The Commander in Chief and the Courts

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The Bush administration claims to have sweeping, inherent, and unchecked war powers to conduct its war against terror. These claims are inconsistent with the text of the Constitution, the Framers’ intent, and the practice of the early leaders of the Republic. Judicial decisions in the first few decades after the Constitution’s adoption affirmed the Framers’ narrow view of executive war powers. This article will address the extent of the president’s inherent powers to prosecute a war, whether Congress can regulate and limit the president’s commander-in-chief power, and the role of the courts in deciding whether the president has overstepped his power in conducting warfare.

The Bush administration claims to have sweeping, inherent, and unchecked war powers to conduct its war against terror. In 2002, the Justice Department’s Office of Legal Counsel argued that “Congress could no more regulate the President’s ability to detain and interrogate enemy combatants than it may regulate his ability to direct troop movements on the battlefield” (U.S. Department of Justice 2002b, 35). That position was later withdrawn as “unnecessary” but was never repudiated (U.S. Department of Justice 2004, 2), and the administration essentially reiterated it in the 2005 presidential signing statement stating that the executive branch would interpret the McCain Amendment’s prohibition on cruel and inhumane interrogations of detainees “in a manner consistent with the constitutional authority of the President as Commander in Chief and consistent with the constitutional limitations on judicial power” (Bush 2005). As a senior administration official later explained, the signing statement was intended to reserve the president’s constitutional right to use harsh interrogation methods “in special situations involving national security” despite the congressional ban (Savage 2006).

Similarly, the Bush administration has argued that the “President has the inherent authority to convene military commissions to try and punish captured enemy combatants even in the absence of statutory authority” (U.S. Department of Justice 2006b, 8). While the administration did not claim that Congress had no power to regulate executive
use of military commissions, it claimed that the president’s inherent power “strongly counsel[ed]” against reading congressional statutes “to restrict the Commander in Chief’s ability in wartime to hold enemy fighters accountable for violating the law of war” (ibid., 8-9).

The administration has also claimed that the president’s inherent constitutional authority as commander in chief and the nation’s sole organ of foreign affairs allows him to authorize warrantless wiretapping, irrespective of the Foreign Intelligence Surveillance Act (FISA). If FISA is read to prohibit the National Security Agency’s warrantless wiretapping program (which it surely does), the administration argues that it is unconstitutional (U.S. Department of Justice 2006a, 8). High-level administration advisors similarly claim that the president has the inherent authority to violate or suspend treaty provisions in wartime (U.S. Department of Justice 2002a, 16). The clearest and most sweeping statement of the president’s authority came from the Department of Defense’s Working Group Report on Detainee Interrogation in 2003 that “in wartime it is for the President alone to decide what methods to use to best prevail against the enemy” (U.S. Department of Defense 2003, 24).

The administration has also articulated a sweeping statutory theory to support its claim of inherent authority. Boiled down to its essentials, this theory reads a declaration of war or other congressional authorization to use force as providing legislative approval for virtually all of the inherent powers that the president claims he has in the absence of such authorization. Thus the president has claimed that the 2001 Authorization of Use of Military Force Act (AUMF), which authorizes the president to use “all necessary and appropriate force” against the people, organizations, or nations involved in the September 11 attacks, provides congressional authorization to detain American citizens or other individuals indefinitely as enemy combatants, to engage in warrantless wiretapping, and to establish military commissions to try enemy combatants. In short, according to the administration, any authorization of force triggers and provides statutory authorization for the inherent powers of the president as commander in chief to take any actions he believes necessary to fight the enemy against whom force is authorized.

Finally, the administration claims that just as Congress cannot interfere in determining what methods and tactics the president can use in fighting its war against terror, neither can the courts. In a series of cases, the Justice Department has claimed that the courts have no jurisdiction to even hear the claims of alien enemy combatants detained in Guantanamo or elsewhere, that they can only provide the most limited facial review of citizens deemed enemy combatants and detained in the United States, that they cannot review challenges to extraordinary renditions or the National Security Agency spying program, and that any review of the military commissions established by the president be extremely deferential.

This article will evaluate the administration’s claims in light of the constitutional design and theory adopted by its framers and the early leaders of the Republic. It will particularly focus on the role of the courts in matters of war and national security. The questions I will address are: (1) to what extent can Congress regulate the president’s prosecution of a duly authorized war, (2) what are the president’s inherent powers in
conducting such warfare in the absence of congressional regulation, and (3) what is the role of the courts in deciding whether the president has overstepped his power in conducting such a war.

