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Article

The Political Constitution of Emergency Powers: Some Lessons from *Hamdan*

Mark Tushnet[†]

Scholars of constitutional law located in law schools inevitably gravitate toward the courts. For us, what the courts say about the Constitution is at the heart of our constitutional order.¹ Not surprisingly, then, the Supreme Court's decision in *Hamdan v. Rumsfeld*² received a great deal of scholarly attention.³ *Hamdan*'s rhetoric reinforced its assertion of the centrality of the courts in the constitutional order.⁴ And yet, *Hamdan* may be more important for what it says about the *political* aspects of the constitutional order. On analysis, *Hamdan* changed the political dynamics associated with the law of emergency powers without changing the legal terrain (as conventionally understood) one whit.⁵ In doing so the decision—and, more im-

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1. This is true even as we acknowledge the existence of aspects of the constitutional order that lie beyond the ken of the courts. We relegate those aspects to the margins of our concern, calling them political questions and attempting to domesticate—that is, reduce the scope of—that category. For my analysis, see Mark Tushnet, *Law and Prudence in the Law of Justiciability: The Transformation and Disappearance of the Political Question Doctrine*, 80 N.C. L. REV. 1203, 1203–06 (2002).

2. 126 S. Ct. 2749 (2006).

3. For example, an April 6, 2007 search of the Westlaw “Journals and Law Reviews” database revealed twenty-six scholarly pieces with “Hamdan” in the title.

4. See *Hamdan*, 126 S. Ct. at 2798 (“[I]n undertaking to try Hamdan and subject him to criminal punishment, the Executive is bound to comply with the Rule of Law that prevails in this jurisdiction.”).

5. Eric Posner and Adrian Vermeule describe *Hamdan* as a decision handed down “after an emergency has run its course.” ERIC A. POSNER & ADRIAN VERMEULE, *TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE*

portant, the political reaction to the decision—helps us understand the way in which the constitutional law of emergency powers is (primarily) political rather than legal.

The *substantive* law of emergency powers specifies what the executive can do to whom when there are rationally indisputable major threats to the continued stable operation of a democratic nation's political and social order.⁶ My argument turns on the proposition, not difficult to establish in my view, that *Hamdan* deals solely with the *procedural* law of emergency powers, that is, with the mechanisms by which the executive obtains substantive authorities. All that *Hamdan* holds is that no statute authorized the President to establish military tribunals, with the characteristics laid out in the President's order, to try persons held as unlawful combatants.⁷ Without a statute authorizing such tribunals, the Court held, the President could establish only tribunals with characteristics that satisfied the requirements of Common Article 3 of the Geneva Conventions.⁸ It is apparent on the face of the *Hamdan* opinions—that is, Justice John Paul Stevens's majority opinion on most issues,⁹ his plurality opinion on another,¹⁰ and Justice Anthony Kennedy's opinion concurring in the result on the former¹¹—that Congress could authorize the creation of the tri-

COURTS 272 (2007). It would follow, I think, that *Hamdan* does not shed light on the judicially constructed law of emergency powers *during* emergencies (although it still might shed light on the political constitution of emergency powers during emergencies). Posner and Vermeule make their observation in the service of a broader argument that courts are quite deferential to executive decision-making power during emergencies and less deferential when emergencies have ended. *Id.* at 15–57. Their other examples involve situations in which there is some reasonable marker for the emergency's termination, such as a surrender or armistice. *Id.* at 165–66. In the absence of such a marker, determining when “an emergency has run its course” is a matter of judgment, and Posner and Vermeule's judgment seems to me driven as much by the conclusion they seek to support as by any independent evidence.

6. I use this definition to exclude from the subject, as I believe proper, questions that arise from the exercise of power during what Kim Lane Scheppele calls “small emergencies.” See Kim Lane Scheppele, *Small Emergencies*, 40 GA. L. REV. 835, 835–36 (2006). In doing so, I do not mean to suggest that examination of the legal order in small emergencies cannot illuminate our understanding of the legal order during larger ones.

7. *Hamdan*, 126 S. Ct. at 2775.

8. *Id.* at 2786. Put another way, according to the Court, existing statutes prohibited the President from creating commissions that did not satisfy those requirements.

9. *Id.* at 2773–75.

10. *Id.* at 2779–80.

11. *Id.* at 2799 (Kennedy, J., concurring).

bunals the President had created, without running into any objections expressly identified in *Hamdan*.¹²

What *Hamdan* did, of course, was change one aspect of the status quo.¹³ After the decision as before, the President could have used existing court-martial procedures as the basis for the rules governing trials of unlawful combatants. But after the decision, unlike the situation before it, the President had to obtain congressional authorization for the creation of military tribunals that departed from the requirements of the Uniform Code of Military Justice and, perhaps, Common Article 3.¹⁴ Initially, the administration appeared to believe that doing so would be relatively simple. It turned out to be a bit more complicated, for reasons that illuminate what I call the political constitution of emergency powers.

I. *HAMDAN* IN THE SUPREME COURT

The facts and holdings of *Hamdan* are well-known, and I summarize only the portion of the Court's opinion that casts light on the political constitution of emergency powers. The administration had created military tribunals that, so the Court held, did not conform to the requirement of Article 21 in the Uniform Code of Military Justice (UCMJ)¹⁵ that military tribunals of the sort involved in *Hamdan* must comply with the requirements of the law of war.¹⁶ The Court held that the President lacked congressional authorization to dispense with

12. As I discuss below, *Hamdan* did not rule out the possibility that there might be *other* objections to tribunals with the characteristics of those created by the President.

13. I focus in this Article on the relation between *Hamdan* and the issue of military commissions. By giving the President an incentive to press forward with legislative proposals dealing with such commissions, *Hamdan* also provided an opportunity for the President and members of Congress to advance policy proposals only loosely related to the one specifically at issue in *Hamdan*. Put in more general terms, unsettling the status quo with respect to a single matter can sometimes unsettle issues in some roughly bounded neighborhood.

