

The Perils of Minimalism

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Minimalism is a theory, of increasing popularity in the United States in recent decades, that requires the judiciary to base its decisions on the most limited grounds available. One of its central tenets dictates that the judiciary, if at all possible, should base its rulings on statutory rather than constitutional grounds. Set in the context of the "War on Terror" and a number of U.S. Supreme Court decisions regarding the rights of prisoners held in Guantánamo, this Article seeks to identify the pitfalls of such an approach to judicial decision-making. Specifically, it shows how minimalism has led to legislative enactments that deprive the prisoners of basic rights and that, as a practical matter, compromise the capacity of the Supreme Court ever to adequately address the prisoners' claims. Although minimalism has been defended on the ground that it furthers democratic values, such a view reduces democracy to majoritarianism as opposed to a broad-based deliberative process that gives content to the fundamental values of the nation. It also overlooks the important and constructive role of the judiciary in that process.

Cuba is an island a hundred and twelve miles off the coast of Florida. The United States freed it of Spanish dominion in the Spanish-American War of 1898, but did not take possession of Cuba as spoils of war. Rather, it contented itself with a forty-five square mile area on the southeastern corner of the island, known as Guantánamo Bay, which has been an American naval station ever since.

As a purely formal matter, the United States occupies Guantánamo under a lease, which was first executed in 1903 and modified in 1934. The lease reserves "ultimate sovereignty" in Cuba, but it has no term. The United

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States possesses the unilateral power to terminate the lease, although in fact it has occupied and maintained exclusive control of the territory for more than a century.

Each year the United States tenders the rent — approximately \$4000 — but for the last forty-five years, the Castro government has refused to accept it. The Guantánamo Naval Station has its own residences and stores, some of which are well-known American franchises, including Baskin-Robbins, and it is separated from the rest of Cuba by an extensive fencing system. With the exception of a handful of elderly Cuban employees, holdovers from another era who enter the base on a daily basis for work, there is no exchange between the naval station and the rest of the island. Cuban law, such as it is, does not reach Guantánamo.

In January 2002 — as the Afghanistan war still raged — the Bush Administration decided to open a prison in Guantánamo and has interned hundreds of men there who were captured in that war. Over the last six years, it has been used to detain Al Qaeda suspects seized in a wide number of countries — including Bosnia, Thailand, and Zambia — but Guantánamo remains first and foremost a prison for men captured in Afghanistan or near the border in Pakistan. None of the Guantánamo prisoners are American citizens.

At its height, about eight hundred men were imprisoned at Guantánamo. More than four hundred have been released in the course of the last six years, either in response to intense diplomatic pressure or as a consequence of a process of review — staffed and controlled by the military — that was established in the prison in July 2004 to determine whether there was adequate reason to believe that the prisoners were in fact soldiers of the Taliban or Al Qaeda. We have been told that as of October 2007 there were about three hundred and fifty prisoners remaining in Guantánamo.¹

The United States invaded Afghanistan in October 2001 and ousted the Taliban in less than six months. Under the oversight of America and its allies, the Afghan people have adopted a constitution and held democratic elections. In that sense, the war in Afghanistan ended more than five years ago. Even though there is a growing insurgency in parts of that country, all claims of military exigency that might have justified the initial detention policy at Guantánamo today seem stale. It is important to remember, however, that the United States invaded Afghanistan not simply to oust the Taliban regime for

¹ Press Release, Office of the Assistant Secretary of Defense (Public Affairs), Majid Khan Meets with Private Attorney at Guantánamo (Oct. 16, 2007), *available at* <http://www.defenselink.mil/releases/release.aspx?releaseid=11415>.

supporting and protecting Al Qaeda, but also, and perhaps more importantly, to vanquish Al Qaeda itself. This objective has not been achieved, and it is this larger conflict between Al Qaeda and the United States that the Bush Administration uses to justify its continuing detention of the Guantánamo prisoners.

The basic constitutional question posed by Guantánamo is whether the prisoners held there have any constitutional rights that might be protected by the courts. This may not seem much of a question in many democracies throughout the world, including Israel, because they view their constitutions in universalistic terms. The guarantee of human dignity, for example, controls the actions of Israeli officers wherever they act and against whomever they act.² The American Supreme Court moved toward such a cosmopolitan conception of the United States Constitution during the Warren Court era, but starting in 1990 it headed in a different direction.

The issue arose in a case involving a search of the home — in Mexico — of a Mexican citizen who had been seized, also in Mexico, by agents of the United States and who was then taken for trial to the United States.³ The search had been conducted by American officials and was challenged as a violation of the Fourth Amendment.⁴ The then Chief Justice, William Rehnquist, purporting to speak for a majority, wrote an opinion that espoused a more nationalist conception of the Constitution. According to him, the Constitution protected American citizens from the action of United States officials no matter where they were located. It also protected foreign nationals when they were living in the United States and were part of the American political community, but the Constitution, reasoned Rehnquist, afforded no protection to foreign nationals living abroad. The Administration's decision to transform Guantánamo into a prison rests on the assumption that it, like Mexico, is not part of the United States and that the prisoners, since they are all aliens, cannot claim the protection of the Constitution and the various legal procedures, such as habeas corpus, that could secure that protection.

For their part, the Guantánamo prisoners and their lawyers challenged the legality of their detention and thus contested the scope and force of Rehnquist's 1990 ruling. Rehnquist had emphasized the special wording of the Fourth Amendment, which speaks of "the right of the people," and thus

2 *See, e.g.*, H CJ 769/02 Pub. Comm. Against Torture in Israel v. Gov't of Israel [2006] IsrSC 57(6) 285.

3 *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990).