**Framers and War Powers**

The framers of the Constitution clearly rejected any claim that the president had inherent powers over the initiation and prosecution of wars. The Framers rejected the British model of war powers, which, as articulated by Sir William Blackstone, assigned to the king the "sole prerogative of making war and peace" and the powers "to make treaties, leagues, and alliances with foreign states and princes," to issue letters of marque and reprisal authorizing private persons to engage in warfare, and, as the nation’s first general, to raise and regulate the army and navy (Fisher 2006, 1201-02; Keynes 1982, 22-25). None of these war powers were given to the president. Rather, Congress was given the power to declare war, to issue letters of marque and reprisal, to raise armies and navies, to make rules concerning captures on land and water, and to make rules for the regulation of the army and navy. The president also cannot enter into treaties alone, but requires the advice and consent of two thirds of the Senate.

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The Framers made it clear that they rejected the British model of war powers. James Wilson argued that the “British model . . . was inapplicable to the situation of this Country,” a view concurred in by other Framers (Fisher 2006, 1202). Alexander Hamilton and James Iredell were even more explicit in distinguishing the powers of the British monarch and the American president (Adler 2006, 529). As Hamilton wrote in *Federalist no. 69*,

> The President is to be commander in chief of the army and navy of the United States. In this respect his authority would be nominally the same with that of the King of Britain, but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and Admiral of the Confederacy, while that of the British King extends to the declaring of war and raising and regulating of fleets and armies—all which, by the Constitution under consideration, would appertain to the legislature. (Hamilton, Madison, and Jay 1937, 448; emphasis in original, cited in Adler 2006, 529)

Or as James Wilson stated, “[H]e did not consider the Prerogatives of the British Monarch as a proper guide in defining the executive powers. Some of these prerogatives were of a legislative nature, among others, that of war and peace etc. The only powers he conceived as strictly executive were those of executing the laws, and appointing officers, not (appertaining to and) appointed by the legislation” (Farrand 1996, I: 65-66). The powers of the president as commander in chief were therefore viewed by the Framers as limited and certainly subject to regulation by Congress pursuant to the broad powers Congress was given to “regulate” the army (Adler 2006, 527-29; Fisher 2006, 1203-04).

Nor was the so-called Vesting Clause of Article II, which provides that the executive power shall be vested in a president of the United States of America, viewed by the
Framers as a source of inherent presidential war powers. As Professors Curtis Bradley and Martin Flaherty demonstrate in their lengthy article on the issue, the debates at the Constitutional Convention, the *Federalist Papers*, and the state ratification debates all proceeded on the assumption that the president was granted only the powers specified in Article II and that no inherent power inhered in the general nature of executive power (Bradley and Flaherty 2004). The delegates at the Constitutional Convention desired, in James Madison's words, to “fix the extent of the Executive authority,” and believed that the president’s “powers should be confined and defined,” a position at odds with the concept of amorphous inherent executive authority stemming from the vesting clause (ibid., 594-95). It would certainly have been surprising had a broad, amorphous, inherent executive power emerged from a convention extremely sensitive about limiting the president's power and distinguishing his powers from those of the British monarchy, without anyone at the convention or ratifying debates clearly articulating that Article II’s vesting clause did provide such power.

Finally, the Framers did not incorporate John Locke’s notion of the royal prerogative to act in time of emergency or crisis into the Constitution. The early leaders of the Republic accepted Locke’s thesis that, at times, the executive had the prerogative to take emergency action “without the prescription of the law and sometimes even against it. An emergency permitted the disregard of even the ‘direct letter of the law’ ” (Locke 1960, 159-60, 392-93, 395). But for the founders of the American Republic, this prerogative power was not part of the constitutional authority provided to the president. Rather, if the president or any other military official believed he needed to react to an emergency situation, he had to act unconstitutionally and seek ratification or indemnification from Congress or accept punishment for his actions (Lobel 1989, 1392-97; Schlesinger 1973, 23-25).

For example, President Thomas Jefferson adhered to the position that the Constitution carefully limited executive emergency power and therefore openly acknowledged that certain emergency actions were unlawful, requiring public ratification by Congress (Lobel 1989, 1392). In 1806, during a congressional recess, Jefferson provided the funds for munitions needed to defend American ships, even though such action exceeded his authority under the appropriations laws (Wilmerding 1952, 323). He then made a full disclosure to Congress, admitting that he had acted without a “previous and special sanction by law,” and requested congressional approval (Richardson 1897, 428; Sofaer 1976, 22). After he left the presidency, Jefferson was asked to comment on whether there are “not periods when, in free governments, it is necessary for officers in responsible stations to exercise an authority beyond the law” (Wilmerding 1952, 328). Jefferson responded:

> A strict observance of the written laws is doubtless one of the high duties of a good citizen, but it is not the highest. The laws of necessity, of self-preservation, of saving our country when in danger, are of higher obligation. . . . The officer who is called to act on this superior ground, does indeed risk himself on the justice of the controlling powers of the Constitution, and his station makes it his duty to incur that risk. . . . The line of discrimination between cases may be difficult; but the good officer is bound to draw it at his own peril, and throw himself on the justice of his country and the rectitude of his motives. (Jefferson 1810, 148-49)
Other early leaders took similar positions (Wilmerding 1952). For example, during the debates over the Burr conspiracy, all agreed that “necessity could require a departure from regular processes, but that the constitution disallowed a deliberate substitution of another legal system” (Dennison 1974, 58). Representative Alexander White of Virginia explained to the First Congress that an executive can take actions which are admittedly illegal, and if they benefit the country in time of dire necessity, request indemnification by the legislature. According to White, this procedure “corresponds with the practice under every limited government” (Wilmerding 1952, 323).

General Andrew Jackson’s actions in the aftermath of the battle of New Orleans in 1815 further illustrate the Jeffersonian theory of emergency power. When Jackson’s decisions as commander of the army in detaining prisoners he believed dangerous were challenged in a court action, Jackson’s main justification relied on Jefferson’s view that necessity “may in some cases . . . justify a departure from the constitution” (Sofaer 1981, 245-46). President Madison, relieved that Jackson based his defense on necessity, observed that, even though a suspension of liberties “may be justified by the law of necessity,” the commander “cannot resort to the established law of the land, for the means of vindication” (ibid., 249). The federal court held Jackson’s actions to be unlawful, and it fined him $1,000. Almost thirty years later, Congress enacted legislation to repay Jackson the principal and interest on the fine (ibid., 248-51).

Early Court Decisions

Judicial decisions in the first few decades after the Constitution’s adoption affirmed the Framers’ narrow view of executive war powers. These early decisions reflect three broad principles. First, the judiciary upheld congressional power to regulate not only the decision to go to war but the scope and methods by which warfare would be conducted. Second, the courts took a very narrow view of the executive’s inherent powers in time of war in the absence of congressional authorization. Third, the courts were willing to scrutinize executive claims of military necessity, even on the battlefield, to determine whether executive officials had acted lawfully.

Congress’s Power to Regulate the President’s Power to Conduct Warfare

In a series of early cases involving the quasia war with France of the late 1790s, the Supreme Court clearly indicated that Congress could limit the president’s power to conduct hostilities. In Little v. Barreme, a unanimous Supreme Court upheld the imposition of damages on a naval commander who had acted pursuant to a presidential order to seize a ship that he believed was illegally trading with France.1 Chief Justice John Marshall’s opinion for the Court recognized that the president might have inherent power as commander in chief to seize such vessels illegally trading with the enemy in time of war. Yet Congress had at least implicitly prohibited such military action when it

provided that the president was authorized to seize ships traveling to French ports and did not provide similar authority for ships bound from a French port, as was the ship involved in this case. Marshall recognized that President John Adams’s construction of that statute—authorizing naval commanders to seize ships both going to and coming from French ports—was undoubtedly preferable from a military standpoint and would provide more effective enforcement of the embargo against France. Nonetheless, the Court enforced the law’s limitation of the president’s power to conduct military operations and imposed individual liability on the naval commander for following President Adams’s illegal instructions.

The court’s opinion in *Little v. Barreme* enforcing a legislative circumscription of the president’s commander-in-chief powers in wartime is supported by several other cases arising out of the undeclared war with France. In *Bas v. Tingy*, the Court unanimously held that France was an enemy for purposes of a law that permitted the salvage of enemy ships, despite the absence of a declaration of war. Three of the four justices who wrote seriatim opinions agreed that in the words of Justice Samuel Chase, “Congress is empowered to declare a general war, or Congress may wage a limited war, limited in place, in objects and in time.”² As Justice Bushrod Washington stated, a limited, undeclared war is known as an imperfect war, and “those who are authorized to commit hostilities, act under special authority, and can go no further than to the extent of their commission.”³ Justice William Patterson also agreed that an undeclared or imperfect war was nonetheless war, in which “as far as Congress tolerated and authorized the war on our part, so far may we proceed in hostile actions.”⁴

The next year, Justice John Marshall reiterated the basic principle articulated by Justices Chase, Washington, and Patterson in *Talbot v. Seeman*.⁵ Marshall wrote that “the whole powers of war being, by the constitution of the United States, vested in Congress, the acts of that body can alone be resorted to as our guides” in determining whether Captain Silas Talbot had a lawful right to seize an armed vessel commanded and manned by Frenchmen.⁶ Marshall, writing for a unanimous Court, recognized, as had Patterson, Chase, and Washington in *Bas*, that Congress may authorize either a general war or a limited partial war.