14. Cf. Neal Kumar Katyal, *Hamdan v. Rumsfeld: The Legal Academy Goes to Practice*, 120 HARV. L. REV. 65, 95–96 (2006) (observing that the Court's decision meant that the President had to obtain a majority vote from Congress, whereas a decision in favor of the administration would have required a Congress that disagreed with the President to achieve majorities large enough to overcome a presidential veto).

15. 10 U.S.C. § 821 (2000).

16. *Hamdan*, 126 S. Ct. at 2803 (Kennedy, J., concurring).

compliance with the law of war.¹⁷ The administration claimed that legislation enacted after the UCMJ—the Authorization for the Use of Military Force¹⁸ (AUMF) against al-Qaeda and those associated with it, and the Detainee Treatment Act of 2005¹⁹—did provide the requisite authority.²⁰ The Court disagreed. The AUMF did not “even hint[] that Congress intended to expand or alter the authorization set forth in Article 21 of the UCMJ.”²¹ Nor did the Detainee Treatment Act contain language bearing on the rules to be used in military tribunals; all it did was assume that such tribunals existed, and structure the process for reviewing decisions by such tribunals.²²

The next question was whether the procedures to be used in the tribunals as then structured were consistent with the UCMJ.²³ The government relied on a provision in the UCMJ that required “rules” under the UCMJ to be “uniform insofar as practicable.”²⁴ The Court held that “the ‘practicability’ determination the President has made is insufficient to justify variances from the procedures governing courts-martial.”²⁵ The President *had* specifically found that it was impracticable to conform the rules to those in ordinary criminal trials in civilian Article III courts,²⁶ but had said nothing about the practicability of conforming the rules to those used in courts-martial. And, the Court held, the record before it, standing alone and without any presidential determination to which deference might be owed, did not show why using court-martial procedures would be impracticable.²⁷

17. The Court did not rule that the President *could not* create such tribunals without congressional authorization, carefully noting that the President had not claimed in *Hamdan* as it reached the Supreme Court that the President had the authority to create such tribunals in the face of a congressional prohibition because of his constitutional power as commander in chief of the armed forces. *Id.* at 2774 n.23.

18. Pub. L. No. 107-40, 115 Stat. 224 (2001).

19. Pub. L. No. 109-148, 119 Stat. 2739.

20. *See Hamdan*, 126 S. Ct. at 2774–75 (“The Government would have us . . . find in either the AUMF or the DTA specific, overriding authorization for the very commission that has been convened to try Hamdan.”).

21. *Id.* at 2775.

22. *Id.* at 2775.

23. *Id.* at 2786.

24. 10 U.S.C. § 836(b) (2000).

25. *Hamdan*, 126 S. Ct. at 2791.

26. *Id.*

27. *Id.* at 2792.

Legislation might not be needed to overcome this difficulty. A presidential determination of impracticability might have been sufficient. That was not true of another aspect of the case. The Court held that, according to the law of war, those in Hamdan's position—unlawful enemy combatants—were entitled to the protection of so-called Common Article 3 of the Geneva Conventions.²⁸ That Article requires, the Court held, that even such combatants must not be sentenced “without previous judgment by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”²⁹ The existing military tribunals were not “regularly constituted courts,” apparently because they were not created through the ordinary processes by which courts are usually created—that is, by legislation.³⁰ Here too, the “regular constitution” requirement would seem to be satisfied by legislation creating tribunals *without regard to their characteristics* or the procedures used in them.³¹ Any law would do.

What of the “indispensable” judicial guarantees? The Court held that provisions authorizing denial of access to the prisoner (or his lawyers) of evidence against him were an indispensable requirement of Common Article 3: “[A]t *least absent express statutory provision to the contrary*, information used to convict a person of a crime must be disclosed to him.”³² Note, though, that this requirement flowed from the UCMJ's incorporation of the law of war.³³ Congress could displace the law of war and expressly authorize tribunals that did indeed dispense with some procedures “recognized as indispensable by civilized peo-

28. *Id.* at 2795–96. As a domestic constitutional lawyer, I am not in a position to assess whether, as I have been told by others more expert than I, this is a strained or unusual interpretation of the scope of Common Article 3. See Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287. For present purposes, all that matters is that the Court held as it did.

29. *Id.* at 2796 (quoting 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).

30. *Id.* at 2796–97.

31. See *id.* at 2797 (quoting Justice Kennedy's explanation that regularly constituted courts are those established by congressional statute).

32. *Id.* at 2798 (emphasis added).

33. See 10 U.S.C. § 821 (2000) (“The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions . . . tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or *by the law of war* may be tried by military commissions.” (emphasis added)); *Hamdan*, 126 S. Ct. at 2799 (Kennedy, J., concurring) (arguing that Congress requires that “military commissions like the ones at issue conform to the ‘law of war’”).

ples,” although one can imagine that there might be some political obstacles to doing so in terms that acknowledged the departures from such procedures. Congress would have to say that it was properly removing itself from the community of civilized peoples, and might be reluctant to do so.³⁴

Hamdan, then, turned entirely on the proposition that Congress had not authorized the President to create tribunals with characteristics that departed from those required by the law of war.³⁵ It said nothing about what procedures, if any, the Constitution required in such tribunals. The Bush administration proposed legislation that would have authorized it to conduct tribunals different only in trivial respects from those it had devised on its own.³⁶ Had such a statute been enacted, *Hamdan*’s holding would not threaten the tribunals’ operation. Yet, the initial reaction to the administration’s proposal from important political actors was quite hostile, on the asserted ground that the proposal could not survive in court. So, for example, Senator John Warner, who had served as Secretary of the Navy and was on the Senate Armed Services Committee, said, “I feel this bill has got to pass what I call the federal court muster, so this thing doesn’t get tangled up in the courts again and go all the way to the Supreme Court, and then down she goes again.”³⁷ This might perhaps refer to constitutional problems other than those addressed in *Hamdan*, with Senator

34. As the events played out, this concern was expressed as reluctance to state explicitly that the United States was willing to disregard its (international) obligations under the Geneva Conventions, although the Military Commissions Act does make it clear that these obligations operate only on the international level and provide no benefits directly to those tried by military commissions. See Military Commissions Act of 2006, Pub. L. No. 109-366, § 3(a), 120 Stat. 2600, 2602 (to be codified at 10 U.S.C. § 948(b)(g)) (“No alien unlawful enemy combatant subject to trial by military commission under this chapter may invoke the Geneva Conventions as a source of rights.”).

