

### 3. Enemy Combatants and the Problem of Judicial Competence

*John Yoo*

FROM THE INITIAL RETURNS, one might believe that the 2003–2004 October term of the Supreme Court dealt the Bush administration a defeat in the war on terrorism. *Rasul v. Bush* held that the federal courts—for the first time—will review the grounds for detaining alien enemy combatants held outside the United States.<sup>1</sup> In *Hamdi v. Rumsfeld*, the justices required that American citizens detained in the war have access to a lawyer and a fair hearing before a neutral judge.<sup>2</sup>

While the Court has unwisely injected itself into military matters, closer examination reveals that it has affirmed the administration's fundamental legal approach to the war on terrorism and left it with sufficient flexibility to effectively prevail in the future. Despite the pleas of legal and media elites, the Justices did not turn the clock back to September 10, 2001. Rather, the Court agreed that the United States is at war against the al Qaeda terrorist network and the Taliban militia that supports it. It agreed that Congress has authorized that war. The justices implicitly recognized that the United States may

1. *Rasul v. Bush*, 124 S. Ct. 2686 (2004).

2. *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004).

use all 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. The days when terrorism was merely considered a law enforcement problem and our only forces were limited to the FBI, federal prosecutors, and the criminal justice system will not be returning.

Nonetheless, the Court also emphasized the importance of judicial review in assessing the cases of individual detainees captured in the war on terrorism. The Supreme Court made clear that it would no longer consider military decisions in wartime to be outside the competence of the federal courts. Instead, the judiciary would review the grounds for the detention of enemy combatants. Expansion of judicial review into military decisions represents an intrusion of the federal courts that is unprecedented on both formal and functional grounds. At the simplest, formal level, this expansion required the Court to effectively overrule a precedent decided at the end of World War II that was exactly on point.<sup>3</sup> At a broader, functional level, it will call on the judiciary to make factual and legal judgments in the midst of war, pressing the courts far beyond their normal areas of expertise and risking conflict with the other branches in the management of wartime measures.

This chapter 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 Supreme Court's cases in *Hamdi* and *Rasul* accepted the judgment of the political branches on this important point; the government's authority to detain enemy combatants without charge followed. Part III discusses the Court's decision to require a certain level of due process for enemy combatants, both citizens and aliens, detained both within and outside the United States. Part IV questions whether the comparative institutional competencies of the judiciary make it a good choice to advance and to carry out national security and foreign policy.

3. *Johnson v. Eisentrager*, 339 U.S. 763 (1950).

## I.

After the September 11 terrorist attacks, the United States went to war against the al Qaeda terrorist organization. On that day, al Qaeda operatives hijacked four commercial airliners and used them as guided missiles against the World Trade Towers in New York City and the Pentagon in the nation's capital. Resisting passengers brought down in Pennsylvania a fourth plane that appears to have been headed toward either the Capitol or the White House. The attacks caused about 3,000 deaths, disrupted air traffic and communications within the United States, and caused the economy billions of dollars in losses. Both the president and Congress agreed that the attacks marked the beginning of an armed conflict between the United States and the al Qaeda terrorist network.<sup>4</sup> Indeed, al Qaeda's September 11 attacks amounted to a classic decapitation strike designed to eliminate the political, military, and financial leadership of the country.

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 since the 1993 bombing of the World Trade Center, September 11 made salient the unconventional nature of both the war and the enemy. Al Qaeda is not a nation-state, nor is it an alter-ego supported by a nation state, which may distinguish it from the groups in the Vietnam War. As a nonstate actor, al Qaeda does not have a territory or population, nor does it seek to defend or acquire any specific territory. In this respect, it is unlike an indigenous rebel group that is fighting to replace an existing regime through an intrastate civil war.

Al Qaeda's operations are also unconventional and, as strategic

4. See President's Military Order "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," 66 *Fed. Reg.* § 1(a), 57,833 (Nov. 13, 2001); *Authorization for Use of Military Force*, Pub. L. 107-40, 115 Stat. 224 (2001).

analysts like to say, asymmetric. Al Qaeda soldiers do not wear uniforms, and they do not operate in conventional units and force structures. Rather, their personnel, material, and leadership move through the open channels of the international economy and are organized in covert cells. Al Qaeda does not seek to close with and defeat the enemy's regular armed forces on the battlefield. Instead, it seeks to achieve its political aims by launching surprise attacks, primarily on civilian targets, through the use of unconventional weapons and tactics, such as concealed bombs placed on trains or using airplanes as guided missiles. Victory does not come from defeat of the enemy's forces and eventually a negotiated political settlement, rather it comes from demoralizing an enemy's society and coercing it to take desired action.

Another factor distinguishes the war against al Qaeda from previous wars. In previous modern American conflicts, hostilities were limited to a foreign battlefield, while the U.S. home front remained safe behind the distances of two oceans. In this conflict, however, the battlefield can occur anywhere, and there can be no strict division between the front and home. The September 11 attacks themselves, for example, were launched by foreign forces from within the United States, using American airliners, against targets wholly within the United States. While American territory has witnessed foreign attack in the past, most notably the attack on Pearl Harbor to launch World War II, September 11 constituted the first major attack on the continental United States, and on major American cities since the War of 1812.

