Judicial Review of Unlawful Combatant Detentions under the United States Constitution

David Jenkins

Faculty of Law
McGill University
Montréal

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Abstract

This thesis examines how United States federal courts can review the President's exercise of the war powers to detain American citizens, or non-citizens having similar rights, as unlawful combatants. It argues that the separation of powers doctrine, based on Lockean principles, permits probing judicial review of such an executive detention, where the President exercises the war powers in a way that effectively adjudicates individual rights or impacts upon domestic affairs.

The constitutional controversy over unlawful combatant detentions is fundamentally a separation of powers problem. Existing functionalist and formalist theories about the separation doctrine, as well as dichotomous debates about individual rights versus national security, fail to reconcile judicial deference to executive decisions in some war powers cases with closer scrutiny in others. This thesis therefore proposes a new separation of powers theory that explains the existing war powers jurisprudence, while establishing principles upon which courts can vigorously review future executive war powers decisions that interfere with individual rights or impact upon domestic matters, such as with the detention of a citizen as an alleged unlawful combatant.

The thesis first sets out a separation of powers theory based on the political thought of John Locke, placing upon each branch a fiduciary duty to make decisions only in ways best calculated to serve the public good. The "deliberative processes" approach to the separation doctrine, growing out of this fiduciary duty, functionally distributes constitutional power among the branches depending upon which one is most institutionally suited to resolve the matter at hand. Judicial application of the political question doctrine in past war powers cases demonstrates such a Lockean deliberative processes analysis, in the ways that courts have questioned judicial competency to scrutinize the executive's strategic military decisions. Cases dealing

specifically with unlawful combatant detentions, in turn, show that judicial competence to review executive military decisions increases when the President functionally adjudicates individual rights of the citizen, a deliberative process for which the courts are more institutionally competent. Accordingly, this thesis concludes that courts can review executive unlawful combatant detentions under adjudicative standards of legality, procedural fairness, and reasonableness.

Résumé

La présente étude porte sur la manière dont les juridictions des Etats-Unis peuvent contrôler l'exercice par le Président des pouvoirs de guerre dont il dispose pour mettre et maintenir en détention des ressortissants américains ou des étrangers ayant des droits similaires et définis comme des combattants illégitimes. L'auteur montre que le principe de séparation des pouvoirs inspiré par Locke permet le contrôle judiciaire de ces détentions administratives, dès lors que le Président exerce les pouvoirs de guerre dont il dispose d'une manière qui, d'un point de vue fonctionnel, revient à une décision quasi judiciaire portant sur des droits individuels ou ayant une incidence sur des questions internes.

La controverse constitutionaliste que soulèvent les détentions de combattants illégitimes se pose fondamentalement en termes de séparation des pouvoirs. Les théories fonctionnalistes et formalistes, comme la dichotomie débattue entre droits individuels et sécurité nationale, n'expliquent pas pourquoi certaines décisions font montre d'une déférence à l'égard des décisions de l'exécutif pendant que d'autres les soumettent à un contrôle plus serré. L'auteur propose donc une nouvelle théorie de la séparation des pouvoirs qui permet à la fois d'expliquer la jurisprudence rendue sur la question des pouvoirs de guerre et d'établir des principes sur lesquels les tribunaux pourront se fonder pour passer rigoureusement au crible les futures décisions prises par l'exécutif dans le cadre des pouvoirs de guerre, et qui méconnaîtraient des droits individuels ou interviendraient dans des affaires internes, comme c'est le cas avec la mise et le maintien en détention de personnes présumées combattants illégitimes.

La première partie de la thèse propose une théorie de la séparation des pouvoirs inspirée de la pensée politique de Locke, imposant que les décisions prises par chaque branche du pouvoir le soient sous des formes les plus à même de servir le bien commun. De cette obligation de loyauté (*fiduciary*

duty) peut se déduire une nouvelle approche de la doctrine de séparation des pouvoirs en termes de « processus délibératifs » : le pouvoir constitutionnel est fonctionnellement réparti entre les diverses branches en fonction de leur aptitude institutionnelle à résoudre au mieux la question en cause. L'application judiciaire de la doctrine de la question politique dans les affaires qui ont eu trait aux pouvoirs de guerre démontre cette analyse lockéenne des processus délibératifs : les juridictions ont douté de l'existence de leur compétence à contrôler les décisions militaires stratégiques de l'exécutif. Les affaires ayant eu à connaître spécifiquement des détentions de combattants illégitimes montrent en revanche que l'étendue de la compétence en matière de contrôle des actes du gouvernement en matière militaire augmente lorsque le Président prend des décisions équivalent fonctionnellement à des décisions judiciaires individuelles sur des droits de l'homme, un processus délibératif dans lequel les tribunaux ont davantage de compétence institutionnelle. Dès lors, l'auteur conclut que les tribunaux peuvent exercer un contrôle des actes de l'exécutif en matière de détention de combattants illégitimes, à l'aune des principes juridictionnels de légalité, du procès équitable et du raisonnable.

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Preface

The attacks against the United States on September 11, 2001 need no recounting, nor do the main events in the so-called "war against terrorism." This was a new kind of unconventional conflict. Ignited by devastating terrorist attacks against civilians and domestic infrastructure, planned and carried out by radical religious extremists, this "war" was one in which the United States had no traditional state enemy. Even with the more conventional military actions in Afghanistan, the United States nevertheless had to take into account that the al-Qaeda organization, ostensibly under the leadership of Osama bin Laden, was a complex, international, and sub-state entity. While it could field tenacious field combatants, as in Afghanistan, it also had cooperation from radical Islamic groups around the world, as well as a global network of operatives living in many western countries and trained to commit terrorist actions. Some of these potential terrorists were even citizens of the countries they intended to target. The threat from al-Qaeda or other terrorist groups was thus considerable, not only on account of the potential loss of life, but because of its unconventional nature, its invisibility, its existence across and within national borders, and its focus upon civilian targets. Terrorist violence on this large of a scale and operational sophistication challenged long-accepted notions of warfare and criminal activity, as the September 2001 attacks at once appeared as heinous, irrational crimes and cold, calculated acts of war.

This ambiguity complicated (if not confused) American policy choices following the 2001 attack, leading to military action in Afghanistan, passage of the *Patriot Act*,[1] and on one level even the invasion of Iraq, supposedly to prevent its acquisition of weapons of mass destruction that might later fall into terrorist hands. Other nations also responded to the perceived terrorist threat.

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

There was broad international support, with military and logistical assistance, in Afghanistan. Many countries passed new and controversial anti-terrorism laws. While the international community largely protested, not without good grounds, the United Kingdom and some minor U.S. allies also joined in the invasion of Iraq. Some commentators have drawn attention to the social, economic, and political causes behind Islamic terrorism and its targeting of American, and more generally Western, interests. Others have criticized American anti-terrorism measures as gross over-reactions, in light of the doubtful legality of the Iraq war, the shocking abuses at Abu Ghraib prison, and the prolonged executive detentions of alleged unlawful combatants both within the United States and at Guantanamo Bay (an American controlled naval base in Cuba). While these concerns should not be underestimated, terrorism nonetheless posed a serious threat to innocent civilians in the United States or elsewhere. Bombings of Bali in 2003, Madrid in 2004, and London in 2005 all proved, with great loss of life, the continuing existence of terrorism's threat. What all of the above indicates, however, is that terrorism – from any political source, not just radical Islamic fundamentalism – presents challenges to legal order by increasing the already inherent tension between individual rights and public security. A national response to terrorism is therefore not just about countering or eliminating that unconventional threat, but about protecting lives alongside a commitment to the rule of law.

This thesis focuses on one narrow legal aspect of the "war against terrorism" and its relationship with the rule of law. It examines the U.S. President's authority under his war powers to detain citizens, or non-citizens having similar rights, as "unlawful combatants" for having violated the rules of war, and the authority of the courts to review the lawfulness of such detentions. The President ordered two citizens and one non-citizen to be so held within the United States, and their petitions, as of August 2005, resulted in a favorable Supreme Court decision having significant implications for the rule of law and the constitutional separation of powers. The June 2004 ruling in *Hamdi* v. *Rumsfeld*[2] affirmed that a citizen alleged to be an unlawful

[2] 542 U.S. 507; 124 S. Ct. 2633 (2004).

combatant had a right to due process, reviewable in the courts. Subsequent habeas corpus petitions from citizens, or non-citizens having similar substantive rights, would therefore invite potentially probing judicial review of an executive detention decision. The *Hamdi* case consequently had implications for another six-hundred or more non-citizens held indefinitely and incommunicado as unlawful combatants in Guantanamo Bay, and subject upon presidential order to trial by military commission. Some federal courts had denied jurisdiction over the Guantanamo Bay prisoners, due to their detention in Cuba rather than the United States. Nevertheless, the Supreme Court decision in *Rasul* v. *Bush*,[3] a companion case to *Hamdi*, allowed federal courts to hear their petitions for habeas corpus. The actual extent of any due process rights of the non-citizen detainees in Guantanamo remained unsettled as of August 2005. However, in light of *Hamdi*, they too might be entitled to due process, making the executive's detention orders potentially subject to considerable judicial scrutiny.

What does this thesis hope to achieve? While much has already been written about the unlawful combatant detentions and military commissions, this thesis analyzes them in the broader context of the Constitution's separation of powers. Such detentions and commissions prove constitutionally problematic for the separation of powers doctrine because of the unique nature of the alleged unlawful combatancy as both a criminal and martial status, simultaneously invoking the judiciary's role in protecting rights and the executive's responsibility for maintaining national security. Unlawful combatant detentions raise the question as to whether they are legitimate exercises of the war powers or executive encroachments upon judicial power. At stake is no less than the constitutional equilibrium between the branches in times of emergency, and with it disruption of the Constitution's structural protections for protecting rights against arbitrary assumptions of executive power. While the President had detained only two citizens, and a non-citizen on American soil, as unlawful combatants, the proverbial slope was a potentially very steep and slippery one indeed. The Supreme Court

[3] 542 U.S. 466; 124 S. Ct. 2686 (2004).

acknowledged these concerns in *Hamdi*, with its due process analysis. However, this thesis goes beyond a doctrinal study of the judicial review of unlawful combatant detentions to examine the fundamental separation of powers assumptions upon which it rests. It suggests a new separation of powers theory, premised upon the deliberative processes that the branches use when making decisions. This theory explains the deferential approach of courts in most war powers cases, while justifying strong judicial review under *Hamdi*, when the President uses those powers to infringe individual rights or impact upon domestic affairs.

The thesis' structure reflects its approach to understanding the judicial review of unlawful combatant detentions. Part I immediately launches into constructing a general theory of separation of powers, arising from an examination of the Lockean political theory that underlies the United States Constitution. Part II then explains how federal war powers jurisprudence reflects constitutional assumptions consistent with this new theory. Parts I and II together, therefore, present a theoretical model that explains the Supreme Court's decision in *Hamdi*, and offers to future courts a basis for the principled review of the war powers. Part III analyzes the legal status of unlawful combatants, the contextual limitations of *Ex parte Quirin*[4] as the main precedent for such detentions, and the ways in which courts have approached the habeas corpus review of these cases. In the end, the thesis proposes that its deliberative processes theory of separation of powers permits the substantive judicial review of unlawful combatant detentions, based upon standards of legality, procedural fairness, and reasonableness. The President does indeed have a constitutional responsibility to protect the public against the unconventional threat of terrorism. Courts, however, remain the guardians of the rule of law, even in face of new dangers, and must ensure that liberty does not succumb to that same executive sworn to defend it.

[4] 317 U.S. 1 (1942).

Part I: The Separation of Powers

Introduction

In fighting the so-called "war against terrorism," the President's designation and detention of American citizens as unlawful combatants, under his war powers and without the benefit of trial in the civil courts, raised important issues about the separation of powers. In the 2004 case of *Hamdi* v. *Rumsfeld*,[1] the Supreme Court upheld the existence of such an executive detention power, but made clear that courts could review the detentions of citizens for due process compliance, upon petition for a writ of habeas corpus. However, the Court's assertion of judicial review in *Hamdi* not only left unresolved many questions about the precise scope of such review, but seemingly conflicted with a war powers jurisprudence that mandated considerable deference to executive exercises of the war powers. The Court's decision in *Rasul* v. *Bush*,[2] by allowing non-citizen alleged unlawful combatants held offshore in Guantanamo Bay, Cuba, to petition for a writ of habeas corpus, only further brought into doubt a rational framework for war powers review.

The extent of the President's war powers has long been an issue in American constitutional law. Designated both as Commander-in-Chief and Chief Executive by the Constitution, the President's military authority nevertheless is subject to Congress' own constitutional power to declare war. There exists tension, and often ambiguity, between congressional and presidential authority to make military decisions. While courts have a constitutional duty to review legislative and executive acts for compliance with the Constitution, they have usually remained hesitant to interject

[1] 542 U.S. 507; 124 S. Ct. 2633 (2004).

[2] 542 U.S. 466; 124 S. Ct. 2686 (2004).

themselves into the politically charged atmosphere and uncertainties of war-making. Courts accordingly have found that Congress can broadly delegate decision-making authority to the President in matters of war, national security, and foreign affairs. Such decisions become constitutionally problematic, however, when they infringe individual rights and have an impact upon domestic rather than purely foreign affairs. In such circumstances, the President's exercise of the war powers threatens to upset the separation of powers, weakening the Constitution's structural protections for individual rights.

Reconciliation of apparent doctrinal conflicts between *Hamdi*, *Rasul*, and other war powers cases requires reevaluation of the underlying constitutional assumptions upon which those decisions might rest. The executive's detention of unlawful combatants, and the judicial review of them, accordingly becomes a fundamental problem about the separation of powers. Explanation of both the wide judicial deference to some executive exercises of the war powers (such as strategic military command), and the greater scrutiny of others (like unlawful combatant detentions) merits a new separation of powers theory. Part I proposes just such a theory, focusing upon the deliberative processes which the government branches use in making decisions. Using this theory, Parts II and III bring into line the seemingly contradictory results between *Hamdi*, *Rasul*, and past war powers cases. The starting point for this deliberative processes theory is, simply enough, perhaps the most basic premise of Anglo-American constitutional thought: John Locke's notion that all government authority is exercisable only for the public good.

Chapter I: Executive Power and Public Trust

Political Authority for the Public Good

"*Salus populi suprema lex.*"[3] This principle, given by Locke in his *Second Treatise on Government*, underlies the exercise of political authority by the executive branch and indeed by government as a whole. Locke not only proposed this principle as a moral imperative for government, but further suggested a constitutional paradigm where exercise of executive and legislative power should be structurally divided better to achieve the public good and to prevent an institutional centralization of authority that might lead to tyranny. Modern separation of powers between executive, legislative, and judicial branches is, interpreted in light of this Lockean paradigm, a similar structural means to ensure that government acts only for the public good. The separation doctrine prevents arbitrary exercise of power by channeling it through separate branches, each having unique institutional attributes and deliberative capabilities that promote rational decision-making by government actors. Substantive determination of just what the public good requires in any particular instance, then, results from an empirical, "inter-branch" reasoning process. Executive discretion, its legal limitations, and protection of individual rights through political as well as judicial processes all combine to achieve respect for the Lockean paradigm; that is, a structural model that under all circumstances (at least ideally) serves the animating principle of the public good.

Locke began his examination of government structures with the legislative power, the representational nature of which built upon his idea that

[3] John Locke, *Second Treatise on Government* (1689), § 158.

popular consent is the fountain of legitimacy for all government authority.[4] However, this analysis of Locke's paradigm begins with the executive power for three reasons. First, the danger that unchecked executive power presents to the public good highlights the special trust that accompanies all government power, and the necessity of diffusing power among the branches in order to enforce the fiduciary obligations that they all necessarily have. Thus, executive power is a fitting topic with which to begin an examination of the purposes of and restrictions upon political power in general. Second, the unitary nature of the executive branch deprives it of the majoritarian justification that might mask or excuse oppressive actions by a representative legislature. Having a lesser representative mandate than the legislature, the executive runs greater risk of misjudging the public good, while its unitary nature can promote decisiveness and efficiency at the expense of balancing various societal interests. Third, the threat that arbitrary executive power poses to individual rights and the rule of law has historically been a focus of Anglo-American political theory. Locke's *Second Treatise* itself, written during the age of the Glorious Revolution, displays concern about executive power and its precarious relationship with the public good. Protection for rights and maintenance of the rule of law remain fundamental to American, British, as well as other legal systems. Such concerns reach their height in matters of war, national security, and foreign affairs, when their exigencies require that the public rely upon strong executive power, and public-safety imperatives threaten to trump individual rights. It is at this point – where executive power becomes strongest and most necessary – that one can best begin to understand the fiduciary obligations that both justify and limit it.

Lockean Prerogative

Locke explains that executive authority, which he calls "prerogative," is "nothing, but a Power in the hands of the Prince to provide for the publick

[4] Peter Josephson, *The Great Art of Government: Locke's Use of Consent* (Lawrence, Kansas: University Press of Kansas, 2002) at 215.

good."[5] This executive discretion is necessary, as "the Law-making Power is not always in being, and is usually too numerous, and so too slow, for the dispatch requisite to Execution: and because also it is impossible to foresee, and so by laws to provide for, all Accidents and Necessities, that may concern the publick. . . ."[6] Exercisable by the executive in the absence of law, the prerogative is defined not only by the substantive requirement that it serve the public good, but by the presence of political exigency where a legislature is unable or unwilling to act. Perhaps when extraordinary circumstances exist, such as when foreign invasion or attack might be imminent, it might even dictate that the executive act contrary to positive law where there is no time for the legislature to change it.[7] Accordingly, Locke's prerogative power is an independently standing, non-statutory executive discretion to act (but not make law) for the public good.