35. More modestly, it is easy to read *Hamdan* as resting solely on that proposition—and, I believe, hard though not impossible to read it more substantively.

36. See Kate Zernike, *Crucial Senator Says a Few Problems Remain in Bill on Terror Tribunals*, N.Y. TIMES, Sept. 9, 2006, at A10 (summarizing the administration’s proposal).

37. *Id.* (quoting Sen. Warner). Senator Lindsay Graham offered a similar—and similarly slightly ambiguous—comment: “It would be unacceptable, legally, in my opinion, to give someone the death penalty in a trial where they never heard the evidence against them. ‘Trust us, you’re guilty, we’re going to execute you, but we can’t tell you why.’ *That’s not going to pass muster*; that’s not necessary.” Kate Zernike, *Lawyers and G.O.P. Chiefs Resist Proposal on Tribunal*, N.Y. TIMES, Sept. 8, 2006, at A24 (quoting Sen. Graham) (emphasis added).

Warner concerned that, for example, non-separation-of-powers objections to the tribunals' procedures might lead the courts to invalidate those procedures. Shortly after *Hamdan*, though, Senator Warner had been unambiguous, and his later statement probably tracked his earlier views:

We've got to structure his law in such a way that if it ever came back up through the Supreme Court, it will not be struck down. . . . It's important for the credibility of the United States to put this issue at rest and let the world realize we're affording them the protections *as the Supreme Court outlined*.³⁸

If, as I have argued, the Supreme Court had in fact not "outlined" any procedures in *Hamdan*, what were these references about? I suggest that they reflected an intuitive presumption, widely shared but readily displaced, that constitutional law as articulated by the Supreme Court provides the only *legal* framework—that is, the only framework larger than the particulars of specific statutes—for structuring emergency powers. As the debate over creating military tribunals developed, that presumption disappeared. Senator Warner, along with Senators Lindsay Graham and John McCain, advanced their views about the procedures the tribunals should use *on the merits*. They quickly stopped suggesting that the procedures they preferred had been, or would be, required by the Supreme Court, and shifted to asserting that those procedures were, in their view, the ones that *ought* to be used, without reference to adjudicated constitutional law.³⁹ At that moment, the political constitution replaced the legalized one.

As events turned out, these Senators' policy preferences with respect to procedures were relatively weak. The statute that was eventually adopted gave the President almost as much as he had sought initially.⁴⁰ The defendant might get ac-

38. Kate Zernike & Sheryl Gay Stolberg, *Issue of Detainee Rights Creates a Divide on Capitol Hill*, N.Y. TIMES, July 10, 2006, at A5 (quoting Sen. Warner) (emphasis added).

39. See, e.g., Kate Zernike, *Deal Reported Near on Rights of Suspects in Terror Cases*, N.Y. TIMES, Sept. 13, 2006, at A20 (quoting Senator McCain's statement, "Senator Warner and I and Senator Graham and others are not going to agree to changes in the definitions in Common Article 3, because that then sends the message to the world that we are not going to adhere fully to the Geneva Conventions.").

40. See Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600; Doyle McManus, *Detainee Bill Boosts the GOP*, L.A. TIMES, Sept. 30, 2006, at A1 (noting that the legislation "gave Bush most of what he wanted in substance"). But see Katyal, *supra* note 14, at 97–98 (describing the ways in which the commissions authorized by the Military Commissions Act differ

cess to some items of evidence that the administration's initial proposal would have denied him, and the administration certainly lost the power to decide, entirely at its own discretion, which evidence would be withheld.⁴¹ But, one might be skeptical about the extent to which military prosecutors would actually have withheld much more than the newly enacted statute allows them to withhold.

II. *HAMDAN* AND THE POLITICAL CONSTITUTION OF EMERGENCY POWERS

The *Hamdan* decision and its aftermath illustrates what I call the political constitution of emergency powers, by which I mean nothing more elaborate than that (a) the way in which emergency powers are structured in a well-functioning democracy is a matter of fundamental importance, (b) the way in which they are structured is at least as much a product of the fundamental structures of political power—the distribution of authority between executive and legislature, only a small part of which flows from the Constitution's texts or judicial precedents—as it is of judicially interpreted law, and (c) these structures are as permanent as those found in the Constitution's written text. The role of the courts in a constitution of emergency powers structured importantly by political interactions between executive and legislature is, I suggest, a secondary or collateral issue, important only in some circumstances.⁴²

Discussions of the issues addressed here frequently advert to Justice Robert Jackson's concurring opinion in the *Steel Seizure Case*,⁴³ and I will as well. The opinion divided separation

from those the administration initially established).

41. *Compare* Military Order—Detention, Treatment, and Trial of Certain Non-citizens in the War Against Terrorism, 37 WEEKLY COMP. PRES. DOC. 1665 (Nov. 19, 2001) (allowing admission of all evidence with probative value, as determined by the presiding officer of the military commission), *with* Military Commissions Act of 2006, Pub. L. No. 109-366, § 3(a), 120 Stat. 2600, 2609 (to be codified at 10 U.S.C. § 949a(b)(2)(F)) (providing for the exclusion of evidence where the probative value is outweighed by unfair prejudice, in the consideration of the military judge).

42. And, even in those circumstances, one might plausibly contend that the role of the courts should be small, for reasons connected less to concerns about judicial capacity than to the political structures more directly. Judicial capacity concerns permeate POSNER & VERMEULE, *supra* note 5 *passim*, although as I discuss below, they deal briefly with some aspects of congressional capacity. *See infra* text accompanying notes 83–85.

43. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring).

of powers problems into three categories.⁴⁴ From the perspective opened up by the idea of a political constitution of emergency powers, though, there is only a single category. I take as my opening text the *second* category, dealing with situations in which Congress had neither granted power to, nor withheld power from, the President:

[T]here is a zone of twilight in which [the President] and Congress may have concurrent authority, or in which its distribution is uncertain. . . . In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.⁴⁵

One can treat the term *test* as modestly ambiguous. Justice Jackson appeared to offer his formulation as a test the courts could use to determine whether the President's action in this twilight zone was constitutionally permissible,⁴⁶ although it is manifestly unsuitable as a judicially administrable test.⁴⁷ We can learn more from Justice Jackson if we treat him as referring to contests of power between President and Congress. That is, when Congress and the President have concurrent power, the law we end up with results from "the imperatives of events and contemporary imponderables." I suggest that this is equally true in the other two categories. That is, the outcome of *any* (con)test of power is likely to depend on the interplay of contingent political forces far more than on whatever constitutional interpretations the courts—or anyone else—offers.

The *Hamdan* episode is one in which contingent political forces shifted the problem from the third category, involving a congressional prohibition, to the first, involving a congressional authorization. The reason is straightforward: shortly before a mid-term election in which the prospects for the President's party appeared likely to turn solely on defining a sharp difference between the position taken by his party and that taken by most Democrats on the issue of addressing terrorism, no Republican, even those who initially expressed concerns about expansive assertions of presidential power, had much of an interest in actually curbing that power.⁴⁸ Most Republicans agreed

44. *Id.*

45. *Id.* at 637.

46. *Id.* at 635.

47. How, for example, could a court invoke an "imponderable" to explain why it resolved a controversy in Category Two in favor of or against the President?

48. This analysis turns on the political circumstances at the time the statute was being considered and when it was enacted. Again, as events

with the President on the merits, and those who did not needed no more than a bit of cover, provided by characterizing the resulting legislation as a “compromise” between them and the President. And, given the political circumstances, Democrats appeared unwilling to use the relatively limited political resources they had to fight on *this* battleground, perhaps believing that others presented more favorable prospects. So, in the end, Congress authorized the President to conduct military tribunals using procedures not dramatically different from those found unauthorized in *Hamdan*.⁴⁹

There is, though, an additional part of the story, which is not irrelevant to what follows in my analysis. Some aspects of the new statute are clearly constitutionally vulnerable.⁵⁰ Resolving the constitutional challenges will take some time, during which the array of political power might change. In particular, the administration in place in 2009 and thereafter might have a different set of policy positions, and face a different set of political constraints, than the present administration. What actually happens at that point may differ from what the statute appears to authorize. And, because practice plays a large role in determining what constitutional law in this area is, we may not know for some time what the constitutionally mandated or permissible distribution of authority between the President and Congress is.

Suppose Congress had in fact imposed—or, as will turn out to be relevant, purported to impose—substantial limits on the President’s preferred procedures in the military tribunals. The President might of course have vetoed the legislation, citing

played out, other matters—a congressional sex scandal and some sort of activity by North Korea with respect to its nuclear weapons—affected the political terrain as well. See, e.g., Charles Babington & Jonathan Weisman, *Rep. Foley Quits in Page Scandal*, WASH. POST, Sept. 30, 2006, at A1; Anthony Faiola & Maureen Fan, *North Korea’s Political, Economic Gamble*, WASH. POST, Oct. 10, 2006, at A12.

49. One can imagine different outcomes, resulting from different “imperatives of events.” For example, suppose *Hamdan* had been decided at a time when Congress was already controlled by Democrats with no election looming, and when the President had been abandoned by major elements of his party. Under those circumstances, the legislative response to *Hamdan* might well be much farther from the President’s policy preferences than the Military Commissions Act is.

50. For an initial analysis, which argues that the constitutionally vulnerable provisions should be interpreted so as to conform to the Constitution, and that the provisions can fairly be so interpreted, see Richard H. Fallon, Jr., & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 HARV. L. REV. (forthcoming June 2007).

both policy arguments for the procedures he preferred and constitutional objections to congressional specification of procedures. Those constitutional objections would rest on the proposition that the manner in which the military dealt with those it held as enemy combatants in the midst of an ongoing conflict was essentially a question of military tactics committed by the Constitution to the President in his capacity as commander in chief.⁵¹ In the political conditions in the fall of 2006, though, a veto was unlikely because, without real talent and luck in presenting the position to the public, a veto would place the *President* (and Republicans) in a position of delaying the start of the military tribunals.

Alternatively, the President might have signed the statute and announced his intention to disregard its unconstitutional restrictions on presidential power, openly inviting a judicial challenge to his actions. Note that, structurally, this would simply replicate the pre-*Hamdan* situation: there would be a statute on the books, and a pending legal challenge that might be resolved against the President. Until that challenge was resolved, the status quo would be, again, the status quo pre-*Hamdan*: enemy combatants held without access to a military tribunal. Nor could we be confident that the constitutional challenge would be resolved quickly on the basis of the *Hamdan* precedent, because, as I have argued, *Hamdan* says nothing about the constitutional distribution of substantive power between President and Congress.⁵²

Now, suppose that—one, two, or more years from now—the courts definitively resolve the constitutional questions *against* the President. What happens next? Not necessarily the implementation of the (hypothesized) statutory procedures. A President in a weak political position would of course have to implement those procedures, as would a President (remember, we might be dealing with the person in office in 2009 or after) who agreed that the congressionally prescribed procedures were good policy. What, though, of a President who both rejected those procedures and was in a strong political position? Such a President would, I am sure, propose *new* legislation to deal with enemy combatants, and might obtain it because of the political strength of his or her position.

51. So, for example, the President might claim that the way in which enemy combatants were treated, even procedurally, would affect the way in which enemies in the field would conduct their operations.

52. See *supra* notes 6–12 and accompanying text.

To return to Justice Jackson's analysis, I have argued that the way in which tests of power are resolved when Congress purports to restrict the President's powers is indistinguishable from the way in which they are resolved in the "zone of twilight." Everything will "depend on the imperatives of events and contemporary imponderables," not "law" in the usual sense. Or, put another way (and as I would prefer) the interplay of events and contemporary imponderables—that is, politics—*is* constitutional law in this domain.