Thus, like previous wars, an important dimension of the conflict with al Qaeda has occurred abroad, in which the U.S. armed forces and the intelligence agencies have played an offensive role aimed at destroying the terrorist network. In October 2001, the United States launched a military campaign in Afghanistan that within a few short weeks rooted out al Qaeda from its bases and removed from power

the Taliban militia that had harbored it.<sup>5</sup> The United States has conducted operations against al Qaeda terrorists in other parts of the world, such as the Philippines, Yemen, and parts of Africa. It has detained hundreds of al Qaeda and Taliban fighters as prisoners at the naval base at Guantanamo Bay, Cuba. In March 2003, motivated in part by Iraq's suspected links to terrorist groups in general and al Qaeda specifically, the United States and its allies invaded Iraq and removed Saddam Hussein from power.<sup>6</sup>

Unlike previous conflicts, however, the war against al Qaeda also has a significant domestic dimension. The initial salvo was launched by al Qaeda operatives against the United States from within the United States. Al Qaeda shows no lessening in its efforts to pull off another attack within the United States on the scale of September 11. The Justice Department has discovered al Qaeda cells in cities such as Buffalo, New York, and Portland, Oregon; detained a resident alien who had intended to destroy the Brooklyn Bridge; and intercepted at least one 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. Many were deported. Al Qaeda agents taken into custody within the United States have been designated as enemy combatants and are being detained without criminal charge until the end of the conflict. Congress enacted legislation—the USA Patriot Act—to enhance the powers of the FBI

5. For my earlier discussions of the legal issues surrounding the Afghanistan war, see Robert J. Delahunty and 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. POLICY 487 (2002); John C. Yoo and James C. Ho, *The Status of Terrorists*, 44 VA. J. INT'L L. 207 (2003).

6. Of course, the primary justifications for the war in Iraq were Hussein's continuing possession of a weapons of mass destruction (WMD) program and his flouting of United Nations Security Council resolutions. See John Yoo, *International Law and the War in Iraq*, 97 AM. J. INT'L L. 563 (2003).

and the intelligence community to defeat international terrorists within the United States,<sup>7</sup> and created a new Department of Homeland Security to consolidate twenty-two separate domestic agencies with responsibilities for domestic security.<sup>8</sup> After these legislative changes, the government engaged in an expanded surveillance effort to monitor the communications of terrorist targets under the Foreign Intelligence Surveillance Act.

It is this virtually unprecedented domestic dimension to the conflict that has led some to misunderstand the fundamental nature of the conflict with al Qaeda. They argue that terrorism is a tactic, not an enemy, and that this implies that the war on terrorism is a problem for the criminal law, as it was before September 11, 2001. The war on terrorism is no different conceptually from the war on drugs, the war on poverty, or the war on crime. These “wars” also have their own nonstate actors, such as drug cartels or organized crime groups. However, I believe September 11 is different in kind rather than degree. Perhaps the confusion arises from 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, al Qaeda is different from a drug cartel or organized crime groups, and hence its defeat is more a matter for war than for crime.

Several reasons distinguish the war against the al Qaeda terrorist network from a large-scale criminal investigation or a broad and persistent social problem. First, al Qaeda represents a wholly foreign threat that emanates from outside the United States. This makes it different from homegrown terrorism, such as the bombing of the

7. *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act*, Pub. L. No. 107-56, 115 Stat. 272 (2001).

8. Exec. Order No. 13,228, *Establishing the Office of Homeland Security and the Homeland Security Council*, 66 *Fed. Reg.* 51,812 (2001).

Oklahoma City federal building by Timothy McVeigh, which would be an appropriate subject for the criminal justice system. Second, al Qaeda is unlike a crime organization in that it seeks purely political ends, rather than acting out of a desire for gain or financial profit. Al Qaeda attacked the United States because it wants the United States to withdraw its military and political presence from the Middle East. It may seek financial gain to fund its terrorist operations to achieve that goal, but financial advancement is not its purpose. Third, al Qaeda has proven that it is capable of inflicting a level of violence on the United States that pushes its conduct beyond the realm of crime into that of war. While the location of the precise line between the violence of crime and that of war may not be certain, it seems clear that the September 11 attacks crossed that line, with their approximately 3,000 deaths and billions of dollars in damage.

## II.

In *Hamdi*, the Supreme Court accepted the political branches' basic decision to characterize the September 11 attacks as war. In so doing, it rejected arguments that terrorism had to be understood solely as criminal activity, and it denied the notion that war could only occur against nations and not against nonstate actors as well.

During the fighting in Afghanistan, Yaser Hamdi was captured by Northern Alliance troops, a coalition of groups allied to the United States and opposed to the Taliban militia, and was handed over to the U.S. armed forces.<sup>9</sup> Hamdi was transferred to the naval station at Guantanamo Bay and then, upon discovery that he had been born in the United States, to a navy brig in South Carolina. He was not charged with a crime. Hamdi's father filed a writ of habeas corpus seeking his son's release, based on the claim that as an American citizen, Hamdi could not be held without criminal charges or access

9. These facts are taken from the Court's majority opinion. *Hamdi*, 124 S. Ct. 2633 (2004).

to a tribunal or counsel. He based his argument on 18 U.S.C. § 4001(a), which declares that “[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.” Although the government did not challenge Hamdi’s right to seek habeas, it argued that he was detained lawfully as an enemy combatant under the laws of war. It refused to allow Hamdi access to a lawyer or to appear in person in court. Finally, the government provided to the court as evidence 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.

