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Courts at War

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COURTS AT WAR

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INTRODUCTION

From the initial returns, one might believe that during its 2003–04 Term the Supreme Court dealt the Bush Administration a defeat in the war on terrorism.[1] Two cases, both handed down in the last few days of the Term, seemed to give rise to the popular notion that the judiciary had thoroughly rebuked the executive branch.[2] One case, *Rasul v. Bush*, held that, for the first time, the federal district courts may review the grounds for detaining alien enemy combatants held outside the United States.[3] In a second case, *Hamdi v. Rumsfeld*, the Court required that American citizens detained in the war have access to a lawyer and a fair hearing before a neutral judge to challenge their status as enemy combatants.[4]

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1 *See, e.g.*, Andrew Buncombe, *Court Defies White House With Camp Delta Ruling*, INDEP. (U.K.), June 29, 2004, at 24 ("In what represented President Bush's most damaging legal defeat since he assumed office, the court ruled 6–3 that . . . prisoner[s] [taken] as part of the so-called 'war on terror' could not be held indefinitely without access to lawyers or the courts."); Stephen Henderson, *Detainees Win Access to Courts: Supreme Court Rulings Deliver a Legal Blow to the Administration's Antiterrorism Policy*, PHILA. INQUIRER, June 29, 2004, at A1 ("The U.S. Supreme Court repudiated a central legal doctrine of the administration's antiterrorism efforts yesterday . . . ."); Steve Lash, *Court Clarifies Issues of Individual Rights: Bush Administration Rebuffed as Justices Say Detainees Must be Afforded Due Process*, ATLANTA J.-CONST., July 4, 2004, at B5 ("The court handed the Bush administration several stinging setbacks.").

2 *See* Hamdi v. Rumsfeld, 542 U.S. 507 (2004); Rasul v. Bush, 542 U.S. 466 (2004).

3 *Rasul*, 542 U.S. at 483.

4 *Hamdi*, 542 U.S. at 533, 559.

While the Court has unwisely injected itself into military matters, closer examination reveals that these two decisions affirm the Administration's fundamental legal approach to the war on terrorism and leave it with sufficient flexibility to achieve its future goals effectively. Despite the pleas of legal and media elites,[5] the Justices did not turn the clock back to September 10, 2001. The Court agreed that the United States is at war against the al Qaeda terrorist network and the Taliban militia that supports it.[6] The Court found that Congress has authorized that war.[7] The Justices implicitly recognized that the United States may use all of the tools of war to fight a new kind of enemy that has no territory, no population, and no desire to spare innocent civilian life.[8] The days when society considered terrorism merely a law enforcement problem and when our forces against terrorism were limited to the Federal Bureau of Investigation, federal prosecutors, and the criminal justice system will not return.

Nonetheless, the Court emphasized the importance of judicial review in assessing the cases of individual detainees captured in the war on terrorism.[9] The Court made clear that it would no longer consider military decisions in wartime to be outside the competence of the federal courts.[10] Instead, the judiciary would review the legality of the detention of enemy combatants.[11] The expansion of judicial review into military decisions represents an unprecedented formal and functional intrusion by the federal courts into the Executive's traditional powers. At the formal level, the decisions in *Rasul* and *Hamdi* required the Court effectively to overrule a precedent from the end of World War II.[12] At a broader, functional level, these decisions will require the judiciary to make factual and legal judgments, in the

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5 *See, e.g.*, Brief of Amici Curiae Hon. Nathaniel R. Jones et al. in Support of Petitioners, *Hamdi*, 542 U.S. 507 (No. 03-6696); Editorial, *The Supreme Court and Sept. 11*, N.Y. TIMES, Nov. 5, 2003, at A24 (urging the Supreme Court to consider the *Hamdi* and *Rasul* cases and to stand up for civil liberties).

6 *See Hamdi*, 542 U.S. at 518–19.

7 *See id.* at 517–18.

8 *See id.* at 518 ("We conclude that detention of [enemy combatants captured during military operations in Afghanistan], for the duration of the particular conflict in which they were captured, is so fundamental and accepted an incident to war as to be an exercise of the 'necessary and appropriate force' Congress has authorized the President to use.").

9 *See, e.g., id.* at 528–29 (discussing the judicial test generally used to balance serious, competing interests such as an individual's right to due process and the government's security interests); *Rasul*, 542 U.S. at 484–85 (discussing the availability of judicial review to nonresident aliens).

10 *See* Rasul v. Bush, 542 U.S. 466, 474 (2004) ("[T]his Court has recognized the federal courts' power to review applications for habeas relief in a wide variety of cases involving Executive detention, in wartime as well as in times of peace.").

11 *See id.* at 483.

12 *See* Johnson v. Eisentrager, 339 U.S. 763, 781 (1950) (holding that German nationals convicted by a U.S. military commission after World War II did not have the right to the writ of habeas corpus).

midst of war, that press the federal courts far beyond their normal areas of expertise. These decisions also create potential conflict with the other branches of government in managing warfare.

This Article discusses four issues. Part I explains why the events of September 11, 2001 demonstrate that terrorism has become a matter for war, rather than simply a crime. Part II argues that the government's authority to detain enemy combatants without charges is a natural outcome of the Supreme Court's willingness to accept the judgment of the political branches. Part III discusses the Court's decision to require a certain level of due process for enemy combatants, regardless of citizenship. Part IV questions whether the comparative institutional competencies of the judiciary make federal courts a good choice to carry out national security and foreign policy.

I
FROM CRIME TO WAR

On September 11, 2001, al Qaeda operatives flew two hijacked planes into the World Trade Center towers in New York City and a third into the Pentagon in Washington, D.C. Passengers appeared to have brought down a fourth plane, which may have been headed toward either the Capitol or the White House. The attacks proved devastating—killing about three thousand people and causing economic losses totaling billions of dollars. Al Qaeda intended these attacks to eliminate the political, military, and financial leadership of the country. Both the President and Congress agreed that the attacks represented the start of an armed conflict between the United States and the al Qaeda terrorist network.[13]

It may be useful at the outset to discuss the difference between al Qaeda and September 11 on the one hand, and the traditional wars that had characterized the nineteenth and twentieth centuries on the other. While al Qaeda had conducted a series of attacks against the United States prior to September 11, including the 1993 World Trade Center bombing, September 11 demonstrated the unconventional nature of the war and of the enemy.[14] Al Qaeda is not a nation-state, nor

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13 *See* Authorization for Use of Military Force, Pub. L. No. 107-40, § 2, 115 Stat. 224, 224 (2001); Military Order of Nov. 13, 2001, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism § 1(a), 66 Fed. Reg. 57,833, 57,833 (Nov. 16, 2001).

14 *See, e.g.*, Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2054 n.24 (2005) (discussing the "'unconventional nature'" of "'the current conflict'" (citing Brief for the Respondents at 16, Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (No. 03-6696))); M. Scott Holcomb, *View from the Legal Frontlines*, 4 CHI. J. INT'L L. 561, 562 (2003) ("The US, a nation that complies with the law of war, had to fight against an unconventional terrorist force that does not comply with the law of war."); Gerald L. Neuman, *The Abiding Significance of Law in Foreign Relations*, 2004 SUP. CT. REV. 111, 145 ("It is difficult . . . to sort out the implications of [the long-recog-

is it an alter ego supported by a nation-state. Al Qaeda does not have a territory or population, nor does it seek to defend or acquire any specific territory.[15] Unlike an indigenous rebel group, al Qaeda is not attempting to protect territory or to replace an existing regime through an intrastate civil war.

Moreover, al Qaeda's operations are unconventional and, according to strategic analysts, asymmetric.[16] Al Qaeda soldiers do not wear uniforms and they do not operate in conventional units or force structures.[17] Rather, al Qaeda personnel, material, and leadership move through the open channels of the international economy and organize themselves in covert cells.[18] Al Qaeda does not seek to confront and defeat its enemies' armed forces on the battlefield. Instead, it seeks to achieve its political aims by launching surprise attacks—primarily on civilian targets—using unconventional weapons and tactics, such as concealing bombs on trains and using airplanes as guided missiles.[19] Al Qaeda does not seek victory by defeating the enemy's forces and negotiating a political settlement, but by attempting to demoralize an enemy's society and coercing it to take desired action.[20]

Another factor distinguishes the war against al Qaeda from previous wars. America waged previous conflicts on foreign battlefields, while the home front remained safe behind the distances of two oceans. In the present conflict, the battlefield can exist anywhere,

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nized history of placing enemy nationals at a legal disadvantage] for the unconventional armed conflict between the United States and al Qaeda, a non-state entity of transnational character with uncertain membership."); John C. Yoo, *Judicial Review and the War on Terrorism*, 72 GEO. WASH. L. REV. 427, 429 (2003) [hereinafter Yoo, *Judicial Review*] ("The unconventional nature of the war [on terrorism], and of the enemy, has called upon the United States government to undertake a full spectrum of domestic and international responses.").