One can fairly ask, though, why the analysis I have outlined should be called *constitutional* rather than (merely) political. The answer, I believe, is that the analysis of how politics operates rests on aspects of the nation's political structure—some rooted in the Constitution, others not—that are as recalcitrant to change as any provisions written into the Constitution. Or, put another way, we know that constitutional change occurs without changes in constitutional text—either by judicial interpretation or through the processes of informal "amendment" or development that scholars such as Bruce Ackerman and David Strauss have identified.⁵³ Many of us, though of course not all, are comfortable in calling these changes constitutional rather than merely political because we believe that the outcomes are as fixed in our political order as are outcomes written into the constitutional text—that is, not unreviseable (as the Constitution's written provisions are formally reviseable by amendment pursuant to Article V), but recalcitrant to change.

III. THE POLITICS OF SEPARATION OF POWERS

What, then, are the underlying constitutional structures out of which the politics I have discussed emerge?⁵⁴ Two are obvious: the regular election cycle, and the general idea of

53. See BRUCE ACKERMAN, *WE THE PEOPLE 2: TRANSFORMATIONS* 383–420 (1998) (arguing that the Constitution has in fact been altered outside the formal amendment process); David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457, 1461 (2001) (describing "formal constitutional amendments of the kind Article V envisions" as only "incidental to the main processes of constitutional change").

54. Most of the analysis that follows deals with separation of powers generally, referring only incidentally to particular features of separation of powers during emergencies. This Article is part of a larger project on the relation between politics and emergencies in political theory and practice, including the practice of parliamentary systems.

separation of powers.⁵⁵ Some issues, varying depending on the surrounding social and political conditions, get thrust to the fore as an election approaches. So, for example, national anti-crime legislation rose to the top of the political agenda in election years when the public perceived crime to be rising.⁵⁶ And today, we can expect legislation related to terrorism to be pushed to the top of the agenda in election years. *Hamdan* provided the occasion for proposing some terrorism-related legislation in 2006, but I am confident that, had *Hamdan* not been decided, or had it been decided in a way not inducing the President to propose legislation, nonetheless some terrorism-related legislation would have been put forward.⁵⁷

At the most abstract level, separation of powers is *about* the political Constitution. The general account of separation of powers offered in *The Federalist*, for example, treats politics as the mode in which separation of powers operates, with ambition set against ambition.⁵⁸ Everyone knows, of course, that the Founders' specific vision of ambition countering ambition no longer describes separation of powers in the modern constitutional system, essentially because of the unanticipated—or at least undesired—rise of political parties.⁵⁹ And yet, it is easy enough to insert political parties into the general separation of powers system and focus on the ways in which politicians' relations to their political parties, and to their opponents' parties, provides some structure for political contention over who should exercise how much power in what circumstances.

55. I do not insist that these are analytically distinct, and would have no objection to describing the regular election cycle as an aspect of the general separation of powers.

56. The Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197, and the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, are good examples.

57. Some modest support for this proposition is the administration's effort to obtain legislative authorization for its program of surveillance of certain cross-border communications, operated by the National Security Agency. See, e.g., Eric Lichtblau & Scott Shane, *Bush is Pressed over New Report on Surveillance*, N.Y. TIMES, May 12, 2006, at A1. *Hamdan* induced the administration to place greater weight behind legislation authorizing military commissions; I suspect that, in the absence of *Hamdan*, equivalent weight would have been placed behind the surveillance legislation.

58. See, e.g., THE FEDERALIST NO. 51, at 252 (James Madison) (Terence Ball ed., 2003) ("Ambition must be made to counteract ambition.").

59. See Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2313 (2006).

The reason is this: as an analytic matter, there might be a large number of ways in which political parties are integrated into political systems, but deeply embedded practices in the United States dramatically reduce the number of possibilities. Nearly every jurisdiction uses a one-member-per-district, plurality winner rule to select the winner of an election.⁶⁰ Such a rule encourages the development of no more than two parties.⁶¹ Another practice, which emerged early, is that presidential elections are resolved in national campaigns, not through the selection of local notables by each state's electors followed by selection of the President by the House of Representatives.⁶² These two practices push strongly in the direction of having a relatively small number of nationally organized parties.

Within the general category of nationally organized political parties we can observe some more specific variants. Historically, the national political parties in the United States have been coalitions of local parties held together by a common interest in obtaining disparate policies from the national government.⁶³ To see how national parties can be coalitions of disparate groups, consider a simplified example, in which there are only two issues that are not strongly related to each other—domestic industrial policy and foreign policy, perhaps. One party contains advocates of a strongly interventionist national government in domestic affairs, the other a laissez-faire faction. What of those who care more about foreign than domestic policy—the isolationists and the multilateralists? It might happen—perhaps because of the choices specific political leaders make, perhaps by chance—that Party A becomes committed to

60. WILLIAM G. MAYER, *THE DIVIDED DEMOCRATS: IDEOLOGICAL UNITY, PARTY REFORM, AND PRESIDENTIAL ELECTIONS* 95 (1996).

61. For a discussion, see MAURICE DUVERGER, *PARTY POLITICS AND PRESURE GROUPS* 23–32 (1972).

62. See JAMES MACGREGOR BURNS, *THE DEADLOCK OF DEMOCRACY: FOUR-PARTY POLITICS IN AMERICA* 24–42 (1963).

63. See EVERETT CARLL LADD, JR. & CHARLES D. HADLEY, *TRANSFORMATIONS OF THE AMERICAN PARTY SYSTEM: POLITICAL COALITIONS FROM THE NEW DEAL TO THE 1970S* 303 (2d ed. 1978) (describing the traditional view of the modern period, in which the role of local parties has diminished, as one in which the two national parties in the United States seek to “mobilize varying segments of the electorate through diverse appeals across a series of axes of conflict”). One overarching policy, which held parties together for a long time, is patronage. A. JAMES REICHLEY, *THE LIFE OF THE PARTIES: A HISTORY OF AMERICAN POLITICAL PARTIES* 251 (1992). You might disagree with your party allies on many issues, but combine with them to gain control of the national government and the jobs at its disposal. See *id.*

a strongly interventionist domestic program and an isolationist foreign policy, Party B to laissez-faire and multilateralism. Strong isolationists who, all things considered, would prefer laissez-faire domestic policies might end up voting for Party A because they care more about getting an isolationist foreign policy than they do about getting a laissez-faire domestic policy.⁶⁴