After proceedings in the district court and the Fourth Circuit, the case arrived before the Supreme Court on the question of whether the government could detain Hamdi as an enemy combatant. This raised the basic questions of whether the September 11 attacks constituted a 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 were at war. 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, right to counsel, the right to remain silent, and the right to a speedy trial. Hamdi’s detention also would have violated Section 4001(a), because no act of Congress has overridden the rights of criminal defendants to be free of detention without criminal charge.

A four-justice plurality opinion 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. As an initial matter, the Court avoided the Solicitor General’s argument that the president could detain Hamdi pursuant solely to his authority, under Article II of the Constitution, to conduct war.<sup>10</sup>

10. *Id.* at 2639.

The Court could do so because Congress had enacted a statute on September 19, 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. Agreement of the political branches 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. “There 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.<sup>11</sup> The Court did not itself conduct any inquiry into whether the basic facts satisfied the statute or whether the statute satisfied the Constitution. It did not ask whether the September 11 attacks had indeed constituted an act of war for constitutional purposes; it did not ask whether sufficient evidence existed to show that al Qaeda was responsible for those attacks; nor did it examine whether the Taliban regime was sufficiently associated with al Qaeda to fall within the September 18 authorization.

Once the Court agreed 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. Ever since the earliest days of warfare, the lesser power to detain combatants has been understood to fall within the greater authority to use force against the enemy.<sup>12</sup> 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. In fact, such detention is the merciful, humanitarian alternative to a practice of granting no quarter to the enemy. That power extends even to U.S. citizens, as it did in the case of *Ex parte Quirin*, in which the Court upheld the World

11. *Id.* at 2640.

12. See, e.g., *Ex parte Quirin*, 317 U.S. 1, 28 (1942).

War II detention and trial by military commission of Nazi saboteurs, one of whom apparently was a U.S. citizen.<sup>13</sup> 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 hostile to the United States or coalition partners’ and ‘engaged in an armed conflict against the United States.’”<sup>14</sup> No specific congressional authorization, the Court further concluded, was needed. “Because detention to prevent a combatant’s return to the battlefield is a fundamental incident of waging war,” the Court concluded, “in permitting the use of ‘necessary and appropriate force’” Congress authorized wartime detention of enemy combatants.<sup>15</sup>

The Court finally upheld the third leg of the administration’s justification for Hamdi’s detention. Hamdi and his supporters argued that his detention was unconstitutional because it was indefinite—a return to the idea that terrorism constitutes a fundamentally criminal enterprise. Hamdi sought a return to September 10, 2001—when terrorists were arrested based on probable cause; were indicted by grand juries; received *Miranda* warnings, attorneys, a speedy trial, and the right to know all of the government’s case, to depose and call any relevant witnesses, and to seek *Brady* evidence, among other things. The Court flatly rejected this argument. 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. The days when terrorism was merely considered a law-enforcement problem and our only forces were limited to the FBI, federal prosecutors, and the criminal justice system will not be returning any time soon.

Instead, the Court drew upon the standard rule under the laws of war that prisoners can be detained until the end of a conflict. This

13. *Id.*

14. *Hamdi*, 124 S. Ct. at 2640–41.

15. *Id.* at 2641.

principle follows from the basic purposes of wartime detention of enemy combatants. As we have seen, to borrow the plurality's words, "the purpose of detention is to prevent captured individuals from returning to the field of battle and taking up arms once again."<sup>16</sup> The flip side of this purpose is that once a conflict is over, the relationship between the nations and populations returns to peace.<sup>17</sup> Once peace exists, no reason continues to exist for detaining captured combatants, and it becomes the obligation of each nation to prevent their citizens from restarting hostilities. "The United States may detain, for the duration of these hostilities, individuals legitimately determined to be Taliban combatants who 'engaged in an armed conflict against the United States.'"<sup>18</sup> So long as "the record establishes that United States troops are still involved in active combat in Afghanistan," detention may continue. The Court accepted the government's arguments that it was premature to identify when the conflict *might* end while combat operations in Afghanistan were still ongoing, as they are still ongoing today.

At the same time, the Court acknowledged the unconventional nature of the war on terrorism and suggested that if hostilities continued for "two generations," Hamdi's detention might indeed become indefinite and fall outside the government's war powers. Aside from recalling Justice O'Connor's fondness for measuring time by generations,<sup>19</sup> the Court did not provide any specific details about why thirty-six years ought to constitute any principled line. Suppose American troops remain engaged in combat in Afghanistan in 2040; nothing in the laws of war requires the United States to release Hamdi or other Taliban detainees. Even if Hamdi were no longer a threat

16. *Id.* at 2640.

17. Cf. Geneva Convention (III) Relative to the Treatment of Prisoners of War, art. 118, Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364; Hague Convention (II) on Laws and Customs of War on Land, art. 20, July 29, 1899, 32 Stat. 1817; Hague Convention (IV) of 1907, Oct. 18, 1907, 36 Stat. 2301.

18. *Hamdi*, 124 S. Ct. at 2642.

19. See *Grutter v. University of Michigan*, 539 U.S. 306, 343 (2003).

because of his age, harmlessness itself is not a grounds to seek release—nations at war, for example, are not required to release disabled prisoners of war. While the United States may decide to release older or less dangerous prisoners as a matter of policy, the Court identified no constitutional rule that required their release within a specific period of time not set by the end of hostilities.