4 The Fourth Amendment provides that "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . ." U.S. CONST. amend. IV.

it was not at all clear that the 1990 case applied to provisions such as the Due Process Clause of the Fifth Amendment, which protects the life, liberty, and property of "any person."⁵ A question could also be raised as to whether Rehnquist's opinion had the backing of a majority and thus governed. The crucial fifth vote came from Anthony Kennedy, then a recent appointee, who said that he joined the Chief Justice's opinion, but then went on to express the view "that the Government may act only as the Constitution authorizes, whether the actions in question are foreign or domestic."⁶ He implied that the government might be obliged to respect certain basic rights even when acting overseas, though constitutional norms would have to be adjusted to take account of the different contexts. Kennedy thought the phrase "the right of the people" appearing in the Fourth Amendment was not a term of limitation, but more a rhetorical flourish to emphasize the rights being conferred.

On two separate occasions, once in June 2004 and then again in June 2006, the Supreme Court addressed the claims of the Guantánamo prisoners. Both decisions rebuffed the Administration and received banner headlines in the press. Such results were indeed remarkable because a majority of the Justices seemed to cut through a tradition in American history of judicial deference to the Executive on military matters. All the world breathed a sigh of relief. Yet on closer inspection these victories for the Guantánamo prisoners were less momentous than they first appeared. Rather than resolving the basic constitutional claims of the prisoners, the Court based these decisions entirely on statutory grounds.

In fashioning the opinions in this way, Justice Stevens, who wrote for the Court in both instances, seemed to be pursuing a methodology — widely referred to as minimalism — that has gained currency in recent years in some corners of the liberal establishment in the United States.⁷ One tenet of minimalism directs the judiciary to resolve cases on statutory grounds if at all possible, and to turn to the constitutional issues only if necessary. Those who defend this method of decision-making argue that minimalism lets judges reduce the potential costs of wrong decisions. Constitutional decisions are

5 The Fifth Amendment provides that "nor shall any person . . . be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend V.

6 *Verdugo-Urquidez*, 494 U.S. at 277-78 (Kennedy, J., concurring).

7 See, e.g., CASS SUNSTEIN, *RADICALS IN ROBES* (2005); CASS SUNSTEIN, *ONE CASE AT A TIME* (2001) [hereinafter SUNSTEIN, *ONE CASE AT A TIME*]; Cass Sunstein, *Minimalism Versus Perfectionism in Constitutional Theory: Second-Order Perfectionism*, 75 *FORDHAM L. REV.* 2867 (2007); Cass Sunstein, *Testing Minimalism: A Reply*, 104 *MICH. L. REV.* 123 (2005); Michael C. Dorf, *Legal Indeterminacy and Institutional Design*, 78 *N.Y.U. L. REV.* 875 (2003).

for all time, the apostles of minimalism note, while a statutory interpretation can easily be corrected. Perhaps more importantly, minimalists also say that relying on statutory grounds encourages, nay, requires the President to work with Congress to further his objectives, thereby promoting the democratic values of the nation.

To the surprise of no one, after each of the Court's decisions, the Administration turned to Congress and quickly obtained the necessary legislative warrant for its detention program in Guantánamo. As a consequence, Congress became a full partner of the President in this front of the "War on Terror." This turn of events has led me to ponder the wisdom of minimalism as a decisional strategy and provides the primary impetus for this Article.

Part of my concern with minimalism is specific to the Guantánamo detainees. For over six years, they have been unable to obtain a satisfactory response to their constitutional claims. Their continued imprisonment has been the subject of a series of judicial rulings and congressional enactments, and the Court's initial decisions, couched in statutory terms that virtually invited legislative intervention, will likely make it more difficult — not impossible, but considerably more difficult — for the Court to reach a satisfactory resolution of the ultimate constitutional issues. In this respect, the decision to proceed in two steps, as minimalism dictates, already has had enormous costs, even if the Court eventually affords them all that the Constitution promises or the Administration decides to close Guantánamo.

My more important point, however, is not confined to the Guantánamo decisions, but sweeps more generally. Beyond the important questions it raises about Executive privilege, Guantánamo also provides a context to examine minimalism as a general decisional strategy. The flaws of minimalism extend beyond the tally of costs and benefits at Guantánamo and entail two fundamental theoretical misunderstandings. The first relates to the Court's function. To my eyes, the Court sits not to resolve the dispute before it, which may leave the Court free to choose the narrowest ground that would serve that purpose, but rather to nourish and protect the basic values of the Constitution.

The second failing of minimalism arises from its supposition of a necessary antagonism between constitutional pronouncements and democratic values. I maintain that democracy should not be understood as simple majoritarianism — let the political branches have their say — but rather as a deep and broad-based deliberative process in which we — all of us — give content to the values that define us as a nation. Constitutional pronouncements do not prevent or even stifle such deliberations, but rather, by fully revealing

the threat that is posed to our basic commitments, give such deliberations a certain vitality.

I.

One of the fundamental tenets of the American Constitution is the principle of freedom. It denies the government the authority to imprison anyone unless that person is charged with a crime and swiftly brought to trial. An exception is allowed for enemy combatants seized on the battlefield. The Bush Administration invoked this exception to incarcerate the Guantánamo prisoners and to hold them without criminal charges. Some prisoners claimed, however, that their imprisonment was mistaken — that in fact they were not soldiers of the Taliban or Al Qaeda — and sought a writ of habeas corpus in federal court in Washington D.C. to press their claim.

The writ of habeas corpus has both a statutory and a constitutional basis. Article I, Section 9 of the U.S. Constitution identifies the terms under which habeas corpus may be suspended, and by regulating the suspension and thus presupposing its availability, gives some measure of constitutional protection to the writ.⁸ On top of that, a federal statute specifically grants federal courts jurisdiction to issue the writ of habeas corpus.⁹ In the first Guantánamo case to reach the Supreme Court — the 2004 decision in *Rasul v. Bush*¹⁰ — the Supreme Court put the constitutional issues aside and held only that the prisoners could utilize the federal statute to adjudicate their claim to freedom. The Court did not decide the merits of the prisoners' claim to freedom, only that the federal district court had, as a matter of statutory interpretation, jurisdiction to hear that claim as long as the prisoners' custodian — the Secretary of Defense — was within reach of the court.