Prerogative power has a dual relationship to the public good. "[W]here the Legislative and Executive Power are in distinct hands,"[8] the public good justifies executive discretion – even wide and far-reaching discretion, if necessary – at the same time that it directs the ends and limits of the prerogative. In the absence of conflicting law, the public good therefore legitimates as well as constrains the prerogative. Significantly, however, the

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[5] Locke, *Second Treatise*, § 158.

[6] *Ibid.*, § 160.

[7] Ruth W. Grant, *John Locke's Liberalism* (Chicago: University of Chicago Press, 1987) at 84-85; Locke emphasizes that discretionary executive power complements, rather than obstructs, the law, stating "[f]or *Prerogative is nothing but the Power of doing publick good without a Rule.*" *Ibid.*, § 166 [emphasis original]. However, he also finds that the prerogative might dictate action *against* the "direct Letter of the Law," *ibid.*, § 164, when the public good demands. See also *ibid.*, § 159-60. Clearly, such executive usurpation should be exceptional, with the paradoxical purpose of violating the law in order to save it. The absolute imperative, but dangerous, nature of such illegal executive action is perhaps best illustrated by President Lincoln's unilateral suspension of the writ of habeas corpus, without Congress' prior approval, in the face of Southern secession. Responding to criticisms of his early habeas suspensions without congressional approval, Lincoln asked: "Are all the laws but one to go unexecuted, and the Government itself go to pieces lest that one be violated?" Presidential Address to Congress in Special Session (4 July 1861). For an analysis of a "liberal response" to presidential power during national emergencies, in which such power is not permanently and dangerously normalized by the law, but is instead exercised in open contravention of the Constitution and the laws, see Jules Lobel, "Emergency Power and the Decline of Liberalism" (1989) 98 Yale L. J. 1384.

[8] Locke, *Second Treatise*, § 159.

public good is more than a standard against which to judge the acceptability of prerogative actions; the public good is itself definitional of the prerogative. That is, the executive does not possess a general discretion to act as it wills where the law is silent, maybe or maybe not intending to advance the public good, or even violate it altogether. Rather, executive actions taken without due regard for and intention to serve the public good would not be prerogative ones at all under Locke's definition. Such actions, essentially demonstrating bad faith by the executive, would instead be illegitimate and arbitrary impositions of power, threatening political liberty and degenerating into tyranny; they would not be prerogative power at all, under Locke's conception of it. Abuse of power might, of course, advance the selfish ends and personal ambitions of the executive officer. Such abuse is the antithesis of the prerogative, in that it is action unreasonable for purposes of achieving the public good.[9]

Because Locke bases government upon consent, thereby suggesting popular sovereignty, it is only in the calculated interests of the public that government can lawfully act; hence the requirement that the executive's prerogative decisions be reasonable ones towards achieving those ends. In the Lockean scheme, as described by Ruth Grant, "[m]en consent to government for certain reasons, to fulfill particular purposes. Political action must be reasonably related as means to those ends or it ceases to be political and is instead despotic."[10] Grant's understanding of the term "political action" reflects a Lockean perspective of prerogative, and government power in general, in that it contrasts with despotic or arbitrary power that is divorced from the substantive purpose of serving the public good. Lockean prerogative, as an executive power bound up with and limited by the public good, cuts the ground out from under divine right or other absolutist theories of executive-centered government, legitimizing authority not upon an executive's personal right to govern but upon his political trust. This trust places upon the

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[9] Grant, *supra* note 7 at 72-73, 141-42. Grant also distinguishes arbitrary from absolute authority, the latter, as he sees it, being an ultimate sovereign authority having power over life and death.

[10] *Ibid.* at 82.

executive, or any other government actor, a fiduciary obligation to act reasonably in pursuit of public ends.[11] As John Dunn writes, "any political society which derives its legitimacy formally from a set of rights of its sovereign which are not derivatives of the wills of his subjects violates the logical preconditions for a legitimate political society."[12] A legitimate political society, which arises from popular consent, fixes among the normative goals of political association not just community survival, but the realization of certain fundamental values, such as personal liberty, that substantively enrich the conception of the public good.[13] The executive's, or other government actor's, resulting fiduciary obligation is reasonably to exercise power so as to promote both society's security along with its substantive values. Locke's conceptualization of legitimate political authority in this way fixes a trust relationship between the executive and the people upon the consensual delegation of authority by the latter to the former. The prerogative consequently arises from the executive's fiduciary obligation, and so must be a principled and reasonable exercise of discretion. The public good in this way remains the benchmark for simultaneously assessing the legitimacy of executive actions and defining them as Lockean prerogative.

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[11] *Ibid.* at 187-88.

[12] John Dunn, *The Political Thought of John Locke: An Historical Account of the Argument of the 'Two Treatises of Government'* (Cambridge: Cambridge University Press, 1969) at 124.

[13] Thus, Locke, *Second Treatise*, § 134, claims: "The great end of Mens entering into Society, being the enjoyment of their Properties in Peace and Safety, and the great instrument and means of that being the Laws establish'd in that Society; the *first and fundamental positive Law* of all Commonwealths, *is the establishing of the Legislative* Power; as the *first and fundamental natural Law*, which is to govern even the Legislative it self, is *the preservation of the Society*, and (as far as will consist with the publick good) of every person in it."; Although Dunn, *ibid.* at 123-24, writes that the Lockean community's goals focus upon man's relationship with God and the "accomplishment of religious duty," the substantive moral purposes of society certainly could be other than promotion of religion. Without a substantive moral framework to guide individual and even collective moral judgment, then, as Dunn states, *ibid.* at 266, rational human action would fall back upon the "confusing abstractness of the utilitarian calculus." Locke's *A Letter Concerning Toleration* (1689) suggests that the duties of even a religiously based society are compatible with individual moral choice, within certain parameters. What is more important is that different moral frameworks for society still mandate substantive ends to both individual actions and a government authority wielded for the public good. These frameworks therefore posit an ethic of individual or communitarian fulfillment going beyond Hobbesian order and security, and mere preservation of the polity. Indeed, some substantive political ethic of liberty or freedom itself "is to be valued a 'fence' to preservation." Grant, *supra* note 7 at 90-91; See also Richard H. Cox, *Locke on War and Peace* (Oxford: Clarendon Press, 1960) at 107.

The Lockean principle of prerogative lies beneath the concept of executive power in both the American and British political systems, their republican and monarchical differences notwithstanding. As for the Crown, Blackstone defined its prerogative as something that "must be in it's [sic.] nature singular and eccentrical; that it can only be applied to those rights and capacities which the king enjoys alone. . . ."[14] Nevertheless, Blackstone made clear that those unique powers exist not for the good of the monarch himself, but for use on the public's behalf. The prerogative, he added, is also limitable by statute,[15] suggesting it to be subject to Parliament's judgment as to what the public good requires. Dicey, in finding the prerogative to be the residuum of the Crown's historically inherent authority, also acknowledged its subordination to the representative Parliament and its moral accountability to the public as a whole.[16] This relationship to legally sovereign Parliament and politically sovereign public, as well as to independent courts that could define the prerogative's boundaries, accordingly places the prerogative under the rule of law. Dicey's description of the rule of law rests upon a Lockean idea that executive discretion is a fiduciary power for the public good, accountable to the legislature, courts, and general public.[17]

As Louis Fisher points out, many scholars see the United States Constitution as breaking from Britain's monarchical model of executive prerogative, particularly by giving the Senate power to ratify treaties and placing in Congress the power to declare war. On this latter point, Fisher particularly disagrees with the argument that the Constitution followed British example, which might encourage independent presidential initiative in war-making.[18] Fisher's point, as well as original intent arguments, nevertheless

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[14] William Blackstone, *Commentaries on the Laws of England: A Facsimile of the First Edition of 1765-1769*, vol. 1 (Chicago: University of Chicago Press, 1979) at 231-32.

[15] *Ibid.* at 244-45.

[16] Albert Venn Dicey, *Introduction to the Law of the Constitution*, 4th ed. (London: Macmillan, 1893) at 351-52, 355-56.

[17] See Locke, *Second Treatise*, §§ 149-52.

[18] Compare Louis Fisher, *Presidential War Power*, 2d rev. ed. (Lawrence, Kan.: University Press of Kansas, 2004) at 15 with John C. Yoo, "The Continuation of Politics by Other Means:

contrasts with two centuries of the Constitution's development. Presidents from Washington onward and supporters of a strong executive have gradually expanded presidential authority over many matters which might be considered "war-making" in its broadest sense.[19] American constitutional practice, going back to the beginnings of the Republic, rests upon a Lockean presumption of executive prerogative to act for the public good, even where the President's specific powers in some instances differ from those of the Crown, as with the ratification of treaties or the declaration war.

Alexander Hamilton suggested early on that the vesting of "executive Power" in the President was a "general grant" of executive authority beyond those powers enumerated.[20] Some framers, notably Jefferson, would have strongly disagreed based upon strict constructions of the Constitution. Nevertheless, Hamilton's Lockean view had its proponents and has served as the basis upon which subsequent Presidents (including Jefferson, notably in regard to the Louisiana Purchase and the naval campaign against the Barbary pirates), as well as other lawyers and politicians, would justify executive

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The Original Understanding of War Powers," (1996) 84 Cal. L. Rev. 167; See also Charles J. Cooper, Orrin Hatch, Eugene V. Rostow, and Michael Tigar, "What the Constitution Means by Executive Power" (1988) 43 U. Miami L. Rev. 165 at 193 where Rostow comments that "[t]he fact that the Presidency was intended to be a strong independent office, and that he had a vaguely defined prerogative power carried over from the British Constitution, is undeniable." Erwin Chemerinsky, "Controlling Inherent Presidential Power: Providing a Framework for Judicial Review" (1983) 56 S. Cal. L. Rev. 863 at 870-878, outlines four basic models for executive power under the Constitution. These models, representing points on a continuum, 1) permit the President to act only with clear statutory or constitutional authorization, 2) grant broad inherent authority unimpeded by Congress or the courts, 3) recognize an "interstitial" inherent power under which the President can act independently only insofar as he does not usurp legislative or judicial powers, and 4) give an inherent power to the President to act where there is no clear statutory or constitutional authority preventing him from doing so. Chemerinsky, however, finds the first model "too inflexible to be a workable standard of review of Presidential actions," *ibid.* at 883, while the second model of broad inherent power lacks sufficient accountability to be acceptable in a constitutional democracy, *ibid.* at 885-86. Instead, the appropriate model is either the third or fourth one, the difference between them being that courts or Congress, respectively, have primary responsibility for checking the President, *ibid.* at 887-88. Chemerinsky prefers the third model, where courts must review presidential actions for infringement of legislative and judicial powers, *ibid.* at 890-91.

[19] Fisher, *ibid.* at 16, indeed recognizes but criticizes the historical incidents of expanding executive power as contrary to the intention of the framers.

[20] Alexander Hamilton, *Works of Alexander Hamilton*, ed. by C. Hamilton, vol. 76 (1851) at 80-81, quoted in Laurence H. Tribe, *American Constitutional Law*, 2d ed. (Mineola, N.Y.: Foundation Press, 1988) at 210.

exercises of discretion. While the presidencies of Jackson and Lincoln occasioned, in different ways, significant expansions of executive power based upon claims of necessity and the public good, Theodore Roosevelt went furthest by articulating his "stewardship theory:"

> I declined to adopt the view that what was imperatively necessary for the nation could not be done by the President unless he could find some specific authorization to do it. My belief was that it was not only his right but his duty to do anything that the needs of the nation demanded unless such action was forbidden by the Constitution or by the laws. Under this interpretation of executive power I did and caused to be done many things not previously done by the President and the heads of the departments. I did not usurp power. In other words, I acted for the public welfare, I acted for the common well being of all our people, whenever and in whatever manner was necessary, unless prevented by direct constitutional or legislative prohibition. . . .[21]

Roosevelt acknowledged the public good as both the legitimizing and limiting force behind executive power. Accordingly, as Locke suggested with the prerogative, the President could act for the public good when exigencies demanded, except where the Constitution's express provisions or the laws passed by Congress prevented him from doing so.

Chief Justice (and former President) Taft judicially recognized something near to Roosevelt's stewardship theory in the 1926 Supreme Court case of *Myers* v. *United States*,[22] finding that the President could indeed exercise unenumerated powers that flowed from Article II's general grant of executive power, as long as not forbidden by the Constitution or statute. He wrote, "[t]he executive power was given in general terms strengthened by specific terms where emphasis was regarded as appropriate, and was limited by direct expressions where limitation was needed. . . ." [23] Taft did not go

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[21] Theodore Roosevelt, *The Autobiography of Theodore Roosevelt*, ed. by Wayne Andrews (New York: Charles Scribner's Sons, 1958) at 197-98. Roosevelt, *ibid.* at 198, mentioned Jackson and Lincoln as examples, while contrasting his view of the presidency to that of his successor, Taft.

[22] 272 U.S. 52 (1926).

[23] *Ibid.* at 118 (citing Hamilton, 7 J. C. Hamilton's *Works of Hamilton* at 80-81). See also *In re Neagle*, 135 U.S. 1 (1890) (finding that the President can take measures in the absence of statutory authorization in order to fulfill a general obligation to enforce the laws and

quite as far as the stewardship theory might perhaps permit, however. Presidential authority was only "a grant of the power to execute the laws," and the Constitution's division of executive, legislative, and judicial power meant that the branches should be kept separate where not expressly blended.[24] Still, the Chief Justice offered in passing *dictum* that there were occasions when executive officers might act in a "quasi-judicial character."[25] Taft's opinion in *Myers* certainly embraced the Hamiltonian view, but resisted full acceptance of Roosevelt's stewardship theory in so far as it might suggest that the executive could stray, without limitation, into areas constitutionally reserved for the legislative and judicial branches. The *Myers* decision did not answer just how far the President's power might extend in any particular case, but nevertheless generally premised it upon the Lockean prerogative.

The New Deal and the rise of the post World War II "imperial presidency" have only further expanded presidential power. Constitutional practice, then – regardless of what some critics might prefer – characterizes presidential power as neither limited to express textual grants, strictly construed, nor restricted to the "mere execution" of statutory laws, in which narrow executive discretion has no quasi-legislative or quasi-judicial aspects.[26]

Constitution), compared with *R.* v. *Secretary of State for the Home Department, ex parte Northumbria Police Authority* [1988] 1 All ER 556 (C.A.) (Crown may take law enforcement measures under the prerogative for the defense of the realm, where not prohibited by statute).

[24] 272 U.S. at 116-17.

[25] *Ibid.* at 135.

[26] For criticism of theories of executive power that give inherent law-making authority to the President, see Henry P. Monaghan, "The Protective Power of the Presidency" (1993) 93 Colum. L. Rev. 1. Monaghan, however, does support a "protective" power by which the President can act, without statutory authorization, to protect the personnel, property, and instrumentalities of the United States. However, Monaghan admits, *ibid.* at 69, that "presidential use of the protective power can perhaps be shown to be 'legislative' in nature. But . . . any boundary between impermissible law-making and permissible public administration is not analytical, but conventional. Limited and protective presidential conduct would not ordinarily be understood to be presidential law-making, whatever the analytical resemblance." Monaghan thus seems to pin his criticisms upon a formalistic categorization of executive and legislative acts by downplaying any functional resemblance they might have. The idea of a presidential protective power also does not undermine the Lockean notion that prerogative authority is contextually dependent upon the necessity of action. It is the identification of just such a necessity, and the question of proportionate response, that raises questions about the scope, but not the existence, of both presidential and Crown prerogative. Steven Calabresi, "The Vesting Clauses as Power Grants" (1994) 88 Northwestern U. L. Rev. 1377 at 1392, rejects the notion as "preposterous" that presidential power resembles anything

The President's discretionary power, like that of the Crown, is a Lockean prerogative in practice as well as theory.

However, Locke's idea of prerogative presents a problem of constitutional design. That is, "to understand how the executive may be constitutionally and legally constrained, and yet also retain the latitude to act outside or against the law for the public good."[27] Because the prerogative is by definition exercisable only for the public good, and must combine "activism" with "discretion and self-restraint,"[28] it is subject to a "Fiduciary Trust . . . for the safety of the People . . . ."[29] This trust, as already suggested above, legitimizes and constrains executive authority based upon the permitted ends of the public good and the reasonableness of the means to achieve it. The empowering and limiting aspects of the public good thus create a "dialectical problem," as Dunn puts it, which is "critical to Locke's enterprise."[30] A fiduciary trust is different from a contractarian interpretation of executive

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like the Royal prerogative. However, he believes that Article II, section 1 of the Constitution nevertheless grants a general executive power to the President, subject to the provisions in section 2 that "all help to define, limit, and give content to the otherwise vast grant of power. . . ," *ibid.* at 1397. Calabresi, however, does not undertake a closer examination of the nature of executive discretion within the American and British systems, and how they are conceptually similar in Lockean terms. Prerogative power is not an incident only of monarchical government, but represents a discretionary power, however defined and limited, that inherently exists in executive office. In any case, the denial of an extra-statutory law-making power in the hand of the executive does not discount the existence of prerogative discretion. Indeed, the British Crown itself possesses no prerogative law-making authority within the realm. The Civil War and the Glorious Revolution settled that question in Parliament's favor long before the American Revolution. The Crown today still possesses no inherent authority to make law, despite continuing to possess considerable prerogative powers. In the American colonies, though, the Crown might have had some concurrent law-making authority along with the imperial Parliament. Such Royal authority would, however, have been an incident to what might essentially be considered a prerogative over foreign affairs. Any comparison between a domestic law-making power in the President and whatever prerogative powers exercised by the King over America as a foreign possession is thus misplaced. Again, prerogative must be understood in Lockean terms as the core discretion of the executive, which remains conceptually the same whatever the form of the executive branch or the limits imposed upon the scope and exercise of that discretion.