Upholding detention as a central aspect of the war power is perhaps the most significant aspect of the Court's terrorism decisions. Afghanistan presents the easiest case: a traditional conflict between two nation-states that occurred primarily on the battlefield. It may be hard to believe, but the United States was lucky—al Qaeda and its Taliban allies chose to deploy fighters in a battlefield setting where superior American air and ground power gave the United States the advantage. Al Qaeda will not make that mistake twice. Rather, al Qaeda seeks to infiltrate operatives into our open society with the goal of launching surprise attacks designed to inflict massive civilian casualties. As the Jose Padilla example shows (whose case was dismissed by the Supreme Court because it was improperly brought in New York), al Qaeda has been recruiting American citizens who can better escape detection. Although fighting there continues, Afghanistan will not be the front line of the future; O'Hare airport, New York harbor, and the Mexican and Canadian borders will be. Preventing the government from detaining citizens who have decided to become terrorists would have seriously handicapped the nation's ability to stop attacks and to gain better intelligence on our enemy's plans.

### III.

Up to this point, the Court remained well within the bounds set by previous Courts in reviewing government war powers to detain enemy combatants. At the outset of the Civil War, for example, the Court had deferred to the president's determination of whether a war had broken out with the Confederacy. In *The Prize Cases*, the Court

explained that “[w]hether the President in fulfilling his duties as Commander in Chief” was justified in treating the southern States as belligerents and instituting a blockade, was a question “to be *decided by him*.”<sup>20</sup> The Court could not question the merits of his decision, but must leave evaluation to “the political department of the Government to which this power was entrusted.”<sup>21</sup> As the Court observed, the president enjoys full discretion in determining what level of force to use.<sup>22</sup> At the end of World War II, the Court had found that the question of whether a state of war continued in existence despite the apparent cessation of active military operations was a political question.<sup>23</sup> In the first years of World War II, the Court upheld the government’s authority to detain enemy combatants, even citizens, during war. Despite the arguments of a coalition of law professors, members of the bar, and commentators, in *Hamdi*, it would have been remarkable for the Court to have disregarded this framework developed over the nation’s long history and to have challenged the political branches in perhaps their area of greatest competence.<sup>24</sup>

It was at this point, however, that the Court then took a wrong turn and overstepped the traditional boundaries of judicial review. All

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

21. *Id.*

22. *Id.* (“He must determine what degree of force the crisis demands.”) (internal quotations omitted); see *Eisenrager*, 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.”); *Chicago & S. Air Lines v. Waterman Steamship 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.”).

23. *Ludecke v. Watkins*, 335 U.S. 160, 167–70 (1948).

24. It is important to note that although Justice O’Connor’s opinion drew only a plurality of the Court—Chief Justice Rehnquist and Justices Kennedy and Breyer—Justice Thomas’s dissent agreed with the plurality on these essential points.

parties agreed that an American citizen held as an enemy combatant could challenge his detention through a petition for a writ of habeas corpus. This had been the rule since at least *Ex parte Milligan* (1866), in which the Court ordered the release of an American citizen who had plotted to attack military installations and was detained by Union military authorities while “the courts are open and their process unobstructed.”<sup>25</sup> Milligan had been captured well away from the front, had never associated with the enemy, and at best was merely a sympathizer with the Confederate cause.<sup>26</sup> The crucial question, then, was not whether habeas corpus would remain available but how the process ought to be structured to take into account the government’s interests in protecting the national security and the noncriminal nature of the detention, while at the same time providing a sufficient test of the government’s evidence to guard against pretextual detentions.

Viewed at a somewhat higher level of generality, *Hamdi* really called upon the Court to determine how much information judges need to perform the habeas function in a wartime detention context. In a regular habeas case, for example, a federal court reviewing a purely executive detention (rather than, as is usually the case, detention and conviction of a criminal defendant by the state courts) might exercise de novo review of the facts. If the executive claimed, for example, that an individual had to be detained because he posed an imminent threat to public safety, a judge might feel it necessary to examine witnesses in court and to directly review the records of the detention.<sup>27</sup> Or, following Judge Wilkinson’s approach in the Fourth Circuit, the Court could have accepted the “some evidence” standard

25. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 121 (1866).

26. *Id.* at 131.

27. See, e.g., *United States v. Salerno*, 481 U.S. 739, 748 (1987) (“in 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, 82–83 (1909) (governor’s detention of individual because of insurrection).

that required the government to provide the facts that led the military to believe that a detainee satisfies the legal standard for status as an enemy combatant. 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. Such considerations had led the Court in 1950 to refuse to allow alien enemy combatants resort to habeas at all. In *Eisentrager*, the Court had held that German POWs convicted by military commission for war crimes could not seek review of their sentences in a federal court through a writ of habeas corpus. 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 a 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.<sup>28</sup>

Add to these concerns the important military interest, only made more acute by the unconventional nature of the war with al Qaeda, of interrogating enemy combatants for information about coming attacks. Unlike previous wars, the current enemy 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 targets with the aim of causing massive casualties. They have no armed forces to target, no territory to defend, no people to protect, and no fear of killing themselves in their attacks. The front

28. *Eisentrager*, 339 U.S. at 779.