Similarly, in the 1806 case of *United States v. Smith*, Justice Patterson, a participant in the Constitutional Convention, addressed Congress’s power to regulate what today would be considered covert action. In that case, two defendants indicted for attempting a military expedition against Spanish America claimed that their acts had been authorized by President Jefferson and his cabinet and subpoenaed members of the cabinet as part of their defense. Patterson, presiding at the trial with District Judge Matthias Tallmadge, held that the testimony of the cabinet members was irrelevant because the president did not have the constitutional authority to violate the statute forbidding such private military expeditions:

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². *Bas v. Tingy*, 4 U.S. (Dallas) 37, 43 (1800) (emphasis added).
³. Ibid., 40 (emphasis added).
⁴. Ibid., 45.
⁶. Ibid., 28.
“The President of the United States cannot control the statute, nor dispense with its execution, and still less can he authorize a person to do what the law forbids.”

These early cases contradict the Bush administration’s claim of inherent power over the conduct of warfare that Congress cannot interfere with. If Congress can proscribe the capture of vessels believed to be trading with the enemy in time of war, surely Congress can also regulate the detention and interrogation of enemy combatants in time of war. That Congress can proscribe certain military tactics in enforcing a trade embargo in time of war certainly means that it has the power to preclude certain methods of interrogating prisoners. As Marshall suggests, the commander-in-chief power would normally extend to capturing such vessels. Indeed, the “battlefield” of the 1790s war with France was the high seas. Nonetheless, Congress could limit the commander-in-chief power, even if the president believed such limitations interfered with his prosecution of the war.

More generally, the justices viewed Congress as having the power to authorize limited, undeclared war in which the president’s normal power as commander in chief would be limited. In such limited wars, the commander in chief’s power would extend no further than Congress had authorized. Given that generally accepted principle, there seems little constitutional question that Congress can limit the weapons, the interrogation tactics, the detention procedures, or the trial procedures for alleged war criminals in the current hostilities against al Qaeda.

Presidential Power Flowing from a Declaration of War

The early Supreme Court decisions also contradict the administration’s assertions that the president has the inherent power, pursuant to either a declaration of war or the more limited statutory authorization, to take all measures necessary to prosecute the war successfully. Nor did the courts defer to the president’s judgment of what measures are necessary. In Brown v. United States, the government argued that enemy property located within the United States could be seized and condemned by the executive pursuant to a declaration of war. Chief Justice Marshall conceded that a sovereign had a right both to detain enemy aliens and confiscate the property of the enemy—wherever found—in time of war. Yet he nonetheless held that Congress, by declaring war, had not authorized the president to seize enemy property in the United States. Marshall held that the congressional power “to make rules concerning captures on land and water” was an “independent substantive power, not included in the declaration of war.” Therefore, the declaration did not authorize the president to seize enemy property in the United States. Indeed, Marshall notes that Congress’s independent authorization for the detention of enemy aliens, and for “the safe keeping and

accommodation of prisoners of war,” “authorizations that were separate from its declaration of war, affords a strong implication that [the president] did not possess those powers by virtue of the declaration of war.”

Marshall rejected the government’s argument that a declaration of war should give the president the power to execute all of the laws of war, and that therefore the government could take all actions that the laws of war allow. Because the laws of war only permitted the seizure of enemy property but did not require it, Marshall held that it was a question of policy “proper for the consideration of the legislature, not the executive or judiciary.”

Justice Joseph Story, in dissent, would have held that “by the act declaring war, the executive may authorize all captures which, by the modern law of nations, are permitted and approved.” Interestingly, the majority, the dissent, and even the government suggested that the president did not have the commander-in-chief power to seize property which international law did not permit to be confiscated.

The Courts and Military Necessity

The early Supreme Court had no difficulty in reviewing executive claims that unilateral action in wartime was required by military necessity. The Court generally followed two strategies. Where the law was violated, the Court held that even perceived military necessity did not render the executive action constitutional. Rather, the official was required to pay damages—as in the Little v. Barreme case. As the Little case demonstrated, Congress could decide later to indemnify the officer if it felt his actions were really necessary (Wilmerding 1952, 324 n.6). Similarly, in the Apollon case, the Court found an executive official liable for damages for the seizure of a ship and cargo, even though the official had been motivated by perceived necessity. Justice Story wrote for a unanimous Court:

It may be fit and proper for the government, in the exercise of the high discretion confided to the executive, for great public purposes, to act on a sudden emergency, or to prevent an irreparable mischief, by summary measures, which are not found in the text of the laws. Such measures are properly matters of state, and if the responsibility is taken, under justifiable circumstances, the legislature will doubtless apply a proper indemnity. But this Court can only look to the questions, whether the laws have been violated; and if they were, justice demands, that the injured party should receive a suitable redress.