[27] Josephson, *supra* note 4 at 233.

[28] *Ibid.*

[29] Locke, *Second Treatise*, § 156. Locke writes this in the specific context of the executive's duty regularly to convene the legislature or take action in their absence, indicating both the executive's subservience to law and obligation to act for the public welfare where the law is silent.

[30] Dunn, *supra* note 12 at 150.

authority, which would establish an agreement between the executive and the people. Such agreement would imply that the executive possessed certain rights to the exercise of power, circumscribed though they might be through the contractual obligation.[31] The idea of trust, presenting a dialectical problem about the legitimization and limitation of government authority, makes it difficult to define an exclusive sphere of executive power both existing *vis-à-vis* the legislative and judicial branches, and permitting absolute discretion without regard for the public good.

Of course, in attempting to address this dialectical problem, the framers of the American Constitution departed from the Crown's historically delineated prerogative powers and sought greater control over executive discretion. They placed, to project backward the phraseology of *Myers*, specific emphasis and direct limitations on executive power, where needed.[32] Rather than binding the executive with more precise definitions of how or when the Chief Executive and Commander-in-Chief could make international agreements or order military operations, for example, the Constitution gave Congress a participatory role in those decisions through the treaty and declare war clauses. The President can only make treaties with the advice and consent of the Senate, and commands the armed forces subject to Congress' power to declare war. Differences between presidential and Crown powers, and even between legislative and judicial powers in the United States and the United Kingdom, however, demonstrate rather than reject Lockean theory as a common foundation of the two systems.

The U.S. Constitution's congressional checks on presidential power highlight important substantive, as well as structural, aspects of Lockean

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[31] Even though Locke famously advocated the notion of a social contract, that contract has trust qualities. Rather than conflicting, however, the concepts of contract and trust are not incompatible. Ross Harrison, *Hobbes, Locke, and Confusion's Masterpiece: An Examination of Seventeenth-Century Political Philosophy* (Cambridge: Cambridge University Press, 2003) at 212, suggests, for example, that the political trust arises from a "double contractual operation," in which individuals fictionally contract to form a political society, then subsequently create a government as a "corporate entity" empowered to act on its behalf. See Grant, *supra* note 7 at 104.

[32] 272 U.S. at 118.

prerogative. First, executive discretion by nature cannot be clearly defined, and thus structural mechanisms are necessary to determine the substantive public good and, consequently, the allowable scope of such discretion. Second, prerogative power, as a trust, does not include rights, as such, belonging to the executive and serving its own purposes alone. Rather, the trust places upon the executive a fiduciary obligation in the use of its discretion. Prerogative power therefore has a substantive aspect insofar as it promotes the public good. However, the trust has strong structural elements, as the executive can exercise prerogative only where the legislature is unable or unwilling to act. The different ways in which the American and British constitutions provide for the institutional determination of the public good and the exercise of the prerogative are only variations for how a constitutional system can manage the relationship between the substantive and structural aspects of the executive's public trust. These differences do not present theoretical conflicts as much as they only show variations in how to solve the same dialectical problem presented by Lockean prerogative. In both the United States and the United Kingdom, then, the problem of defining and limiting the scope of executive discretion is based upon a Lockean paradigm that requires elucidation of separation of powers principles.

The Federative Power

Additional to prerogative discretion in domestic affairs, the executive also possesses what Locke terms the federative power. These two classes of power are generally combined in the hands of the executive,[33] and the discretionary nature of the federative power makes it in kind similar to the prerogative that the executive exercises in domestic matters. This similarity between these powers means that, as in British law, a broader usage of "prerogative" might commonly refer to federative power along with the prerogative in Locke's narrower domestic sense. However, though similar in

[33] Congress' share in the treaty and war-making powers, for example, demonstrates an exception to an executive monopoly over the federative power, as enjoyed by the Crown.

nature, the federative power has a distinct focus from domestic prerogative in terms of their applications.[34] While Locke's domestic executive power is inwardly directed towards members of the public, in that it concerns the domestic enforcement of positive laws or use of discretion for the public good,[35] the federative power externally acts upon those individuals, groups, or states outside of the political society.[36] The subjects upon which the executive exercises its prerogative and federative power therefore differ. The federative power comprises the making of, "War and Peace, Leagues and Alliances, and all the Transactions, with all Persons and Communities without the Commonwealth. . . ,"[37] actions usually associated with the Crown's prerogative, and some of which the President partly shares with Congress. In any case, the federative power, unlike the domestic prerogative, engages the public as "one Body in the State of Nature."[38] While political factions might exist within a political society, on the international scene the society engages others as an aggregate force. This unity intensifies and unifies the demands of the public good, while recognizing the common dangers posed to it by outside threats.[39]

Although the federative power responds to external threats, there exists a risk that the executive might misdirect the federative power inward against domestic society itself, manipulating concerns over foreign affairs, war, or national security issues in order to increase its domestic prerogative or abuse its trust. "Therefore, war making is a public good where the optimal assignment of power for the most effective delivery also leads to a great risk that it will be produced for private ends."[40] In spite of this risk, international

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[34] Locke, *Second Treatise*, §§ 147-48.

[35] *Ibid.*, § 147.

[36] *Ibid.*, § 145.

[37] *Ibid.*, § 146.

[38] *Ibid.*, § 145.

[39] Cox, *supra* note 13 at 122-23.

[40] John Oldham McGinnis, "The Spontaneous Order of War Powers" (1997) 47 Case West. L. Rev. 1317 at 1322.

relations between nations or groups exist in a dynamic and unpredictable state of nature requiring flexible, energetic action. Federative power, therefore, "is much less capable to be directed by antecedent, standing, positive Laws, than the *Executive* [domestic prerogative]; and so must necessarily be left to the Prudence and Wisdom of those whose hands it is in, to be managed for the publick good."[41] In defending the proposed presidency during the state ratification debates on the American Constitution, Alexander Hamilton similarly pointed to the need for executive leadership, especially in war:

> Of all the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand. The direction of war implies the direction of the common strength; and the power of directing and employing the common strength forms a usual and essential part in the definition of the executive authority.[42]

Hamilton's justification for a presidential war power, however, upheld a general proposition about the necessity of the federative power, a proposition which Blackstone had earlier proffered in describing the British Crown's war prerogative.[43] Though foreign affairs might often present more uncertainties or urgency than domestic matters, Locke's federative power and domestic prerogative are part of a unified "prerogative" in a broader sense that both represent an executive discretion to act for the public good where the law is silent or inadequate. As with the domestic prerogative, the public good thus justifies and limits the exercise of federative power. However, it does so in a more pronounced way since the federative power responds to common threats and presents greater risks of domestic abuse. Notwithstanding their differences in focus and degrees, as one writer puts it, the "executive-federative power" comprises "in truth a single power viewed from different perspectives,"[44] legitimized and limited by the executive's trust obligations.

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[41] Locke, *Second Treatise*, § 147; Cox, *supra* note 13 at 127.

[42] Alexander Hamilton, *The Federalist* (1788) No. 74.

[43] Blackstone, *supra* note 14 at 249-50.

[44] Cox, *supra* note 13 at 126-27.

There are three aspects of federative power that clearly distinguish it from the domestic prerogative, yet similarly place them both within a Lockean constitutional paradigm. First, federative power addresses foreign affairs and external threats that generally present a greater risk to the public as a collective whole. Both the uncertainties of external affairs and their potentially greater threat to the society justify greater latitude of executive discretion than is the case with the domestic prerogative. However, the end for which the executive exercises federative power remains the public good. Second, the executive can and often must access vast national resources whether military, economic, or otherwise, when employing the federative power. Broad executive discretion to direct those resources is appropriate in order to respond to outside threats to the public good. However, the danger is that the executive might redirect formidable government power inward against the very public it is supposed to serve. The public good, for the same reasons that it legitimizes the federative power, limits its exercise to external threats. Finally, under the Lockean paradigm, the executive acts for the public good within a structural model that divides power between government branches. Constitutional structures limit the exercise of prerogative in the broad sense, in the ways that they diffuse government power to determine the public good, as well as to permit or restrain executive discretion. Structuralism weakens with the executive's use of federative power, however, as it operates on an international plane that resembles a state of nature between states or even non-state entities. In this state of nature, the executive is free to act externally to the political society in ways that would be unacceptable in regard to domestic matters within it. The context in which the executive exercises federative powers will also make it more difficult to determine just what the public good requires, and what measures will reasonably achieve it. When exercising the federative power, the executive will encounter fewer legal restrictions and will have greater freedom of judgment. However, constitutional structures that limit the executive's discretion should again strengthen if it attempts to redirect the federative power inward.

The tense but close relationship between domestic prerogative and federative powers becomes clearer from the Supreme Court's decisions in

United States v. *Curtiss-Wright Corp.*[45] and *Youngstown Sheet and Tube Co.* v. *Sawyer*,[46] which broached the respective foreign and domestic powers of the President. The first case, from 1936, dealt with the President's powers under statute to forbid arms sales to Bolivia and Paraguay in the face of a continuing military conflict between them. Violation of such a presidential proclamation, pursuant to the statute, was a criminal offense. Curtiss-Wright Corporation, which had violated the executive prohibition, claimed that the statute was void as an unconstitutional delegation of Congress' authority to the President, giving him an unfettered discretion to trigger the statute and determine the extent of its operation in particular cases. Consequently, appellees claimed, Congress had impermissibly abdicated its legislative responsibilities to the executive branch. The Supreme Court disagreed, reversing the decision of the Appeals Court. The majority's reasoning rested upon a differentiation between government powers in respect of domestic and foreign matters. Writing for the Court, Justice Sutherland suggested that governmental acts in relating to foreign powers, such as the making of treaties and making of war, did not derive from affirmative grants in the Constitution, but necessarily vested in the federal government as concomitants of national sovereignty.[47] Furthermore, the President was the representative of the nation in foreign affairs. The President, Sutherland suggested, possessed by virtue of his office an independent power to act in foreign affairs that combined with any other statutory powers delegated by Congress.[48] The executive power at issue, however, was not one of law-making. Only Congress could make or undo law, but it could delegate to the President the discretion as to when and in what circumstances to bring the statute into force or halt its operation.[49] This executive authority, combined with long precedent of political practice, meant that broad congressional delegations over foreign affairs were constitutional.

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[45] 299 U.S. 304 (1936).

[46] 343 U.S. 579 (1952).

[47] 299 U.S. at 318.

[48] *Ibid.* at 319-20.

[49] *Ibid.* at 332.

While supporting a strong and independent executive role in foreign affairs, *Curtiss-Wright* was clearly a case of legislative delegation. It did not clarify just what the extent of any inherent federative power might be, and did not suggest that any such power would be exclusive and immune from congressional limitation. The Court's decision, despite favoring executive discretion in foreign affairs, was also limited in two other important ways. First, the Court did not speculate on the possibility that the President might in some way act so as to infringe upon the rights of the citizen either in the absence of or against statute, thereby using Lockean "federative" power to have an inward effect on the political society. Indeed, in recitation of the many statutory precedents that evidenced an accepted constitutional practice of broad delegation in foreign affairs, the impression is that some form of legislative cooperation or authorization might indeed be necessary for the President to use federative power in a way adversely affecting individual rights. Second, the Court's clear distinction between the government's foreign and domestic powers erected geographic as well as subject matter barriers to the President's "federative" powers, whether arising inherently through the Constitution or by delegation through statute. The implication of Justice Sutherland's reasoning was that the scope of presidential discretion would be narrower when he acted within American borders, as well as in matters otherwise having domestic effect, or usually decided by the legislative and judicial branches.

This second point was the basis for the Supreme Court's decision in *Youngstown*, which complemented *Curtiss-Wright* in that it explained some limitations upon the executive's use of federative power. In April 1952, President Truman ordered government seizure of most of the nation's steel mills, intending to avert a workers' strike that might disrupt arms production for the war in Korea. Lacking any direct or implied statutory authority to make the order, Truman claimed that the Constitution granted him general power to act in the national interest, by virtue of the Article II provisions vesting in him the executive power, ordering him to take care that the laws be faithfully executed, and designating him Commander-in-Chief. Writing a

short opinion for the majority, Justice Black rejected the President's seizure order as an unconstitutional attempt at law-making. In granting executive power to the President and requiring him to execute the laws, the Constitution limited the presidential role in making laws to recommendation and veto of legislation. Rather than executing congressional policy with the ordered seizure, the President was himself making and executing his own policies, thereby intruding upon the province of Congress. Within this legislative province, and outside that of the executive, was the power to take private property for public use.[50] Justice Black's short opinion did not examine in detail the separation of powers, nor question the legislative nature of appropriation; so far the case might stand for clear boundaries between the legislative and executive actions. However, in further rejecting any presidential authority to order the seizure in his capacity as Commander-in-Chief, Justice Black flashed some deeper insight into the Constitution's restrictions upon the President's "federative" power, as Locke would have classified it. In responding to the President's assertions of broad powers of military command, Justice Black wrote: "Even though 'theater of war' be an expanding concept, we cannot with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces has the ultimate power as such to take possession of private property in order to keep labor disputes from stopping production."[51] The President could not seize private property not just because it was an act of law-making, Justice Black seems to have suggested, but because the President had crossed a line from "federative" into domestic affairs.[52] The Court's opinion, however, did not delve into the extent of presidential powers within a theater of war and whether actions there that might otherwise be impermissible law-making on the home-front might be acceptable exercises of the President's "federative" power.

It fell to Justice Jackson, in a concurring opinion, to set out the separation of powers proposition for which the *Youngstown* case is best

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[50] 343 U.S. at 587-88.

[51] *Ibid.* at 587.

[52] See also *ibid.* at 631-32, *per* Douglas J., concurring.

known. Justice Jackson struck upon the functional nature of branch powers, recognizing that they were context-dependent and fluctuated as a result of their interdependence.[53] The result of this observation was his tri-partite, and now well-known, analysis of executive power. With considerable explanation, he posited first that when the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. Justice Jackson cited *Curtiss-Wright* for this proposition, while also recognizing that the earlier case suggested possible inherent presidential authority in foreign affairs when Congress had not acted. Second, when the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers. Consequently, there was a "zone of twilight" in which President and Congress might have concurrent authority or the constitutional distribution of power was uncertain. Last, Justice Jackson stated that when the President takes measures incompatible with the expressed or implied will of Congress, his power would be at its "lowest ebb." In such a case, the President could only rely upon whatever constitutional powers he had minus those possessed by Congress over the matter.[54] "Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system."[55] Justice Jackson thereby attempted to give the President's enumerated powers a pragmatic "scope and elasticity" free from rigid, "doctrinaire textualism."[56] Rejecting the notion that the Constitution girdled the President with any powers as broad as that of the Crown prerogative, Justice Jackson nevertheless recognized that the President enjoyed broad inherent discretion to act in matters of foreign affairs and military command. Despite disclaiming any presidential prerogative similar to that of the Crown, Justice Jackson's sketch of executive discretion still reflected the prerogative of Locke. Jackson's view of prerogative discretion in foreign affairs,

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[53] *Ibid.* at 635.

[54] *Ibid.* at 635-38.

[55] *Ibid.* at 638.

[56] *Ibid.* at 640.

matching that of Locke's federative power, thus prompted him to reject President Truman's seizure order as unconstitutional executive law-making. The Justice found it alarming that "a President whose conduct of foreign affairs is so largely uncontrolled, and often even is unknown, can vastly enlarge his mastery over the internal affairs of the country by his own commitment of the Nation's armed forces to some foreign venture."[57] Justice Jackson's analysis of executive power, defined by its structural relationship to Congress, fundamentally rested upon considerations as to whether the President had acted with domestic effect and in a way adverse to private rights, or had externally directed his power to matters of foreign affairs. Jackson's model is a Lockean one, and constructs a paradigm for federative power in trust.

Curtiss-Wright and *Youngstown* illustrate the aspects of Lockean federative power, which, when compared with the narrower domestic prerogative, show that discretion is conceptually similar in both cases, but distinguishable upon the basis of an "'umpirage' between the individuals within the society, and . . . the proper organization and direction of the force of the political society with respect to threats which emanate from without."[58] Federative power, unlike domestic prerogative, necessarily directs itself against entities and persons which are external to the political society. Particularly in regard to war, federative power in this sense projects abroad the unified sovereignty of the political society. Although application of the federative power can operate directly upon external parties, such power potentially poses a frightening threat to the public if misdirected by a corrupt or unwise magistrate.[59] Inward direction of the federative power by itself risks breaching the executive's fiduciary obligation, due to the risk that it can pose

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[57] *Ibid.* at 642.

[58] Cox, *supra* note 13 at 107, 124-25.

