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Justice Stevens and the Expert Executive

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DEBORAH PEARLSTEIN*

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INTRODUCTION

In the months surrounding Justice John Paul Stevens’s announcement of his intention to retire from the Supreme Court, public discussions about the import of his departure regularly noted his significance on the current Court as the last remaining military service veteran of World War II.1 Indeed, taking the Justice’s landmark post-September 11 opinions standing alone, it was not difficult to speculate that the Justice’s personal knowledge and experience of wartime executives past informed his decisions in cases such as Rasul v. Bush (establishing federal court jurisdiction over the claims of the Guantanamo Bay detainees),2 and Hamdan v. Rumsfeld (holding the Executive without statutory authority to establish military commission trials at Guantanamo Bay).3 Perhaps the perceived failures of the World War II-era Court to check executive initiatives in wartime contributed to the Justice’s rejection of the contemporary Executive’s calls for broad deference from the Court sixty years after Korematsu.4

* Associate Research Scholar, Woodrow Wilson School of Public and International Affairs, Princeton University; Visiting Faculty Fellow, University of Pennsylvania Law School; Clerk to Justice John Paul Stevens, 1999–2000. © 2011, Deborah Pearlstein. The ideas developed in this Essay are based on remarks the author first presented at a symposium sponsored by the University of California at Davis Law Review on March 6, 2009, and published in Deborah N. Pearlstein, A Measure of Deference: Justice Stevens from Chevron to Hamdan, 43 U.C. Davis L. Rev. 1063 (2010).

4. Korematsu v. United States, 323 U.S. 214 (1944) (holding that the conviction of a U.S. citizen for violating an order excluding all persons of Japanese ancestry in defined geographic areas did not violate the Constitution); see Craig Green, Wiley Rutledge, Executive Detention, and Judicial Conscience at 1301
Yet Justice Stevens’s opinions in the national-security cases represent only a small fraction of the decisions in which the Justice was required to evaluate the relevance and persuasiveness of the Executive’s interpretation of law. Of arguably even greater significance in this respect is the Justice’s opinion for the Court in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, the watershed administrative law decision typically understood to have cemented a requirement of judicial deference to Executive Branch interpretations of otherwise ambiguous statutes. *Chevron* was broadly seen as “revolutionary” in identifying the Executive’s expertise and superior political accountability—as well as the Court’s correspondingly limited credentials in that realm—and in citing that functional strength as a central basis for deferring to an agency interpretation of a statute.

Coming from the *Chevron* Justice, then, *Hamdan* might be thought a particular puzzle. Rejecting the Executive’s arguments that existing federal statutes should be interpreted as authorization for the President’s military commissions, Justice Stevens’s opinion for the Court shows no evident deference to the President’s interpretation of the law. Were not those same functional advantages of the Executive—superior accountability and expertise—just as much at work in the security cases, marked if anything by their lack of deference to the Executive? How can one square *Chevron* on one hand, with *Hamdan* on the other, in understanding Justice Stevens’s appreciation for Executive Branch interpretation of law? This Essay explores a set of potential answers to that question. Although several factors may be relevant in explaining the seemingly varied approaches—including both a broad misunderstanding of *Chevron*’s meaning in the first instance and a concern for constraining the wartime Executive in particular—this Essay suggests that the decisions are best seen as of a piece in reflecting the Justice’s commitment to respecting the Executive’s functional strengths. As his opinions reveal, Justice Stevens understands these strengths as flowing not from the Executive’s formal power per se, but from the reasons why the Executive’s views of the law may matter.

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I. *Chevron and Hamdan*

Said to be the most-cited Supreme Court case in "modern public law,"\(^7\) *Chevron* famously established a two-step inquiry for courts to follow in ascertaining how to take executive views into account when reviewing agency interpretations of statutory authority.\(^8\) Where the Court finds statutory meaning clear using standard tools of statutory interpretation in the first instance (text, context, legislative history, etc.), it need not consult executive views.\(^9\) But where the meaning of the statute is ambiguous, the Court must cease its usual exercise in determining the law's import and inquire only whether the executive agency's interpretation is a "permissible" construction of the statute.\(^10\) If the Executive's view is reasonable, no further judicial inquiry into the meaning of the law is necessary.\(^11\)

Justice Stevens's opinion for the Court in *Chevron* explained why such deference was a sensible approach: "While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices" in interpreting ambiguous statutes.\(^12\) Statutory interpretation was, at least at the ambiguous margins, a task that demanded policy judgments best carried out by one of the political branches. It would thus be assumed that an ambiguous statute was Congress's implicit attempt to leave some interpretive power with the executive agency.\(^13\) At the same time, *Chevron* acknowledged a second reason for deference that the Court had long recognized: executive agency views may help inform statutory meaning when a given situation "depend[s] upon more than ordinary knowledge respecting the matters subjected to agency regulations."\(^14\) Not only because the President is elected and the Court is not, but also because the President's agents may have specialized knowledge in a complex field, the Executive's views on the meaning of the law are worth careful consideration.