15 *See, e.g.*, Glenn M. Sulmasy, *The Law of Armed Conflict in the Global War on Terror: International Lawyers Fighting the Last War*, 19 NOTRE DAME J.L. ETHICS & PUB. POL'Y 309, 310 (2005) ("Security threats are no longer from nation-states alone, but increasingly from rogue, international criminals operating across the borders of nation-states."); John Yoo, *War, Responsibility, and the Age of Terrorism*, 57 STAN. L. REV. 793, 816 (2004) ("Terrorist groups like al Qaeda . . . have no population or territory to defend . . . .").

16 *See* William Bradford, *Barbarians at the Gates: A Post-September 11th Proposal to Rationalize the Laws of War*, 73 MISS. L.J. 639, 673–74 (2004) ("United States armed forces . . . are distinctly disadvantaged by a grossly asymmetrical legal framework in which morally inferior warriors enjoy all its protections but respect none of its obligations." (citation omitted)); John Yoo, *Using Force*, 71 U. CHI. L. REV. 729, 749–50 (2004) ("The easier availability of weapons technology, the emergence of rogue states, and the rise of international terrorism have presented more immediate threats to national security than those from attack by other nation-states. . . . [T]hese different developments mean that an attack can occur without warning, because its preparation has been covert and it can be launched by terrorists hiding within the civilian population.").

17 PAUL L. WILLIAMS, AL QAEDA: BROTHERHOOD OF TERROR vii–viii (2002).

18 *See* OLIVER ROY, GLOBALIZED ISLAM: THE SEARCH FOR A NEW UMMAH 52–54 (2004).

19 *See id.*

20 *See id.* at 55–57.

and there is no strict division between the front and home. Foreign forces launched the September 11 attacks, for example, from within the United States, using American airliners, against targets wholly within the United States. While American territory has witnessed foreign attacks in the past—most notably the attack on Pearl Harbor that launched American entry in World War II—September 11 constituted the first major attack on the continental United States, and against major American cities, since the War of 1812.

In the weeks after September 11, the Bush Administration decided to pursue al Qaeda by taking offensive military action abroad. In October 2001, the United States invaded Afghanistan, forced al Qaeda from its bases, and ultimately removed from power the Taliban militia that had harbored al Qaeda.[21] The Bush Administration has since supported a friendly, elected government led by former rebel leader Hamid Karzai. The United States has carried out military operations against al Qaeda terrorists in places such as the Philippines, Africa, and the Middle East. As a result, it has captured hundreds of al Qaeda and Taliban fighters and sent them to the U.S. Naval Base in Guantanamo Bay, Cuba. Motivated in part by Iraq's suspected links to terrorist groups generally and al Qaeda specifically, the United States and its allies invaded Iraq in March 2003 and removed Saddam Hussein from power.[22]

War against al Qaeda also has an important defensive dimension. Al Qaeda operatives launched the initial attack against the United States from within. Al Qaeda does not show any sign of reducing its efforts to launch another attack on the scale of September 11.[23] Law enforcement has uncovered al Qaeda cells in cities such as Buffalo, New York and Portland, Oregon. It has detained a resident alien who intended to destroy the Brooklyn Bridge and intercepted at least one

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21 *See, e.g.*, Yoo, *Judicial Review*, *supra* note 14, at 429–30. For my earlier discussions of the legal issues surrounding the Afghanistan war, see Robert J. Delahunty & John Yoo, *The President's Constitutional Authority to Conduct Military Operations Against Terrorist Organizations and the Nations that Harbor or Support Them*, 25 HARV. J.L. & PUB. POL'Y 487 (2002); John C. Yoo & James C. Ho, *The Status of Terrorists*, 44 VA. J. INT'L L. 207 (2003).

22 The primary justifications for the war in Iraq were Saddam Hussein's continuing pursuit of a weapons of mass destruction (WMD) program and Iraq's flouting of United Nations Security Council resolutions. *See* John Yoo, *International Law and the War in Iraq*, 97 AM. J. INT'L L. 563, 565–66 (2003).

23 Some reports even indicate that new bin Laden associates are eyeing soft targets on U.S. soil. *See* Joseph Curl, *Stopping bin Laden is 'Greatest Challenge,'*, WASH. TIMES, Mar. 4, 2005, at A1 ("President Bush yesterday said stopping Osama bin Laden from committing a new attack on U.S. soil is 'the greatest challenge of our day,' but vowed that the United States eventually will bring to justice the mastermind of the September 11 terrorist attacks. . . . [T]he president noted that the al Qaeda terrorist recently came out of hiding to urge his chief ally in Iraq, Abu Musab Zarqawi, to attack Americans. 'Bin Laden's message is a telling reminder that al Qaeda still hopes to attack us on our own soil,' Mr. Bush said.").

American citizen in Chicago who had planned to explode a radiological dispersal device, known as a "dirty bomb," in a major American city. After the attacks, the federal government investigated and detained hundreds of illegal aliens within the United States with possible links to the terrorists. Al Qaeda agents taken into custody within the United States have been detained without criminal charge as enemy combatants. Congress passed the USA Patriot Act to broaden the powers of the FBI and the intelligence community to conduct electronic surveillance of international terrorists inside the United States.[24] Congress created a Department of Homeland Security that incorporated twenty-two separate agencies with responsibilities for domestic security.[25]

It is this domestic dimension that has produced misunderstanding of the fundamental nature of the conflict with al Qaeda. Some believe that terrorism is a tactic—not an enemy—which implies that the war on terrorism is a problem for the criminal law, as it was before September 11, 2001.[26] The war on terrorism is no different than the war on drugs, the war on poverty, or the war on crime, the argument goes, as these "wars" also have nonstate actors, such as drug cartels and organized crime groups. September 11 is different in kind rather than degree. Perhaps the misunderstanding arises from the differences between the political rhetoric of the "war on terrorism" and the actual conflict, which is between the United States and the al Qaeda terrorist organization and its affiliates. The United States is not at war with every group in the world that uses terrorist tactics. Furthermore, as discussed below, al Qaeda is different from drug cartels or organized crime groups, and hence its defeat is more a matter for war than criminal justice.

Several factors distinguish the war against al Qaeda from a large-scale criminal investigation or a broad, persistent social problem. First, al Qaeda represents a foreign threat that originates outside the United States. Al Qaeda's foreign element makes it different from homegrown terrorism, such as Timothy McVeigh's 1995 bombing of the Alfred Murrah Federal Building in Oklahoma City, which is an appropriate subject for the criminal justice system. Second, al Qaeda is unlike a crime organization in that it seeks purely political ends,

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24 *See* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Pub. L. No. 107-56, §§ 201–16, 115 Stat. 272, 278–90 (codified as amended in scattered sections of U.S.C.).

25 *See* Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (codified as amended in scattered sections of U.S.C.).

26 *See* Mark A. Drumbl, *Victimhood in Our Neighborhood: Terrorist Crime, Taliban Guilt, and the Asymmetries of the International Legal Order*, 81 N.C. L. REV. 1, 1 (2002) ("[T]here are important deontological, communitarian, and consequentialist reasons why the [September 11] attacks—and terrorism in general—should be constructed as criminal attacks.").

rather than purely financial gain. Al Qaeda attacked the United States because it wants the United States to withdraw its military and political presence from the Middle East. Al Qaeda may seek financial gain to fund its terrorist operations to achieve that goal, but financial advancement is not its purpose.[27] Third, al Qaeda has proven that it is capable of inflicting a degree of violence and destruction that crosses the line separating crime and war. Although the precise location of this line may not be certain, it seems clear that with approximately three thousand deaths and billions of dollars in damage, the September 11 attacks crossed this line.