In analyzing the case in this way, Justice Stevens failed to engage the major premise that was the cornerstone of the government's argument and that had been sustained by the Court of Appeals. Relying on Rehnquist's ruling in the 1990 Mexican case, the government argued that habeas was not available because the prisoners do not possess any substantive constitutional

8 "The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it." U.S. CONST. art. I, § 9, cl. 2.

9 The federal habeas statute provides that "writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions." 28 U.S.C. § 2241(a) (2000).

10 542 U.S. 466 (2004).

rights that might be vindicated by the writ. They are aliens, and although aliens residing in this country may enjoy the same constitutional rights as American citizens, this cannot be said of the Guantánamo prisoners, who have no independent ties to the political community and are in fact imprisoned abroad. Accepting the government's argument, the Court of Appeals ruled, "We cannot see why, or how, the writ may be made available to aliens abroad when basic constitutional rights are not."¹¹

To his credit, Justice Stevens emphasized in his opinion in *Rasul* the special, somewhat anomalous, status of Guantánamo. Although it is not part of the United States as that term is ordinarily used, it has been under the exclusive control and authority of the United States for more than a century. Justice Stevens also listed in a single footnote the essential claims of the prisoners — that they are not enemy combatants and have been held incommunicado for some time without being charged with a crime — and concluded by noting that if these allegations were proved true, their incarceration would be unlawful.¹² However, Justice Stevens did not otherwise address the constitutional premise underlying the argument of the government and the decision of the lower court.

In July 2004, immediately after the *Rasul* decision, the Administration established a process in Guantánamo to address the claims of those prisoners who in fact denied that they were enemy combatants.¹³ Under the scheme then established, these claims are to be resolved by tribunals, referred to as Combatant Status Review Tribunals, that are staffed entirely by military officers appointed by the Secretary of the Navy and are governed by regulations issued by him. According to these regulations, prisoners are not allowed to have lawyers to represent them in these proceedings, only military officers with security clearance. The tribunals are not bound by the rules of evidence such as would apply in a court of law, and are permitted to consider any evidence — presumably hearsay and the product of coercive interrogation — that the presiding officer deems relevant. The decisions are to be reviewed by a designate of the Secretary of the Navy. Each year, a separate military panel examines the need for continued detention of persons previously found to be enemy combatants. These decisions are in turn reviewed by a civilian official designated by the Secretary.

The roots of this procedure can be traced to another decision handed

11 *Al Odah v. United States*, 321 F.3d 1134, 1141 (D.C. Cir. 2003).

12 *Rasul*, 542 U.S. at 483 n.15.

13 Memorandum from Paul Wolfowitz, Deputy Secretary of Defense, to the Secretary of the Navy (July 7, 2004), available at <http://www.defenselink.mil/news/Jul2004/d20040707review.pdf>.

down on the same day as *Rasul, Hamdi v. Rumsfeld*.¹⁴ This case involved an American citizen who was captured in Afghanistan and held in a naval brig in South Carolina. The government accused him of being a soldier of the Taliban, even though he denied having taken up arms against the United States and claimed that he had been in Afghanistan for personal reasons. He insisted that the procedures used by the Administration to determine that he was an enemy combatant were insufficient under the Constitution.

Justice O'Connor announced the opinion of the Court. In it she granted the prisoner, as a matter of due process, an evidentiary hearing on his claim to freedom. She also declared that the prisoner was entitled to access to counsel. She added, however, that the tribunal need not abide by the stringent evidentiary requirements of a trial in federal court. In that vein, she held that the government could rely on field records to create a presumption of lawfulness of the detentions and that the burden would be on the prisoners to rebut the presumption. Even more, O'Connor said that military tribunals might be used to hear these claims of freedom. Justice Souter, joined by Justice Ginsburg, whose votes were needed to give O'Connor's opinion majority status, refused to endorse the use of military tribunals as a substitute for habeas corpus.

Following *Hamdi*, it was unclear where the claims of freedom of American citizens held as enemy combatants might be adjudicated — would only a federal court under a writ of habeas corpus be acceptable or would a military tribunal suffice? Despite this uncertainty, the Administration quickly acted on the assumption that a military tribunal was acceptable for the Guantánamo prisoners — all of whom are aliens. Indeed, since not a word in *Rasul* required the procedural apparatus that the military established in Guantánamo in July 2004, the Administration's decision to set up Combatant Status Review Tribunals there might be seen as a preemptive strike against the efforts of the Guantánamo prisoners to obtain access to federal habeas corpus.

At the same time as it established these tribunals, the Administration turned to Congress to explicitly foreclose the habeas remedy. Since the *Rasul* decision held that the jurisdictional requirements of the habeas statute could be satisfied if the custodians of the prisoners were within the reach of the district court, it was, of course, within the power of Congress to amend the statute to deny a habeas remedy to the Guantánamo prisoners. Congress exercised this power in the Detainee Treatment Act of 2005, which amended the habeas corpus statute to provide that no court shall have jurisdiction to

14 542 U.S. 507 (2004).

hear "an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantánamo Bay, Cuba."¹⁵

The statute also gave the Court of Appeals for the District of Columbia exclusive jurisdiction to review the decisions of the Combatant Status Review Tribunals and any military commissions that might be established to try the Guantánamo prisoners for war crimes. Appellate review was limited to whether the tribunal had complied with the standards and procedures established by the Secretary of Defense, and whether those standards and procedures were consistent with the Constitution, provided, the statute was quick to add, the Constitution was applicable to such proceedings. In addition to this restrictive language, almost out of an abundance of caution, the Act declared that it should not be construed as conferring any constitutional rights on aliens detained as enemy combatants in Guantánamo.