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 the 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.

According to this understanding of war, *de novo* judicial review threatened to undermine the very 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. Appropriate concern over these considerations should have led the Court to adopt the “some evidence” standard, which promised to narrow 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.

Joined by Justices Souter and Ginsburg, however, the plurality imposed vague guidelines for reviewing detentions. Rejecting the positions of both *Hamdi* and the government, it struck the compromise that an enemy combatant must receive a lawyer and “a fair opportunity to rebut the Government’s factual assertions before a neutral decisionmaker.” It transplanted that most amorphous of standards—the *Mathews v. Eldridge*’s 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.<sup>29</sup> 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 *Eldridge* test can be applied with any serious coherence. The values that *Eldridge* calls on the courts to balance seem obviously difficult, if not impossible, to measure against any common metric. The Court's own discussion in *Hamdi* bears this out. On the one hand, Justice O'Connor wrote that an individual citizen's interest "to be free from involuntary confinement by his own government" is fundamental.<sup>30</sup> On the other hand, the government has a "weighty and sensitive" interest in preventing enemy combatants from returning to fight against the United States.<sup>31</sup> 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 carrying out the shadowy war against al Qaeda with its most effective sources and methods. Once defined as prevailing in the conflict, 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 before, "It is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation."<sup>32</sup>

Nevertheless, how the Court actually measures these factors is unclear, especially so in the Court's opinion. Do we gauge the government's interest in protecting the national security in lives potentially saved times the reduction in the probability of an attack—factoring in the average value of a life as measured by the Department of Health and Human Services or the Environmental Protection

29. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

30. *Hamdi*, 124 S. Ct. at 2647.

31. *Id.*

32. *Haig v. Agee*, 453 U.S. 280, 307 (1981) (citation omitted).

Agency? And how does the government measure the individual liberty interest against unwilling detention—in the average amount of dollars that an average citizen would pay to avoid detention per hour? If these efforts to monetarize the values seem silly, then perhaps we can admit there is no systematic, rational way to balance these competing values. Then, to make matters even more difficult, the Court requires that judges use these values as guideposts with which to determine which procedural features should attend habeas corpus proceedings for enemy combatants. Even though it made various observations about possible procedures—such as suggesting that the government should receive a presumption in favor of its evidence, one that put the burden of proof on the detainee to disprove—the Court really just punted on the procedures to the lower courts and the executive branch.

One might think of *Hamdi* as a case in which its practical importance outstrips its significance as a matter of theory or policy. After all, the government had detained only three American citizens as enemy combatants, Yaser Hamdi, John Walker Lindh, and Jose Padilla. As of this writing, Lindh was transferred to the criminal justice system and reached a plea bargain with prosecutors, while Hamdi has renounced his citizenship and been released to the custody of Saudi Arabia. *Hamdi*, however, has application far beyond the remaining case of Padilla because of the Court's decision in *Rasul v. Bush*, in which the Court found that Guantanamo Bay (and perhaps military operations worldwide) lay within the jurisdiction of the federal courts. *Rasul* essentially overruled *Eisentrager*, and it unwisely threatens to inject the federal courts into the micromanagement of the military. *Rasul* provided no guidance on how soon those hearings must be held, where they will be held, who can participate, and how classified intelligence will remain protected. Despite an extended discussion of the peculiarities of the Guantanamo lease, *Rasul* even leaves unclear whether judicial review would apply beyond the Guantanamo base

to Iraq (and Saddam Hussein) or Afghanistan (and Osama bin Laden, should he be captured).

Without any discussion of these issues in *Rasul*, we can only assume that the approach outlined in *Hamdi* will prove sufficient to meet habeas corpus standards. If the process is sufficient to meet the due process standards for American citizens detained within the United States, it seems safe to conclude that they will satisfy the requirements for alien enemy combatants detained outside the United States. Although it unwisely extended its reach to wartime detentions outside the United States, the Court left the executive branch with substantial room to maneuver on the nature and scope of review. *Hamdi*, for example, approves of a detainee's access to counsel, but it does not explain when they can meet, whether their communications can be monitored for clandestine messages, or whether the lawyers can be military officers. *Rasul* studiously avoided any discussion of the substantive rights, if any, that al Qaeda and Taliban detainees have, and neither decision overturned the administration's policy that the Geneva Conventions do not apply. 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). Military commissions already established by President Bush 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, threaten to extend not just to the navy brig in Charleston, South Carolina, but also to Guantanamo Bay, Afghanistan, and even Iraq.

#### IV.

Despite protests to the contrary, *Hamdi* and *Rasul* will thrust the federal courts into the center of policy making in the war on terrorism. The courts will face decisions about whether the government

must produce certain kinds of evidence or witnesses, particularly those involving intelligence information and assets; how long the government can question detained enemy combatants before they have access to a lawyer; and how much the government must disclose in open court about its operations. These decisions will have an effect on the tactics and operations that the government will be able to use to combat terrorism in the future. Because the Court did not set any clear lines, but instead called on lower courts to balance multiple factors, it is hard to escape the conclusion that the federal judiciary will have a significant policy-making role on terrorism issues. This part of the chapter 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. 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?