Political parties need not be coalitions, though. They might be ideologically unified, as has increasingly been the case in recent decades, more so, or more quickly, for the Republican Party than for the Democratic Party.⁶⁵ Whether parties are coalitions or ideologically unified affects the operation of the modern separation of powers system.⁶⁶

Suppose we consider the political constitution along two dimensions, one involving the structure of the party system and the other whether the national government is under unified or divided party control.⁶⁷ The political constitution of emergency

64. Of course this example is based on what national political parties have been through most of United States history. In the modern era, for example, the Democratic Party was a coalition between Northern urban liberals and Southern racial conservatives, held together in part by patronage and in part by commitments in both factions, though with different degrees of strength, to domestic economic policies requiring national legislative action—supporting agricultural production in the South, manufacturing in the North. See LADD & HADLEY, *supra* note 63, at 129–34 (describing Southern support for New Deal programs); REICHLEY, *supra* note 63, at 206–09. And the Republican Party joined northeastern internationalists and midwestern isolationists in a coalition held together by a commitment to domestic policies motivated by a nervousness about the expansion of government during the New Deal and after. See *id.* at 251–52 (describing the positions of Republicans during the presidency of Dwight D. Eisenhower).

65. See MAYER, *supra* note 60, *passim* (arguing that Democrats have found it more difficult to maintain party unity than Republicans).

66. I do not discuss here in any detail some of the features of that system's operation when one party is ideologically unified and the other is a coalition, although I will mention some in passing. Nor will I devote attention to the effects of partially divided government, that is, one in which one party controls the presidency and one but not both houses of Congress.

67. Actually divided government can occur even when the government is nominally unified, if the minority party in Congress is able to use procedural devices, such as the filibuster in the United States Senate, that have the effect of imposing supermajority requirements (where the required supermajority is larger than the actual one). I note, though, that a device that is formally available may not be politically available in some circumstances, as demonstrated by the controversy over the use of a filibuster on judicial nominations, and its resolution through a compromise whose strength has not yet been tested. See Byron York, *Dr. Frist's Operation: How the Senate Majority Leader Played a Game of Filibuster Chicken*, NAT'L REV., June 20, 2005, at 17 (de-

powers will typically generate different outcomes in each of the relevant categories.

The classical version of separation of powers—again, ambition countering ambition—will arise when we have divided government with ideologically unified parties.⁶⁸ Not the interests of the man but the interests of the party will be conjoined to the interests of the place, as a President and his supporters in Congress seek to advance presidential prerogatives against the resistance of a unified competing party in Congress.⁶⁹ Contests will be resolved by the balance of political forces, with each side deploying the weapons available to it in political contention: internal legislative rules to obstruct or structure the progress of a proposal through Congress, congressional oversight hearings, the rhetorical resources of the presidency, and the like.⁷⁰

The situation is not dramatically different with divided government and parties that are coalitions. Added to the mix will be efforts by the supporters of presidential or congressional

scribing how the Republican threat of the “nuclear option” constrained Democratic use of the filibuster). Similarly, Democrats formally had the power to filibuster the military tribunals legislation, but were constrained politically to refrain from doing so. See Editorial, *Rushing Off a Cliff*, N.Y. TIMES, Sept. 28, 2006, at A22.

68. In what follows, I focus entirely on the way in which parties operate within the institutions of national government. Political scientists distinguish between the “party-in-government,” my concern here, and the “party-in-the-electorate,” those who support the party at election time. See, e.g., V.O. KEY, JR., *POLITICS, PARTIES, AND PRESSURE GROUPS* 163–65 (1964). The reason I focus on the “party-in-government” is that it is the mechanism by which the modern separation-of-powers system works. Ultimately, of course, there is some relation between those who form the party-in-government and their constituents in the party-in-the-electorate. However, that relation is a complex one, including such features as gerrymandering, which loosens the control some constituents in the party-as-electorate have over their representative. See, e.g., Note, *A New Map: Partisan Gerrymandering as a Federalism Inquiry*, 117 HARV. L. REV. 1196, 1211 (2004). I do not have even preliminary thoughts on the way in which the relation between the party-in-the-electorate and the party-in-government affects the operation of separation of powers.

69. This is true even if the competition is only for the moment, with the party controlling Congress hoping to take over the presidency in the next election. That is, one can expect that a party that strongly defends presidential prerogatives, but not Congress, when it controls the presidency, will abandon that position if its opponents win the presidency and it takes over Congress.

70. It is probably worth emphasizing that these contests can occur over the entire terrain of policy. That is, a President who seeks to advance a specific national security agenda may be forced to make concessions with respect to that agenda because his opponents threaten to thwart his ability to implement some policy unrelated to national security.

prerogative to peel away some members of the party controlling the presidency or Congress. This will be possible to the extent that the issues that divide and unite coalitions include either issues about congressional and presidential power as such,⁷¹ or about the specific policy issue that divides the President and the party controlling Congress.⁷² Again, the contest will be resolved politically, although we can expect the President to prevail somewhat more often here than in the prior scenario because the party controlling Congress will have to expend more political resources to bring enough members of the President's party to its side than it has to when it is ideologically unified in opposition to the President.

The President's prospects improve further when there is unified government with parties that are coalitions, although presidential success is not guaranteed. The reason is that there is some chance that the minority party may be able to pull away enough members of the President's (coalitional) party for the minority party to prevail on specific issues.⁷³

71. In this configuration, we might describe a "presidential party" consisting of political officials in the executive branch and some members of Congress, and a "congressional party" consisting almost entirely of members of Congress, although perhaps with some allies in the executive branch. See BURNS, *supra* note 62, at 241–64 (arguing that both major parties are divided into presidential and congressional parties, each of which has distinctive interests and tendencies).