The Supreme Court's first encounter with the Detainee Treatment Act of 2005 occurred in its June 2006 decision in *Hamdan v. Rumsfeld*.¹⁶ At issue in that case was not so much the principle of freedom, which had been central to *Rasul*, but rather the requirement, also rooted in the Due Process Clause, of procedural fairness. The Court was asked whether a prisoner — in this instance, Salim Ahmed Hamdan, alleged to have been Osama Bin Laden's bodyguard and personal driver — could be tried for war crimes by a military commission specifically established for that purpose by the President, or whether the trial should be conducted by a regularly constituted court, such as a court-martial.

To stop his trial before the military commission, Hamdan had sought a writ of habeas corpus. He filed this petition before the enactment of the Detainee Treatment Act, but, as it turned out, his habeas petition was pending in the Supreme Court at the time the statute was enacted. The first question the Supreme Court had to consider, therefore, was whether the bar

15 Detainee Treatment Act of 2005, Pub. L. No. 109-148, div. A, tit. X, § 1005(e)(1), 119 Stat. 2680, 2742 (the specific provision quoted above was codified at 28 U.S.C. § 2241(e)(1) (2000), and was subsequently amended in 2006). Another provision of the Act, fiercely fought by the Administration, prohibited the government from inflicting "cruel, inhuman, or degrading treatment or punishment" on prisoners held anywhere in the world. *Id.* § 1003(a) (codified at 42 U.S.C. § 2000dd(a) (2000)). The Act, however, failed to provide any remedial measures for victims of abuse and effectively limited the prosecution of any interrogator who used interrogation methods "that were officially authorized and determined to be lawful at the time that they were conducted." *Id.* § 1004(a) (codified at 42 U.S.C. § 2000dd-1(a) (2000)).

16 126 S. Ct. 2749 (2006).

on habeas corpus in the Act prevented the Court from reaching the merits of the prisoner's claim.

Stevens responded to this question by subtly parsing the statutory language. The Act stated that its prohibition on the issuance of habeas writs by federal courts "shall take effect on the date of enactment."¹⁷ It also contained another, separate provision expressly stating that the rule granting the D.C. Court of Appeals exclusive jurisdiction to review final decisions of the Combatant Status Review Tribunals or military commissions should be applicable to cases pending on the date of enactment.¹⁸ Stevens relied on this second provision relating to appellate review by the D.C. Court of Appeals, unmistakably applicable to pending cases, to infer that Congress had not intended the Act's general bar on granting habeas relief to Guantánamo prisoners to apply to pending cases such as Hamdan's.¹⁹

The minimalism of *Hamdan* was also manifest in the way the Supreme Court ruled on the merits of the claim challenging the use of military commissions to try some of the Guantánamo prisoners for war crimes. Justice Stevens fully understood the highly irregular and exceptional nature of military commissions. They are tribunals of exigency, which should be used, in his terms, to punish an "act for which the [accused] was caught red-handed in a theatre of war and which military efficiency demands be tried expeditiously."²⁰ Stevens also noted that Hamdan's case did not fit this model because the Guantánamo prison was not in a theatre of war and because three years had lapsed between Hamdan's capture and the filing of formal charges. These discrepancies even led Justice Stevens to express the fear that in the case of Guantánamo a military commission had been transformed "from a tribunal of true exigency into a more convenient adjudicatory tool."²¹ Yet in the end Stevens did not turn these sentiments into a principle of higher law. As minimalism dictates, he did no more than decide that the use of military commissions in Guantánamo was not authorized by statute, and in fact violated a provision of the Uniform Code of Military Justice (UCMJ).²²

The most plausible source of authority for the establishment of the commissions was Article 21 of the UCMJ, which provides that the granting of jurisdiction for courts-martial should not be construed as depriving

17 Detainee Treatment Act, div. A, tit. X, § 1005(h)(1) (codified at 10 U.S.C.A. § 801 note (2000)).

18 *Id.* § 1005(h)(2) (codified at 10 U.S.C.A. § 801 note (2000)).

19 *Hamdan*, 126 S. Ct. at 2763-69.

20 *Id.* at 2785.

21 *Id.* at 2793.

22 *Id.*

military commissions of jurisdiction "that by statute or by the law of war, may be tried by military commissions."²³ Yet, for Justice Stevens, Article 21 did not authorize the use of military commissions but merely preserved those independently authorized either by statute or the law of war. Stevens found no other statute authorizing the use of military commissions to try the Guantánamo prisoners, and further concluded that the customary laws of war did not include the particular charge against Hamdan, namely, conspiracy to commit war crimes. Justice Kennedy did not subscribe to the portion of Stevens's opinion relating to the law of war, and in so doing deprived it of majority status. In any event, Justice Stevens made clear that Congress could redefine the customary law of war to include the conspiracy charge.

Stevens not only complained of the absence of statutory authority for the Guantánamo commissions, but also found that the procedures to be used by the Guantánamo commissions violated Article 21's requirement that the procedures of courts-martial and military commissions be "uniform insofar as practicable."²⁴ In reaching this conclusion he placed special emphasis on the fact that before a commission the accused may be excluded from the proceeding or denied access to the information used against him under a broader range of circumstances than courts-martial would allow. Justice Stevens also observed that the rules of evidence of the Guantánamo commissions were much less stringent than those of courts-martial. Before a commission, prosecutors could introduce evidence that the presiding judge deemed to "have probative value to a reasonable person,"²⁵ a standard that seems to render admissible hearsay evidence and even evidence obtained by coercion. In addition, those convicted by a Guantánamo commission have no right to appeal to a civilian court unless they face capital punishment or imprisonment for more than ten years. However, rather than condemn these rules as a violation of the duty, rooted in the Due Process Clause, to provide fair procedures, Justice Stevens, consistent with the principles of minimalism, held only that they violated the uniformity requirement of Article 21 of the UCMJ.