[59] See *ibid.* at 129, for the suggestion that the external operation of the federative power typically will not occasion internal constitutional crises. While the public might therefore give extraordinary deference to executive judgment in foreign affairs and war, however, the executive's inward re-direction of the federative power would then abrogate the grounds for such deference as that power would more likely impinge upon the security of the community and the rights of the individual.

to the public good. The dialectical problem that the public good poses for federative power – that is, how its exercise might promote security from external dangers without threatening liberties within the society – raises structural questions resting upon separation of powers principles.[60] Such principles must allow the legislature and courts to defer to the executive in federative matters where they are not as institutionally well-suited for decision, yet to assert themselves in domestic affairs where the executive risks abusing its discretion.

[60] *Ibid.* at 113-14; McGinnis, *supra* note 40 at 1323.

Chapter II: Legislative Power and Politicization of Fiduciary Obligation

Executive Accountability to the Legislature

Locke's structural scheme for controlling executive discretion focuses upon the legislature, with its authority grounded in its representative capacity. Discussing specifically the executive's arbitrary refusal to convene the legislature, Locke outlines the connections between the executive's abuse of its discretion, its moral accountability to the public, and the necessity of preserving the legislature as a structural check. Where the executive fails to convene the legislature, a prerogative power exercised in trust, the public has an appeal to Heaven and possesses moral justification in rebelling.[61] By grossly abusing its discretion and violating its fiduciary obligation to act for the public good, the executive absolves political society from allegiance to it.[62] The important question for Locke then becomes not whether the executive can do wrong, which it clearly has done in such a case, but rather who is to judge it and hold it accountable under its fiduciary obligation. For Locke, that ultimate judge is the people,[63] who have consented to form political society and establish a magistracy to act on their behalf. Moreover, executive accountability for its breach of trust rests upon an epistemological assumption that the people themselves can ascertain their own interests. The executive's fiduciary obligation to act reasonably for the public good therefore precludes arbitrary and self-serving actions, because they dissolve the moral bonds that hold together political society. A serious breach of trust by the executive can

[61] Locke, *Second Treatise*, §§ 155, 167-68.

[62] *Ibid.*, § 151.

[63] Harrison, *supra* note 31 at 215-16.

be an act of violence against the people, inviting their resistance and potentially leading to a state of war between governors and governed.[64]

Rebellion, however, is a necessarily extreme recourse against persistent and severe executive abuses; it ruptures political society and discounts as ineffective constitutional means of correcting such abuses. To prevent or remedy abuses of discretion that fall short of tyranny, Locke institutionally counterbalances the executive with a representative legislature wielding supreme law-making power.[65] The legislature, rather than the people directly, can hold the executive accountable under its fiduciary obligation to act for the public good. Individuals must no longer exercise their own judgments about whether to endure executive abuses or return to a state of nature through rebellion. Instead, Locke's structural model provides institutionalized means for the public accountability of the executive. The resulting constitutional paradigm permits "sophisticated institutional representation of the will of the people," which not only diffuses government power generally, but channels public resistance to enforce the executive's fiduciary obligation.[66] Consequently, "[l]egal avenues for redress against tyrannical abuses give effect to the right of resistance without destabilizing the government."[67]

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[64] See *ibid.*; Dunn, *supra* note 12 at 178-79; Thomas Jefferson put forth such a Lockean argument in the American Declaration of Independence in 1776: "We hold these truths to be self-evident: That all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness; that, to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed; that whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it, and to institute new government, laying its foundation on such principles, and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness. Prudence, indeed, will dictate that governments long established should not be changed for light and transient causes; and accordingly all experience hath shown that mankind are more disposed to suffer, while evils are sufferable than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same object, evinces a design to reduce them under absolute despotism, it is their right, it is their duty, to throw off such government, and to provide new guards for their future security."

[65] See Locke, *Second Treatise*, §§ 20-21, 89, where he explains that one purpose of civil society is to provide for means of appeal when those in authority attempt to do injury to the public or corrupt the laws to that effect.

[66] Dunn, *supra* note 12 at 182, and 181-84.

[67] Grant, *supra* note 7 at 163, also suggesting that "Locke justifies extralegal resistance only as a last resort." As examples of legal lines of appeal, Grant writes that "[i]mpeachment, judicial

Locke's discussion of the legislature demonstrates how it can hold the executive politically accountable, and impose legal limitations upon executive discretion that are themselves eventually enforceable by the courts.

Taking the Glorious Revolution and its constitutional settlement as his example, Locke gives an outline for what would become the doctrine of parliamentary sovereignty in the United Kingdom, thereby giving a strong legislative check against executive misconduct.[68] "[T]he *Legislative is the Supream Power*" he writes, and "all other Powers in any Members or parts of the Society, [are] derived from and subordinate to it."[69] Taken as an expression of the public good, legislative action can limit executive discretion under both the domestic prerogative and federative power.[70] This legislative power does not conflict with the broader concept of prerogative as an executive discretion exercisable for the public good, but is instead intrinsic to it; by definition, prerogative exists in the absence of, and not in opposition to, controlling law. The executive might participate directly in the legislative process by consenting to bills, but any duly enacted statute binds it where that statute applies. Consequently, it is conceptually impossible that "the People have *incroach'd upon the Prerogative*, when they have got any part of it to be defined by positive Laws."[71] There can be no such encroachment, as prerogative broadly termed is not defined independently of the law and the executive possesses no free-standing right to govern. All executive discretion is inherently bound up with statutory, or even common-law, limitations in that it only exists within legal boundaries.

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review, a constitutional amendment procedure, and trial by jury could all be seen in this light." See further *ibid.* at 202-03.

[68] "The theorist of the Revolution is Locke; and it was his conscious effort to justify the innovations of 1688." Harold J. Laski, *Political Thought in England: Locke to Bentham* (London: Oxford University Press, 1961) at 23.

[69] Locke, *Second Treatise*, § 150.

[70] *Ibid.*, § 153.

[71] *Ibid.*, § 163. See generally *ibid.*, §§ 162-66, discussing that the scope of prerogative expands and contracts, depending on whether a particular executive tends to use its discretion for or against the public good.

Locke's legislature may statutorily limit or abrogate executive discretion where it deems it to be in the public good to do so. It could, of course, also choose to delegate discretionary authority to the executive, but in any case can direct how the executive should exercise such discretion. Furthermore, constitutional requirements, conventions, and common law might predetermine the scope of executive discretion over any particular matter. The Glorious Revolution, for example, resulted in Parliament reserving to itself some of the former Royal military prerogatives. This statutory reservation, in the *1688 Bill of Rights*,[72] has ever since remained a constitutional restriction on the Crown, and possesses such importance in Anglo-American political thought that the United States Constitution textually incorporates much of it. The *1688 Bill of Rights* declares that "the raising or keeping a standing army within the kingdom in time of peace, unless it be with consent of Parliament, is against law."[73] Parliament further possesses the power of the purse, as the *Bill of Rights* establishes "[t]hat levying money for or to the use of the Crown by pretence of prerogative, without grant of Parliament, for longer time, or in other manner than the same is or shall be granted, is illegal."[74] These parliamentary reservations responded to the claims of Stuart monarchs that they, by prerogative, could raise an army and fund it by levying taxes without Parliament's consent. The Crown retains a prerogative power to declare war and command armed forces in the field (being "federative" matters), but only with whatever forces Parliament sees fit to raise and finance by law.

The United States Constitution expands upon the *1688 Bill of Rights* by reserving to Congress even further power over the military. Moreover, while the *1688 Bill of Rights* was a parliamentary statute, albeit a constitutionally fundamental one, the United States Constitution purports to be the voice of the popular sovereign itself. The Constitution is accordingly supreme over ordinary legislation and thereby binds executive and legislative branches alike,

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[72] *An Act declaring the Rights and Liberties of the Subject, and settling the Succession of the Crown, 1688* (Eng.) 1 Will. & Mary, Sess. 2, c. 2 [hereinafter *1688 Bill of Rights*].

[73] *Ibid.*, s. 6.

[74] *Ibid.*, s. 4.

unless changed under special amendment procedures.[75] Congress can authorize an army for up to two years, maintain a navy, make regulations for the armed forces, call the states' militias into national service and oversee their organization.[76] All money bills must arise in the House of Representatives,[77] as they do in the House of Commons, so that only Congress may raise revenue to "provide for the common Defence."[78] Similar to the Crown, the President remains Commander-in-Chief[79] only over whatever forces Congress chooses to put at his disposal. In similar ways, the war powers of the Crown and the President remain dependent upon legislative willingness to provide military resources. Parliament and Congress can thus preempt or end any executive military action that they deem harmful to the public good, by refusing to fund or otherwise maintain the armed forces. The legislature can thus politically influence as well as legally bind the executive, thereby establishing the contours of the executive's trust and holding the executive accountable under its fiduciary obligation.

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[75] U.S. Const. arts. V (amendment process) and VI (supremacy clause).

[76] Congress has power "To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years; To provide and maintain a Navy; To make Rules for the Government and Regulation of the land and naval Forces; To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions; To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress." *Ibid.*, art. I, § 8; Although Commander-in-Chief of the federal armed forces, the President has no independent constitutional authority to command state militias. A state militia only comes under the President's command at the invitation of the state's Governor, or as "federalized" pursuant to act of Congress. See *infra* note 79; Currently, the organization of state National Guard units and the conditions under which the executive branch can call them into federal service are governed by U.S. Code, titles 10 and 32.

[77] "All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as on other Bills." U.S. Const. art. I, § 7.

[78] "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States." *Ibid.*, § 8.

[79] "The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States." *Ibid.*, art. II, § 2.

The United States Constitution, however, restricts executive discretion in military matters in one important way that departs from British practice, but upholds the same principle as any other restrictions upon Lockean prerogative. While the Crown can declare war at its own discretion, in the United States only Congress can do so. Wary of executive military adventurism abroad and tyranny at home, the framers of the Constitution lodged the war declaring power in legislative hands,[80] thereby diffusing government power, encouraging political debate and broader consensus, and making government war policy more publicly accountable. The constitutional reservation of the war-declaring power to Congress seeks to avoid ill-considered or wrongly motivated executive military action that would constitute a breach of trust.[81] Congress, then, has constitutional authority to judge the executive's fiduciary obligations in war-making, even though the executive generally enjoys broad discretion over "federative" matters. In actual political practice, the discretion of the President as Commander-in-Chief to initiate hostilities, only afterwards seeking legislative acquiescence, is much greater than the Constitution's declare war clause would suggest. Nevertheless, the constitutional requirement that only Congress can declare war, in addition to raising military forces, ensures a vital and complex political process between the executive and legislative branches when deciding whether to commit the nation to war.[82] The President must court and maintain legislative approval for his military

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[80] Congress has power "To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water." *Ibid.*, art. I, § 8.

[81] Fear of entangling alliances and principles of federalism also led the framers to strip the President of a treaty-making prerogative like that of the Crown, requiring instead that he make treaties only with the advice and consent of the Senate, for which a two-thirds majority of those Senators present is required. *Ibid.*, art. II, § 2.

[82] Of course, questions remain as to whether limited or unconventional military conflict qualifies as "war" for constitutional purposes, and what kind of congressional actions are constitutionally sufficient to authorize presidential military actions under the declare war clause. The so-called "war against terrorism," and Congress' *Authorization for Use of Military Force Joint Resolution*, Pub. L. No. 107-40, 115 Stat. 224 (18 Sept. 2001) [hereinafter *Authorization for Use of Military Force*, *Military Force Authorization*, or *Joint Resolution*] in response to the attacks of 11 September 2001, present such problems of constitutional interpretation and raise questions about the separation of powers within the context of national security. For discussion of the "war against terrorism" and the *Military Force Authorization*, see 230, below.

actions. This Lockean structural model politically and legally constrains presidential discretion in military, just as in other, matters.

Inter-branch dialogue over war policy, as found in the United States, exists to a degree in the British system, as well. Although the Crown, pursuant to the prerogative, requires no prior legislative approval to take the United Kingdom to war, political concerns nonetheless mandate some executive and legislative cooperation. First, the Crown exercises its prerogative only through the advice of ministers sitting in Parliament. The Prime Minister, according to whose advice the Crown would declare war, himself remains politically accountable to the House of Commons. The Prime Minister must maintain the confidence of a Commons majority for the Crown's military actions. The Government's military decisions will not only face criticism by the opposition, but might potentially alienate the Prime Minister's support within his own party, as the 2003 invasion of Iraq illustrated to Mr. Blair. The Prime Minister's loss of confidence in the Commons, the actual threat of which depends upon the size of the majority, would result in the fall of the Government. Second, while the Crown can take military action without prior legislative approval, the sovereign power of Parliament looms latently in the background. As best exemplified by the *1688 Bill of Rights*, Parliament could pass some form of permanent statutory restriction upon the Crown's war prerogative either in response to exceptional executive breaches of its trust, or as part of general constitutional reforms intending to reduce the scope of executive discretionary power. Thus, even though the Prime Minister loosely controls the House of Commons through the leverage of party discipline (and through the *Parliament Acts* can therefore push for the enactment of legislation without the Lords' consent, in some cases),[83] the Crown's war prerogative remains situated within a Lockean structural model. Exercise of the prerogative is politically, and potentially even legally, restrained by a sovereign Parliament that remains the judge of whether the executive complies with its fiduciary obligation.

[83] See Brigid Hadfield, "Judicial Review and the Prerogative Powers" in *The Nature of the Crown: A Legal and Political Analysis*, ed. Maurice Sunkin and Sebastian Payne (Oxford: Oxford University Press, 1999) 199 at 205.

Legislative Accountability to the Public

The legislature's authority to check executive abuses of trust rests upon its representative role for the public. Its representative character, along with Locke's principle that all government power must be exercised in trust for the public good, puts the legislature under a fiduciary obligation of its own. Although Locke did not expound upon an electoral system, he nonetheless alluded to public choice in the legislature's composition:[84]

> If the *Legislative*, or any part of it be made up of Representatives chosen for that time [of assembly] by the People, which afterwards return into the ordinary state of Subjects, and have no share in the Legislature but upon a new choice, this power of chusing must also be exercised by the People, either at certain appointed Seasons, or else when they are summon'd to it. . . .[85]

Being in some way chosen by the people, individual legislators maintain links to various societal interests that are more directly accountable than those of the executive. While some writers have emphasized the people's right of rebellion

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[84] It is important to remember that while Locke's legislature may theoretically represent the public as a whole, it must not necessarily be popularly elected. Indeed, this corresponds with the theory of virtual representation under which members of Parliament legislated on behalf of both the disfranchised populace at home and peoples living throughout the Empire. Locke's legislature is fundamentally a republican, not a democratic, one. Historical restrictions on the voting of those without sufficient wealth, women, racial minorities, and other groups illustrate the gaps that have existed between the make-up of the voting electorate and the legislature's responsibility to act on behalf of the public as a whole. Indeed, property qualifications echoed Locke's own idea that one of the primary aims of government and the social contract was to protect property rights, justifying greater political participation for propertied individuals. Accordingly, the legislature is morally bound to act not only for the good of qualified electors, but also for those non-voting individuals for whom the legislature likewise exercises power in trust. Legislators must weigh the good of their local constituencies and favored political factions with that of the polity as a whole. The disjunction between a legislator's responsibility to particular interest groups and the greater public good therefore belies democratic tensions between the needs of the community and the many multiple sub-communities having various and conflicting interests. Although Locke would have assumed that the legislature was electorally accountable only to a small proportion of the population, and certainly not to a universal electorate, the legislature nevertheless had a fiduciary obligation to act for the good of the general public. See J. W. Gough, *John Locke's Political Philosophy*, 2d ed. (Oxford: Clarendon Press, 1973) at 123.

[85] Locke, *Second Treatise*, § 154.

against executive tyranny,[86] this recourse is an extreme one under Locke's structural model. The fiduciary obligation of the legislature itself requires it to hold the executive to a coexisting obligation. Only where the structural model fails, through the legislature's breach of this trust, would the people be able to engage their right to rebellion. Nevertheless, Locke's suggestion of periodic elections engages another structural back-up within his constitutional paradigm. That is, through elections, the people can oust those legislators failing their fiduciary obligation as understood by the general public (or, more accurately, as understood by the voting public). Elections allow the public to "turn the rascals out," and replace them with legislators more closely attuned to public sentiment. It is only where the legislature seems persistently corrupt, and the electoral system is inadequate for correction of the problem, that institutionalized means for resistance give way to the right to rebellion.

In Locke's day, the *Act of Settlement, 1701*[87] asserted Parliament's power, as a representative body, to fulfill its trust by holding the executive accountable. The *Act* followed upon the Glorious Revolution, which rendered kingship dependent upon the people's consent expressed through the sovereign Parliament.[88] While far from democratic or representative by contemporary standards, the House of Commons of Locke's era was nevertheless an elected assembly, even though chosen by relatively few propertied elites.[89] Of course, after the *Great Reform Bill* of 1832[90] enlarged the franchise, the modern Commons has grown stronger in its democratic legitimacy. Responsible government also means that ministers depend directly upon support of a Commons majority, and are regularly called to account by the House. The House of Lords, though remaining an unelected chamber, is ultimately

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[86] See for example Gough, *supra* note 84 at 45-47, 123.

[87] *Act of Settlement, 1701* (Eng.), 12 & 13 Wm. III, c. 2.

[88] Laski, *supra* note 68 at 34.

[89] See Gough, *supra* note 84 at 128-29.