Alternatively, the courts reviewed the lawfulness of executive actions by adjudicating whether the claimed military necessity did in fact exist. In Mitchell v. Harmony, for instance, the Supreme Court upheld a damage award against a commander for the improper seizure of property during the Mexican War, ruling that the question of

9. Ibid. (emphasis added).
10. Ibid., 129.
11. Ibid., 145.
12. Ibid., 128-29.
whether an emergency had been present was for the jury to determine. While the Mitchell Court did permit a very narrow area of lawful executive emergency power to seize property during wartime, its main emphasis was on limiting that power by defining emergency narrowly. The standard utilized by the Court was that the danger must be “immediate and impending,” and “such as will not admit of delay.” That the officer honestly believed such emergency to exist and took the property to promote the public service was deemed insufficient if there were no reasonable grounds for the officer’s belief that the peril was “immediate and menacing.”

The early Supreme Court was not reluctant to review executive claims of emergency power during wartime. In none of these cases did the Court decide either that the dispute was nonjusticiable or that broad, inherent, executive constitutional powers over war and foreign affairs authorized the acts. As Professor Christopher May has written in discussing this early period, “Where the executive had proceeded on its own, the judiciary displayed a remarkable willingness to analyze the relationship between its conduct and the war emergency” (May 1989, 18).

The Judiciary and Military Necessity in the Current Conflict with Al Qaeda

An underlying motif of the Supreme Court’s recent decisions involving the administration’s war on terror has been the tension between judicial review and the executive’s articulation of claimed military necessity. As we have seen, the early Supreme Court generally did not defer to such claims. The modern judiciary’s record has been decidedly more mixed, most infamously in Korematsu v. United States, where the Court deferred to the judgment of the military authorities that the exclusion of Japanese Americans from the West Coast was a necessary war measure. Moreover, in some cases, such as Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp., the Court has employed broad language suggesting that executive foreign-policy decisions are political, not judicial decisions. However, in the recent enemy combatant cases—Hamdan v. Rumsfeld, Rasul v. Bush, and Hamdi v. Rumsfeld—that Court has refused to defer to claims of broad, unreviewable executive decisions based on claimed military necessity and inherent executive power.

The Court’s jurisprudence in the trilogy of recent enemy combatant cases rests critically on a distinction between military necessity on the actual battlefield in the midst

15. Ibid., 134-35.
16. In Martin v. Mott, 25 U.S. (12 Wheat.) 19 (1827), the Supreme Court did refuse to decide whether an emergency existed justifying the president’s calling the militia into actual service, thus illustrating that the Court was, at times, reluctant to adjudicate executive use of emergency power. In Martin, however, the issue was not the executive’s independent power: Congress had clearly authorized the president’s actions. Instead, the issue was whether a soldier could refuse an executive order because he did not believe an emergency existed.
of combat and claimed necessity to detain or try a detainee several years after their removal from the battlefield. In each of these cases, the Court either explicitly or implicitly found that a generalized claim of military necessity could not negate the Court’s obligation to review the detainee’s claims.

Most recently, in *Hamdan*, the Court struck down the administration’s attempt to unilaterally establish military commissions to try alleged terrorists. Justice John Paul Stevens’s opinion, much of which represented the Court majority and part of which was the opinion of the plurality of four justices, rested heavily on the Court’s rejection of the argument that any military or practical necessity required these commissions.

Justice Stevens and the plurality framed the basic question in the case as “whether the preconditions designed to ensure that a military necessity exists to justify the use of this extraordinary tribunal have been satisfied here.” For the plurality, military commissions to try enemies who violate the laws of war—the type the Bush administration sought to implement—were premised on the “need to dispense swift justice, often in the form of execution, to illegal belligerents captured on the battlefield.” The administration, however, had failed “to satisfy the most basic precondition” for its establishment of military commissions—“military necessity.” Justice Stevens noted that Hamdan’s tribunal was not “appointed by a commander in the field of battle, but by a retired major general stationed away from any active hostilities, . . . [and] he was not being tried for any act committed in the theatre of war.”

Justice Stevens, writing for the Court, returned to the theme of military necessity when discussing the statutory requirement that procedures for military commissions must be the same as those used to try American soldiers in courts-martial (which they clearly were not) unless the administration could demonstrate that the court-martial procedures would not be “practicable.” The Court emphasized the military necessity that comes from battlefield exigencies, stating that the statute “did not transform the military commission from a tribunal of true exigency into a more convenient adjudicatory tool.” The requirement that any deviation be necessitated by a showing of impracticability of court-martial procedures “strikes a careful balance between uniform procedure and the need to accommodate exigencies that may sometimes arise in the theatre of war.” In short, the justices both reviewed and decisively rejected the claim of military necessity upon which the lawfulness of the military commissions rested.