As an alternative ground for condemning the procedures of the Guantánamo commissions, Stevens cited Article 3 of the Fourth Geneva Convention of 1949. That article, common to all of the Geneva Conventions, prohibits the execution or imposition of sentences "without previous judgment pronounced by a regularly constituted court affording all the

23 10 U.S.C. § 821 (amended 2006).

24 *Id.* § 836(b) (amended 2006).

25 *Hamdan*, 126 S. Ct. at 2755.

judicial guarantees which are recognized as indispensable by civilized peoples."²⁶ According to Stevens, a military commission set up to try a particular person or group of persons, such as the Guantánamo detainees, is not a "regularly constituted tribunal" within the meaning of Article 3. Absent some special exigency not present in this case, the "regularly constituted court" would be an ordinary military tribunal, such as a court-martial. Justice Stevens also condemned the procedural rules permitting the exclusion of the accused from the trial and the denial of access to evidence as inconsistent with the language in Article 3 requiring that the tribunal imposing sentence afford "all the judicial guarantees recognized as indispensable by civilized people." To support this conclusion, Stevens cited Article 75 of Protocol 1 of the Geneva Convention of 1949, which affirmed the right to be tried in one's presence.

Justice Kennedy was hesitant to embrace the view expressed by Stevens that the procedures of the commissions violated the UCMJ. He respected what he called the right of presence, but thought that the trial would have to unfold before the Court should determine whether there was any significant discrepancy between the commissions' procedures and courts-martial. Kennedy was also unwilling to ground the right to presence on Protocol 1 of the Geneva Convention, since the United States had refused to ratify it. In this way, he deprived another portion of Stevens's opinion — in this instance the reference to the Geneva Convention — of majority status. Indeed, Kennedy joined only those parts of Stevens's opinion holding that the commissions were not sufficiently authorized by statute. Formally, then, *Hamdan* held only that the Administration lacked the statutory authority to try the Guantánamo prisoners before military commissions.

Not too much should be read into Stevens's use of the Geneva Convention, even standing by itself, as many commentators have done.²⁷ It did not represent a departure from the minimalist premises undergirding his opinion. Although Stevens ruled that the Fourth Geneva Convention was applicable to the conflict between the United States and Al Qaeda, he assumed that the Convention is not by itself judicially enforceable. The relevance of the Convention stemmed only from the fact that Article 21 of the UCMJ conditions

26 Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

27 See, e.g., Oona Hathaway, *Hamdan v. Rumsfeld: Domestic Enforcement of International Law*, in *INTERNATIONAL LAW STORIES* 229 (John Noyes, Mark Janis & Laura Dickinson eds., 2007); David Scheffer, *Hamdan v. Rumsfeld: The Supreme Court Affirms International Law*, *JURIST*, June 30, 2006, <http://jurist.law.pitt.edu/forumy/2006/06/hamdan-v-rumsfeld-supreme-court.php>.

the use of military commissions on compliance with the law of war, which of course includes the Geneva Conventions. What rendered the Guantánamo commissions illegal for Stevens was not Article 3 common to all of the Geneva Conventions, but rather Article 21 of the UCMJ.

In *Rasul*, the Court rejected an argument of the government (about the interpretation of the federal habeas statute). In *Hamdan*, the Court's judgment impinged more sharply on the exercise of executive power. The Court set aside the order of the President establishing the Guantánamo military commissions on the ground that it lacked the necessary statutory authority and perhaps also, depending how you tally the votes, that it conflicted with an existing statutory command. Implicit in this ruling was a constitutional judgment about the allocation of powers between the President and Congress. Although the Court did not altogether deny the President the power to establish military commissions, it strictly confined the circumstances when the President might act unilaterally and further ruled that when a conflict exists with a statute of Congress, the congressional rule will prevail.²⁸ In a sense, then, the Court made a constitutional judgment.

Yet the constitutional character of that judgment must be distinguished from a constitutional judgment that would have deemed the use of a military commission to try Hamdan a violation of due process. Although the judgment allocating power among the branches implicit in the *Hamdan* decision confers some constitutional protection on the Guantánamo prisoners, they receive that protection in only an indirect way — as though they are third-party beneficiaries of a constitutional rule defining the powers of Congress and the President. A due process judgment predicated upon a claim about the unfairness arising from the use of the Guantánamo commissions would view these prisoners as direct beneficiaries of the Bill of Rights, as if there were no distinction between citizens and aliens, and no distinction between Guantánamo and other United States territories such as the fifty States and Puerto Rico.

On the afternoon that *Hamdan* was handed down, legislation was introduced in the Senate to respond to the decision. On October 17, 2006, only four months later, Congress passed the Military Commissions Act of 2006. One provision of the Act reiterated the ban on habeas corpus and made it applicable "to all cases, without exception, pending on or after the date of enactment."²⁹ A second feature of the Act amended Article 21 of the UCMJ in order to fully authorize the use of military commissions to

²⁸ *Hamdan*, 126 S. Ct. at 2774 n.23.

²⁹ Military Commissions Act of 2006, Pub. L. No. 109-336, § 7(b), 120 Stat. 2600, 2636. The Act also extended the geographic scope of the bar against habeas petitions

try the Guantánamo prisoners. It listed the offenses that can be tried before military commissions and included conspiracy to violate the law of war. The Act promulgated a code of procedure that departed from the procedural rules used by courts-martial, and that, only with some qualifications,³⁰ conformed to the procedural code initially prescribed by the Administration. Finally, the Act removed the Geneva Convention as a bar of any sort to the President's plan. It declared that the military commissions the President established were consistent with Article 3 of the Geneva Conventions, gave the President the authority to interpret the Convention, and denied that the Convention was judicially enforceable against the United States. The Administration welcomed this grant of power and went forward with its plan to try a number of the Guantánamo prisoners before military commissions.