For completeness, I should mention also the possibility that some of those who work in the executive bureaucracy might act as members of the congressional party or even the opposition party (for example, by leaking information for political purposes). For an argument that contemporary legal analyses fail to take the political and legal role of bureaucrats seriously enough, see EDWARD L. RUBIN, *BEYOND CAMELOT: RETHINKING POLITICS AND LAW FOR THE MODERN STATE* 46 (2005).

72. That is, it does not matter much whether, for example, a Congress controlled by Democrats opposes presidential power as such or a Republican President's policies about military tribunals, as long as some Republicans in Congress care about either congressional power or oppose the President's policies on the merits.

73. In the most general terms, this describes the development of national domestic policy during the presidency of John F. Kennedy and the first years of the presidency of William J. Clinton, when Democrats also controlled Congress but were unable to enact the full presidential agenda because the minority Republicans obtained enough votes from Democrats to block presidential initiatives. See, e.g., Dana Priest, *Democrats Pull the Plug on Health Care Reform*, WASH. POST, Sept. 27, 1994, at A1 (describing the political context of the failure of President Clinton's health care proposals); Katharine Q. Seelye, *Crime Bill Fails on a House Vote, Stunning Clinton*, N.Y. TIMES, Aug. 12, 1994, at A1 (describing how fifty-eight Democrats voted with Republicans to block passage of an early version of President Clinton's crime bill).

The final category is unified government with ideologically organized parties.⁷⁴ Here the President gets what he asks for, as in the Military Commissions Act.⁷⁵ Is this a matter of concern for the political constitution of emergency powers? If one thought that the classical separation of powers model required outcomes that represented compromises between presidents and Congress, one might find this troubling. But, I wonder whether it should be troubling as a matter of constitutional design, for two reasons. There is no particular reason to think that unified government with ideologically organized parties is a permanent condition, and if it is not, whatever might be troubling about the current situation may disappear. More important, it is entirely unclear that the classical version of separation of powers required any substantive outcomes at all, and in particular whether it envisioned compromises between President and Congress over the division of power. It may be—I believe it is—that the legalized Constitution contemplated that *all* separation of powers issues would fall in Justice Jackson's second category.⁷⁶ If so, *whatever* the political process produces is what the Constitution requires (or permits, if you prefer).⁷⁷

I believe that the configuration of political power prior to the 2006 elections fueled some of the more feverish expressions supporting a strong judicial role in assessing the constitutionality of recent executive and legislative initiatives. Yet, wholly apart from concerns one might have about the courts' capacity to do a decent job,⁷⁸ I wonder whether it makes sense to design our constitutional structures to deal with a temporary configuration of political power. Or, put another way, as a matter of

74. Or perhaps it is unified government with the majority party being ideologically coherent and the minority being a coalitional party (or closer to being one than to being ideologically coherent).

75. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (enrolled as agreed to or passed by both House and Senate, Sept. 29, 2006). Perhaps more accurately, the Republican Party is largely unified ideologically, and dissidents on some issues such as Senator Arlen Specter are not so disaffected as to fight their party too strenuously.

76. See *supra* text accompanying note 45.

77. On this view, the distribution of power between Congress and the President is an issue like the selection of the highest marginal rate for the income tax—something to be determined entirely by politics (with perhaps some caveat about ensuring that the result falls within some very wide boundaries).

78. This is true either because they will be unduly intrusive on those initiatives even though they lack information and expertise, or because they will be unduly deferential to those initiatives—for, I suppose, exactly the same reasons.

abstract principle it might make sense to preserve a strong role for the courts when one ideologically unified party controls both political branches of government, but it seems to me quite difficult to design a judicially administrable doctrine that will say, “Last year you properly played a strong role, but this year, after the elections changed things, you can’t.”

So far I have discussed the two dimensions—the composition of government and the composition of the parties—in rather skeletal terms. I turn now to some slightly more detailed propositions, primarily to indicate *how* some flesh might be put on the bones of the account without insisting that the details I sketch are completely accurate. Consider first what might happen immediately after provocations that the President describes as triggering the need for emergency power. Political scientists have described a “rally round the flag” effect, which in all party configurations increases support for the President.⁷⁹ In the terms I have used, the “rally round the flag” effect may push the political system toward unified government.⁸⁰ Political scientists also observe, though, that this effect dissipates, and the provocation’s size might affect the size of the effect and the speed with which it dissipates.⁸¹ A formally divided government might seem more unified for a while, then revert to its prior divided state.

Second, assume that we are in one of the configurations of power in which some degree of congressional ambition seeks to counter presidential ambition.⁸² How might the politics of that confrontation play itself out? Some suggest that the President

79. See, e.g., Marc J. Hetherington & Michael Nelson, *Anatomy of a Rally Effect: George W. Bush and the War on Terrorism*, PS: POL. SCI. & POL., Jan. 2003, at 37, 37 (describing the effect and providing references to the political science literature).

80. I thank Adrian Vermeule for this observation. See Eric A. Posner & Adrian Vermeule, *Emergencies and Democratic Failure*, 92 VA. L. REV. 1091, 1123, 1138 (2006).

81. See Jong R. Lee, *Rallying Around the Flag: Foreign Policy Events and Presidential Popularity*, 7 PRESIDENTIAL STUD. Q. 252, 253–55 (1977) (finding “some evidence” that the size but not the duration of changes in presidential popularity are “influenced by the salience of event[s]”).