II
JUDICIAL ACCEPTANCE OF THE WAR ON TERRORISM

In *Hamdi v. Rumsfeld*, the Court accepted the political branches' basic decision to characterize the September 11 attacks as war.[28] In so doing, the Court rejected arguments characterizing terrorism solely as criminal activity and denied the notion that war could occur only against nations.[29]

Northern Alliance troops, a coalition of groups allied with the United States and opposed to the Taliban militia, captured Yaser Hamdi during the fighting in Afghanistan and turned him over to U.S. armed forces.[30] The military sent Hamdi to the naval station at Guantanamo Bay, Cuba, and, upon discovery that Hamdi had been born in the United States, transferred him to a naval brig in South Carolina.[31] He was not charged with a crime.[32] Hamdi's father filed a writ of habeas corpus seeking his son's release, claiming that as an American citizen Hamdi could not be held without criminal charges, access to a tribunal, or counsel.[33] He based his argument on 18 U.S.C. § 4001(a), which declares, "No citizen shall be imprisoned or

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27 For example, GlobalSecurity.org states that "al-Qaeda's current goal is to establish a pan-Islamic Caliphate throughout the world by working with allied Islamic extremist groups to overthrow regimes it deems 'non-Islamic' and expelling Westerners and non-Muslims from Muslim countries." Global Security.org, Al-Qaeda, http://www.globalsecurity.org/military/world/para/al-qaida.htm (last visited Nov. 27, 2005). The Council on Foreign Relations states that al Qaeda's "Goals and Objectives of Jihad" are "(1) [e]stablishing the rule of God on earth; (2) [a]ttaining martyrdom in the cause of God; and (3) [p]urification of the ranks of Islam from the elements of depravity." Council on Foreign Relations, Terrorism: Questions & Answers: Al-Qaeda, http://cfrterrorism.org/groups/alqaeda2.html#Q15 (last visited Nov. 27, 2005).

28 *See* 542 U.S. 507, 518 (2004) (plurality opinion).

29 *See* Brief for Petitioners at 12–13, 17 n.8, *Hamdi*, 542 U.S. 507 (No. 03-6696); Bruce Ackerman, *This Is Not a War*, 113 YALE L.J. 1871, 1873 (2004) (arguing that the post-September 11 denouement constitutes a "state of emergency" rather than an outright "war").

30 *See Hamdi*, 542 U.S. at 510.

31 *See id.*

32 *See id.* at 510–11.

33 *See id.* at 511.

otherwise detained by the United States except pursuant to an Act of Congress."[34] The government did not challenge Hamdi's right to seek habeas relief; instead, it argued that he was detained lawfully as an enemy combatant under the laws of war.[35] To support its argument that Hamdi was an enemy combatant, the government submitted a declaration from a Defense Department official stating that Hamdi had traveled to Afghanistan in the summer of 2001, affiliated himself with a Taliban military unit, and surrendered while armed.[36]

The Supreme Court granted certiorari to determine whether the government could constitutionally detain a U.S. citizen as an enemy combatant and what process the government owes to an individual who seeks to challenge his classification as an enemy combatant.[37] These issues raised the basic questions of whether the September 11 attacks constituted an act of war, which branch of the government had the authority to decide that question, and what powers were available to the President if, indeed, the United States was at war.[38] If September 11, for example, merely constituted a criminal act rather than an act of war, then Hamdi's detention was illegal under the Fifth and Sixth Amendments, which require indictment or presentment,[39] the right to counsel,[40] the right to remain silent,[41] and a speedy trial.[42] Hamdi's detention also would have violated § 4001(a), because no congressional act had overridden the rights of criminal defendants to be free from detention without criminal charge.

A four-Justice plurality of the Court agreed with the government that the September 11 attacks had initiated a state of war, that the Afghanistan conflict was part of that war, and that enemy combatants could be detained without criminal charge as part of that war.[43] The Court avoided the Solicitor General's argument that the President could detain Hamdi pursuant solely to the President's authority to

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34 *See id.* at 515.

35 *See id.* at 510, 516.

36 *See id.* at 512–13. The Supreme Court refers to this document as the Mobbs Declaration. *See id.* at 512.

37 *See id.* at 509.

38 *See id.* at 517–21.

39 *See* U.S. CONST. amend. V ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury.").

40 *See* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."); *see also* Johnson v. Zerbst, 304 U.S. 458, 463 (1938) (holding that in federal courts the accused must either have or waive counsel before the government deprives him of his life or liberty).

41 *See* Miranda v. Arizona, 384 U.S. 436, 478–79 (1966).

42 *See* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial.").

43 *See Hamdi*, 542 U.S. at 517–19. Justice O'Connor wrote the plurality opinion, which Chief Justice Rehnquist, Justice Kennedy, and Justice Breyer joined.

conduct war under Article II of the Constitution.[44] This sidestep was possible because Congress had enacted a statute on September 18, 2001 authorizing the President to use "all necessary and appropriate force" against "nations, organizations, or persons" he determines are responsible for the September 11 attacks.[45] The political branches' agreement that the September 11 attacks initiated a war, and that the President could pursue that conflict in Afghanistan, was enough to trigger deference on the part of the Court.[46] The Court did not inquire whether the basic facts of Hamdi's case satisfied the statute, or whether the statute satisfied the Constitution.[47] The Court did not ask whether the September 11 attacks had indeed constituted an act of war for constitutional purposes or whether sufficient evidence existed to show that al Qaeda was responsible for those attacks.[48] The Court also did not examine whether the Taliban regime was sufficiently associated with al Qaeda to fall within the September 18 authorization.[49]

Once the Court found that the September 11 attacks initiated a state of war with al Qaeda, it then accepted the next portion of the Administration's legal framework for the war on terrorism: the lesser power to detain combatants, which has been understood to fall within the greater authority to use force against the enemy.[50] As the Court recognized, the purpose of detention in the military context is not to punish, but merely to prevent combatants from returning to the fight.[51] In fact, such detention is the merciful, humanitarian alternative to a practice of granting no quarter to the enemy.[52] After noting that the laws of war permitted the detention without criminal charge of Confederate soldiers during the Civil War, the Court observed that "[a] citizen, no less than an alien, can be 'part of or supporting forces

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44 *See id.* at 517.

45 Authorization for Use of Military Force, Pub L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001).

46 The Court stated that "[t]here can be no doubt that individuals who fought against the United States in Afghanistan as part of the Taliban, an organization known to have supported the al Qaeda terrorist network responsible for those attacks, are individuals Congress sought to target in passing" the authorization to use force. *Hamdi*, 542 U.S. at 510.

47 *See id.* at 518–19.

48 *See id.*

49 *See id.*

50 *See id.* at 518; *Ex parte* Quirin, 317 U.S. 1, 28–29 (1942) ("An important incident to the conduct of war is the adoption of measures by the military command not only to repel and defeat the enemy, but to seize and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war.").

51 *See Hamdi*, 542 U.S. at 518–19.

52 *See id.* at 518. The power of detention extends even to U.S. citizens, as it did in the case of *Ex parte Quirin*, in which the Court upheld the World War II detention and trial by military commission of Nazi saboteurs, one of whom apparently was a citizen. *See Quirin*, 317 U.S. at 20, 48.

hostile to the United States or coalition partners' and 'engaged in an armed conflict against the United States.'"[53] No specific congressional authorization for detention was needed, the Court concluded, "because detention to prevent a combatant's return to the battlefield is a fundamental incident of waging war."[54]

The Court also agreed with the third part of the Administration's justification for Hamdi's detention.[55] Hamdi argued that his detention was unconstitutional because it was indefinite[56]—a return to the idea that terrorism constitutes a fundamentally criminal enterprise. Hamdi sought a return to September 10, 2001, when the government arrested terrorists based on probable cause and gave them *Miranda* warnings, when grand juries indicted them, and when the law granted them the rights to attorneys, to a speedy trial, to full knowledge of the government's case, to depose and call any relevant witnesses, and to seek *Brady* evidence,[57] among other rights and privileges. The Court flatly rejected this argument.[58] The Justices recognized that the United States may use all of the tools of war to fight a new kind of enemy that has no territory, no population, and no desire to spare innocent civilian life.

Accordingly, the Court invoked the standard rule of the law of war: The government can detain prisoners until the end of a conflict.[59] This rule follows from the basic purposes of wartime detention of enemy combatants. To borrow the plurality's words, "[T]he purpose of detention is to prevent captured individuals from returning to the field of battle and taking up arms once again."[60] The flip side of this purpose is that once a conflict is over, the relationship between the nations and populations returns to peace. Once there is peace, there is no reason to continue to detain captured combatants, and it becomes the obligation of each nation to prevent its citizens from restarting hostilities.[61] The Court stated firmly that "[t]he United States may detain, for the duration of these hostilities, individuals legiti-

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53 *Hamdi*, 542 U.S. at 519 (quoting Brief for the Respondents, *supra* note 14, at 3).

54 *Id.*

55 *See id.* at 521.

56 *Id.*

57 *See* Brady v. Maryland, 373 U.S. 83, 87 (1963) (holding the prosecution's suppression of evidence requested by, and favorable to, an accused violated the defendant's due process rights when the evidence is material to either guilt or punishment, irrespective of the good or bad faith of the prosecution).

58 *See Hamdi*, 542 U.S. at 533–35.