The design and operation of the judiciary give it a comparatively weak institutional vantage point from which to achieve foreign affairs and national security goals. This is not to say that federal courts are institutionally unable to play a role. Rather, the important question for ensuring the most effective pursuit of national policy is, Which institutions within the federal government have a comparative advantage as a matter of their structure? As to this second-order question, I argue that the federal judiciary, in such a role, suffers significant institutional disadvantages that make it a poor choice for carrying out national security policy. It is important to distinguish between both micro and macro level characteristics of the judiciary. Several characteristics of federal courts at the micro level—the operation of individual judges in individual lawsuits—limit the information that flows to courts and the options available to them. At a macro level, certain systemwide features of the Article III judiciary may poorly equip it to carry out national policy on a global scale.

*1. Micro 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 well 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 tools for achieving national security goals. Comparison of courts with other institutions may make these points more salient.

An initial difference between courts and other institutions is access. Compared with other institutions, courts have high barriers to access from parties.<sup>33</sup> Markets, to take one example, have virtually no barriers—all one need do is purchase a product. Congress 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, although studies also show that members of Congress are responsive to public pressure as reflected through the media and constituents.<sup>34</sup> The executive branch has lower levels of access than Congress; it is probably easier for individuals and groups to provide information to, and make requests of, agencies, although perhaps with no greater chances of success than with Congress. Certainly, for members of Congress, access to the executive branch is extremely low. In addition to formal hearings and information transmitted to Congress by the executive branch, agency officials and congressional staff conduct numerous discussions

33. NEIL KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* 125 (1994).

34. See ROBERT COOTER, *THE STRATEGIC CONSTITUTION* 51–74 (1999) (discussing interest group theory of politics).

and meetings in a never-ending dialogue of questions and requests for information and responses.<sup>35</sup>

By contrast, courts have numerous doctrines that limit access to the courtroom. Under standing doctrine, for example, plaintiffs must have suffered an actual injury in fact, which is traceable to conduct on the part of a defendant who can remedy the harm.<sup>36</sup> The timing of the case must be just right, neither too early to be unripe nor too late to be moot.<sup>37</sup> Of particular importance to the subject matter at hand, the case cannot raise political questions whose determination is constitutionally vested in another branch.<sup>38</sup> The plaintiff must actually be able to claim to benefit from a cause of action created under federal law. Litigation itself demands significant resources, at least in comparison with means of accessing the executive or legislative branches. Taking advantage of a judicial forum not only requires time and money to make substantive legal arguments in court and to pursue discovery, but also demands resources for navigating the complexity of litigation rules—hence, the need to hire teams of lawyers to represent parties in interest.

There are also significant differences in the manner by which courts acquire and process information. Information is gathered through a painstaking process of discovery, conducted between the contending parties, which can take a long time and incur great expense. That information must satisfy the federal rules of evidence—it must survive tests for relevance, credibility, and reliability—and it must be presented to the court in accordance with specific, fairly painstaking courtroom procedures. The executive branch, by contrast, can collect information through agency experts, a national and global

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

36. See, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

37. See, e.g., *DeFunis v. Odegaard*, 416 U.S. 312 (1974) (mootness); *United Public Workers v. Mitchell*, 330 U.S. 75 (1947) (ripeness).

38. *Nixon v. United States*, 506 U.S. 224 (1993).

network of officials and agents, and links 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. Courts, however, cannot 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 available to the executive branch, nor can they benefit from the informal methods of information collection at the disposal of the legislature. Indeed, courts usually cannot update the information available on a question except through the context of a case. Thus, if a court has made a decision based on information available to it at time 1, it usually will not continue to gather information thereafter—even if that information gathering would lead it to change its decision—until another case raising the same issue is brought. And even then, a court usually will not reexamine its earlier decision unless the information provided by the parties showed that the factual context has changed so dramatically as to dictate a departure from *stare decisis*.<sup>39</sup>

Article III itself also imposes significant restrictions on the role of courts in performing certain functions. Once the president and Congress have enacted a statute, the judiciary's constitutional responsibility is to execute those goals in the context of Article III cases or controversies, subject to any policy-making discretion that the courts are implicitly given by Congress in areas of statutory ambiguity or of federal common law. Federal judges cannot alter or refuse to execute those policies, even if the original circumstances that gave rise to the statute have changed.<sup>40</sup> If a federal court, for example, finds that a

39. 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 (2000).

40. For a contrary view, see GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1985).

defendant has violated the Helms-Burton Act by “trafficking” in property confiscated by the Cuban government, it must render judgment for an American plaintiff who once owned that property.<sup>41</sup> Article III requires a federal court to reach that decision, even if the effects of the judgment in that particular case would actually harm the national interest. This is because courts cannot control the timing of their proceedings or coordinate their judgments with the actions of the other branches of government. One might easily see how this might be the case: The president, for example, 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 frees 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 could not 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, whereas the political branches, of course, can make constant policy modifications in reaction to ongoing events.