Yet despite the apparent salience of those interests, twenty-two years later when the Court turned to assess the Executive's claim of statutory authority to conduct military commission trials in *Hamdan v. Rumsfeld*, neither *Chevron* nor its reasoning made an appearance in Justice Stevens's *Hamdan* opinion.\(^15\) There, the President had argued that both the statutory Authorization for Use of

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10. Id. at 843.
11. See id. at 844.
12. Id. at 865–66 (explaining further that "federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do").
13. Id. at 843–44.
14. Id. at 844 (quoting United States v. Shimer, 367 U.S. 374, 382 (1961)); see also *Chevron*, 467 U.S. at 865 ("Judges are not experts in the field . . . .").
Military Force (AUMF) and the Uniform Code of Military Justice (UCMJ) should be read to extend the executive authority to try then-Guantanamo detainee Salim Hamdan by military commission. 16 The President argued that the use of military commissions was a “necessary” part of the “necessary and appropriate force” the AUMF authorized the President to use, and “courts are not competent to second-guess judgments of the political branches regarding the extent of force necessary to prosecute a war.” 17 In addition, Article 36 of the UCMJ squarely authorized the President to establish procedures “for cases arising under this chapter triable in . . . military commissions.” 18 Under that provision, the President was delegated broad authority to establish the rules for commission proceedings, including rules different from those ordinarily applied in criminal cases, whenever the President “considers” application of those rules to be not “practicable.” 19 By the terms of the statute itself, deference was due the President’s judgment on what counts as “practicable” or not. And the President had made just such a finding in his executive order providing that “the danger to the safety of the United States and the nature of international terrorism” made standard criminal trials impracticable. 20

Particularly with the UCMJ, one might have imagined that at least *Chevron* deference would apply. The President had seemingly been delegated the power to make rules “with the force of law,” 21 and the President’s competence in military affairs in particular had on occasion led the Court to recognize that his views had singular import. 22 Yet Justice Stevens’s opinion for the Court mentioned neither *Curtiss-Wright* nor *Chevron* and rejected the government’s arguments for its own, wholly independent analysis of the statute. 23 Whether or not the parties to the case thought to cite *Chevron*, 24 it might not have seemed especially surprising for the *Chevron* Justice to invoke *Chevron*-like deference.

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17. Id. at 16–17, 19–20 (citing The Brig Amy Warwick (*The Prize Cases*), 67 U.S. (2 Black) 635, 670 (1862) (the President “must determine what degree of force the crisis demands.”)).
18. Id. at 18 (quoting Uniform Code of Military Justice, 10 U.S.C. § 836 (2006)).
19. Id. at 43–44 (quoting Uniform Code of Military Justice, 10 U.S.C. § 836 (2006)).
20. Id. at 47 n.22 (quoting Military Order of Nov. 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 3 C.F.R. § 918 (2002)).
21. See United States v. Mead Corp., 533 U.S. 218, 229 (2001) (clarifying the scope of *Chevron* deference to require a delegation of power by Congress with authority to make regulations “with the force of law”).
22. See, e.g., United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 319 (1936) (“In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation.”).
23. See Hamdan v. Rumsfeld, 548 U.S. 557, 575–76 (2006); see also id. at 630 (describing the President’s interpretation of Common Article 3 of the Geneva Conventions as “erroneous”).
So why the silence?