[90] *Representation of the People Act, 1832* (U.K.), 2 & 3 Will. IV, c. 45 [hereinafter *Great Reform Bill*].

subordinate to the Commons under the *Parliament Acts*.[91] In the United States, in comparison, James Madison extolled the representative nature of the House of Representatives,[92] while the Sixteenth Amendment[93] made Senators electorally responsible to the people of the states rather than to their legislatures. The presence of some kind of electoral process, in any case, legitimizes legislative power to check the executive, while it also checks legislative abuse of trust by holding individual legislators publicly accountable.[94] Incorrigible legislative breaches of trust, however, might give the people a right to rebel against the legislature, just as they can do against the executive.[95] In any case, the legislature must keep its own fiduciary obligation, for which it is accountable to the public through regular elections. This obligation includes checking executive abuses of power.

Locke emphasizes the connection between the legislature's electoral accountability, its independent trust, and its structural role in checking the executive by strongly condemning any executive interference with its election. Such executive misbehavior might necessitate that the people take the extreme course of dissolving the political society and erecting a new one in its place through revolution.[96] Other executive attempts to thwart the elected legislature through corruption, or even simple defiance, violates the executive's trust, threatens arbitrary rule, and undercuts the foundations of civil government. Thus, Locke writes:

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[91] *Parliament Act, 1911* (U.K.), 1 & 2 Geo. V, c. 35; *Parliament Act, 1949* (U.K.), 12, 13, & 14 Geo. VI, c. 103; See also *House of Lords Act 1999* (U.K.), 1999, c. 34.

[92] See James Madison, *The Federalist* Nos. 52 and 53.

[93] U.S. Const. amend. XVI.

[94] See Locke, *Second Treatise*, §§ 21, 89.

[95] *Ibid.*, § 222; Steven M. Dworitz, *The Unvarnished Doctrine: Locke, Liberalism, and the American Revolution* (Durham, N.C.: Duke University Press, 1990) at 92, illustrates the point, writing that the "theoretical question of the American Revolution was, fundamentally, a *Lockean* question: 'the extent of the legislative power'" (refering to Locke, *ibid.*, ch. 11).

[96] Locke, *ibid.*, §§ 212, 216.

> For the People having reserved to themselves the Choice of their *Representatives*, as the Fence to their Properties, could do it for no other end, but that they might always be freely chosen, and so chosen, freely act and advise, as the necessity of the Commonwealth, and the publick Good should, upon examination, and mature debate, be judged to require.[97]

Executive domination, corruption, or defiance of the legislature would accordingly subvert the public good and destroy the structural model that are both central to his constitutional paradigm. For the same reasons that the executive cannot obstruct legislative independence, the legislature must guard its institutional autonomy, observe constitutional boundaries to its own authority, and fulfill a fiduciary obligation to assess whether the executive, too, has acted for the public good. Accordingly, the legislature must "govern by *promulgated establish'd Laws* . . . designed *for* no other end ultimately but *the good of the People* . . . [and] neither must *nor can transfer the Power of making Laws* to any Body else, or place it any where but where the People have."[98] The legislature cannot exercise electorally legitimized power arbitrarily, abdicate it by complacency, or delegate it away wholesale to the executive without violating its public trust.

Executive power is accordingly subject to legislative oversight, though federative matters usually warrant greater legislative deference to executive discretion than do ones falling under domestic prerogative. The legislature's failure to hold the executive accountable to its fiduciary obligation, however, would be a breach of the legislature's own trust. The executive is therefore politically accountable to the legislature and the public, while the legislature, too, must answer to the public through elections. Where constitutional, statutory, or perhaps common-law restrictions limit executive prerogative broadly speaking, boundaries to executive discretion might also be legally cognizable ones in the courts. The courts' role in enforcing legal limitations upon executive discretion leads yet again to another public trust, giving the judiciary an important place in the Lockean constitutional paradigm.

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[97] *Ibid.*, § 222.

[98] *Ibid.*, § 142.

Chapter III: Judicial Power and Legalization of Fiduciary Obligation

The Courts within Locke's Structural Model

Locke's structural model, being a "proto-doctrine" of separation of powers, counterpoises the executive and legislative branches, each having a trust to act for the public good. This structural dualism promotes a constitutional paradigm in which government power is institutionally diffused to prevent its over-centralization, and through which both branches can uphold their fiduciary obligations.[99] Notably absent from Locke's *Second Treatise*, however, is any developed discussion of the judiciary. Locke writes somewhat vaguely of "appeals" against wrongs and "judges" settling conflicts, but only in the general sense of the need for political institutions to order public affairs.[100] Beyond this, Locke does not propose a judicial power, as understood in modern constitutional practice, taking an independent and equal place with that of the executive and legislative.[101] Nevertheless, Locke, articulating his structural model, hints towards a role for courts: "Those who are united into one Body, and have a common establish'd Law and Judicature to appeal to, with Authority to decide Controversies between them, and punish

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[99] Locke's structural model facilitates the realization of the public good in positive and negative ways. See *infra* note 153 and accompanying text. The positive, rational decision-making aspect of this model is often overshadowed by its negative, defensive purpose of protecting liberty from arbitrary government. Laski, *supra* note 68 at 44-45, for example, writes of Locke's limitation of power through the external dictates of popular sovereignty and the internal division of government into branches; Gough, *supra* note 84 at 108-09.

[100] Locke, *Second Treatise*, §§ 20-21, 89.

[101] Gough, *supra* note 84 at 108; In the British system, one might note that, while they are functionally independent, the courts historically originated as forums for the Crown's Royal justice, while under the doctrine of parliamentary sovereignty they nevertheless remain bound by and subject to legislative will. To further confuse matters, despite the Royal connection of the courts, the House of Lords acts both as an upper legislative chamber and a court of final appeal, while the Lord Chancellor is at once a Member of Parliament and a Crown minister. Thus, the British judicial "branch" is an amalgam of executive and legislative authority, much as Locke might have envisioned. The *Constitutional Reform Act 2005* (U.K.), 2005, c. 4, however, would replace the Judicial Committee of the House of Lords with a Supreme Court of the United Kingdom. The *Act*, as of autumn 2005, has not yet come into force.

Offenders, *are in Civil Society* one with another."[102] This statement possibly recognizes, and certainly does not reject, an independent judicial power.

Under Locke's model of executive-legislative dualism, courts might still have an important place in governance, even if subordinate in the sense that they would be unable to strike down legislative or executive actions.[103] Judicial process offers safeguards for individual liberties against arbitrary government interference. Indeed, Locke states quite clearly that the legislature, though supreme, nevertheless must govern through "*indifferent* and upright *Judges*, who are to decide Controversies by those Laws. . . ."[104] With this terse reference to courts, Locke invokes natural justice principles that underlie the rule of law, and which require judges to be impartial and no-one to suffer deprivation of liberty except according to the law. Locke's proposition, if taken as establishing a necessary relationship between legislative power and a legal system, might even be extrapolated as a kernel for the ideas of Lon Fuller.[105] Expanding on the concept of natural justice, Fuller identifies eight desiderata necessary to a true legal system, and which comprise an "internal morality" of the law.[106] If these requirements are substantially lacking, then the political system is not truly one based upon law. In that case, what passes as law ceases to be a purposeful enterprise, and instead becomes a tool for the imposition of the governing power's arbitrary will. Fuller's purpose for the law is admittedly rather modest, if not morally

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[102] Locke, *Second Treatise*, § 87.

[103] Gough, *supra* note 84 at 108-09, suggests that judicial power in Locke's model would fall under the executive power. This position would be consistent with the historical status of the courts in the British constitution as instruments of Royal justice. However, the Royal foundations of the courts would not account for the appellate role of the judicial committee of the House of Lords, the upper legislative chamber. See also, *ibid.* at 125-26.

[104] Locke, *Second Treatise*, § 131.

[105] See Lon L. Fuller, *The Morality of Law*, rev. ed. (New Haven, Conn.: Yale University, 1969).

[106] *Ibid.* at 39. Fuller's desiderata are 1) a failure to make any rules at all, 2) failure to publicize them, 3) abuse of retroactive legislative, 4) failure to make rules understandable, 5) enactment of contradictory rules, 6) requiring conduct beyond the powers of the parties obliged to obey, 7) introducing frequent changes making orientation of the subject impossible, and 8) failure to ensure a congruence between the rules and their actual administration.

neutral, being that of "subjecting human conduct to the guidance and control of general rules."[107] However, Fuller's argument that law is a purposeful enterprise fits with the Lockean position that all government power is exercisable only in trust for the public good, thus requiring impartial, predictable, and reasonable application of the laws. Although Locke does not overtly discuss courts, there is nothing in his dualistic structural model incompatible with an established judiciary, capable of restraining the exercise of both executive and legislative power through the fair application of standing laws and discretionary decisions. As M. J. C. Vile suggests, Locke even seems to consider "the main function of the State as essentially judicial . . . ,"[108] binding executive and legislative power together with the systematic application of the laws.

Locke's political theory on the whole is at once descriptive and justificatory of the legislative supremacy that Parliament won over the Crown, as well as prescriptive of a constitutional order premised not upon preserving the inherent rights of governors, but upholding their fiduciary obligations to the public.[109] Despite any pretense that the Glorious Revolution had established a stable and enduring political order, the turbulence and instability of the seventeenth century might have warned Locke that constitutional affairs likely would not remain static over time.[110] Locke's own notion of popular consent as the basis of political society necessarily offered a possibility of change, so long as the basic principles of his constitutional paradigm remained. Accordingly, the Lockean paradigm can thus accommodate the historical maturation of the judiciary as independent from and equal to the executive and legislature, and having its own public trust. All three branches sit within a tri-partite structural model that still further diffuses government

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[107] *Ibid.* at 146.

[108] M. J. C. Vile, *Constitutionalism and the Separation of Powers* (Oxford: Clarendon Press, 1967) at 59.

[109] Locke's thinking exhibits a combination of historical empiricism with an intellectual rationalism.

[110] Gough, *supra* note 84 at 115.

power and promotes the public good. At the beginning of the eighteenth century, the *Act of Settlement, 1701* statutorily enshrined the principle of judicial independence (by means of guaranteeing life tenure for judges), which Coke had some time before championed against the King's personal interference with the operation of the laws.[111] The United States Constitution later clearly ensconced the judiciary within the Lockean structural model. Thinkers like Montesquieu, Whig and natural law ideas, and the assertion of popular sovereignty following the American Revolution all buoyed an independent judicial power with a unique fiduciary obligation to apply the law, and check legislative and especially executive breaches of trust.

Montesquieu and Separation of Powers

In the Revolutionary era, broadly ranging from the late colonial period to the adoption of the Constitution in 1787, American political theory elevated the judiciary to an independent third branch capable of legally enforcing the limitations of fundamental law against the government. Among the many philosophical influences upon American thinkers of the period, Locke was perhaps the preeminent.[112] His theories of natural rights, the social contract, and a nascent separation of powers potently combined with radical Whig polemics and the common-law tradition to fortify revolutionary rhetoric about fundamental liberties and the threat of tyranny.[113] Colonists and the founders

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[111] See for example *Prohibitions del Roy* (1607), 12 Co. Rep. 63 and *Case of Proclamations* (1611), 12 Co. Rep. 74; For a brief overview of the growth of judicial independence in England, see Lord Justice Brooke, "Judicial Independence – Its History in England and Wales," in *Fragile Bastion: Judicial Independence in the Nineties and Beyond*, ed. Helen Cunningham (Sydney: Judicial Commission of New South Wales, 2000) 89.

[112] Jerome Huyler, *Locke in America: The Moral Philosophy of the Founding Era* (Lawrence, Kansas: University Press of Kansas, 1995) at 251; Although one cannot go so far as to say Locke's ideas caused the outbreak of the Revolution, which had varied and complex causes, they nevertheless framed the debate, provided American revolutionaries with rhetorical ammunition, offered theoretical concepts with which to understand the background and developments in American political society, and subsequently contributed to constitution-making. See Dworitz, *supra* note 95 at 70.

[113] For a brief description of the whiggery that arose in the late seventeenth and early eighteenth centuries in opposition to Britain's perceived constitutional corruptions, see William B. Gwyn, *The Meaning of the Separation of Powers: An Analysis of the Doctrine from its Origins to the Adoption of the United States Constitution* (New Orleans: Tulane

of the republic also generously drew, in addition to Locke, from the ideas of other political philosophers, probably the most influential of which was Montesquieu.[114] Notwithstanding the importance of the Revolution to the development of the separation of powers doctrine, the colonial grievances motivating it require no explanation here.[115] It suffices to say that the imperial crises arising in the 1760s began a nation-building process leading to the Constitution of 1787, which erected a federal government of limited powers delegated by the popular sovereign. What is important for subsequent judicial development is that American constitutionalism embodied an idealized Whig vision of government, based upon a tri-partite Lockean structural model of executive, legislative, and judicial power. The political philosophies of Locke and Montesquieu, a long tradition of common-law rights, and the emergence

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University, 1965) at 82-83 [hereinafter *Meaning*]. For Whig thought in the American colonies, see Bernard Bailyn, *The Ideological Origins of the American Revolution*, enlarged ed. (Cambridge, Mass.: Belknap Press, 1992) at 27-31 and Gordon S. Wood, *The Creation of the American Republic, 1776-1787* (Chapel Hill, N.C.: University of North Carolina Press for the Omohundro Institute of Early American History and Culture at Williamsburg, Virginia, 1998), ch. 1 [hereinafter *American Republic*]; Laski refers to Locke as "the first Whig." Laski, *supra* note 68 at 40. But see Josephson, *supra* note 4 at 211-12, who finds that Locke's ideas broke with the Whigs' tradition-bound exhortations about the "ancient constitution," going further than simply justifying the constitutional settlement of 1689 in order to propose a more radical arrangement of popular government. Even if one assumes Locke to have been a visionary rather than simply an apologist, which is likely a correct conclusion, much in the *Second Treatise* nevertheless reflects constitutional ideas and Whig ideology of the seventeenth century.

[114] Forrest McDonald, *Novus Ordo Seclorum: The Intellectual Origins of the Constitution* (Lawrence, Kansas: University Press of Kansas, 1985) at 59-60, 66-67; Wood, *American Republic*, *ibid.* at 7-8. Plato and other classical thinkers, along with the cities of Athens and Rome particularly, provided illustrious examples of republican government based upon virtue. As J. G. A. Pocock has shown in *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition*, new ed. (Princeton, N.J.: Princeton Univ. Press, 2003), classical republicanism would return as a potent political force in Renaissance Italy, with great subsequent influence throughout Western Europe. In England, Harrington's *Oceana*, More's *Utopia*, and the great political upheavals of the seventeenth century would carry on this republican tradition. Other sources of natural rights theories included Pufendorf and Grotius, while Hobbes pessimistically countered with his theory of the sovereign Leviathan. With Montesquieu being the greatest of them, Enlightenment writers such as Hume and Rousseau would challenge classical notions of republican virtue, and inspire Madison's reliance upon enlightened self-interest and his fear of self-serving factions.

[115] Changing attitudes towards authority and republican ideals spread throughout the Western world during the Enlightenment, and found particularly fertile ground in the American colonies. For an examination of the long-term, deeper socio-economic factors contributing to the outbreak of the American Revolution, see generally Gordon S. Wood, *The Radicalism of the American Revolution* (New York: Vintage, 1991) chs. 6-10 [hereinafter *Radicalism*]. See also Edward Countryman, *The American Revolution*, rev. ed. (New York: Hill and Wang, 2003) at 35-49, for a review of the imperial political crises in the decades leading up to the outbreak of violence in 1775.

of popular sovereignty all combined in American politics to create a new constitutional role for the courts. This role rests upon the idea that the courts, exercising power in public trust, have a fiduciary obligation to maintain the rule of law. In this way, Locke's executive-legislative dualism evolved into the modern doctrine of separation of powers, having an independent judicial branch.[116] Still, the new structural arrangement remains Lockean in principle. It preserves the political dynamic between the executive and legislative branches, but legalizes their fiduciary obligations through the judicial enforcement of statutory and constitutional limitations upon their power.

Among the greatest influences on the development of judicial power was Montesquieu, who "made Locke's separation of powers the keystone of his own more splendid arch."[117] As Montesquieu wrote:

> [T]here is no liberty, if the power of judging be not separated from the legislative and executive powers. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with all the violence of an oppressor.[118]

Like Locke, Montesquieu did not formulate a strict separation of powers, in which each branch would be wholly insulated from the others. Rather, Montesquieu's prescription for separation was flexible as the branches checked and balanced one another through overlapping powers. Montesquieu's structural model was itself Lockean, in that it diffused authority to prevent its accumulation and arbitrary exercise by any one

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[116] Indeed, the American notion of judicial review was incompatible with a rigidly formalistic notion of separation of powers, but instead "depended upon the acceptance of the idea of checks and balances as essential barriers to the improper exercise of power." Vile, *supra* note 108 at 157-58. Thus, the American separation doctrine is a flexible one, inspired by checks and balances, thereby allowing courts to judge the constitutionality of legislative and executive actions.

[117] McDonald, *supra* note 114 at 80; Laski, *supra* note 68 at 49, observes that "American republicans regarded selected doctrines of Montesquieu's as being virtually on par with Holy Writ."

