the Constitution, see *Federalist* 78, they put nothing in the document which would authorize the Supreme Court to interject itself into the conduct of war. First of all, the separation-of-powers-based doctrines of standing and political question usually keep the courts out of military and foreign affairs matters. Moreover, Article III makes the jurisdiction of federal courts subject to limits enacted by Congress, which the Court ignored in *Hamdan* by side-stepping the DTA.

Your answer #4 suggests the creation of an *ad hoc* international court. Such *ad hoc* courts have provided the basis for establishing permanent international courts, including the International Criminal Court. Creation of international courts has become particularly popular outside the U.S., indeed because they are often viewed as counter-weights to American power. Given this trend, *Hamdan* can be viewed as the Supreme Court's attempt to stay relevant and to become a player on this new international stage.