II. THE CHEVRON EXPLANATION

One piece of the answer seems likely to turn on the relative weakness of *Chevron* itself. In doctrinal terms, *Chevron* arguably has not mattered much to the Supreme Court. As one empirical study concluded, of the thousand-plus cases evaluating agency statutory interpretations that the Court decided between 1984 and 2005, the Court applied *Chevron* in a scant 8.3%.\(^{25}\) For Justice Stevens in particular, it is possible to tell a qualitative story that sees the Justice attempting to pull back on the "revolutionary" reading of *Chevron* over a period of years, beginning almost immediately after the case was decided. In *Immigration and Naturalization Service v. Cardoza-Fonseca*, for example, Justice Stevens wrote for the Court in rejecting a statutory interpretation offered by the federal Board of Immigration Appeals.\(^{26}\) In an opinion emphasizing the extent to which the Court retains interpretive primacy in matters of interpretation, Stevens made clear the potential frequency with which the Court could determine the meaning of administrative statutes without reference to executive views:

> The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.\(^{27}\)

If, as in *Cardoza-Fonseca*, the statute’s text and ordinary canons of construction persuade the Court that the statute is clear, the agency’s view of matters is irrelevant.

Justice Scalia concurred in the judgment in *Cardoza-Fonseca*, but disagreed with Stevens’s reasoning, insisting instead that the Court’s purported clarification was in fact an “evisceration” of *Chevron*.\(^{28}\) Justice Scalia was hardly alone in the assessment of the case as challenging the central deference principle of

\(^{25}\) See Eskridge & Baer, *supra* note 6, at 1121. In the vast majority of the 1,014 cases the Court decided during this period in which an executive agency interpretation of a statute was at issue, the Court applied either a less stringent degree of deference than that afforded by *Chevron*, or no apparent deference at all. *Id.*

\(^{26}\) *Id.* at 421 (1987).


\(^{28}\) *Id.* at 454 (Scalia, J., concurring in the judgment) (arguing that if the Court were able to ignore an agency’s statutory interpretation anytime the Court thinks it can glean the meaning of the statute on its own, *Chevron* is no more than a “doctrine of desperation”).
Indeed, as the Court has moved in the decades since *Chevron* to limit the range of agency decisions to which *Chevron* might apply altogether, Justice Stevens has regularly rejected the notion that the attention due the Executive's views on questions of interpretation was an entitlement that emerged from or was even much transformed by *Chevron*. As he emphasized in his 2009 opinion in *Negusie v. Holder*, "deference to agencies' views on statutes they administer was not born in [*Chevron*], nor did the 'singularly judicial role of marking the boundaries of agency choice' die with that case." By the time *Chevron* came down in 1984, the Court had long since been engaged in the dilemma of how to treat executive-agency interpretations of federal statutes. In this effort, the Court had long recognized—as it reiterated in *Chevron*—that executive-agency views could help give a "full understanding of the force of the statutory policy" when a given situation could be usefully informed by particular kinds of expert or professional knowledge. Yet, as *Chevron* itself insisted, "[t]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." Judges were to retain significant independent authority to determine whether a statute is clear or ambiguous—often the end of an interpretive inquiry—and to determine whether an agency's interpretation is "reasonable"—also a seemingly broad retention of power.

It would be impossible to read Justice Stevens's opinions in *Chevron* and its progeny and conclude that the Justice entirely discounted the Executive's functional advantages over the Court in certain respects. The Executive may have had relevant expertise that the Court lacked that could elucidate statutory meaning. By dint of his electoral accountability, the Executive also enjoyed

29. See, e.g., Sunstein, *supra* note 6, at 2604 ("Taken on its face, Cardoza-Fonseca seems to be an effort to restore the pre-*Chevron* status quo by asserting the primacy of the judiciary on purely legal questions.").

30. See, e.g., *Massachusetts v. EPA*, 549 U.S. 497, 528, 533–35 (2007) (declining to apply *Chevron* deference to an agency's denial of a petition for rulemaking, reviewing the agency action instead to determine whether it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" (quoting 42 U.S.C. § 7607(d)(9) (2006)); *United States v. Mead Corp.*, 533 U.S. 218, 229–31 (2001) (clarifying, in a majority opinion joined by Justice Stevens, that *Chevron* deference applies only where there has been a delegation of power by Congress with authority to make regulations "with the force of law").

31. 129 S. Ct. 1159, 1170–71 (2009) (Stevens, J., concurring in part and dissenting in part) (citations omitted) (quoting *Young v. Cmty. Nutrition Inst.*, 476 U.S. 974, 988 (1986) (Stevens, J., dissenting)); *see also Chevron*, 467 U.S. at 844 ("We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer . . . .").

32. *Chevron*, 467 U.S. at 844 (quoting *United States v. Shimer*, 367 U.S. 374, 382 (1961)); *see also id.* at 865 ("Judges are not experts in the field . . . .").