[118] Baron de Montesquieu, *The Spirit of the Laws: A Compendium of the First English Edition*, ed. by David Wallace Carrithers (Berkeley, Calif.: University of California Press, 1977) bk. XI, ch. 6, para. 5.

institution, while allowing the branches to have input into each other's decision-making, as they were suited to do so, and so hold one another to their fiduciary obligations.[119] Just as Locke's model reflects the 1689 constitutional settlement, Montesquieu's inspiration was the early eighteenth-century British constitution, in which Crown, Lords, and Commons were institutionally separated but balanced through limited, mutual participation in each others' functions.

Although the British constitution, in theory, exhibited Locke's legislative-executive dualism, Montesquieu took notice of the significant institutional role that the Royal courts had assumed in practice. Drawing upon English example, he probably did not imagine the judicial nullification of laws, but if so, likely would have dismissed it as an unenforceable action.[120] He would, however, have noticed the independence of English judges since the *Act of Settlement, 1701*, the role of the courts in developing the common law, and their use of statutory interpretation in a way protective of individual liberties. The constitutional position of English courts underscored that his classification of government power into three departments was not a rigidly formalistic one, but one accommodating considerable inter-branch dynamics. To interpret Montesquieu formalistically, as guaranteeing autonomous institutional spheres strictly separated through judicial review, risks projecting formalistic American constitutional ideas backward in time.[121] Montesquieu

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[119] Vile, *supra* note 108 at 90-91.

[120] "Of the three powers above-mentioned the judiciary is in some measure next to nothing. There remain therefore only two. . . ." Montesquieu, *supra* note 118 at para. 32. But see Gwyn, *Meaning*, *supra* note 113 at 103, 111, who finds that Montesquieu considered the judicial power to be "the most frightening governmental function," as it allows the legislative or executive to determine individual liberties, even as it is incapable of "participating in balancing the constitution."

[121] McDonald, *supra* note 114 at 81-82, seems to read Montesquieu as erecting a separation of powers theory "nearly reconcilable with the English idea of checks and balances" which "provided for separation of personnel, rather than for division of function. . . ." However, as a general proposition, legislative and executive functions coincided with the institutions of Parliament and the Crown. Montesquieu was well enough acquainted with the workings of the British constitution to realize Parliament and Crown did in fact share in exercising some powers. As McDonald points out, *ibid.* at 80, Montesquieu was familiar with Bolingbroke, and so had understanding of both English constitutional theory and practice. The better reading of Montesquieu is that he proposed a general, but not absolute, proposition about the functional separation of powers that might allow for some, but not excessive, mixing of powers. See Gwyn, *Meaning*, *supra* note 113 at 106-13.

functionally analyzed the British constitution by associating the executive, legislative, and judicial power with the Crown, Parliament, and courts. Importantly, however, Montesquieu developed his functional view of the constitution at a time of its transition. Parliament and the Crown's ministers had not yet became intertwined through the principle of responsible government, and the courts had relatively recently emerged independent from Royal control. Nevertheless, the institutional division of government did not preclude overlapping borders of authority. Montesquieu's separation of power theory, as with Locke's structuralism, contributes to a constitutional paradigm in which government power is diffused and the branches hold one another to their fiduciary obligations. In doing this, the separation of powers emphasizes a separation of institutions with interlocking trusts, and recognizes that the branches exercise some concurrent authority in checking one another.

Montesquieu's recognition of the importance of judicial power later resonated with constitutional ideas of many American colonists, who realized the significant implications that his theory had when combined with Locke's.[122] A tri-partite structural model better averted risks of concentrations of government power, in that an independent judiciary had its own fiduciary obligation to hold the executive, as well as the legislature, to account for breaches of trust. Courts in this way assumed a constitutional role in checking abusive executive and legislative actions by enforcing, through an adjudicative process, legal limitations to the other branches' powers. Even though Montesquieu admitted the judiciary to be the weakest of the three branches,[123] Americans would nonetheless find in him and Locke the constitutional framework in which to reassess and emphasize familiar common-law ideas about the importance of adjudication within political society.

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[122] As McDonald, *ibid.* at 84, notes, Montesquieu buttressed the ideas of separation of powers naturally taking shape in America in the decades prior to 1787, so that "he transformed the familiar into a respectable body of doctrine."; Wood, *American Republic*, *supra* note 113 at 151-52.

[123] Montesquieu, *supra* note 118 at para. 4; Alexander Hamilton, in *The Federalist* No. 78, similarly found the judiciary to be the "least dangerous" branch, with power of neither sword nor purse.

Judicial Power and Common Law

While Locke and Montesquieu erected a structural model to promote the public good, the common-law tradition buttressed judicial power in America. It is perhaps not too much to say that the common-law system influenced Locke, whose own ideas in turn became enmeshed with common-law constitutional principles. The link between Lockean political theory and the common law becomes clearer in Blackstone's *Commentaries*, influential in both Britain and the American colonies. Blackstone drew upon Locke, not just for the structural notion of legislature and executive checking one another, but for a political society and legal system based upon natural law and consent.[124] Blackstone's work, however, clearly showed the tensions between the supreme power of the sovereign Parliament and its duty to act for the public good by complying with natural law. To resolve this tension, Blackstone essentially denied it by equating positive and fundamental law: the former was a reflection of the latter, in the same way as were common-law doctrines. In this sense, the *Commentaries* represented a juristic transition between natural law theories and emerging positivism.[125]

In any case, Blackstone presented a rationalized approach to legal thinking that still maintained strong links with the common-law tradition, based upon custom and first principles.[126] The Lockean idea of using structural mechanisms to realize the public good fit in well with Blackstone's "balanced constitution," which protected liberties and transposed natural law into the positive. In Blackstone's description of the constitution, limitations upon authority resulted from the institutional division of social estates, those being the Crown, Lords, and Commons, into a bi-cameral legislature and the executive. No one estate or institution politically dominated the other, but the

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[124] Blackstone, *supra* note 14 at 119-23, 149-51, 259-60.

[125] For strong criticism of Blackstone's constitutional ideas, see Laski, *supra* note 68 at 117-22.

[126] Wood, *American Republic*, *supra* note 113 at 10; Vile, *supra* note 108 at 104-05.

combined authority of the King-in-Parliament was supreme. However, already by the middle of the eighteenth century, many Whigs saw the growth of responsible government, the party system, and political cronyism as undermining the idealized, balanced constitution about which Blackstone wrote. The balance of social forces, and the institutional separation of legislative and executive power, would be mostly fiction at the beginning of the nineteenth century.

Blackstone's influence in the American colonies – where he was widely read and educated generations of common lawyers, judges, and politicians – contributed to complaints and paranoia of some colonists about the ancient constitution's corruption. In the second half of the eighteenth century, differences between the constitution of Blackstone and that which had continued to evolve with political practice became apparent with increasing disagreement between colonists and Parliament over imperial governance. Blackstone himself clearly favored legislative supremacy in the *Commentaries*. However, his promotion of natural law and a Lockean structural model meant to limit government power were, ironically, the bridge by which American constitutional thought could easily cross from a position of legislative supremacy to government limited by transcendent principles. American arguments were more than rhetorical, however; they not only justified popular revolution against perceived tyranny, but suggested a "reformed" or "restored" constitution with legally enforceable restrictions upon executive and legislative power. The old common law, through this whiggish lens, took on special meaning in America, where "protesting colonials fused the constitutional rights of Englishmen with the natural rights of man, thereby merging the views of such legal luminaries and former chief justices of England as Coke, Hobart, and Holt, and the natural law views of Pufendorf, Burlamaqui, and Locke."[127] The fusion of common law with

[127] Huyler, *supra* note 112 at 221; Blackstone maintained continuity with the common law by asserting natural rights through traditional English liberties, and fusing custom with both rationalism and Lockean empiricism. See Michael P. Zuckert, *Launching Liberalism: On Lockean Political Philosophy* (Lawrence, Kan.: University Press of Kansas, 2002) at 238-40, 256-57, 259, 262-63, and Blackstone, *supra* note 14 at 38-43, 47-52, 77-80.

political theory elevated judicial power to the place Montesquieu had assigned for it in his tri-partite structural model for the separation of powers.

Some of Blackstone's own language in the *Commentaries* mirrored that of Chief Justice Coke, whose 1610 judgment in *Dr. Bonham's Case*[128] is one of the earliest suggestions that courts could legally enforce fundamental norms against even Parliament, when adjudicating the rights of the subject. In that case, Coke asserted that "when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such Act to be void."[129] Coke's claim, although an important part of the seventeenth century's constitutional struggles, never became established constitutional doctrine in Great Britain. It was rather the Americans who elaborated upon common-law ideas to justify such judicial power.[130] In other judgments,[131] Coke also found that courts could enforce limitations upon the Crown, while later cases such as *Entick* v. *Carrington*[132] denied the Crown any authority to infringe the liberty of the subject outside of what the law allowed. While the supremacy of Parliament was an undeniable political fact in the middle of the eighteenth century, courts had already championed restraints upon authority, especially that of the Crown. In America, renewed attention to the common law and the courts' adjudicative power assisted the judiciary in taking its place within the structural model articulated by Locke, and further developed by Montesquieu, Blackstone, and American Whigs.

Popular Sovereignty

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[128] (1610), 8 Co. Rep. 114a.

[129] *Ibid.* at 118; See Blackstone, *supra* note 14 at 41, 54, and 91, for remarks about the primacy of natural over positive law, but also 89 and 91, asserting the supremacy of Parliament.

[130] See Adam Tomkins, *Public Law* (Oxford: Oxford University Press, 2003) at 103-04.

[131] See *supra* note 111.

[132] (1765), 19 Howell's State Trials 1029 (C.P.).

Lockean theory and the common-law tradition combined with one of the most radical political innovations coming out of the American Revolution – popular sovereignty. Popular sovereignty justified an independent judiciary having its own fiduciary obligation to check abuses of executive and legislative power, through adjudication of individual rights claims. In the United States and Britain, ideas of popular versus legislative sovereignty represented a fault line determining the relative place of the judiciary within each country's constitutional structure. The American colonists who rebelled in 1776 did so not only against the King, but as much against a Parliament that claimed sovereign authority to legislate for the colonies in their internal matters. The Revolution rejected parliamentary supremacy as leading to legislative tyranny, and emphasized the public good as a limitation upon legislative as well as executive power.[133] After achieving independence, Americans continued to grapple with the institutional forms and political implications of republican government, and the new relationship between governors and governed. By the time of the constitutional convention in 1787, however, American political thinkers had begun to articulate ideas about the sovereignty of the people. This new conception of sovereignty reflected Locke's argument about the consensual nature of political society. It also meant that government's public trust had legal as well as moral dimensions, in that government authority arose from a limited delegation. Popular sovereignty thereby developed out of Anglo-American Whig polemics, which placed government in a hostile opposition to the public it served, and obsessed about government's penchant for corruption, tyranny, and encroachment upon natural liberties.[134] Whigs had, of course, advocated a return to the ancient, balanced constitution, in which the legislative and executive (and the social forces they represented) balanced one another to restrain government power and so protect liberties. In this regard, ideas about popular sovereignty grounded Locke's constitutional paradigm, in which people consented to the formation of a government that exercised power in trust for the public good,

[133] Wood, *American Republic*, *supra* note 113 at 53-54, 344-54.

[134] McDonald, *supra* note 114 at 76-78.

subject to structural mechanisms that divided such power and upheld the branches' fiduciary obligations.

In America, however, where older social distinctions based upon estates were at best weak and political participation was for the time relatively open, whiggish structural ideas centered upon elected assemblies responsible to local constituencies. Many Americans kept faith after the Revolution that the establishment of a legislature chosen through regular local elections, animated by republican virtue, and paired with a weak executive, would avoid the arbitrary and heavy-handed manner of government that they had attributed to Parliament and King. Early experimentation in state governments, however, unfortunately demonstrated that a majority in a republican legislature, unchecked by the executive or courts, could act just as arbitrarily and unwisely as Parliament or King supposedly had.[135] By 1787, many Americans increasingly understood that no one branch of government, including a republican legislature, could be entrusted with supreme authority.[136] From this experimentation came the notion that in a republic, then, only the people themselves could be the ultimate source of government authority. The people were sovereign, delegating limited power to government institutions, the members of which could never entirely be trusted. This new conception of sovereignty easily fell into place within Lockean theory, in which government originated by consent and exercised power only in trust for the public good. Gordon Wood, tracing the rise of popular sovereignty and its effects upon the separation of powers, summarizes these developments:

> The assumption behind this remarkable elaboration and diffusion of the idea of separation of powers was that all governmental power, whether in the hands of governors, judges, senators, or representatives, was

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[135] Wood, *American Republic*, *supra* note 113 at 63-65, 404-13; Concentration of power even in legislative, rather than executive, hands would also violate Locke's rejection of an "*Absolute Dominion*." Josephson, *supra* note 4 at 218-19, citing Locke, *Second Treatise*, §§ 174, 201.

[136] Thus, to understand the significance of popular sovereignty, "[t]he missing link here is the people, that is, the people as distinct from their representatives." Peter L. Strauss, "Symposium: *Bowsher* v. *Synar*: Formal and Functional Approaches to Separation of Powers Questions – A Foolish Inconsistency?" (1987) 72 Cornell L. Rev. 488 at 695.

> essentially indistinguishable. . . . Only the great changes taking place in these years in the Americans' understanding of representation and the people's relationship to the government – all culminations of a century and a half of experience in the New World brought to a head by the anomalies inherent in the constitution-making experiments and summed up in the new meaning given to the idea of the sovereignty of the people – made this assumption possible.[137]

All government power therefore arose from popular sovereignty. The separation of powers, as a Lockean structural model, diffused that popularly delegated power through the executive, legislative, and judicial branches and required them to hold one another to their fiduciary obligations.

Relocating sovereignty in the people provided a theoretical resolution to the problem of a federal union between the states, as well as to the rejection of legislative sovereignty. There would not be a divided sovereignty between states and central government, *imperium in imperio*, but a unified sovereignty residing in the people as a whole. The people, then, had only divided legal exercise of that sovereignty among state and national governments, as well as between several branches.[138] Popular sovereignty dispensed with unlimited legislative power, at the same time that it eradicated the old mixed constitution based upon social classes, an idea that had never fit comfortably with more leveled social realities in the New World. Instead, befitting the Age of Enlightenment, popular sovereignty founded the separation of powers not upon the institutionalization of a feudal class system, but of rational governing processes combined empirically to realize the public good. In this way, "modern conceptions of public power replaced older archaic ideas of personal monarchical government."[139] The new theory of sovereignty associated the legislative, executive, and judicial branches, as institutions defined by their qualities and personnel, with different means of decision-making, rather than with the characteristics and interests of old social orders.[140] Popular

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[137] Wood, *American Republic*, *supra* note 113 at 453.

[138] Popular sovereignty thus supported the new idea of federalism. See Wood, *ibid.* at 446-49, 545-46, and McDonald, *supra* note 114 at 277-82.

[139] Wood, *Radicalism*, *supra* note 115 at 187.

[140] Wood, *American Republic*, *supra* note 113 at 151-52, 383-85, 445-49, 603-04.

sovereignty buttressed Lockean structuralism and bound government more closely to the people by justifying legally, as well as politically, binding fiduciary obligations enforceable in the courts.

Judicial Review

Popular sovereignty was significant in allowing the judiciary to take its place within a Lockean tri-partite structural model, and so lead to the modern doctrine of separation of powers.[141] Exercising its power as a direct delegation from the people, the judiciary acts in trust for the public good.[142] As part of its own fiduciary obligation, the judicial branch holds the executive and legislative to theirs by checking abuses of power and enforcing legal limitations. Unlike the Congress and President, of course, federal judges are not elected but appointed by the executive and confirmed by the Senate. An appointed judiciary nonetheless enjoys democratic institutional legitimacy as its power is delegated to it by the popular sovereign. Moreover, its appointed nature increases its independence by allowing judges to resist political pressures that would otherwise threaten it through electoral polls. Such electoral independence better places the judiciary to check majoritarian excesses in Congress, as well as unreasonable or opportunistic, but politically popular, actions of the President.[143] The judicial role is not to represent the political interests of a majority of the electorate, in any case, but to fulfill its trust impartially by adjudicating disputes and maintaining the rule of law. Accordingly, the separation of powers, based on popular sovereignty, implies

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[141] "The department of government which benefited most from this new, enlarged definition of separation of powers was the judiciary." *Ibid.* at 453-54, and 159-61; Strauss, *supra* note 136 at 696, asserts that popular sovereignty means "*ipso facto*" judicial review.

[142] Wood, *ibid.* at 461-62; "Popular consent now became the exclusive justification for the exercise of authority by all parts of the government – not just the houses of representatives but senates, governors, and even judges. As sovereign expressions of the popular will, these new republican governments acquired an autonomous public power that their monarchical predecessors had never possessed or even claimed." Wood, *Radicalism*, *supra* note 115 at 187.

[143] Louis Fisher, *Constitutional Dialogues: Interpretation as Political Process* (Princeton: Princeton University Press, 1988) at 62-64 [hereinafter *Constitutional Dialogues*].

that the judiciary, as an independent branch, possesses inherent power to review executive or legislative actions that violate their fiduciary obligations.