59 *See id.* at 520.

60 *Id.* at 518.

61 *Cf.* Geneva Convention Relative to the Treatment of Prisoners of War art. 118, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (providing that prisoners of war should be released after hostilities end); Hague Convention (IV) Respecting the Laws and Customs of War on Land and its Annex; Regulations Concerning the Laws and Customs of War on Land § 1, ch. 2, art. 20, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631 (same); Hague Conven-

mately determined to be Taliban combatants who engaged in an armed conflict against the United States."[62] The Court also ruled that as long as "the record establishes that United States troops are still involved in active combat in Afghanistan," the authorities may detain enemy combatants.[63] Thus, the Court accepted the government's arguments that it was premature to identify when the conflict might end given the ongoing combat operations in Afghanistan.[64]

Although the Court recognized the possibility of indefinite detentions, it also acknowledged the "unconventional nature" of the war on terrorism and suggested that if hostilities continued for "two generations," Hamdi's detention might indeed exceed the government's war powers.[65] Aside from recalling Justice O'Connor's fondness for measuring time by generations,[66] the Court did not provide any reason why after two generations it may be necessary to reconsider the laws of war.[67] If American troops remain engaged in combat in Afghanistan in 2040, the laws of war do not require the United States to release Hamdi or other Taliban detainees. Although the United States may decide to release older or less dangerous prisoners as a matter of policy, the Court identified no constitutional rule requiring the release of prisoners within a specific period of time if hostilities are ongoing.[68]

Upholding detention as central to the Executive's war powers is perhaps the most significant aspect of the Court's terrorism decisions. Afghanistan presented the easiest case to justify the detention of enemy combatants: a traditional conflict between two nation-states that occurred primarily on the battlefield. It may be hard to believe given the context of the military conflict, but the United States was lucky that al Qaeda and its Taliban allies responded to the American presence in Afghanistan and deployed fighters in a battlefield setting, where superior American air and ground power gave the United States the advantage and permitted it to capture many operatives. However, al Qaeda will not make the same mistake twice. Rather, al Qaeda seeks to infiltrate operatives into our society with the goal of

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tion (II) With Respect to the Laws and Customs of War on Land art. 20, July 29, 1899, 32 Stat. 1803, 1 Bevans 247 (same).

62 *Hamdi*, 542 U.S. at 521 (quotation omitted).

63 *Id.*

64 *See id.*

65 *Id.* at 520.

66 *See* Grutter v. Bollinger, 539 U.S. 306, 343 (2003) ("We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.").

67 *See Hamdi*, 542 U.S. at 521 (suggesting that if the government continued to hold Hamdi in custody for two generations, his detention might last for the rest of his life, and "if the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding [the authority to detain for the duration of a conflict] may unravel").

68 *See id.*

launching surprise attacks designed to inflict massive civilian casualties. Jose Padilla, whose case the Supreme Court dismissed because it was improperly brought in the Southern District of New York,[69] provides an example of al Qaeda's efforts to recruit American citizens who can better escape detection.[70] Although sporadic fighting in Afghanistan continues,[71] domestic targets such as Chicago O'Hare airport, New York harbor, and the Mexican and Canadian borders will be the front lines of the future. If the Court had prevented the government from detaining citizens who have decided to become terrorists, it would have seriously handicapped the nation's ability to prevent attacks and to obtain better intelligence on our enemy's plans.

III
WAR AND DUE PROCESS

Initially, the Court remained well within the boundaries set by previous Courts in reviewing the government's war powers to detain enemy combatants. In the *Prize Cases*, for example, the Court deferred to the President's determination that the Confederate States' secession had marked the outbreak of the Civil War.[72] It explained that as the Commander-in-Chief, the President, not the Court, had the power to decide whether to treat the southern states as "belligerents" and to institute a blockade.[73] The Court did not question the merits of the President's decision, but stated it must leave such an evaluation to "the political department of the Government to which this power was entrusted."[74] As the Court observed, the President enjoys full discretion in determining what level of force to use when confronted with a crisis.[75] Similarly, after the end of World War II, the Court held that the question of whether a state of war continued to

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69 *See* Rumsfeld v. Padilla, 542 U.S. 426, 451 (2004).

70 The government alleged that Padilla was close to building a "dirty bomb" to be detonated within the United States. *See* Padilla *ex rel.* Newman v. Bush, 233 F. Supp. 2d 564, 572–73 (S.D.N.Y. 2002), *rev'd*, 542 U.S. 426 (2004).

71 *See* ROY, *supra* note 18, at 55–57.

72 *See* The Prize Cases, 67 U.S. (2 Black) 635, 670 (1862).

73 *See id.*

74 *Id.*

75 *Id.* ("He must determine what degree of force the crisis demands." (quotations omitted)); *see* Johnson v. Eisentrager, 339 U.S. 763, 789 (1950) ("Certainly it is not the function of the Judiciary to entertain private litigation—even by a citizen—which challenges the legality, the wisdom, or the propriety of the Commander-in-Chief in sending our armed forces abroad or to any particular region."); Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948) ("The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret.").

exist—despite the apparent cessation of active military operations—was a political question.[76] During the war, the Court upheld the government's authority to detain enemy combatants, even those who are U.S. citizens, during wartime.[77] Despite the arguments of a coalition of law professors, members of the bar, and commentators,[78] it would have been remarkable if the *Hamdi* Court had disregarded this long-standing framework and challenged the political branches in perhaps their area of greatest competence.[79]

Despite acknowledging the government's power to detain enemy combatants, the Court then took a wrong turn and overstepped the traditional boundaries of judicial review. All parties agreed that an American citizen held as an enemy combatant could challenge his detention through a petition for a writ of habeas corpus,[80] as had been the rule since at least *Ex parte Milligan*.[81] In that case, the Court ordered the release of an American citizen who had plotted an attack against Union military installations.[82] The Court noted that the Union authorities could not detain Milligan without process as long as "the courts are open and their process unobstructed."[83] Milligan had been captured well away from the front, had never associated with the enemy, and was, at most, merely a sympathizer with the Confederate cause.[84] The crucial question in *Hamdi*, then, was not whether habeas corpus would remain available, but rather how the process ought to be structured to take into account the government's interests in protecting national security and the noncriminal nature of the detention, while providing a sufficient test of the government's evidence to guard against pretextual detentions.

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76 *See* Ludecke v. Watkins, 335 U.S. 160, 169 (1948) ("Whether and when it would be open to this Court to find that a war though merely formally kept alive had in fact ended, is a question too fraught with gravity even to be adequately formulated when not compelled.").

77 *See Ex parte* Quirin, 317 U.S. 1, 37 (1942) ("Citizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful because in violation of the law of war.").

78 *See* Brief of Amici Curiae International Law Professors Listed Herein in Support of Petitioners, Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (No. 03-6696); Brief for the American Bar Association as Amicus Curiae in Support of Petitioners, *Hamdi*, 542 U.S. 507 (No. 03-6696); Brief of International Humanitarian Organizations and Associations of International Journalists as Amici Curiae Supporting Petitioners, *Hamdi*, 542 U.S. 507 (No. 03-6696).

79 Although Justice O'Connor's opinion drew only a plurality of the Court, Justice Thomas' dissent agrees with the plurality on these essential points. *See Hamdi*, 542 U.S. at 579 (Thomas, J., dissenting) (arguing that Hamdi's detention falls squarely within the war powers of the President and the Court should not "second-guess that decision").

80 *Id.* at 525 (plurality opinion).

81 *Ex parte* Milligan, 71 U.S. (4 Wall.) 2 (1866).

82 *See id.* at 131.

83 *Id.* at 121.

84 *See id.* at 131.

Viewed at a somewhat higher level of generality, *Hamdi* called upon the Court to determine how much information judges need to perform their habeas function in a wartime detention context. In a typical executive detention habeas case, for example, a federal court might review the facts de novo. If the executive claimed, for example, that an individual posed an imminent threat to public safety and had to be detained,[85] a judge might examine witnesses in court and directly review the records of the detention. The Court could have accepted the "some evidence" standard, which requires the government to provide the facts that lead it to believe that a detainee satisfies the legal standard for status as an enemy combatant.[86] That standard seeks to provide the government the maximum flexibility to preserve its intelligence sources and methods, and to minimize interference with ongoing military operations. In 1950, in *Johnson v. Eisentrager*, the Court held that German prisoners of war convicted by a military commission for war crimes could not seek review of their sentences in a federal court through a writ of habeas corpus.[87] According to the *Eisentrager* Court:

> The writ, since it is held to be a matter of right, would be equally available to enemies during active hostilities as in the present twilight between war and peace. Such trials would hamper the war effort and bring aid and comfort to the enemy. They would diminish the prestige of our commanders, not only with enemies but with wavering neutrals. It would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home. Nor is it unlikely that the result of such enemy litigiousness would be a conflict between judicial and military opinion highly comforting to enemies of the United States.[88]

The unconventional nature of the war with al Qaeda makes important military interests more acute because of the need to interrogate enemy combatants for information about future attacks. Unlike enemies in previous wars, al Qaeda is a stateless network of religious extremists who do not obey the laws of war, who hide among peaceful populations, and who seek to launch surprise attacks on civilian

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85 *See, e.g.*, United States v. Salerno, 481 U.S. 739, 748 (1987) ("[I]n times of war or insurrection, when society's interest is at its peak, the Government may detain individuals whom the Government believes to be dangerous."); Moyer v. Peabody, 212 U.S. 78 (1909) (affirming a governor's detention of an individual to quell an insurrection).