33. Id. at 843 n.9.

34. See Jonathan T. Molot, *Reexamining Marbury in the Administrative State: A Structural and Institutional Defense of Judicial Power over Statutory Interpretation*, 96 NW. U. L. REV. 1239, 1337 (2002) (arguing that "judges, and not just administrators, have significant leeway in interpretation and that judicial review of agency interpretations of statutes entails more than mere fidelity to legislative instructions").
policy discretion that the Court did not, and where statutes seemed to leave room for the exercise of that particular kind of discretion, it was appropriate that the Court defer. But where the statute was understandable to the Court by reference to ordinary tools of statutory interpretation, where executive expertise was not in evidence, or where gaps left in statutory meaning opened questions not of policy, but of fact or law, Justice Stevens saw *Chevron* as no obstacle to independent judicial interpretation.

III. The Wartime Explanation

However true the foregoing *Chevron* account may be, it seems an insufficient explanation for the marked rejection in *Hamdan* of the President’s views. Whether or not Congress meant to leave the President policy discretion in issuing rules for the operation of military commissions under the UCMJ, the President’s claim to special expertise in military justice matters could not be rejected out of hand. The President is Commander in Chief of the nation’s armed forces, possessing an important formal claim to constitutional authority over their conduct. If the Court were serious about deferring to the Executive’s law interpretation anywhere, surely it would be here.

It thus seems possible to imagine that Justice Stevens understood the UCMJ question at issue in *Hamdan* to fall into an altogether different category than the Clean Air Act question in *Chevron*. *Hamdan* appeared as a wartime case with significant historical implications, involving essentially the same issue of the legality of military commission trials that the Court had repeatedly encountered during World War II. Indeed, Justice Stevens came to the Court immediately after the war as a clerk to Justice Wiley Rutledge, who himself had struggled with the same questions of executive power, individual rights, and national security that the Court has faced repeatedly since the attacks of September 11, 2001. 35 Before Stevens’s arrival, Rutledge had voted to uphold a military curfew on Japanese-Americans living in certain “military areas” in California, 36 and to allow the exclusion of these citizens from these zones, 37 insisting that the Court defer to the Executive’s judgment in such critical times. 38

Yet following this initial pattern of deference, Rutledge seemed later to regret these decisions, having described the curfew decision at the time as giving him greater “anguish” than any case he had decided, “save possibly one death case” he decided while on the court of appeals. 39 By the time Justice Rutledge faced the question of the legality of the military trial of a Japanese general after the war in *In re Yamashita*, the year before his clerk, John Stevens, took up work at

35. See Green, supra note 4, at 113–75.
39. Id. at 245; see also Green, supra note 4, at 139 & n.174.
the Court, Rutledge was writing in vigorous dissent:

[ Although without doubt the directive [creating the military commission rules] was drawn in good faith in the belief that it would expedite the trial and that enemy belligerents in petitioner’s position were not entitled to more, that state of mind and purpose cannot cure the nullification of basic constitutional standards which has taken place.

. . . The difference between the Court’s view of this proceeding and my own comes down in the end to the view, on the one hand, that there is no law restrictive upon these proceedings other than whatever rules and regulations may be prescribed for their government by the executive authority or the military and, on the other hand, that the provisions of the Articles of War, of the Geneva Convention and the Fifth Amendment apply.

I cannot accept the view that anywhere in our system resides or lurks a power so unrestrained to deal with any human being through any process of trial. 40

Exigencies could arise, but particularly where the government response imposes a burden on individual rights, it was within the power of the courts to check the reasons for the response, in security matters as anywhere else.

In this context, one might be more inclined to see Justice Stevens’s decision in Hamdan as an effort to put into practice the lessons learned by his former boss in an earlier war. Indeed, the opinion in Hamdan more than once invokes Rutledge’s dissent. 41 Writing for the majority two years before Hamdan in Rasul v. Bush, Justice Stevens had made clear his suspicion that the broad detention program at Guantanamo ran afoul of the Constitution and laws of the United States. 42 Congress had already tried once to strip the Court of jurisdiction over the habeas claims of the detainees at Guantanamo Bay, in a provision the Hamdan Court concluded was not effective in stripping those rights before reaching the question of the commissions’ legality. 43 It was unclear in 2006 how many more opportunities the Court would have to engage the merits of the Executive’s initiatives at Guantanamo Bay. The least Rutledge’s former clerk could do was demonstrate that the modern Court would not make the same mistake of unquestioned deference to the Executive’s views that an earlier wartime-era Court had done.