Separation of powers principles mean that the Constitution requires judicial review, even though its text does not expressly provide. The theoretical basis for judicial review is also not weakened by the fact that the nature of such a power remained unsettled for some years after the Constitution's ratification and is still debated even in present times.[144] Even in the midst of the ratification debates, Hamilton could articulate a coherent theory of judicial review, as derived from and exercised in trust for the public. Courts, within the separation of powers, thereby enforce the trusts held by the other branches. He explained that "[t]here is no position which depends on clearer principles than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void."[145] Rejecting legislative supremacy, Hamilton proposed that "[i]t is far more rational to suppose that the courts were designed to be an intermediate body between the people and the legislature in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts."[146] His reasoning would apply even more so to judicial review of executive power, lacking as it does

[144] McDonald writes, *supra* note 114 at 254: "A second fundamental principle on which the delegates were in agreement was that, despite the shakiness of the precedents for the doctrine, the courts would by the very nature of their function have the power to strike down legislative acts if they were in violation of the Constitution." Edward S. Corwin, *The Doctrine of Judicial Review: Its Legal and Historical Basis and Other Essays* (Gloucester, Mass.: Peter Smith, 1963) at 10 [hereinafter *Judicial Review*], similarly expresses the opinion that, in the absence of a specific clause, "the power rests upon certain general principles thought by the framers to have been embodied in the Constitution." Rather than judicial review arising from the written Constitution itself, however, both the review power and Constitution were "offshoots from a common stock, namely the idea of certain fundamental principles underlying and controlling government." *Ibid.* at 27. McDonald, *ibid.* at 258-59, nevertheless goes on to characterize the judicial branch, in the form finally embodied in the Constitution, as "at the mercy of the Congress." The vulnerable position of the judiciary, along with the mixing of legislative and executive functions (illustrated by Senate concurrence in treaties, for example), constitutes in McDonald's opinion an abandonment of Monstesquieu's separation of powers. Again, however, McDonald's assessment results from an overly formalistic interpretation of Montesquieu. On the other hand, McDonald's criticism highlights the more functional notion of separation of powers, and checks and balances, incorporated into the Constitution.

[145] Alexander Hamilton, *The Federalist* No. 78.

[146] *Ibid.*

majoritarian justification, law-making authority, and presenting a greater threat of tyranny. Hamilton's argument suggests how judicial review inherently exists under the separation of powers, premised as it is upon popular sovereignty and Lockean structuralism.

While, as Fisher claims, "[t]he framers did not have a clear or fully developed theory of judicial review,"[147] they certainly understood it as an incipient concept arising from the separation of powers, even before its doctrinal establishment in federal jurisprudence.[148] After 1787, the theoretical notion of judicial review quickly became a widely accepted, if still controversial, constitutional doctrine.[149] In 1803, Chief Justice Marshall judicially established the review power in *Marbury* v. *Madison*,[150] setting forth the premises upon which it rested:

> That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it nor ought it to be frequently repeated. The principles, therefore, so established are deemed fundamental. And as the authority, from which they proceed, is supreme, and can seldom act, they are designed to be permanent.[151]

In upholding the Constitution as a fundamental law superior to all others, which the judiciary was bound to enforce, Marshall implicitly drew upon a

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[147] Fisher, *Constitutional Dialogues*, *supra* note 143 at 48.

[148] Gwyn, *Meaning*, *supra* note 113 at 126-27.

[149] See Fisher, *Constitutional Dialogues*, *supra* note 143 at 49-54; Not only had Coke suggested such a power, several state and early federal cases implied it based not just upon written constitutional provisions, but also unwritten first principles. See especially *Vanhorne's Lessee* v. *Dorrance*, 2 Dallas 304 (C.C.D. Penn. 1795) and *Calder* v. *Bull*, 3 Dallas 386 (1798).

[150] 1 Cranch (5 U.S.) 137 (1803). However, as Corwin, *Judicial Review*, *supra* note 144 at 50-51, points out, the Supreme Court had actually reviewed but upheld the constitutionality of a congressional tax law in *United States* v. *Hylton*, 3 Dallas 171 (1796). Also, the federal circuit court for the district of Pennsylvania in *Hayburn's Case*, 2 Dallas 409 (C.C.D. Penn. 1792), had earlier refused to apply a federal law that it found unconstitutional for violating the separation of powers.

[151] 5 U.S. at 176.

conglomeration of authorities. Building upon ideas from Locke, the common law, and popular sovereignty, Marshall asserted the judiciary's constitutional role as an independent branch capable of checking abusive power by the other two.[152] Whereas executive-legislative structural dualism politicizes fiduciary obligations, the tri-partite separation of powers doctrine legalizes them. By checking the other branches and respecting its own trust, the judiciary thereby preserves the separation of powers and delineates the constitutional authority of each branch.

Modern separation of powers doctrine thus exhibits three points defining the judicial role in the United States and other countries, such as the United Kingdom, which are also fundamentally premised upon Lockean theory. First, although Locke described an executive-legislative dualistic structure, the judiciary has historically matured into an independent third branch of government. The judicial branch furthers the purposes of Locke's structural model, as it diffuses power and is an additional institutional check upon the other branches. Second, as an independent branch, the judiciary exercises its power of adjudication in trust for the people, giving rise to its own fiduciary duty to act for the public good. Courts must assert their own institutional competency to adjudicate particularized disputes and check abuses by the legislature and executive, thereby legalizing their trusts based upon popular sovereignty. Third, courts, because of their trust, have an inherent, constitutionally free-standing power of judicial review. Courts must exercise this review so as to confront or defer to the other branches as appropriate in the circumstances. Methods of confrontation and types of remedy upon review vary, as with the invalidation of primary legislation that violates constitutional restrictions, issuance of non-binding declarations of incompatibility with rights guarantees, or the quashing of executive actions that are unlawful. Nevertheless, while methods of confrontation and degrees of deference to the political branches depend upon the constitutional system,

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[152] See, for example, Charles F. Hobson, *The Great Chief Justice: John Marshall and the Rule of Law* (Lawrence, Kan.: University Press of Kansas, 1996) at 33-43, 54-58. As Hobson, *ibid.* at 58-64, further points out, Marshall's ruling in *Marbury* was therefore the culmination, not the innovation, of a judicial review power to uphold fundamental law against government encroachment.

courts cannot abdicate their duty to consider whether legislative or executive actions violate their fiduciary obligations. Such failure by the courts, in turn, would be in violation of their own trust.

The above three points reflect the interrelated structural, procedural, and substantive elements of the separation of powers doctrine, where the judiciary and the others branches each has its own fiduciary duty. Consequently, separation of powers, and the judicial role within it, relies upon interactive deliberative processes between branches. As part of this inter-branch deliberation, the branches fulfill their public trusts positively through reasonable decision-making and negatively by checking the abuses of each other. Positive and negative institutional roles differ in the cooperative or confrontational aspects of their exercise, yet they remain conceptually unified in that they reflect ongoing and shifting inter-branch dialogue. The separation of powers doctrine, resting upon Lockean structuralism, allows the branches positively to contribute to a reasonable decision-making process and negatively to check actions by coordinate branches.[153] This structuralism differs from a rigidly formalistic division of branch powers where the definition of branch authority is exhaustive and immunized in all cases from the other branches. Courts, for their part, must assert themselves to decide matters appropriately resolved through a case-by-case, adjudicatory process. At the same time, courts must give deference to the political branches in matters as they become unsuitable for adjudication. Where they are suitable, however, courts must review both executive and legislative actions against

[153] The "positive" and "negative" institutional roles are similar to those described by Vile, *supra* note 108 at 18. He associates the negative aspect of separation of powers with the pure, formalistic view of the doctrine, which prevents one branch from interfering with the allocated powers of another. The institutional and functional division is therefore a negative brake upon the abuse or concentration of power because it prevents the courts or political branches from infringing upon the powers of the others. Vile's idea of positive checks, on the other hand, relates to a functional separation of powers by emphasizing checks and balances, through each branch participating in (and consequently having some direct control over) the functional powers associated with the other branches. Under a functional approach, however, it might be that a particular branch constitutionally lacks the legal power to "interfere" with another branch, or is instead constitutionally obligated to "defer" and so refrain from acting even where legal power exists, depending upon a myriad of political and legal considerations. Such a negative check, then, is not necessarily from a lack of constitutional authority, but might represent a branch's decision or duty to refrain from acting where certain decisions are best made elsewhere.

constitutional requirements and statutory law, look that proper procedures are followed, and hold executive decisions to standards of reasonableness, all to ensure that power is not misused in violation of the public good.[154]

[154] The separation doctrine therefore both enables and disables government power, as demonstrated by several objectives such as those listed in Rebecca L. Brown, "Separated Powers and Ordered Liberty" (1991) 139 U. Penn. L. Rev. 1513 at 1533, n. 81 (citing Gwyn, *Meaning*, *supra* note 113 at 127-28. See *infra* note 155).

Chapter IV: Formalist and Functionalist Separation of Powers Theories

Formalist Separation of Powers Theory

The Lockean, tri-partite model of separation of powers between executive, legislative, and judicial branches structurally serves the public good by diluting political authority and facilitating reasonable decision-making, thereby preventing accumulation of power in any one branch and checking its arbitrary exercise.[155] The separation doctrine, however, masks important questions about just how to define the boundaries of each branch's authority, and delimit their interaction both to allow them to check one another while preserving their independence from undue interference or dominance by the others. The attempts by courts and scholars to address these issues generally fall under two schools of thought, those of formalism and functionalism.[156]

Formalism proposes, seemingly simply enough, that the Constitution strictly allocates executive power to the President, legislative power to Congress, and judicial power to the judiciary, with each branch confined to its own autonomous sphere and prohibited from intruding into another.[157] The only mixing and exceptions to these divisions are specific textual departures in the Constitution, such as the President's legislative role through the veto or the Senate's participation in the executive conduct of foreign affairs through its consent to treaties. Other than these limited instances, the branches otherwise

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[155] Gwyn, *Meaning*, *supra* note 113 at 127-28, sets out a list of the normative goals of the separation of powers doctrine. These are: "1) to create greater governmental efficiency; 2) to assure that statutory law is made in the common interest; 3) to assure that the law is impartially administered and that all administrators are under the law; 4) to allow the people's representatives to call executive officials to account for the abuse of power; and 5) to establish a balance of governmental powers."

[156] For reviews of formalism and functionalism, see Cass Sunstein, "Constitutionalism After the New Deal" (1987) 101 Harv. L. Rev. 421 and Brown, *supra* note 154 at 1522-31.

[157] For a description of such "pure doctrine," see Vile, *supra* note 108 at 13, 291.

cannot exercise any power ascribed to another branch, *e.g.* the Congress cannot retain control over the President's execution of the law except through the process of further statutory enactment.[158] Formalism not only protects each branch from intrusion, but also prevents the willing surrender of constitutional responsibilities, as perhaps possible with excessive congressional delegations of rule-making authority to administrative tribunals.[159] Formalists therefore stress the separation of powers as mainly a structural prophylactic to the tyrannical accumulation of power. Because such concentration can occur slowly and unnoticed, and the larger structural implications of institutional mixing are vague, these concerns require the judiciary to define and enforce strict constitutional boundaries between the branches' powers.[160]

Formalist theory has provoked much criticism as being politically unworkable, inefficient and even obstructive to democratic processes, as well

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[158] See *Bowsher* v. *Synar*, 478 U.S. 714 (1986).

[159] Formalism, therefore, presents potential difficulties with Justice Jackson's concurring opinion in *Youngstown*, 343 U.S. at 634 *et seq.*, where he characterized presidential power to be at its height, when exercised pursuant to congressional authorization. Under formalism, the President might nonetheless be unable to act because to do so would be an impermissible delegation of legislative authority to the executive branch. See Paul R. Verkuil, "The American Constitutional Tradition of Shared and Separated Powers: Separation of Powers, the Rule of Law and the Idea of Independence" (1989) 30 Wm. and Mary L. Rev. 301 at 318-19.

[160] Martin H. Redish, *The Constitution as Political Structure* (New York: Oxford University Press, 1995) at 114 (incorporating arguments previously made in Martin H. Redish and Elizabeth J. Cisar, "'If Angels Were to Govern': The Need for Pragmatic Formalism in Separation of Powers Theory" (1991) 41 Duke L.J. 449.); Resting upon a strict textual construction, formalism accordingly fits with originalism, which favors a constitutional interpretation based upon the intent of the framers. Among the Court's separation of powers decisions, *Immigration and Naturalization Service* v. *Chadha*, 462 U.S. 919 (1983), is perhaps the most illustrative (and to critics, perhaps infamous) example of the formalist approach. In *Chadha*, the Supreme Court struck down the oft-used "legislative veto" as a violation of the separation of powers doctrine. The Court reasoned that Congress' statutory reservation of power to overturn an executive administrative decision infringed upon the President's exclusive constitutional responsibility to execute the law. Accordingly, any congressional change to an administrative decision must be made by bill passing both houses and being presented to the President for signature or veto. Dean Alfange, Jr., "The Supreme Court and the Separation of Powers: A Welcome Return to Normalcy?" (1990) 58 Geo. Wash. L. Rev. 668 at 727, writes that "[i]n *Chadha*, the Court attained some sort of pinnacle of simplistic reasoning, and its opinion has been subjected to severe and well-warranted criticism." See also Justice Scalia's dissenting opinions in *Morrison* v. *Olson*, 487 U.S. 654, 697 *et seq.* (1988) and *Mistretta* v. *United States*, 488 U.S. 361, 413 *et seq.* (1989).

as unable to describe actual constitutional practice.[161] Formalism is particularly troubling in respect of the authority of administrative organs, which vary in their control by the executive branch, and often exercise combined executive, legislative, and judicial functions in their implementation of statutory regimes.[162] Furthermore, originalist arguments for formalism overlook or discount the significant historical transformation of the presidential role in American political life.[163] Finally, formalism's focus upon strict institutional boundaries overshadows the normative concerns of the separation of powers doctrine. The doctrine not only structurally prevents tyranny by avoiding concentrations of government power, but just as importantly serves the public good by promoting reasonable decision-making through inter-branch cooperation and checking abuses through inter-branch conflict.[164] Strict formalism, therefore, cannot theoretically accommodate the nation's vast administrative apparatus that has grown since the New Deal, an

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[161] See generally Paul Gewirtz, "The American Constitutional Tradition of Shared and Separated Powers: Realism in Separation of Powers Thinking" (1989) 30 Wm. and Mary L. Rev. 343; Richard A. Champagne, Jr., "The Separation of Powers, Institutional Responsibility, and the Problem of Representation" (1992) 75 Marquette L. Rev. 839 at 857; It is questionable whether the formalist's strict separation of powers has ever been a workable basis of government. "The doctrine of the separation of powers, standing alone as a theory of government, has . . . uniformly failed to provide an adequate basis for an effective, stable political system. It has therefore been combined with other political ideas, the theory of mixed government, the idea of balance, the concept of checks and balances, to form the complex constitutional theories that provided the basis of modern Western political systems." Vile, *supra* note 108 at 2; Gabriel A. Almond, "Introduction: A Functional Approach to Comparative Politics" in Gabriel A. Almond and James S. Coleman, eds., *The Politics of the Developing Areas* (Princeton: Princeton University Press, 1960) 3 at 18, asserts that "[i]t is impossible to have political structures in relation to one another in a common process without multifunctionalism . . . ," a position agreeable with that of Vile, *ibid.* at 319.

[162] See Sunstein, *supra* note 156 at 493-99; Richard H. Fallon, Jr., *Implementing the Constitution* (Cambridge, Mass.: Harvard University Press, 2001) at 3; Vile, *ibid.* at 318-19.

[163] Alfange, *supra* note 160 at 721; Sunstein, *ibid.* at 499; Martin Flaherty, "The Most Dangerous Branch" (1996) 105 Yale L.J. 1725 at 1816-19. Indeed, while formalists might find intemperate functionalism dangerous, formalism's blindness to constitutional realities of presidential dominance poses just as great a risk. As Flaherty comments, *ibid.* at 1821, "[w]here the [constitutional] commitment is balance, even the most glaring survey indicates that the executive branch long ago supplanted its legislative counterpart as the most powerful – and therefore most dangerous – in the sense that the Founders meant."

[164] Brown, *supra* note 154 at 1525; Donald E. Elliott, "Why our Separation of Powers Jurisprudence is so Abysmal" (1989) 57 Geo. Wash. L. Rev. 506 at 527.

apparatus without which the federal government could not govern efficiently, if at all.[165]

Formalism, moreover, suffers from two theoretical problems. First, many government actions defy easy classification as distinctly executive, legislative, or judicial.[166] Definitional problems become only more acute in the context of the operation of administrative agencies. Aside from administrative structures, however, the Constitution itself illustrates the terminological difficulties inherent in formalist argument. For example, the Constitution designates the Vice-President, an executive officer, as the President of the Senate, a legislative position having a vote in the event of a tie in the upper chamber. The dual character of the Vice-Presidency, therefore, offers a little noted but clear example of direct executive participation in the legislative process. While the Constitution created the Vice-Presidency in the same clause that it established the Presidency, it sets out the Vice-President's legislative role in Article I, section 3 alongside the powers of Congress. Thus, the Vice-President's tie-breaking vote in the Senate is, formally, an executive exercise of what is functionally legislative power. The Constitution presents another anomaly in formalist theory in the case of presidential impeachment. Under Article I, section 3 the Senate can legislatively try the President for "Treason, Bribery, or other high Crimes and Misdemeanors."[167] The upper legislative chamber thereby functionally adjudicates personal conduct and the legal rights of office-holding, and can render judgment that removes the President from office.[168] With impeachment, Congress therefore acts in a

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[165] For discussion of the New Deal's impact upon American law, see generally Sunstein, *supra* note 156 ; Bruce Ackerman, *We the People* (Cambridge, Mass.: Belknap Press of Harvard Univ. Press, 1991), has characterized the New Deal as a "constitutional moment," when normative attitudes about the role of government changed so substantially as effectively to "amend" the Constitution through interpretive means.