82. I put it this way primarily for expository convenience. There is a sense among commentators that emergencies trigger executive initiatives—executive ambition—to which legislatures respond. That may be so in general, but I believe that much depends on the prior state of executive-legislative power relations, and that analytically we should be alert to the possibility that initiatives might emerge from an energized legislature, to be countered by executive ambition.

has a systematic advantage over Congress.⁸³ The executive branch is nominally unified under the President, and so can develop a single position, whereas Congress has many members who seek to advance both a general view and more parochial interests.⁸⁴ The President has readier access to relevant information than Congress does, and can keep the information secret even from Congress.⁸⁵ Finally, the President can act quickly, whereas Congress takes time to deliberate and enact legislation.⁸⁶

One might wonder, though, about whether these characteristics give the President much of an advantage over Congress, except in the very short run. It is easy to exaggerate the unity within the executive; it is part of the folklore of Washington, for example, that the Department of State and the Department of Defense are regularly at odds over the proper response to external threats. Leaks from within the executive bureaucracy are common, and not always at the behest of the President. Specialized committees and their professional staff members can, over time, acquire expertise and information equivalent to, or exceeding, that of the President's political appointees and employees in the executive bureaucracy. Congress can organize itself to engage in real-time oversight of executive operations, and at least has attempted to do so by requiring that the President notify a select group of congressional leaders of some operations.⁸⁷

83. See, e.g., POSNER & VERMEULE, *supra* note 5, at 47 (including among the "institutional disadvantages" of Congress a "lack of information about what is happening" and an "inability to act quickly and with one voice").

84. *Id.* at 170.

85. See *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936) (in foreign affairs, the President "has his confidential sources of information").

86. See, e.g., POSNER & VERMEULE, *supra* note 5, at 170 ("Congressional deliberation is slow and unsuited for emergencies. Congress has trouble keeping secrets and is always vulnerable to obstructionism at the behest of members of Congress who place the interests of their constituents ahead of those of the nation as a whole.").

87. See National Security Act of 1947, 50 U.S.C. § 413(a)(1) (2000 & Supp. 2006) ("The President shall ensure that the congressional intelligence committees are kept fully and currently informed of the intelligence activities of the United States."); *id.* § 413(b)(1) ("[T]he Director of Central Intelligence . . . shall keep the congressional intelligence committees fully and currently informed of all covert actions. . . ."). The latter provision has come to be understood as allowing disclosure only to the so-called Gang of Eight, the party leaders and chairs and ranking members of the House and Senate Intelligence Committees. See Scott Shane, *Report Questions Legality of Briefings on Sur-*

Focusing on oversight rather than legislation brings an additional consideration into view. Congress and the President interact regularly, and on a large range of issues. Repeat players, including the President, have to keep the entire playing field in mind. A President who capitalizes on a momentary advantage with respect to a particular emergency-related issue might find himself facing retaliation, not over emergency-related issues, but over nominations to unrelated executive positions or over some purely domestic program.

None of this is to say that claims about the President's advantages in emergencies are entirely mistaken, but only that one can easily overstate them and, in particular, overestimate the extent to which temporary advantages translate into permanent ones. In my view, the political configurations I have described—unified versus divided government and the types of political parties we have—are more important in structuring the constitution of emergency powers than the differences between the institutional characteristics of the executive branch and Congress. The preceding pages have tried to show that the idea of having a political constitution of emergency powers is conceptually coherent; it allows for analysis at least as systematic as that available when we deal with a legalized constitution, and draws upon structures embedded in the written constitution nearly as firmly as the document's words themselves.

CONCLUSION

Is the political constitution of emergency powers that we seem to have normatively attractive? To some extent one cannot answer that question without addressing the most general questions about the attractiveness of a legalized constitution: how often, and on what issues of how much importance, will courts enforce the *legalized* constitution appropriately (from one's own normative perspective)?⁸⁸ To the extent that narrower questions are possible, I would observe that the political constitution of emergency powers deals with *who* as between President and Congress gets to make substantive decisions. It does not deal with whether those decisions, once made, are con-

veillance, N.Y. TIMES, Jan. 19, 2006, at A19 (describing the controversy over whether disclosure of a surveillance program to the "Gang of Eight" was consistent with the National Security Act).

88. The best analysis of which I am aware is Wojciech Sadurski, *Judicial Review and the Protection of Constitutional Rights*, 22 OXFORD J. LEGAL STUD. 275 (2002).

sistent with what I earlier called substantive constitutional norms—most importantly the individual rights protected by the Constitution. Nor does it deal with the distribution of decision-making authority between the political branches on the one side and the courts on the other.⁸⁹ Senator Specter asserted that the courts would hold unconstitutional some of the restrictions on the availability of habeas corpus contained in the military tribunals statute.⁹⁰ He might be right, or he might be wrong, but the political constitution of emergency powers does leave *that* constitutional question to the courts. Similarly with the statute's provisions dealing with the admissibility of evidence before such tribunals—the provisions may be unconstitutional in some applications, and the political constitution of emergency powers allows the courts to so hold. The political constitution of emergency powers can fit comfortably with a legalized constitution of individual rights.⁹¹

Justice Stevens ended his opinion in *Hamdan* with a paean to the Rule of Law.⁹² Many of those who thought that the President's military commissions were unconstitutional have similar qualms about the Military Commissions Act.⁹³ But, if *Hamdan* is a triumph of the Rule of Law, so must be the Military Commissions Act. (Now apply the logical rule of contraposition.)⁹⁴

89. One exception is that the political constitution excludes the courts from deciding what the Constitution prescribes to be the distribution of power between the President and Congress. That exclusion might result from a definition of what the political constitution is, or, as I would prefer, from an analysis of the Constitution that produces the conclusion that the Constitution prescribes no distribution of power at all, but only sets up a framework of political contestation over that question.

90. 152 CONG. REC. S10264 (daily ed. Sept. 27, 2006) (statement of Sen. Specter).

91. The fit might be comfortable, but the entire ensemble might be distasteful to those who believe that only a fully legalized constitution is likely to be normatively attractive.

92. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2798 (2006).

93. See Press Release, Ctr. for Constitutional Rights, Center for Constitutional Rights Argues to Court that Military Commissions Act is Unconstitutional (Nov. 2, 2006), <http://www.ccr-ny.org/v2/reports/report.asp?ObjID=SHznm0ARDp&Content=881>; Press Release, Sen. Patrick Leahy, Leahy Opposes 'Flagrantly Unconstitutional' Military Commission Bill (Sept. 27, 2006), available at 2006 WLNR 17083902.

94. That rule is: If *P* implies *Q*, then not-*P* implies not-*Q*. See Layman E. Allen, *Symbolic Logic: A Razor-Edged Tool for Drafting and Interpreting Legal Documents*, 66 YALE L.J. 832, 841 (1957).