A last micro difficulty arises from the substantive challenge presented by international law. Detention decisions will call on the federal courts not only to find facts in applying the enemy combatant standard; they may also have to hear claims brought by detainees that their treatment or conditions of confinement violate international treaties or customary international law or that the manner of their capture violated international law. International law is a very different subject from that usually encountered by federal courts. Many observers admit that the very concept of customary international law—law that “results from a general and consistent practice of states followed

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

by them from a sense of legal obligation” rather than through positive enactment<sup>42</sup>—is fraught with difficulty.<sup>43</sup>

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

An analogy here can be made to the disputes over the use of legislative history in statutory interpretation. Whether courts should consult legislative history has proven to be one of the focal points for broader debates about the nature of the legislation, the process of judicial reasoning, and the purpose of interpretation. To summarize all too briefly, many who believe that courts should seek out Congress’s “intent” or broader “purpose” find reliance on legislative history, along with other policy considerations, generally acceptable.<sup>44</sup>

42. Restatement (Third) of the Foreign Relations Law of the United States § 102(2) (1987).

43. Compare ANTHONY A. D’AMATO, *THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW* 4 (1971) with IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 5–6 (4th ed., 1990).

44. See, e.g., William N. Eskridge Jr., *Textualism, the Unknown Ideal?* 96 MICH. L. REV. 1509 (1998) (reviewing ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1997)); Daniel A. Farber and Philip P. Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423 (1988); William N. Eskridge

A minority argue that legislative history ought not to be used, either because there is no such thing as a collective intent or because consulting legislative history evades the formal separation of powers.<sup>45</sup> Adrian Vermeule made a similar argument in this debate: Even if courts should seek legislative intent, their “limited interpretive competence” suggests that they “might do better, even on intentionalist grounds, by eschewing legislative history than by consulting it.”<sup>46</sup> Judges simply may have limited competence in understanding and properly using legislative history, leading both to high decision costs in conducting extensive reviews of legislative history without any corresponding reduction (and perhaps even an increase) in error costs.

If this is true with regard to legislative history, these costs will only be compounded in the context of international law. The sources of legislative history at least rest within the general bounds of American public law, and so will be familiar to most judges. Although expensive to gather and analyze in relation to other forms of American legal research,<sup>47</sup> legislative history may well be cheap to use in comparison with sources of international law, which comes in different languages, involves not just texts but also practices, and is recorded in sources that are often not publicly available. Even the use of more conventional public sources, such as multilateral treaties and the resolutions of the UN General Assembly, have serious interpretive problems. It is highly questionable, for example, that nations that refuse to sign treaties should be held to the same norms because

---

Jr. and Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321 (1990).

45. See, e.g., John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673 (1997); Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J. L. & PUB. POL’Y, 61, 68 (1994).

46. See Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of Holy Trinity Church*, 50 STAN. L. REV. 1833 (1998).

47. See, e.g., Kenneth W. Starr, *Observations About the Use of Legislative History*, DUKE L. J. 371, 377 (1987); Eskridge, *supra* note 44, at 1541; Vermeule, *supra* note 46, at 1868–69.

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 of the General Assembly, have no formal authority in declaring customary international law if, by definition, that law represents the practice of *states*, not the opinions of international organizations.<sup>48</sup> The most pertinent evidence of state practice will be the most expensive to come by, and there is no empirical showing yet that federal courts will perform better in their use than any other institution.

## 2. *Macro institutional factors*

The organization of the federal judiciary as an institution perhaps has even more significant effects on the comparative ability of the courts to achieve national security goals. First, the federal judiciary is a generalist institution composed of generalist judges. Members of the judiciary are not often chosen because of expertise in any particular subject—unlike, say, the way in which scientists may be hired for work at the Department of Energy, the Environmental Protection Agency, or the Food and Drug Administration. This is even more so the case in foreign affairs; judges are usually not chosen because of any background in specific regions or areas, 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, and its members are more likely to be chosen because of their prominence as litigators or as public officials. It is difficult to remember more than a handful

48. The legitimacy of this “new” customary international law is debated in Prosper Weil, *Toward Relative Normativity in International Law?* 77 AM. J. INT’L L. 413, 433 (1983); Alain Pellet, *The Normative Dilemma: Will and Consent in International Lawmaking*, 12 AUSTRALIAN Y.B. INT’L L. 22 (1992), and is summarized in ANTONIO CASSESE AND JOSEPH H. H. WEILER (eds.), *CHANGE AND STABILITY IN INTERNATIONAL LAWMAKING* (1988). For discussions of the problems with international law raised here, see generally Patrick Kelly, *The Twilight of Customary International Law*, 40 VA. J. INT’L L. 449 (2000).

of judges who had significant foreign affairs experience before their appointment to the federal bench, and certainly 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 in the way that some European judicial systems are. This not only prevents specialization, but it also retards the accumulation of experience and the easy internal transmission of information between judges handling common issues. Few judges will have any special background, for example, in arms control issues, and even if some gain significant knowledge about it through a particular case, the generalist organization of the judiciary means that this experience will not be retained and put to use in all future cases on the same subjects. In fact, it is highly unlikely those judges will hear cases on the same subject again.

Second, of the three branches of government, the judiciary is the most decentralized. It can lay claim to being 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.<sup>49</sup> Until appellate courts have ruled on a legal issue, the judges in these district courts can hold ninety-four different interpretations of the law. There are thirteen federal courts of appeals, with 179 judges.<sup>50</sup> 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 each year in the district courts.<sup>51</sup> Given the other demands on the Supreme

49. History of Federal Judgeships, U.S. District Courts, <http://www.uscourts.gov/history/tableh.pdf>.

50. History of Federal Judgeships, U.S. Courts of Appeals, <http://www.uscourts.gov/history/tablec.pdf>.

51. Judicial Caseload Indicators 2003, <http://www.uscourts.gov/caseload2003/front/Mar03Txt.pdf>.

Court's caseload, it is doubtful that the Court could devote a significant portion of its docket to correcting erroneous interpretation of international law or mistaken interference with foreign and national security policy set by the political branches. Unless this happens, the geographic organization of the federal courts may well produce disharmony or at least an undesirable diversity of possible interpretations and applications of international law and foreign policy.