In February 2007, the D.C. Court of Appeals — the very same court that had decided *Rasul* prior to the Supreme Court's decision — ruled on the legality of the Military Commissions Act of 2006. The Court of Appeals first held that, as a matter of statutory interpretation, the very same habeas petitions considered in *Rasul* and then again in *Hamdan* were now clearly and unmistakably barred by the Act.³¹ As the Court said, "it is almost as if the proponents of [the statute] were slamming their fists on the table, shouting 'when we say all, we mean all — without exception!'"³² The Court of Appeals then went on to consider the charge that the statute was unconstitutional as an improper suspension of the writ of habeas corpus. On this question, the Court of Appeals, displaying none of the reticence of the Supreme Court, reiterated the position it had taken earlier — aliens imprisoned at Guantánamo did not enjoy any constitutional rights.

The Court of Appeals was mindful of the anomalous status of Guantánamo as a territory over which the United States has exercised long-term exclusive jurisdiction and control. Yet it concluded that de facto sovereignty was not sufficient. The Court of Appeals held that for constitutional purposes,

by prisoners so that the bar applies to all non-U.S. citizens that the government determines to be illegal enemy combatants, regardless of where the government is holding them. *Id.* § 7(a).

30 For example, the Military Commissions Act requires judges to exclude evidence if its prejudicial value substantially outweighs its probative value. The Act also requires that prosecutors give notice of and an opportunity to rebut hearsay evidence before they are permitted to use it. Compare Military Commissions Act § 949a(b)(2), with United States Department of Defense, Military Commission Order No. 1, Mar. 21, 2002, available at <http://www.defenselink.mil/news/Mar2002/d20020321ord.pdf>.

31 *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007), cert. granted, 127 S. Ct. 3078 (2007).

32 *Id.* at 987.

Guantánamo should be viewed much as we would view a foreign country, not like one of the States or a territory such as Puerto Rico. By way of support for this proposition, the Court of Appeals pointed to the legislative determination in the Detainee Treatment Act of 2005 that "the United States, when used in a geographic sense . . . does not include the United States Naval Station at Guantánamo Bay, Cuba."³³

Lawyers for the prisoners sought review of the Court of Appeals' decision. In April 2007 the Supreme Court denied certiorari but, to the surprise of Court watchers, it reversed itself in June, thereby providing itself yet a third opportunity to resolve the central question — do the Guantánamo prisoners have any constitutional rights that might be protected by a writ of habeas corpus? — that it had avoided in 2004 and again in 2006.

II.

On two separate occasions, the Supreme Court refused to address the question whether the Guantánamo prisoners had any constitutional rights that might be protected by habeas corpus. We can now readily see the costs of such a minimalist strategy: the cycles of litigation, the hardship on the prisoners, and the resources consumed by the judicial and legislative branches. But what has been gained?

In a separate and very short concurrence in *Hamdan*, Justice Breyer pointed to a possible answer. Stressing the limited nature of the Court's decision, he said that the Court had done no more than declare that Congress had failed to grant the President the authority to create the kind of commission at issue in the case, and in fact seemed to deny that authority. "Nothing," Breyer continued, "prevents the President from returning to Congress to seek the authority he believes is necessary."³⁴ Then, to justify the value of that exercise, Breyer invoked the theme that had been made prominent by the proponents of minimalism and in much of Breyer's extrajudicial writing: democracy.³⁵ Judicial insistence that the President turn to Congress and gain its assent would further the democratic purposes of the Constitution.

Such a view ignores the specific democratic system — presidential — established by the American Constitution. In a presidential system, there are two mandates from the electorate, one for the President and another for the

³³ *Id.* at 992.

³⁴ *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2799 (2006) (Breyer, J., concurring).

³⁵ See STEPHEN BREYER, *ACTIVE LIBERTY* (2005).

legislature. Of course, when a measure is endorsed by both the President and the legislature, both mandates are being honored. But to insist upon the priority of the decision of the legislature when it conflicts with that of the President or to require congressional authorization to use military commissions is to ignore a distinctive feature of the presidential claim to authority, one that might, seen objectively, give it priority, especially in the context of war: The President speaks for the nation as a whole. Although the members of Congress can also speak for the nation, they are elected by districts or states and are necessarily responsive to their local constituencies.

Granted, there may be offsetting democratic advantages of the legislative chamber. For example, it may be easier for electors to hold individual members of Congress accountable than it is to hold the President accountable. The multitude of representatives in Congress may also make public deliberation more common, though hardly a strong institutional practice, as anyone knows who has witnessed on late night TV many a legislator making a speech to an almost empty chamber. Account must indeed be taken of the (promised) deliberative character of the legislative process and the ways it facilitates accountability, but the distinct electoral mandate of the President or his claim to democratic authority should not be ignored.

Even more fundamentally, it would be wrong to assume, as the proponents of minimalism do, that the democratic values of the Constitution are furthered by simply enhancing the power of elected officials. Democracy is not majoritarianism. Increasing the power of the political branches enlarges the opportunities for the majority to exercise its will, but it does not ensure that this exercise of will is based on a consideration of all the interests affected or entail the kind of reflection that makes such exercises of will worthy of our respect. Maybe nothing can ensure such reflection, but a robust use of the judicial power — a strong and unqualified statement of constitutional principle — often provides the foundation for such reflection and in so doing enhances the deliberative character of the majority's decision.

The United States Constitution vests enormous power in elected officials and requires periodic elections. It also enshrines certain basic values — free speech, religious liberty, racial equality, due process — that have long been the source of America's identity and inner cohesion. All the branches of government, including the elected ones, have the right and responsibility to interpret these values, but the Supreme Court has a special responsibility in this domain. It is expected to protect these values from transient majorities and the officials who serve them, although the Court is always subject to the checks inherent in the amendment process, regulations governing the jurisdiction of the federal judiciary, loud and forceful expressions of

popular and professional disapproval, and the appointments process. The Court stands above politics, but is always inextricably tied to it.