86 *See* Hamdi v. Rumsfeld, 542 U.S. 507, 527–28 (2004) (plurality opinion) ("Under this review, a court would assume the accuracy of the Government's articulated basis for Hamdi's definition . . . and assess whether that articulated basis was a legitimate one.").

87 339 U.S. 763, 785 (1950).

88 *Id.* at 779.

targets with the aim of causing massive casualties. They have no armed forces in the field, no territory to defend, no populace to protect, and no fear of killing themselves in their attacks. The front line is not solely a traditional battlefield, and the primary means of conducting the war includes the efforts of military, law enforcement, and intelligence officers to stop attacks before they occur. Information is an indispensable primary weapon in the conflict against this new kind of enemy, and intelligence gathered from captured operatives is perhaps the most effective means of preventing future terrorist attacks upon U.S. territory.

Given this understanding of war, de novo judicial review threatens to undermine the effectiveness of the military effort against al Qaeda. A habeas proceeding could become the forum for recalling commanders and intelligence operatives from the field into open court, disrupting overt and covert operations, revealing successful military tactics and methods, and forcing the military to shape its activities to the demands of the judicial process. Indeed, the discovery orders of the trial judge in *Hamdi* threatened to achieve exactly these results.[89] Appropriate concern for such considerations should have led the Court to adopt the "some evidence" standard, which would have narrowed judicial inquiry to the facts known to the government and subject to production in court. Justice Thomas, who observed that courts "lack the expertise and capacity to second-guess" the battlefield decisions made by the military and ultimately the President, agreed with this approach.[90]

Joined by Justices Souter and Ginsburg,[91] however, the plurality imposed vague guidelines for reviewing detentions.[92] Rejecting the positions of Hamdi and the government, the Court struck the compromise that an enemy combatant must receive notice and "a fair opportunity to rebut the Government's factual assertions before a

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89 The district court rejected the Mobbs Declaration as insufficient to justify Hamdi's detention and

> ordered the Government to turn over numerous materials for *in camera* review, including copies of all of Hamdi's statements and the notes taken from interviews with him that related to his reasons for going to Afghanistan and his activities therein; a list of all interrogators who had questioned Hamdi and their names and addresses; statements by members of the Northern Alliance regarding Hamdi's surrender and capture; a list of the dates and locations of his capture and subsequent detentions; and the names and titles of the United States Government officials who made the determinations that Hamdi was an enemy combatant and that he should be moved to a naval brig.

Hamdi, 542 U.S. at 513–14.

90 *See id.* at 579 (Thomas, J. dissenting).

91 *Id.* at 539 (Souter, J., concurring).

92 *See id.* at 553.

neutral decision maker."[93] The Court thus transplanted the amorphous *Mathews v. Eldridge* test to determine whether a process meets the requirement of the Due Process Clause: a balancing of the private interest affected by government action, the government's interests, and the costs of providing greater process—all measured in the context of deciding whether more process would reduce government error.[94] That the Court had to resort to a case about the procedural due process rights that attend the termination of welfare benefits suggests the extent to which the Court was improvising.

It is difficult to understand how the *Mathews* test can be applied with any serious coherence. The values that *Mathews* calls on the courts to balance seem obviously difficult—if not impossible—to measure against any common metric.[95] The Court's own discussion in *Hamdi* bears this out. On the one hand, Justice O'Connor wrote that an individual citizen's interest in being "free from involuntary confinement by his own government without due process of law" is fundamental.[96] On the other hand, the government has a "weighty and sensitive" interest in preventing enemy combatants from returning to fight against the United States.[97] The Court could have defined the government's interest at an even higher level of importance, because requiring the government to reveal intelligence information—such as the surveillance of al Qaeda leaders—during habeas proceedings could prevent the government from most effectively carrying out its war against al Qaeda. Once defined as victory itself, rather than simply detaining enemy combatants, the government's interest would have reached the most compelling level known to American constitutional law. As the Court has said, "It is obvious and unarguable that no governmental interest is more compelling than the security of the Nation."[98]

Nevertheless, the Court left unclear how courts should actually balance these factors. Should a court gauge the government's interest in protecting the national security by multiplying the number of lives potentially saved by the reduction in the probability of an attack—factoring in the uniform value of a life as measured by the Environ-

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93 *Id.* at 533 (plurality opinion).

94 *See* 424 U.S. 319, 335 (1976).

95 *See, e.g.*, Jonathan Turley, *Art and the Constitution: The Supreme Court and the Rise of the Impressionist School of Constitutional Interpretation*, 2004 CATO SUP. CT. REV. 69, 97 ("A case that dealt with disability benefits rather than core issues of separation of powers and individual rights, *Mathews* gave the Court a license to use its own translation of rights in light of other contemporary concerns and issues . . . .").

96 *Hamdi*, 542 U.S. at 531.

97 *Id.*

98 Haig v. Agee, 453 U.S. 280, 307 (1981) (quotation and citation omitted).

mental Protection Agency?[99] And how should the government measure the individual liberty interest in not being detained—as the average price that an average citizen would pay per hour to avoid detention? If these efforts to monetize the prongs of the *Mathews* test seem silly, it may be because there is no systematic, rational way to quantify these competing values. To make matters even more difficult, the Court requires judges to use these values as guidance for the procedural features that should attend habeas corpus proceedings for enemy combatants. The *Hamdi* Court suggested possible procedures, such as putting the burden of proof on the detainee to show why he does not meet the criteria for detention. Nevertheless, the Court punted the determination of which procedures are constitutional to the lower courts and the executive branch.[100]

The practical consequences of *Hamdi* may outstrip its theoretical significance. After all, the government has detained only three American citizens as enemy combatants: Yaser Hamdi, John Walker Lindh, and Jose Padilla. The Bush Administration chose to transfer Lindh from military detention to the criminal justice system and reached a plea bargain with prosecutors.[101] Hamdi renounced his citizenship and has been released to the custody of Saudi Arabia.[102] *Hamdi*, however, has application far beyond the remaining case of Jose Padilla because of the Court's decision in *Rasul*. In *Rasul*, the Court found that Guantanamo Bay is within the habeas corpus jurisdiction of the federal courts.[103] Effectively overruling *Eisentrager*, *Rasul* unwisely threatens to interject the federal courts as micromanagers of the military. It provided no guidance on when or where habeas corpus hearings must be held, who can participate, or how classified intelligence will remain protected. Despite an extended discussion of the peculiarities of the Guantanamo lease, *Rasul* leaves unclear even whether judicial review would apply beyond Cuba to Iraq (and Saddam Hussein) or to Afghanistan (and Osama bin Laden, should he be captured).[104]

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99 *See, e.g.*, Eric Posner & Cass Sunstein, *Dollars and Death*, 72 U. CHI. L. REV. 537, 549–51 (2005) (estimating valuation of human life by federal agencies, including the EPA).

100 *Hamdi*, 542 U.S. at 534, 537–39.

101 *See* Press Release, U.S. Dep't of Justice, Statement from the Attorney General Regarding John Walker Lindh's Guilty Plea (July 15, 2002), http://www.usdoj.gov/opa/pr/2002/July/02_ag_400.htm.

102 *See* Press Release, U.S. Dep't of Justice, Statement of Mark Corallo, Director of Public Affairs, Regarding Yaser Hamdi (Sept. 22, 2004), http://www.usdoj.gov/opa/pr/2004/September/04_opa_640.htm.

103 *See* Rasul v. Bush, 542 U.S. 466, 483–84 (2004).