IV. THE FUNCTIONAL EXPLANATION

The extent to which Justice Rutledge’s wartime experiences on the Court influenced Justice Stevens’s approach to the wartime Executive may well be ultimately undiscoverable. Justices themselves may not have conscious access

40. 327 U.S. 1, 81 (1946) (Rutledge, J., dissenting).
42. 542 U.S. 466, 483 n.15 (2004).
43. Hamdan, 548 U.S. at 572–84 (holding that the Detainee Treatment Act had not successfully deprived the Court of jurisdiction over Hamdan’s case).
to how all their lifetime influences lead them to decide as they do. In all events, a less biographically contingent explanation seems apparent: namely, that Justice Stevens believes the Executive's views are relevant—in any context—only insofar as they reflect the actual and reasoned consideration of functional expertise evident on the record. Stevens's post-*Chevron* decisions have thus chafed against the categorical demand for deference reflected in the revolutionary view of *Chevron*—a view that would arguably allow the Court to defer to agency views whether or not the opinions of the actual experts inside the agency were consulted.

Consider, for example, Justice Stevens's 2007 opinion for the Court in *Massachusetts v. EPA*, which declined to afford the EPA *Chevron* deference in its decision not to regulate greenhouse-gas emissions. The Court acknowledged that it had "neither the expertise nor the authority to evaluate" whether to regulate greenhouse gases. Nonetheless, the majority opinion engaged the agency's explanation point by point and concluded that although the agency certainly had expert knowledge it could bring to bear in rendering its decision, the agency had in fact relied on considerations well beyond its field of expertise. Among the EPA's arguments was the position "that regulating greenhouse gases might impair the President's ability to negotiate with 'key developing nations' to reduce emissions." Yet Congress had authorized the State Department rather than the EPA "to formulate United States foreign policy with reference to environmental matters relating to climate." Here, the EPA's assertions about the likely impact on international negotiations had been made without evidence that they had ever consulted the State Department. In this respect, the EPA lacked the demonstrable expertise that might lead its views to merit deference.

From this perspective, one might better see *Hamdan* not as a case in which the Court showed the President no deference, but rather a case in which the Court deferred to the views of the relevant experts inside the Executive Branch. The Executive's briefs in *Hamdan* argued that the UCMJ delegated broad

45. Id. at 533.
46. Id. at 533–34 ("Although we have neither the expertise nor the authority to evaluate these policy judgments, it is evident they have nothing to do with . . . a reasoned justification for declining to form a scientific judgment."); see also id. at 535 ("EPA must ground its reasons for action or inaction in the statute.").
47. Id. at 533.
48. Id. at 534.
49. Id.
50. Much the same reasoning is evident in one of Justice Stevens's final opinions involving the State Department's understanding of the terms of a treaty. There, Justice Stevens declined to defer to the treaty interpretation put forward by the Department of State. *Abbott v. Abbott*, 130 S. Ct. 1983, 2008 (2010) (Stevens, J., dissenting) ("[T]he Department offers us little more than its own reading of the treaty's text. Its view is informed by no unique vantage it has, whether as the entity responsible for enforcing the Convention in this country or as a participating drafter. . . . I see no reason, therefore, to replace our understanding of the Convention's text with that of the Executive Branch.").
authority to the President to establish rules for commission proceedings, including rules different from those generally recognized in criminal cases, whenever the President "considers" application of those rules to be not "practicable." 51

The briefs posited that the President had made just such a dispositive finding in his executive order providing that "the danger to the safety of the United States and the nature of international terrorism" made standard criminal trials impracticable for detainees like Hamdan. 52

In the Hamdan Court's view, the President's generalized finding about the viability of criminal trials was "insufficient." 53 Statutory language requiring commission and court martial procedures to be "uniform" to the extent "practicable" did not say that uniformity could be waived whenever the President "consider[ed]" it impracticable. 54 This statutory standard was far more objective, requiring uniformity "insofar as" practicable. 55 Even assuming that the President's generalized finding that criminal trials were inadequate was relevant to the impracticability inquiry, and that such a finding "would be entitled to a measure of deference" 56 under the statute, "the only reason offered in support of that determination is the danger posed by international terrorism." 57 Although the Court emphasized that it did not "for one moment underestimat[e] that danger," it found no specific reason in the record for challenging the notion that standard court martial rules would work. 58 "There is no suggestion, for example, of any logistical difficulty in securing properly sworn and authenticated evidence or in applying the usual principles of relevance and admissibility." 59 In the absence of any such record, dissenting Justice Clarence Thomas cited statements made to the media by civilian Defense Department officials to help support the case that commissions were necessary. 60 But the majority dismissed such statements as inadequate: "We have not heretofore, in evaluating the legality of executive action, deferred to comments made by such officials to the media." 61 Expertise in the Executive was not a functional advantage to be assumed; it was a virtue executives would have to demonstrate.