Similarly, Justice Anthony Kennedy, in his concurrence, emphasized the Court’s finding that no exigency, practical need, or military necessity required the deviation from the normal procedures followed by courts-martial. For Justice Kennedy, as with the other justices in the majority, the term “practicable” cannot be construed to permit deviations

20. Ibid., 2777.
21. Ibid., 2782.
22. Ibid., 2785.
23. Ibid.
24. Ibid., 2793.
based on mere convenience or expedience.” 25 Hamdan had been detained for four years and the government had demonstrated no exigency or evident practical need for departure from court-martial procedures. 26

In contrast, the theme that runs throughout Justice Clarence Thomas’s dissent is that the Court’s decision constituted an unprecedented departure from the traditionally limited role of the courts with respect to warfare. 27 For the dissenters, the Court’s determination that Hamdan’s trial before a military commission that deviated from court-martial procedures and was not warranted by practical need or military necessity constituted an impermissible intrusion into the executive’s power to take appropriate military measures pursuant to the congressional authorization of the use of force against those who aided the terrorist attacks that occurred on September 11, 2001. The dissenters believed that “the plurality has appointed itself the ultimate arbiter of what is quintessentially a policy and military judgment.” 28 For the dissenters, the president has the power to appoint military commissions in exigent and nonexigent circumstances, and the Court should not determine whether such actions are necessary. Nor should the Court decide whether regular court-martial procedures are “practicable,” for “that determination is precisely the kind for which the ‘judiciary has neither the aptitude, facilities nor responsibility.’ ” 29 For Thomas, that decision is reserved to the president by Congress’s authorization “to use all necessary and appropriate force against our enemies.” 29 Or, as Justice Antonin Scalia’s dissent argues, an order enjoining ongoing military commission proceedings “brings the Judicial Branch into direct conflict with the Executive in an area where the Executive’s competence is maximal and ours is virtually nonexistent.” 30

There seems absolutely no reason why the judiciary’s competence to evaluate the legality of a military commission is “virtually nonexistent.” One would think that the federal judiciary would have a great deal of expertise in analyzing whether deviations from basic principles of judicial procedure are necessary. For example, as Justice Kennedy asks, why should it be necessary to allow the secretary of defense or his political designee to make dispositive decisions during the middle of the trial or appoint the presiding officer at trial—powers which raise concerns about the commission’s neutrality? The judiciary is certainly capable of evaluating whether a fair trial is compromised when the government can introduce into evidence statements obtained through the use of coercive interrogation methods prohibited by the Geneva Conventions and U.S. law. Nor is a court incompetent to evaluate the competing claims of fair process and necessity. Moreover, questions such as the scope and interpretation of Common Article 3 of the Geneva Conventions, the historical practice of military commissions, or whether conspiracy is a war crime all seem to be quintessential legal issues of the type courts generally grapple with. Decisions made in the heat of battle may require speed, secrecy, discretionary

25. Ibid., 2801 (Kennedy, J., concurring in part).
26. Ibid., 2805, 2807-08.
27. Ibid., 2826 (Thomas, J., dissenting).
28. Ibid., 2838.
29. Ibid., 2843 (citing Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp., 333 U.S. 103 [1948]).
30. Ibid., 2822 (Scalia, J., dissenting) (emphasis added).
judgment, and immediate access to information that military commanders, and not courts, are qualified to make. But none of those attributes characterize the determination of whether military trials undertaken four years after the capture of a prisoner utilize fair, lawful, or necessary procedures. Neither Scalia nor Thomas argues that the administration’s military commissions were militarily necessary or that the regular court-martial procedures were impractical, but simply claim that that decision was not for the Court to make.

Similarly, in *Hamdi v. Rumsfeld*, the Court also distinguished between judicial review of detentions on the battlefield and review over indefinite detentions of citizens once they had been removed from the theater of war. The plurality opinion rejected the government’s argument that any significant judicial review of a citizen detained as an enemy combatant would have a dire impact on the central functions of warmaking:

> While we accord the greatest respect and consideration to the judgments of military authorities in matters relating to the actual prosecution of a war, and recognize that the scope of that discretion necessarily is wide, it does not infringe on the core role of the military for the courts to exercise their own time-honored and constitutionally mandated roles of reviewing and resolving claims like those presented here.

Of course, the phrase “actual prosecution of the war” is somewhat vague—and the president argues that virtually everything he does to fight terrorism—electronic surveillance, indefinite detention of prisoners at Guantanamo and elsewhere, or extraordinary rendition—are matters relating to the actual prosecution of the war. But in the context of the opinion, it is clear that the plurality distinguishes military actions taken on or near the battlefield and military decisions about individuals detained far from the actual fighting. The plurality distinguished between “initial captures on the battlefield,” which the parties agreed need not receive due process, and the process required “when the determination is made to continue to hold those who have been seized.” In the latter circumstances, the Court rejected the government’s assertion that the Court’s role must be “heavily circumscribed.” The *Hamdi* plurality made clear that “what are the allowable limits of military discretion, and whether they have been overstepped in a particular case, are judicial questions.” In ringing words it proclaimed that “we have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation’s citizens.”