The authority of the Court to set aside ordinary congressional enactments or executive decrees because they conflict with basic values does not presuppose that those who happen to be judges possess any moral expertise. Nor does it assume that the Justices are guardians of the disenfranchised, such as the several hundred foreign nationals presently imprisoned in Guantánamo. Rather, the claim of authority stems from the simple fact that all exercises of the power by judges are bounded by the strictures of public reason. Judges must listen to grievances they might otherwise wish to ignore, hear from all affected parties, and then give a principled response to the grievances before them.

Judges exercise their power within the context of a dispute, but we should not confuse the context within which a power is exercised and the social purposes served by the exercise of that power. The requirement that the Court exercise its power within the context of a concrete dispute is based upon instrumental considerations. It seeks to ensure that the Court, situated within an adversarial system and so dependent upon it, be given a full presentation of the facts and the law. The purpose of the Court is not, however, to resolve the dispute before it, but rather to give, through the reason of the law, concrete meaning and expression to the values of the Constitution.

The need for the Court to defend the Constitution in this way is always great, but even greater in times of war, especially when the war is so amorphous and ill defined, and generates as much fear as a war against terrorism, where the enemy is invisible and threatens to strike at home. In the midst of such a war, fears are likely to be great and a small group of outsiders — the prisoners in Guantánamo — can easily be made to shoulder the burden of our self-protective instincts. These individuals are alleged to be the agents of our enemy and are conveniently isolated on a distant island. In such a setting, I maintain, robust use of the judicial power — one that projects a clear, unqualified view of the requirements of the Constitution — will further, not diminish, public deliberation and thus democratic values. Such a use of the judicial power does not preclude further action by the political branches, but rather sets the limits of that action and thus provides the framework for their continued deliberation.

Proponents of minimalism may well acknowledge the danger to our liberties from the coordinated actions of the legislative and executive branches but then seek refuge in what I have described as a two-step process — in the words of the manifesto of minimalism, "One Case

at a Time."³⁶ Minimalism's defenders stress that a decision grounded on a conflict with a statute does not preclude the Court from later striking down a congressional revision of that statute, if the Court then determines that the revisions violate the Constitution. Yet, those who have defended the Supreme Court's minimalism in cases such as *Hamdan*, as Justice Breyer has, on the ground that it is doing no more than requiring the President to consult with Congress and that "[t]he Constitution places its faith in those democratic means,"³⁷ will, I venture to suggest, be ill-disposed, maybe even embarrassed, to ignore or set aside the congressional action endorsing the President's program.

Formally, the option remains, but as a purely practical matter it has become encumbered. For an institution that values consistency, there is an inherent awkwardness in invalidating an act of Congress after declaring that "[t]he Constitution places its faith in those democratic means," especially when the congressional response to the initial decision was so predictable. The field of action has also changed. When the Court eventually addresses the issue that it has so long avoided — do the Guantánamo prisoners have any constitutional rights that may be secured by habeas corpus? — it will have to confront the Congressional declaration, not present at the time of *Rasul*, that Guantánamo is not part of the United States. Of course, the Court can set aside that declaration, but only after it decides that it is for the Court, not Congress, to determine the legal status of Guantánamo. Moreover, the Justices, always mindful of the stature of the Court and the limits of its authority, will be keenly aware of the new institutional alignment and are likely to be humbled by it. Instead of defending the Constitution against the unilateral actions of the Executive, they might, in this second step, have to act against both the President and Congress.

The argument against minimalism presented here is predicated on an assumption that a majority of the Justices are prepared to defend the constitutional rights of Guantánamo detainees, but believe that minimalist decisions better serve democratic ideals. This assumption about the disposition of the Justices may be far-fetched. Indeed, minimalism may be so appealing to a portion of the liberal wing of the American academy only because the alternative I offer — a cosmopolitan conception of the Constitution and a robust articulation of the rights it confers — is no longer possible as a practical matter. This alternative vision may be unable to garner five votes. Under this assumption, minimalism is less a strategy — an active

³⁶ SUNSTEIN, ONE CASE AT A TIME, *supra* note 7.

³⁷ *Hamdan*, 126 S. Ct. at 2799 (Breyer, J., concurring).

choice by the majority to disregard constitutional questions — and more a characterization or rationalization of the only result that a majority of the Justices could reach. Strategy necessarily implies a choice.³⁸

Of course, choice will always remain for the individual Justice, and for him or her minimalism might therefore be viewed as a decisional strategy. Justice Kennedy rejected a minimalist approach in *Rasul*. In contrast to Stevens, he refused to treat the Guantánamo prisoners' right to habeas as purely a matter of statutory interpretation. Speaking at the level of general constitutional principles, Kennedy viewed the Constitution as reaching the Guantánamo prisoners and insisted that there were sometimes circumstances — present in the case before him — "in which the courts maintain the power and the responsibility to protect persons from unlawful detention even where military affairs are implicated."³⁹ He emphasized that the United States had exercised long-term, exclusive control over Guantánamo, and that the territory was far removed from any hostilities. He was also moved by the fact that the Guantánamo prisoners were being held indefinitely, not just for weeks or months, but for years, making the Administration's claims of military necessity and its objection to habeas weak. No other Justice joined this opinion: Breyer, Souter, Ginsburg and O'Connor silently joined Stevens's opinion and acquiesced in his exercise of minimalism.

By June 2006, the time of *Hamdan*, the margins had drawn closer. John Roberts had replaced William Rehnquist as Chief Justice. Although Roberts did not participate in *Hamdan*, as a circuit judge Roberts had sustained the use of the military commissions.⁴⁰ More to the point, Sandra Day O'Connor had retired and was replaced by Samuel Alito, who in the *Hamdan* decision sided with Justices Thomas and Scalia in defense of executive power. In *Hamdan* as in *Rasul*, Justice Kennedy wrote a separate opinion, but in this case his primary purpose was to explain why he believed that the Guantánamo military commissions were not authorized by Congress. Breyer, Souter and Ginsburg were able to join this portion of Kennedy's opinion, as well as Stevens's opinion for the Court (like Souter and Ginsburg, Kennedy joined Breyer's separate concurrence).