104 *See id.* at 478–79 ("[B]ecause 'the writ of habeas corpus does not act upon the prisoner who seeks relief, but upon the person who holds him in what is alleged to be unlawful custody,' a district court acts 'within [its] respective jurisdiction' within the meaning of § 2241 as long as 'the custodian can be reached by service of process.'" (second

Without any discussion of these issues in *Rasul*, one must assume that if the approach outlined in *Hamdi* satisfies the due process requirements for American citizens detained within the United States, it will likely satisfy the requirements for alien enemy combatants detained outside the United States. Although the Court unwisely extended its reach to wartime detentions outside the United States, it left the executive branch substantial room to maneuver on the nature and scope of review. *Hamdi*, for example, approves of a detainee's access to counsel,[105] but does not explain when they may meet, whether their communications may be monitored for clandestine messages, or whether the lawyers may be military officers. *Rasul* studiously avoids any discussion of what substantive rights, if any, al Qaeda and Taliban detainees have, and neither decision overturns the Administration's policy that these detainees are not prisoners of war under the Geneva Conventions. The Pentagon could easily adapt its existing review process for Guantanamo prisoners to meet the standards of *Hamdi* (as Justice O'Connor seemed to invite).[106] Military commissions that President Bush has already established to try alien terrorists would almost certainly meet the procedural requirements set out by the Court. Thus, the Court's intervention into detainee policy and its imposition of ambiguous standards for review seem to require the executive branch to provide process to alien detainees identical to that given to citizens. That is, the ambiguity of the *Mathews* framework gives the executive branch little choice but to take up the one avenue already outlined by the Court. The Court's rulings threaten to extend not only to the navy brig in Charleston, South Carolina, but to Afghanistan, and even Iraq.

IV
WAR AND COMPARATIVE INSTITUTIONAL ANALYSIS

Despite protests to the contrary, *Hamdi* and *Rasul* have thrust the federal courts into the center of policymaking in the war on terrorism. The courts must decide whether the government should produce certain kinds of evidence or witnesses (particularly those involving intelligence information and assets), how long it may question detained enemy combatants before they have access to a lawyer, and how long it

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alteration in original) (quoting Braden v. 30th Judicial Court, 410 U.S. 494, 494–95 (1973))). This passage of the Court's opinion will surely be offered as evidence that judicial review for U.S.-held detainees knows no bounds.

105 *See* Hamdi v. Rumsfeld, 542 U.S. 507, 539 (2004) (plurality opinion).

106 *See id.* at 538 ("There remains the possibility that the standards we have articulated could be met by an appropriately authorized and properly constituted military tribunal . . . . [M]ilitary regulations already provide for such process in related instances, dictating that tribunals be made available to determine the status of enemy detainees who assert prisoner-of-war status under the Geneva Convention.").

may hold prisoners. These issues will undoubtedly affect which tactics and operations the government will be able to use to combat terrorism in the future. Because the Supreme Court did not set any clear lines, but instead directed lower courts merely to balance a multiplicity of ambiguous factors, it seems inevitable that the federal judiciary will significantly affect terrorism policies. This Part questions whether the courts have a comparative advantage in the area of foreign policy and national security, or whether such decisions should be left to the political branches. In other words, do the federal courts, now charged with interpreting and applying *Hamdi* and *Rasul*, have a superior ability to gather information to make national security decisions, or even to conduct the balancing called for by the Supreme Court?

They do not. The design and operation of the judiciary give it a comparatively weak institutional vantage point from which to manage foreign affairs and achieve national security goals. To ensure the most effective pursuit of national policy on terrorism, the responsibility for policy decisions should be entrusted to the institution within the federal government that has a structural comparative advantage in making such decisions. Because the federal judiciary suffers significant institutional disadvantages with regard to foreign affairs, it is a poor choice to carry out national security policy. It is important to distinguish between both micro- and macrolevel characteristics of the judiciary. Several characteristics of federal courts at the microlevel—the operation of individual judges in individual lawsuits—limit the information and options available to the courts. At the macrolevel, certain systemwide features of the Article III judiciary may poorly equip it to carry out national security policy on a global scale.

A. Microlevel Institutional Factors

The defining function and features of the Article III courts, which may make them superior to other branches in performing certain functions, also may make them comparatively less suited to playing a leading national security role. Federal courts are designed to be independent from politics, to passively allow parties to drive the litigation, and to receive information in highly formal ways through litigation. These characteristics may make courts more neutral in their decision making and fairer in their attitude toward defendants or detainees, but they also may render the courts less effective in achieving national security goals. Comparing courts with other institutions may clarify these points.

An initial difference between courts and other institutions is access. Compared with other institutions, courts have relatively high

barriers to access.[107] Markets, to take one example, have virtually no barriers—all one need do to gain access is purchase a product. Congress, to take another example, has somewhat higher barriers than markets. It is generally thought that interest groups must provide campaign contributions or political support in order to attain access to political leaders, though members of Congress are also responsive to public pressure as reflected through the media and constituents. The executive branch has lower barriers to access than Congress, because it is easier for individuals and groups to provide information to, and make requests of, agencies than Congress, though these lower barriers may not bring greater chances of success. For members of Congress, barriers preventing access to the executive branch are extremely low. In addition to formal hearings, agency officials and congressional staff conduct numerous informal discussions and meetings in a never-ending dialogue of questions, requests for information, and responses.[108]

In contrast, courts have numerous doctrines that create high barriers to access. Under standing doctrine, for example, plaintiffs must have suffered an actual injury in fact that is fairly traceable to a defendant's alleged wrongful conduct, which may be remedied by the court.[109] The timing of the case must also be just right—neither too early so as to be unripe[110] nor too late so as to be moot.[111] Of particular importance to the subject matter at hand, courts cannot answer political questions whose determination is constitutionally vested in another branch.[112]

In addition to these court-imposed access limitations, the nature of litigation itself demands significant resources, at least compared with the means necessary to access the executive or legislative branches. Utilizing a judicial forum not only requires time and money to make substantive legal arguments and to pursue discovery,

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107 *See* NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY 123 (1994) ("[T]he adjudicative process is more formally defined and has more formal requirements for participation than do the [political process or market].").

108 *See, e.g.*, Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 623–24 (1984).

109 *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) ("[T]he plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." (citations and quotations omitted)).

110 *See* Abbott Labs. v. Gardner, 387 U.S. 136, 148–49 (1967); United Pub. Workers v. Mitchell, 330 U.S. 75, 89–90 (1947).

111 *See, e.g.*, DeFunis v. Odegaard, 416 U.S. 312, 319–20 (1974) (dismissing the case of a law school applicant alleging racial discrimination since he was nearly finished with law school).

112 *See* Nixon v. United States, 506 U.S. 224, 228 (1993).

but also demands navigating complex litigation rules, which often necessitates hiring teams of lawyers to represent the interested parties.

There are also significant differences in the ways courts acquire and process information. Parties gather information through a painstaking process of discovery, which can be time-consuming and expensive. They present information to the court, which must satisfy the Federal Rules of Evidence—it must be judged relevant,[113] credible,[114] and reliable[115]—and it must be presented to the court in accordance with specific and painstaking procedures. The executive branch, by contrast, can collect information through agency experts, a national and global network of officials and agents, and connections with outside groups and foreign governments. Congress can collect information itself or acquire it from the executive branch or outside groups via relatively inexpensive hearings. In general, courts do not proactively collect information on a question before them. Aside from public record information, such as that contained in open media sources or scholarly journals, courts must rely on the parties to bring information to them. Courts do not operate the broad network of information sources that is available to the executive branch, nor can they benefit from the informal methods of information collection the legislature has at its disposal. Courts generally cannot update the information available on a question except in the context of a case. Thus, if a court has made a decision based on information available to it at a given time, the court will not continue to gather information on that issue thereafter—even if additional information would lead the court to change its decision—until another case raising the same issue arises. Even then, a court generally will not reexamine its earlier decision unless the new information provided by the parties shows that the factual context has changed so dramatically as to dictate a departure from precedent.[116]

Article III itself also significantly limits the role of federal courts in performing certain functions. Once the President and Congress have enacted a statute or the President and Senate have made a treaty, the judiciary's constitutional responsibility is to execute those goals in the context of Article III cases or controversies, subject to any policymaking discretion implicitly given to the courts by Congress in areas

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113 FED. R. EVID. 401 (limiting evidence in courts to that which is of "consequence to the determination of the action").

114 *See* FED. R. EVID. 601–15 (describing the qualifications for witnesses and the scope of their potential testimony).

115 *See* FED. R. EVID. 901–03 (outlining requirements for authentication of physical evidence).