In some areas, 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, and provide a more effective voice for local communities in federal judicial decision making. These are not positive values, 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.<sup>52</sup> Indeed, in cases such as *Crosby* and *Garamendi*, the Court recently has preempted state efforts to influence the conduct of foreign nations precisely because of the need for a uniform foreign policy set by the Congress or the president.<sup>53</sup> This rationale, however, which was offered to justify national preeminence over the fifty states, applies with equal force to a federal judiciary of ninety-four district courts and thirteen appellate courts. The usual factors that have led to judicial specialization do not seem to be present here. 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,

52. See generally FREDERICK MARKS, *INDEPENDENCE ON TRIAL: FOREIGN AFFAIRS AND THE MAKING OF THE CONSTITUTION* (1973).

53. *American Insurance Association v. Garamendi*, 539 U.S. 396 (2003); *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000).

*Rasul* seems to suggest that enemy combatants held outside the United States could bring suits in any of the federal district courts. Judicial implementation of foreign and national security policy seems to bring a promise of disharmony where uniformity is perhaps supremely important.

Third, institutional structure also suggests that judicial activity in national security may be slow, in terms of both implementation and self-correction. Lawsuits can often take years to complete. Even when cases are expedited, they will certainly require several months to complete from time of filing to final judgment and appeal. Even though they did not reach extensive discovery or trial proceedings, recent Supreme Court cases on Massachusetts' efforts to sanction Burma and on California's efforts to provide remedies for Holocaust victims still took several years to adjudicate.<sup>54</sup> Last term's 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 decision on the threshold substantive questions.<sup>55</sup> These cases may even have proceeded quickly by judicial standards, but the important question is whether, as a matter of comparative institutional competence, the executive or other branches can implement foreign policy goals even faster.

Delay also may be the story of the day with regard to monitoring and feedback. Judicial errors or deviations from policy may take years to reverse or may even go entirely uncorrected. Stories about the delay between the filing of a suit in federal court and the eventual judgment are well known. Slowness obviously impedes the swift and effective execution of foreign policy. Delay also infects the judiciary's institu-

54. The lawsuit in *Garamendi* began in 1999 and was not finally decided by the Supreme Court until 2003 (124 S. Ct. at 2385). *Crosby* began in 1998 and was not decided by the Supreme Court until 2000 (530 U.S. at 371).

55. See, e.g., *Hamdi*, 124 S.Ct. at 2636 (Hamdi captured in 2001; habeas filed in 2002); *Rasul*, 124 S.Ct. at 2691 (detainees captured in 2001; habeas filed in 2002).

tional systems for communicating between its different units and for correcting errors. Even though the federal courts have an appeals court system for detecting and correcting errors, it can take months, if not years, to run its course. Even if a district or circuit judge acts in defiance of established circuit court or Supreme Court precedent, litigation is needed to correct the error. Standards of review concerning fact finding may even render some decisions immune from appellate review, despite contrary or conflicting results reached by different trial courts in similar cases. Transmission of information identifying and correcting errors may become garbled within the system, which helps explain the repeated cycles of repeal and remand that can occur in the context of a single case.<sup>56</sup>

The judiciary's characteristics as an institution render it superior to other institutions for certain kinds of decisions. It can address issues more fairly and with less interference from the political branches, and it can implement federal policy over a wide number of cases throughout the country. Its high level of insulation from outside control allows it to help solve political commitment problems between interest groups or between branches of government. Its virtues, however, also create its problems as an institutional actor in foreign affairs and national security. Its evenhandedness and passivity create problems in gathering and processing information effectively 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.

All of this is not to say that the federal courts should be utterly removed from the review of the detention of American citizens as enemy combatants. *Hamdi* is on the books, and the Supreme Court has decided *Rasul* and essentially overruled *Eisentrager*, which I think

56. Martin Shapiro, *Toward a Theory of Stare Decisis*, 1 J. LEG. STUD. 125, 125–34 (1972).

will prove to be mistaken. The federal courts *will* play a role in making terrorism policy, unless Congress and the president cooperate and enact a new habeas statute to govern enemy combatant cases (which appears unlikely so far). Nevertheless, these decisions provide to the lower courts fairly broad discretion in shaping procedures. Choices still must be made about the timing of detainees' access to lawyers, whether *Miranda* rights will be invoked, what evidence must be produced, whether witnesses must appear, and what standard of review should be applied to the military's decisions. Decisions still must be made about the deference, if any, that courts will provide to the executive's interpretation and application of international law, such as the Geneva Conventions. Even if the Court has rejected the "some evidence" test, it still might adopt the deference afforded to agency decision making under the arbitrary and capricious standard and *Chevron*.<sup>57</sup>

These 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 that would be 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 macro institutional problems with courts, the judiciary may undermine, rather than promote, national policy in the war on terrorism by overestimating its abilities and refusing to provide deference to the political branches.

57. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (judicial deference to agency interpretation of ambiguous law).