The Court’s decreasing deference to executive wartime determinations made away from the battlefield can also be seen in the *Hamdi*’s plurality emphasis on the narrow “context” of that case: “A United States citizen captured in a foreign combat zone.” The plurality’s emphasis on Hamdi’s battlefield capture came in response to the four dissent-
ers who argued that the president has no power at all—either under the Non-Detention Act or the Constitution—to detain an American citizen as an enemy combatant and suggests that at least some justices in the plurality might have agreed with the dissenters in the case of Jose Padilla, an American citizen who was not captured on a foreign battlefield but rather detained at the Chicago airport. The administration claims that the “battlefield” in its global war against terrorism is worldwide, including the United States, but the Hamdi plurality defined the battlefield in that case as the armed conflict taking place in Afghanistan. While the Fourth Circuit Court of Appeals later concluded that Padilla could be detained as an enemy combatant even though he was detained in the United States because he was at one time “armed and present in a combat zone during armed conflict,” the Second Circuit had reached the contrary conclusion prior to the Hamdi decision.\(^\text{38}\) Apparently the government was sufficiently concerned that the Supreme Court would reverse the Fourth Circuit that they avoided Supreme Court review of Padilla’s case by releasing him from detention as an enemy combatant and charging him with a crime—one having nothing to do with the enemy combatant charge—prior to the Supreme Court’s taking up Padilla’s appeal from the Fourth Circuit ruling.

Finally, in Rasul v. Bush, Justice Kennedy’s concurrence again articulates the theme of the absence of direct military necessity which underlies much of the opinions in both Hamdi and Hamdan. Kennedy argued that the Court’s assertion of habeas jurisdiction over the Guantanamo detainees in that case was warranted in part because the government’s indefinite detention without trial or other legal proceedings of the detainees presented a “weaker case of military necessity. . . . Perhaps, where detainees are taken from a zone of hostilities, detention without proceedings or trial would be justified by military necessity for a matter of weeks; but as the period of detention stretches from months to years, the case for continued detention to meet military exigencies becomes weaker.”\(^\text{39}\) Similar, but unarticulated, reasoning undoubtedly motivated the majority to reject the government’s claim that the assertion of habeas jurisdiction would impermissibly interfere with the president’s ability to wage the war against terrorism.

**War and Judicial Competence**

Scholars such as John Yoo or Richard Posner argue for “a light judicial hand in national security matters,” or for the judiciary to abstain altogether in wartime challenges to executive policies (Posner 2006, 35-37; Yoo 1996). Yoo views the Hamdi and Rasul decisions “as an unprecedented formal and functional intrusion by the federal courts into the executive’s traditional powers” that will take the courts “far beyond their normal areas of expertise” (Yoo 2006, 574-75).

These scholars emphasize the judiciary’s institutional deficiencies in addressing war or national security matters. Judges are generalists, unlike congressional committees or executive bureaucracies that focus on national security issues. The judiciary, unlike the

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Defense Department or the Senate Foreign Relations Committee, has no machinery for the systematic study of an issue. And Yoo argues that the federal judiciary is a decentralized, slow, deliberate body which erects substantial doctrinal and resource barriers on parties seeking access and whose ability to acquire and process information is more limited than the political branches (Yoo 2006, 592-600).

These critiques of judicial competence in war, national security, or foreign affairs matters ignore central and critical functions of the judiciary that are important both in wartime and times of peace. The judiciary is the one branch uniquely situated to police the legal limits imposed on executive discretion over military or national security matters. While the executive clearly has greater discretion in times of war, its power is not unbounded and still is limited by law. Determining what those legal limits are and how they apply in particular cases are often issues that involve the judiciary’s expertise and experience. Issues such as whether the president has the power to detain American citizens as enemy combatants, can hold detainees indefinitely without according them fair hearings, can try detainees by means of military commissions that permit evidence obtained by torture or other coercive means to be admitted, or whether detainees can be subjected to torture or other cruel and inhumane methods of interrogation are not matters beyond the competence of judges.