To conceive of minimalism as a judicial strategy, now for an individual Justice, we must assume that at least one Justice in the *Hamdan* majority was inclined to find that the Guantánamo commissions were objectionable

38 See Neil S. Siegel, *A Theory in Search of A Court, and Itself: Judicial Minimalism at the Supreme Court Bar*, 103 MICH. L. REV. 1951, 1963-64 (2005).

39 *Rasul v. Bush*, 542 U.S. 466, 486 (2004) (Kennedy, J., concurring).

40 *Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir. 2005), *rev'd*, 126 S. Ct. 2749 (2006).

from the perspective of due process and that the prisoners could use habeas corpus to vindicate their rights. Otherwise there would be no choice and thus minimalism could not be conceived as a strategy of decision. There are hints in *Rasul* and *Hamdan* that this assumption is reasonable. In the obscure footnote in *Rasul* that I have already mentioned, Justice Stevens referred not to Rehnquist's opinion in the 1990 Mexican case but rather to Justice Kennedy's, in which he argued that the Constitution imposes certain minimum obligations on U.S. officials wherever they act and against whomever they act. In *Hamdan* itself Justice Stevens attacked the rule excluding the accused from trial on the ground that it represented a departure from, in the words of the Geneva Convention, "a judicial guarantee recognized as indispensable to civilized people" — a standard not very different from due process itself. Perhaps some of those who joined his opinions in both cases — Souter, Breyer, or Ginsburg — believed that the proceedings about to commence at Guantánamo offended the Constitution and that the prisoners are entitled to habeas corpus.

For our imagined Justice, writing a separate opinion in *Hamdan* based on constitutional considerations would not have undermined the judgment itself, for, like the statutory decision, it would have declared the use of the commissions unlawful. But given the sharp division on the Court, such a separate opinion would have deprived Stevens's opinion of majority status. This would have disappointed Stevens, presumably anxious to speak for the Court, and thus would have strained collegial relations. Yet respectful disagreement, even to the point of depriving a colleague of the privilege of delivering a majority opinion, should never be taken as a personal offense. The duties of an officer of the Court are far too weighty.

Filing a separate concurrence might also introduce an element of uncertainty. Some of the majority might object to the use of commissions on statutory grounds, others on the basis of due process. Under these circumstances, neither the President nor Congress would know whether the illegality could be cured by enacting legislation. Such uncertainty should not, however, be necessarily viewed as a fatal vice.

For one thing, our imagined Justice could count on the ingenuity of the political branches to move forward in the face of whatever uncertainty he or she might create. In the *Hamdi* case, for example, the Court was badly splintered and it was unclear whether the evidentiary hearing to which the prisoner was entitled should be held before a military tribunal or a federal court. Faced with such uncertainty, the Administration entered into an agreement that allowed the prisoner to move to Saudi Arabia, subject to certain restrictions and renunciation of his American citizenship.

Alternatively, our imagined Justice might be willing to subject the

political branches to legal uncertainty in order to fully express deeply held beliefs. This second, more principled stance may well be justified, or at least rationalized, on the theory that his or her job is to defend the Constitution and the values that it embodies, not to facilitate the choices of the elected branches. More pragmatically, this Justice might act on the understanding that a bold, forceful and let's hope eloquent opinion articulating the underlying constitutional principles, even if joined by no other Justice, would enrich the resources of the law. It would not be the law, but as was the case with Justice Brandeis's famous concurrence in *Whitney v. California*,⁴¹ it might enhance the law by introducing a new strain into the sources from which the law evolves.

A separate opinion by our imagined Justice based on due process would also have made an immeasurable contribution to public discourse, including the debate occurring in the legislative chambers or the offices of the executive. It would have underscored the true stakes at issue. Had such an opinion been filed in *Hamdan*, politicians and the citizens they serve could have seen with far greater clarity that the Guantánamo military commissions are at variance not only with various statutes and maybe even international agreements, but also, and more importantly, with the Constitution.

III.

The apostles of minimalism say that we should be comforted by the fact that at some future point — the so called second step — the Court can address the central constitutional issues posed by Guantánamo. That second step is now upon us. By virtue of its turnaround in June 2007, the Supreme Court has taken up the question, twice avoided, of whether the Guantánamo prisoners have any constitutional rights that might be secured by habeas corpus. Unfortunately, however, the proponents of minimalism have failed to recognize that the capacity of the Court to address that question is considerably compromised by the limited character of its initial decisions.

A miracle may of course occur. The Court may find within itself the resources to declare the bar to habeas corpus contained in the Detainee Treatment Act and the Military Commissions Act unconstitutional. The Iraqi war has grown increasingly unpopular. The political tide is turning against the Administration, and as a result even the present Congress may be moved to repeal these measures. Should this come to pass, however,

41 274 U.S. 357, 372 (1927) (Brandeis, J., concurring).

we should not view such developments as vindicating the principles of minimalism, but rather as a fortuity of history. The incremental vision of minimalism in no way provides for the arrival of a political environment that is favorable to the Constitution.

Guantánamo has brought the consequences of minimalism into stark relief. For six years the President, acting with full authorization of Congress, has been allowed to operate a prison beyond the reach of the Constitution. All the prisoners have been subjected to intensive interrogation, maybe even tortured. Some have been placed on trial for war crimes before military commissions. Even if all this comes to an end; even if the trials are stopped and the remaining prisoners are either freed or brought under the jurisdiction of the Constitution, Guantánamo and all that it implies will remain a sad part of American constitutional history.

On October 14, 2007, the New York Times reported that a courthouse was being constructed at Guantánamo for the trials before military commissions. When the unfortunate episode of Guantánamo is finally brought to an end, as I hope it soon will be, this building could serve as a monument to the failures of minimalism. It will remind us of the need, especially in times of stress, for the Court to stand strong and tall and use its power to defend the basic charter of the nation.