Indeed, far from having a detailed set of reasons from the President why special commission rules were necessary to the task, the Hamdan Court had


52. Id. at 43–47 & n.22 (quoting Military Order of Nov. 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 3 C.F.R. § 918 (2002)).


54. See id. (citing 10 U.S.C. § 836).

55. See id. (citing 10 U.S.C. § 836).

56. Id. at 623 n.51.

57. Id. at 623.

58. Id. at 623–24.

59. Id. at 623.

60. Id. at 712–13 (Thomas, J., dissenting).

61. Id. at 623 n.52 (majority opinion) (citing id. at 712–13 (Thomas, J., dissenting)).
before it indications from the military's resident experts in war crimes trials that
tended to support just the opposite conclusion. The petition for certiorari to the
Court had cited the leaked internal email messages from several military
prosecutors who had requested transfers away from their positions as commis-
sion prosecutors after expressing grave concerns that the commissions were not
only legally flawed but also corrupt.62 The Court likewise had amicus briefs
from recently retired admirals and generals arguing that the President was
wrong in determining that the Geneva Conventions did not apply in the instant
conflict, and that recent civilian conclusions to the contrary were endangering
American lives.63 Amici retired officers emphasized the Court's Article III
power to interpret the treaty law independently and urged the Court to "direct
the President to afford [Hamdan Geneva Conventions] protections forthwith.»64
And prominent press accounts had reported that the Administration had by-
passed standard internal decision-making processes when it designed the commis-
sions, ensuring that "[m]ilitary lawyers were largely excluded" from the process
of developing a commission trial system in the days following the September 11
attacks.65 In a multipart series of articles, the New York Times detailed how
civilian officials in the Administration had put forward commission rules over
the objections of senior military leaders, including the Army Judge Advocate
General, that the rules fell short of domestic and international law standards.66
For a Court looking for record assurance that the decision-making process that
produced the commissions was supported by analysis of the Executive's experts
themselves, it was possible to find much cause for concern.

62. See Petition for Writ of Certiorari at 28, Hamdan, 548 U.S. 557 (No. 05-184) ("[T]he chief
prosecutor had told his subordinates that the members of the military commission that would try the
first four defendants [which include Hamdan] would be "handpicked" to ensure that all would be
1, 2005, at A1 (describing leaked email messages from military prosecutors complaining about the lack
of fairness in the military commissions)).
63. See, e.g., Amicus Curiae Brief of Retired Generals and Admirals and Milt Bearden in Support of
Petitioner at 15-24, Hamdan, 548 U.S. 557 (No. 05-184).
64. Id. at 3.
66. Id. ("Many of the Pentagon's experts on military justice, uniformed lawyers who had spent their
careers working on such issues, were mostly kept in the dark . . . [T]he Army's judge advocate general,
Maj. Gen. Thomas J. Romig, hurriedly convened a meeting of senior military lawyers to discuss a
response [to a draft presidential order creating the commissions]. The group worked through the
Veterans Day weekend to prepare suggestions that would have moved the tribunals closer to existing
military justice. But when the final document was issued that Tuesday, it reflected none of the officers'
ideas, several military officials said. 'They hadn't changed a thing,' one official said. In fact, while the
military lawyers were pulling together their response, they were unaware that senior administration
officials were already at the White House putting finishing touches on the plan."); see also Tim Golden,
(describing divisions over military tribunal rules among senior officials in the Pentagon, the White
House, the National Security Council, the State Department, and the Justice Department).
CONCLUSION

The exercise of explaining a jurisprudence that spans more than three decades on the bench is invariably difficult. It would be remarkable indeed if a Justice’s views showed no indication of evolution during such a period of time. Yet Justice Stevens’s repeated engagement with the views of the Executive Branch seems far more consistent than not. It reflects the judgment that expertise and record evidence could be persuasive indeed. Far less valuable was the mere assertion of executive authority.