Moreover, war as well as peace requires structural checks on executive overreaching, perhaps even more so because of the greater dangers of executive aggrandizement of power during wartime. Despite the arguments of those such as Yoo and Posner that either the Congress or executive branch itself can provide adequate checks, this safeguard certainly has not proven adequate during the current conflict against terrorism. Congress has been quiescent, providing virtually no check or oversight of the president’s treatment, detention, or proposed military trials of enemy combatants until the Supreme Court entered the fray. Nor has Congress challenged the president’s policy of extraordinary rendition, in which the executive sends suspected terrorists to countries where they will be tortured and detained indefinitely without judicial process. Indeed, even after the Supreme Court forced Congress to grapple with the defects of the administration’s proposed military commissions, Congress enacted a statute that many senators believed was unconstitutional. The chairman of the Senate Judiciary Committee voted for the statute and justified his vote by stating that “the court will clean it up” (Lithwick and Schragger 2006; Los Angeles Times 2006).

Moreover, institutional, legal, and political checks within the executive branch have been even less effective. The Office of Legal Counsel, an institutional check within the Justice Department which is supposed to provide independent legal advice, produced secret memos written by handpicked political appointees providing advice that conformed to the bottom line their superiors desired (Pillard 2006, 1297). When the Bybee Torture Memo, which was never intended to be publicly disclosed, was leaked to the press, the resulting firestorm of criticism caused it to be withdrawn.

This problem is not limited to this administration; for decades the executive branch has sought to keep the legal advising process confidential (Pillard 2006, 1302). Moreover, the administration’s discussions of legal strategy after September 11 largely excluded the military lawyers and foreign-policy officials who presumably had the expertise that Yoo
or Posner believe places the executive at a comparative advantage over judges in national security matters (Golden 2004, § 1, 1; Mayer 2006). For example, when some of the military lawyers protested the administration’s detainee policies, they were generally ignored by the small coterie of high-level officials who were driving the policies (Mayer 2006). The public deliberation and rational argumentation of differing opinions that characterize judicial proceedings are an institutional strength of the judiciary that has been sorely lacking in the administration’s determination of legal strategy in fighting terrorism. While troop movements, battle plans, and military strategies ought to be kept secret and out of the Court’s purview, legal issues and strategies, such as the definition of torture, the constitutional authority of the president to violate or suspend treaties or authorize torture, and the applicability of the Geneva Conventions in the current fight against terrorism, are matters best resolved in the course of open dialogue and debate that the judiciary, not the executive, is most institutionally attuned to.

Conclusion

The Supreme Court’s assertion of judicial power to review the president’s enemy combatant policies is consistent with the constitutional design to limit and provide checks on executive power, both in wartime and in peace. It is also consistent with the early judiciary’s assertiveness in deciding cases challenging executive wartime decisions. But the Court’s decisions nonetheless surprised many observers, perhaps because of the all too often tendency of the modern judiciary to defer to executive wartime decisions.

Commentators have offered various theories to explain the Court’s muscular approach to the enemy combatant cases. Perhaps the Court has learned from the lessons of the past; maybe the Court’s prior wartime precedents restraining executive power such as Milligan or Youngstown Sheet & Tube played a role in the Court’s reaching the conclusions it did. Or it may be that these decisions are the result of the very slowness of the judicial process that Yoo describes—namely that the delay of three to five years between September 11 and these Court decisions meant that the Court could decide these cases when the sense of crisis had already somewhat passed. It could also be that these decisions are the product of the more general assertiveness of the late-twentieth-century judiciary. Such explanations have been proffered by various commentators (Waxman 2005, 1).

But perhaps these Court decisions are a reaction to the executive’s claim that, in this new kind of war against terror, no law applies to the treatment of enemy combatants. The administration claims that we are at war and that neither the Constitution nor the normal human rights law applicable to peace time governs the treatment of enemy combatants. But at the same time, the administration also argues that the normal laws of war—the Geneva Conventions, the rules governing prisoners of war—do not apply because these prisoners are unlawful enemy combatants and the normal rules of war do not apply to our fight against al Qaeda. According to the administration’s assertions, no law governs and whatever treatment is accorded to these prisoners is purely a matter of administration discretion. These prisoners were in what amounted to a legal black hole.
The Court pushed back against the executive’s argument that these prisoners could be held totally outside of the rule of law and that there could be no review, or only extremely deferential reviews, of their detention. The administration’s argument that this was a new kind of war against a nontraditional enemy ironically suggests that more robust review of the administration’s detention policies is required. This new kind of war is likely to drag on for many years, decades, or generations. In this conflict, the traditional boundary lines separating war and peace, civilian and combatant, battlefield and home front have been blurred, perhaps beyond recognition, leading to both a higher chance of military error in deciding who to detain and the possibility of lifetime detention for innocent people erroneously detained. In these circumstances, the need for judicial review is greater than in past wars.

A guiding principle of the U.S. Constitution is that the government is one of limited powers. President Bush claimed virtually unlimited, unchecked power to detain and try people the government believed to be enemy combatants. It fell to the Court to tell the president that he was wrong.

References


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