116 *See, e.g.*, Thomas R. Lee, *Stare Decisis in Economic Perspective: An Economic Analysis of the Supreme Court's Doctrine of Precedent*, 78 N.C. L. REV. 643, 660 (2000).

of statutory ambiguity or of federal common law.[117] Federal judges cannot alter or refuse to execute laws, even if the original circumstances that gave rise to the statute or treaty have changed. If a federal court, for example, finds that a defendant has violated the Helms-Burton Act by "trafficking" in property confiscated by the Cuban government, it is obligated to render judgment for an American plaintiff who once owned that property.[118] Article III requires a federal court to reach that decision even if the effects of the judgment in that particular case would harm the national interest.[119]

Judicial decisions may harm the national interest because courts cannot control the timing of their proceedings or coordinate their judgments with the actions of the other branches of government. For example, the President might be engaged in a diplomatic campaign to pressure a Middle Eastern country into terminating its support for terrorism at the time that a judicial decision freed a suspected al Qaeda operative. A judicial decision along these lines could undermine the appearance of unified resolve on the part of the United States, or it might suggest to the Middle Eastern country that the executive branch cannot guarantee that it could follow through on its own counterterrorism policies. A court cannot take account of such naked policy considerations in deciding whether a federal statute has been violated or whether to grant relief, while the political branches can constantly modify policy in reaction to ongoing events. Even if the judiciary seeks guidance from the executive branch, such deference may undermine any appearance of judicial independence.

A last microfactor that affects the courts' institutional competence arises from the substantive challenge presented by international law. Detention decisions require the federal courts to do more than simply find facts in applying the enemy combatant standard.[120] Detainees may also claim that their manner of capture, treatment, or conditions of confinement violate international treaties or customary international law.[121] Federal courts usually do not encounter international law. Many observers admit that the very concept of customary international law—law that "results from a general and consistent practice of states followed by them from a sense of legal obligation"

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117 *See, e.g.*, RICHARD H. FALLON, JR. ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 743–56 (5th ed. 2003).

118 *See* John Yoo, *Federal Courts as Weapons of Foreign Policy: The Case of the Helms-Burton Act*, 20 HASTINGS INT'L & COMP. L. REV. 747, 774 (1997).

119 *See id.*

120 *See In re* Guantanamo Detainee Cases, 355 F. Supp. 2d 443, 478–80 (D.D.C. 2005) (evaluating petitioners' claims based on the Geneva Conventions).

121 *See* Rasul v. Bush, 542 U.S. 466, 483–85 (2004).

rather than through positive enactment[122]—is fraught with difficulty.[123]

Even if the very nature of international law were not so uncertain and ambiguous, it is likely that the federal courts either would experience a high error rate in determining its content or expend excessive resources in attempting to reach the appropriate legal answer. International law involves sources that are not often encountered by federal judges or domestic lawyers. The very source of customary international law—state practice—is not as readily available to courts as are reported decisions.[124] Moreover, state practice may not be reflected in publicly available documents, but may more often lie in the archives of the State Department and foreign ministries, or may not even be recorded in documents at all, but might instead rest in the preserve of unwritten custom. American judges, who are almost all generalists, would have to survey the actions of governments over the course of dozens, if not hundreds, of years. Only then could they begin to make fine-grained judgments not just about what states have done, but why they did it.

An analogy can be made to the disputes over the use of legislative history in statutory interpretation. Whether courts should consult legislative history has been a focal point for broader debates about the nature of the legislation, the process of judicial reasoning, and the purpose of interpretation. Many who believe that courts should seek out Congress's intent or broader purpose find reliance on legislative history, along with the judiciary's own policy considerations, generally acceptable.[125] A minority argues that courts should not use legislative history to interpret statutes, either because there is no such thing as a

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122 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102(2) (1987).

123 *Compare* ANTHONY A. D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW 4 (1971) ("[T]he concept of custom has not been subjected to satisfactory intensive analysis. . . . The questions of how custom comes into being and how it can be changed or modified are wrapped in mystery and illogic."), *with* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 4 (4th ed. 1990) (citing with approval the definition of international custom as a recognition among nations of a certain practice as obligatory).

124 *See* BROWNLIE, *supra* note 123, at 5 ("The material sources of custom . . . include . . . diplomatic correspondence, policy statements, press releases, the opinions of official legal advisers, official manuals on legal questions, e.g. manuals of military law, executive decisions and practices, orders to naval forces etc., comments by governments on drafts produced by the International Law Commission, state legislation, international and national judicial decisions, recitals in treaties and other international instruments, a pattern of treaties in the same form, the practice of international organs, and resolutions relating to legal questions in the United Nations General Assembly." (citations omitted)).

125 *See, e.g.*, William N. Eskridge, Jr., *Textualism, the Unknown Ideal?*, 96 MICH. L. REV. 1509, 1509–11 (1998) (reviewing ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997)); William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 325–32 (1990); Daniel A. Farber & Philip P. Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423, 424–25 (1988).

collective intent[126] or because consulting legislative history evades formal separation-of-powers notions.[127] Adrian Vermeule argues that even if courts should seek legislative intent, those of "limited interpretive competence might do better, even on intentionalist grounds, by eschewing legislative history than by consulting it."[128] Judges simply may have limited competence in understanding and properly using legislative history—leading to high decision costs in conducting extensive reviews of legislative history—without any corresponding reduction (and perhaps even an increase) in error costs.

If judges' limited competence in reviewing legislative history leads to high decision costs, such costs will be even higher in the context of international law. The sources of legislative history rest well within the general bounds of American public law, and thus will be familiar to most judges. Although it is expensive to gather and analyze in relation to other forms of American legal research,[129] legislative history may be inexpensive to use in comparison to sources of international law—which is often written in foreign languages that must be translated, found not only in texts but also in practices, and recorded in sources that are often not publicly available. Even more conventional public sources of international law, such as multilateral treaties and the resolutions of the United Nations General Assembly, present serious interpretive problems. It is highly questionable, for example, that nations that refuse to sign treaties should be held to those treaty norms because they have "ripened" into custom, or that customary international law should be read to go beyond the standards set by a widely joined treaty. Decisions by organs of the United Nations, particularly the General Assembly, have no formal authority to declare customary international law, if by definition that law represents the practice of states and not the opinions of international organizations. The most pertinent evidence of state practice—state actions—will sometimes be the most expensive to ascertain, and there is, as of yet, no empirical showing that federal courts will perform better in their use than any other institution.

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126 *See, e.g.*, Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61, 68 (1994) ("Intent is elusive for a natural person, fictive for a collective body."); John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 674–75 (1997).

127 *See* Manning, *supra* note 126, at 707–25.

128 Adrian Vermeule, *Interpretive Choice*, 75 N.Y.U. L. REV. 74, 84 (2000).

129 *See, e.g.*, Eskridge, *supra* note 125, at 1541; Kenneth W. Starr, *Observations About the Use of Legislative History*, 1987 DUKE L.J. 371, 377; Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of* Holy Trinity Church, 50 STAN. L. REV. 1833, 1870–71 (1998).

B. Macrolevel Institutional Factors

The organization of the federal judiciary as an institution may have even more significant effects on the comparative ability of the courts to achieve national security goals than the microlevel factors. First, the federal judiciary is a generalist institution composed of generalist judges. The executive branch does not usually appoint members of the judiciary because of expertise a candidate may possess in any particular subject, unlike the Department of Energy, the Environmental Protection Agency, or the Food and Drug Administration, which hire specialized scientists. The lack of specialized judicial expertise is accentuated in foreign affairs. Judges are not usually chosen because of any background in specific regions, nor are they selected because they have experience in national security issues. As an institution, the judiciary is unlikely to have great facility with international legal, political, or economic theories or materials; its members are more likely to be chosen because of their prominence as litigators or as public officials. Very few judges have significant foreign affairs experience before their appointment to the federal bench. Moreover, a candidate's prominence in the field of public international law or international relations theory would not be a strong selling point for a nominee.

Similarly, the federal judiciary itself is organized along generalist lines. Aside from the Court of Appeals for the Federal Circuit, the federal courts are organized by geographic region, not by subject matter as are some European judicial systems. This system of organization not only prevents specialization, but also retards the accumulation of experience and hampers the internal transmission of information between judges handling common issues. For example, few judges have any special background in arms control issues. Even if a judge gains significant knowledge about arms control through a particular case, this experience will not be retained or put to use in future cases on the same subjects because of the generalist organization of the judiciary. In fact, it is highly unlikely that that judge would hear cases on the same subject again.

A second macrolevel institutional factor relevant to the courts' comparative ability to achieve national security goals is that the judiciary is the most decentralized of the three branches of government. It is the most balkanized, if also the most deliberate. The front line of the judiciary is composed of ninety-four district courts, which are staffed by more than 667 judges.[130] Until appellate courts have ruled

130 JUDGESHIP ANALYSIS STAFF, ADMIN. OFFICE OF THE U.S. COURTS, HISTORY OF FEDERAL JUDGESHIPS, U.S. DISTRICT COURTS III-22 tbl. H, http://www.uscourts.gov/history/tableh.pdf.

on a legal issue, the judges in these district courts can hold ninety-four different interpretations of the same law. There are thirteen federal courts of appeals, with 179 judges.[131] The Supreme Court currently hears between seventy and eighty-five cases per year, while about 60,000 cases a year are filed in the courts of appeal and about 325,000 cases are filed a year in the district courts.[132] Given the other demands on the Supreme Court's caseload, it is doubtful that the Court could devote a significant portion of its docket to correcting erroneous interpretations of international law or mistaken interferences with regard to foreign and national security policies set by the political branches. Unless the Supreme Court could review more cases, the geographic organization of the federal courts may produce disharmony, or at least an undesirable diversity of interpretations and applications of international law and foreign policy.

In some areas of law, this level of decentralization might not pose such a problem. Geographically organized courts may better tailor national policies to local conditions, allow for diversity and even experimentation in federal policies, as well as provide a more effective voice for local communities in federal judicial decision making. These are not desirable traits, however, in foreign affairs and national security. The Constitution specifically sought to centralize authority over these subjects to provide the nation with a single voice in its international relations, so as to prevent other nations from taking advantage of the disarray that had characterized the Articles of Confederation.[133] Indeed, the Court recently held in *Crosby v. National Foreign Trade Council*[134] and *American Insurance Ass'n v. Garamendi*[135] that state efforts to influence the conduct of foreign nations are preempted by federal policy precisely because of the need for a uniform foreign policy set by Congress or the President. This rationale, offered to justify national preeminence over the fifty states, applies with equal force to a federal judiciary of ninety-four district

131 JUDGESHIP ANALYSIS STAFF, ADMIN. OFFICE OF THE U.S. COURTS, HISTORY OF FEDERAL JUDGESHIPS, U.S. COURTS OF APPEALS tbl. C, http://www.uscourts.gov/history/tablec.pdf.

132 OFFICE OF JUDGES PROGRAMS, ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS: MARCH 31, 2003, at 6, http://www.uscourts.gov/caseload2003/front/Mar03Txt.pdf.

133 *See generally* FREDERICK W. MARKS III, INDEPENDENCE ON TRIAL: FOREIGN AFFAIRS AND THE MAKING OF THE CONSTITUTION (1986) (exploring the origin of the Constitution in the context of foreign affairs during the period preceding the Constitution's inception).

134 530 U.S. 363, 372–73 (2000) (finding that federal law preempted a Massachusetts statute barring state entities from buying goods or services from companies that did business with the nation of Burma).

135 539 U.S. 396, 401 (2003) (invalidating a California statute on the basis that it impermissibly interfered with the federal government's conduct of foreign relations, because it required insurance companies doing business in California to disclose all information relating to policies sold in Europe by the company or anyone "related to it" between 1920 and 1945).

courts and thirteen appellate courts. The geographic factors that usually led to judicial specialization are not present in the foreign affairs context. Unlike the Second Circuit and securities law, there is no natural geographic center for matters that affect international relations, and unlike the D.C. Circuit and administrative law, the habeas corpus statute does not require that detainee suits be brought in a specific court of appeals—in fact, *Rasul* seems to suggest that enemy combatants held outside the United States could bring suits in any of the federal district courts.[136] Judicial involvement in foreign and national security policy will create disharmony where uniformity is crucial.

Third, institutional structure also suggests that judicial activity in national security may be slow in implementation and self-correction. Lawsuits often take years to complete, and even when cases are expedited, they last for several months from the time of filing to final judgment and appeal. The enemy combatant cases—in which the legal issues were clear, no discovery was needed, and detainees had significant liberty interests in a swift resolution—still required roughly two to three years for a decision on the threshold substantive questions. The prosecution of Zacarias Moussoui, detained in the fall of 2001, has only recently been resolved by a guilty plea.[137] Although these cases may be proceeding quickly by judicial standards, the important question is whether, as a matter of comparative institutional competence, the executive or other branches can implement foreign policy goals even faster.

Monitoring and feedback in the judicial system may also cause delay. Judicial errors or deviations from policy may take years to reverse or may even go entirely uncorrected. Problems of delay also infect the judiciary's institutional systems for communication between its different units and for correcting errors. While the federal courts have an appeals court system for detecting and correcting errors, an appeal can take months if not years to resolve. Even if a district or circuit judge acts in defiance of established circuit or Supreme Court precedent, litigation is necessary to correct the error. Standards of review concerning factfinding may even render some decisions effectively immune from appellate review despite contrary or conflicting

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136 *See* Rasul v. Bush, 542 U.S. 466, 473 (2004) ("Congress has granted federal district courts, within their respective jurisdictions, the authority to hear applications for habeas corpus by any person who claims to be held in custody in violation of the Constitution or laws or treaties of the United States." (quotation omitted)).

137 *See* Neil A. Lewis, *Surprise Terror Plea Leaves Unresolved Issues*, N.Y. TIMES, Apr. 24, 2005, at A30 ("Zacarias Moussaoui's sudden decision this week to plead guilty . . . provided administration prosecutors with an unassailable victory. But it may also leave unresolved many important issues, most notably the roiling debate over whether terrorist suspects can be effectively prosecuted in America's civilian courts, which grant numerous rights to defendants.").

results reached by different trial courts in similar cases. Transmission of information identifying and correcting errors may become distorted within the system, which causes the repeated cycles of appeal and remand that can occur in the context of a single case.[138]

The judiciary's institutional characteristics render it superior to other institutions for certain kinds of decisions. The judiciary is able to address issues more fairly, because it can operate with less interference from the political branches, and it can implement federal policy over a wide number of cases throughout the country. Additionally, it can help solve political commitment problems among interest groups or branches of government due to its high level of insulation from outside political control and influence, thus allowing the judiciary to enforce commercial or political bargains neutrally. The judiciary's virtues, however, also create its problems as an institutional actor in foreign affairs and national security. Its evenhandedness and passivity create problems in effectively gathering and processing information and in coordinating its policies with other national actors. Its procedural fairness and geographic decentralization prevent it from acting swiftly in a unified fashion, and it lacks effective tools for the rapid assimilation of feedback and the correction of errors.

CONCLUSION

Despite the judiciary's comparative institutional weakness in foreign policy, the federal courts should not be wholly removed from review of the detention of American citizens as enemy combatants. The Court has decided *Hamdi* and *Rasul*, essentially overruling *Eisentrager*. While this course will likely prove to be misguided, it is certain that federal courts *will* play a role in making terrorism policy (unless Congress and the President cooperate and swiftly enact a new habeas statute to govern enemy combatant cases, which appears unlikely so far). Nevertheless, these decisions provide broad discretion to lower courts in shaping procedures. Decisions must also be made about the timing of detainees' access to lawyers, whether *Miranda* rights[139] will be invoked, what evidence must be produced, whether witnesses must appear, and what standard of review to apply to the military's decisions. Decisions still must be made about the level of deference, if any, that courts will provide to the executive's interpretation and application of international law, such as the Geneva Conventions. Even

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138 *See* Martin Shapiro, *Toward a Theory of* Stare Decisis, 1 J. LEGAL STUD. 125, 129–30 (1972).

139 Miranda v. Arizona, 384 U.S. 436, 444 (1966) ("[T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.").

if the Court has rejected the "some evidence" test,[140] it still might adopt the deference afforded to executive agency decision making under the arbitrary and capricious standard and *Chevron* deference.[141]

The decisions to come will fall on a spectrum between outright de novo review according to standards similar to those of the criminal justice system and a standard more deferential to the political branches. The analysis here seeks to point out the institutional difficulties that the courts will encounter in attempting to play a de novo role in reviewing national security decisions during the war on terrorism. All too often these decisions are characterized in terms of the policy goal sought, without regard to the second-order question of relative institutional capabilities. Rather than ask itself whether it can balance security against liberty interests—obviously it can choose some point on the policy spectrum—the judiciary ought to ask itself whether the other branches could strike a better balance based on more informed judgment. Given the micro- and macroinstitutional problems with courts, the judiciary may undermine, rather than promote, national security policy in the war on terrorism by overestimating its abilities and refusing to afford deference to the political branches.

140 *See* Hamdi v. Rumsfeld, 542 U.S. 507, 537 (2004) (plurality opinion).

141 Chevron U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 842–43 (1984) (deferring to agency interpretations of congressional statutes where there is no clear meaning and where the interpretation is a reasonable construction of the statute's language).