[166] Thomas O. Sargentich, "Symposium: *Bowsher* v. *Synar*: The Contemporary Debate About Legislative-Executive Separation of Powers" (1987) 72 Cornell L. Rev. 430 at 456.

[167] U.S. Const. art. II, § 4.

[168] *Ibid.*, art. I § 3; Donald S. Lutz, *The Origins of American Constitutionalism* (Baton Rouge: Louisiana State University Press, 1988) at 159, points out the examples of the Vice-President's senatorial role and the impeachment process, observing that, at least according to European ideas, "[t]he resulting political system resembles a hopeless . . . mélange of the separation of powers and the mixed government models."

judicial manner despite the Constitution's general prohibition against bills of attainder.[169] Further complicating the characterization of the impeachment process, the Chief Justice presides over the Senate trial,[170] raising the question as to whether a judicial officer thereby exercises a legislative or judicial function.[171]

The formalist argument presumably would reconcile these constitutional provisions by asserting that these anomalies of institutional mixing are limited exceptions to the separation doctrine, considered by the framers as the only such exceptions needed to maintain checks and balances between the branches.[172] Beyond express textual departures from institutional division, the branches may not constitutionally exercise powers belonging to another branch. In this sense, formalist theory reveals its connection to both strict constructionism and originalism. It is also at odds both with established jurisprudence, particularly regarding individual rights and much administrative law, resting upon broad textual interpretation and historically changing expectations regarding both limitations upon and responsibilities of government power.[173] Formalist theory, in attempting to accommodate these

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[169] U.S. Const. art. I, § 3

[170] *Ibid.*

[171] *Ibid.*, § 9; As Verkuil points out, *supra* note 159 at 308-310, impeachment "enshrines the idea of separation of functions, a concept that administrative agencies borrow when they combine aspects of the prosecutorial and judicial functions within the executive branch." However, Verkuil does not resolve the definitional problems in separation of powers theory, and remains vulnerable to a formalist retort based upon strict textualism. Although asserting that a substantive notion of the rule of law applies to the separation of powers, he does not make an argument as to why the administrative mixing of functions is otherwise constitutionally permissible. Notwithstanding, his rule of law argument is prescient, and his example of impeachment rightly suggests a constitutional commitment to mixing deliberative processes.

[172] See *Bowsher*, 478 U.S. at 721-27 (*per* Burger C.J.), and Jusice Scalia's dissents in *Morrison*, 487 U.S. at 697-99 and *Mistretta*, 488 U.S. at 416-22.

[173] Chief Justice Marshall's warnings about strict constructionism in the context of federalism are perhaps just as relevant to an overly formalistic approach to separation of powers: "Powerful and ingenious minds, taking, as postulates, that the powers expressly granted to the government of the union, are to be contracted, by construction, into the narrowest possible compass, and that the original powers of the state are retained, if any possible construction will retain them, may, by a course of well-digested, but refined and metaphysical reasoning, founded on these premises, explain away the constitution of our country, and leave it, a magnificent structure, indeed, to look at, but totally unfit for use." *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1 at 185 (1824).

challenges, requires that courts struggle to classify all government action under its strict typology of executive, legislative, and judicial power. As such, it cannot coherently reconcile its strict constructionist and originalist foundations with adherence to precedent and political realities, which demonstrate considerable mixing of powers between the branches. Thus, formalism's textualism has descriptive shortcomings that fail to explain many actual exercises of government authority, and it consequently neglects deeper normative questions about how decision-making is reasonably related to values or policy goals that serve the public good.[174]

Second, while formalism suffers from an inability clearly to delineate government actions, as it purports to do, it also has long-term structural implications difficult to predict. Formalism claims that breach of strict separation of branch powers might seem innocuous or benevolent in the short-term, but that disregard for its prophylactic purpose could lead to gradual, unnoticeable accumulations of power that could threaten liberty in the future. However, formalism itself presents constitutional dangers in that the misclassification of a government power, and consequently its allocation to the wrong branch, could allow that branch to undermine the other ones under its formal, but functionally mismatched, authority and risk making bad decisions on matters for which it is not institutionally suited. Government actions themselves, it can be argued, are not inherently executive, legislative, or judicial, nor do they become so solely on account of their exercise by a particular branch or their definition by the courts.[175] Formalistic misclassification could mean that one branch could inappropriately exercise power free from the necessary oversight by a coordinate branch institutionally suited to decide the matter.

Pragmatic Formalism

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[174] Sargentich, *supra* note 166 at 459.

[175] See Alfange, *supra* note 160 at 729, writing that "[i]t is absurd to say that everything done by the legislature is automatically legislative, and that everything done by the executive is automatically executive" (criticizing *Chadha*, 462 U.S 919).

A variant of formalism - pragmatic formalism - recognizes that there are limited instances where one branch might exercise powers associated with another branch, outside of the Constitution's express exceptions, where such exercise is necessarily attendant upon or incidental to the branch's own constitutional duties. Martin Redish has advocated pragmatism as an attempt to avoid the unworkable strictures of strict formalism, in regard to the realities of the administrative state, by admitting that some mixing of functions advances the underlying normative goals of the separation doctrine.[176] Pragmatism, however, maintains the basic formalist premise that the separation doctrine remains textually bound by the Constitution's division of executive, legislative, and judicial powers, and discernible boundaries are required to maintain the prophylactic barrier to the dangerous accumulation of power. Pragmatism thus continues to reject functionalist approaches that doubt the conceptual possibility or workable applicability of clear definitions of branch powers, outside the context of their exercise.[177]

In some cases, pragmatism nonetheless resembles a restrained functionalism, permitting greater mixture of institutional power for efficiency and policy reasons. The case of *Mistretta* v. *United States* illustrates Redish's pragmatic approach, but with distinctly functionalist overtones.[178] The case considered the constitutionality of the *Sentencing Reform Act of 1984*,[179] which created the United States Sentencing Commission as an independent commission located within the judicial branch. The Commission, consisting of sitting federal judges and lay persons appointed by the President and approved by the Senate, had responsibility for promulgating sentencing

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[176] Such goals include democratic accountability, diversification of functions, and the checking of power. Redish, *supra* note 160 at 6; See also *supra* note 155, for Gwyn's list of goals.

[177] Redish, *ibid.* at 6-7, 100, 107.

[178] 488 U.S. 361 (1989), discussed in *ibid.* at 155-58. Thus, the Court "resolved the constitutional issue on the basis of a flexible, functional standard." Alfange, *supra* note 160 at 759.

[179] Pub. L. No. 98-473, 98 Stat. 1987, codified at 18 U.S.C. § 3551 *et seq.* and 28 U.S.C. §§ 991-998 (1982 ed., Supp. IV).

guidelines for federal crimes and monitoring their implementation by the courts. The Supreme Court rejected an argument that the *Act* violated the separation of powers as an unconstitutional delegation of legislative power. The Court found that, while Congress has delegated considerable rule-making discretion to the Commission, it had provided sufficient guidelines to control the exercise of such discretion. Furthermore, rejecting a "hermetic division among the branches,"[180] the Court found that the location of rule-making authority in the Commission did not allow the judiciary to usurp legislative power, did not undermine judicial independence, and concerned matters appropriate to the central mission of the judiciary. As Dean Alfange writes, from a functionalist perspective:

> [I]nasmuch as sentencing is inherently a judicial responsibility, it is not improper for Congress, exercising its authority under the Necessary and Proper Clause, to delegate rulemaking authority to the judicial branch with regard to this function even though rules establishing sentencing guidelines are considerably more substantive in nature than the procedural rules that the judiciary has generally been delegated authority to make.[181]

However, taken as an example of pragmatism, *Mistretta* represents an approach more constrained than what functionalist theory might otherwise allow. In assessing whether the delegation was incidental to the judicial function or gave a broader policy-making authority to the judiciary, the majority in *Mistretta* did not functionally balance efficiency or majoritarian concerns against manifest threats to individual rights or excessive readjustments in inter-branch relations. Instead, the delegation was permissible because it was related and incidental to judicial power broadly conceived, and therefore remained conceptually premised upon the formalist division of branch powers.[182] *Mistretta* therefore represented a case where the functionalist and pragmatic formalist approaches led to the same result.

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[180] 488 U.S. at 381.

[181] Alfange, *supra* note 160 at 756.

[182] Justice Scalia, in a dissenting opinion starting at 488 U.S. at 413 *et seq.*, put forward a strictly formalistic approach, characterizing rule-making by the Commission as pure law-making, rather than an ancillary judicial function. As such, he found the *Sentencing Reform Act* to be unconstitutional, as Congress could not delegate away law-making power under any

Redish's argument, at first glance, would seem to recommend itself as a principled, yet common-sense, approach to formulating a workable separation of powers jurisprudence straddling the line between formalism and functionalism. Redish is persuasive in suggesting that, for instance, the executive branch can act legislatively as long as rule-making is necessarily related to and limited by the execution of a sufficiently constraining statute. With the idea of incidental power, at the heart of his pragmatic approach, he hints at a deeper understanding of government authority, in which exercise of "mixed" powers is more than just flexible, convenient, or efficient delegations and assumptions of otherwise separated branch powers. That is, a branch's "incidental" exercise of other powers undercuts the very notion of distinct and autonomous spheres of authority, instead suggesting a more generalized decision-making process, in which power is wielded in any particular matter by that branch (or branches) most suited to do so based upon its institutional attributes. Redish, however, does not delve deeper into the theoretical nature of incidental power, and pragmatic formalism ultimately suffers, if less so, from the same definitional problems as strict formalism. Under both pragmatic and strict formalism, the question remains as to just what powers are executive, legislative, or judicial. If, for example, the executive makes rules incidental to the implementation of a statutory regime, it is at least sometimes unclear as to whether such rule-making is then an exercise of legislative or executive power. This is the theoretical weakness of formalist theory, which similarly infects its pragmatic version. Classification of actions remains important in deciding whether they are incidental or not to branch

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circumstances. In support of his position, Scalia, *ibid.* at 419-20, quoted Locke for the proposition that the legislature could not transfer away its authority. Scalia's limited quotation of Locke, without the full context of Locke's theoretical scheme, fell into the formalistic trap of defining all rule-making as exclusively legislative power, and consequently failed to appreciate how the formulation of sentencing guidelines could legitimately display a functional mixing of branch powers. The Court, in contrast, recognized functional ambiguities, suggesting, *ibid.* at 391, n. 17, *per* Blackmun J.: "Indeed, had Congress decided to confer responsibility for promulgating sentencing guidelines on the Executive Branch, we might face the constitutional questions whether Congress unconstitutionally had assigned judicial responsibilities to the Executive or unconstitutionally had united the power to prosecute and the power to sentence within one Branch." Justice Scalia no doubt would have found such delegation to the executive branch to be equally a violation of the separation of powers, but the Court's statement nevertheless makes the point about the resistance of many government actions to clear, formalistic definitions and divisions among the branches.

power, and in determining whether they are a permissible exercise by that branch or an improper intrusion upon another branch's sphere of authority. Certainly, pragmatic formalism goes further than the strict theory in explaining and accommodating the administrative state. In the end, however, the pragmatic model escapes neither the definitional difficulties of the strict variant nor the long-term dangers of misclassifying, and so constitutionally isolating, powers within an inappropriate branch.[183] Furthermore, by allowing the incidental exercise of powers usually belonging to another branch, pragmatism still requires a contextual determination of why and to what degree such exercise is constitutionally permissible. For strict formalists, therefore, pragmatism would seem to involve the same unacceptable *ad hoc* determination that informs their criticisms of functionalism, while for functionalists it cannot sufficiently escape formalist constraints.

Functionalist Separation of Powers Theory

Contrasting with formalism, the functionalist theory counters that the Constitution does not erect strict barriers isolating the three branches from one another, but allows their mixing to promote checks and balances, as well as government efficiency. Functionalism stresses normative goals, so that "[s]eparation of powers is not an end in itself; it is a means to the larger ends of preserving liberty and maintaining efficiency."[184] Counter-emphasis on checks and balances arises from suspicion of rigid categorizations of power, which might impede government's responsiveness to political needs and impede efficiency, adaptability, and democratic majoritarianism served by

[183] Redish, *supra* note 160 at 101-02, 136, admits difficulty in defining and allocating functions as executive, legislative, or judicial, but believes that the Supreme Court can overcome it just as it attempts to do when defining many other constitutional terms, such as the meaning of speech. However, Redish ultimately cannot escape the problem that the Court might wrongly allocate powers among the branches, disguising them under the fiction of formalistic definitions. Indeed, his pragmatic approach to formalism seems to recognize without fully resolving that, for example, functional legislative power incidentally exercised by the President should be considered by the courts as formally executive power. See *ibid.* at 117-18.

[184] Alfange, *supra* note 160 at 712, and 755

congressional delegations of powers.[185] Not surprisingly, then, functionalism is at odds with originalism and strict interpretation of constitutional text.[186] Furthermore, emphasis upon checks and balances necessarily discourages any separation theory that would constitutionally insulate departmental spheres of authority, within which a branch might act without any checks and which the other branches might oppose only with difficulty. Functionalism is more descriptive of constitutional practice than is formalism, and so quite compatible with the administrative state and complex political accommodations within and among the branches. Thus, under a functional jurisprudence, courts would not automatically strike down any and every attempt by one branch to exercise powers associated with another. Instead, courts would evaluate the functional characteristics and implications of the power exercised in assessing whether or not the branch action violated the separation doctrine. In doing this, courts would be open to more than incidental exercises of other powers, as conceded by pragmatic formalism. Such evaluation would consider factors as how far executive power is enabled by statutory language or related to statutory purpose, whether one branch's actions threaten to undermine the independence or equality of another, intrudes upon the "core" functions of another branch, or unduly threatens individual rights and lacks appropriate practical safeguards.[187]

Functionalism accordingly emphasizes the normative goals of the separation doctrine, rather than its formal division of government power between three branches. Consequently, critics of functionalism charge that it actually undermines separation of powers by permitting *ad hoc* judicial decision-making that subjects principle to policy interests and efficiency, and destroys the structural prophylaxis against accretions of power. According to this view, functionalism not only violates the Constitution's plain language institutionally dividing the exercise of executive, legislative, and judicial power, but collapses the separation of powers into a substantive, case-by-case

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[185] Brown, *supra* note 154 at 1527-29.

[186] Sunstein, *supra* note 156 at 495-96; Flaherty, *supra* note 163 at 1812-13.

[187] Brown, *supra* note 154 at 1527-29, 1564.

evaluation as to whether the particular action is expedient, excessively disruptive of the other branches, or violates constitutional rights like due process.[188] Admittedly, some balancing of decision-making form versus normative concerns is indeed inherent in the functional approach. Furthermore, intemperate preference for efficiency, or simple equation of the separation doctrine with a due process analysis, would effectively be no principled standard at all, and would threaten the Constitution's structural mechanisms for protecting rights and serving the public good. Extreme functionalism would effectively provide no guiding principles, and permit a free delegation of authority and use of discretion that would result in the same possible problems as strict formalism. That is, the executive might, through congressional abdication of legislative responsibility and political oversight, as well as the judiciary's overly broad deference to executive decisions, exercise potentially arbitrary discretion. Extreme functionalism could therefore result in the executive's concentration of unchecked decision-making authority, just as would happen under a strict formalist approach where functionally legislative or judicial powers were wrongly categorized as belonging to the executive branch.

Despite their theoretical differences, both formalism and functionalism share two important analytical premises. The first and non-troubling is that any separation of powers model has the normative purpose of preserving political liberty through the division of power among the branches. This purpose indeed fits with Locke's constitutional paradigm, where a structural model allows government power better to serve the public good and holds each branch to its own trust. However, the problem is just what separation of powers theory best realizes these normative goals, while being representative of actual political practice and assumptions.[189] The second shared, and more problematic, premise between the two theories is that government actions can be typologically labeled as executive, legislative, or judicial and, like corporeal things, can be compartmentalized in or at times traded between the

[188] Redish, *supra* note 160 at 125.

[189] Fallon, *supra* note 162 at 24.

branches. Questions of how to distinguish between executive, legislative, and judicial powers, and just what constitutionally systemic significance such distinctions have, are at the center of both formalistic and functionalist separation of powers analysis.[190] Both theories fail to recognize that executive, legislative, and judicial powers are analytical constructs for legally and politically managing governmental power, and accordingly defy clear, conclusive definitions.[191] Even though functionalists point to definitional problems in criticizing formalism, their own counter-emphasis upon checks and balances

> contains underlying, if suppressed, premises of institutional formalism. After all, it makes sense to say that X 'checks' and 'balances' Y only if X and Y are in some basic sense independent of one another. . . . In the end, to avoid challenges to the formalistic underpinnings of separation theory by emphasizing a checks and balances framework can go only a certain distance toward averting the pitfalls of abstract institutional definitions.[192]

Both functionalism and formalism remain premised upon the identification and allocation of specific powers to the branches, which powers are in some sense separate in their natures. Functionalism and formalism, then, are in fact theoretically aligned in assuming that there exist specific, identifiable government powers, inherently executive, legislative, or judicial, and which either can or cannot be allocated respectively between the branches.

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[190] Champagne, *supra* note 161 at 844-45; For discussion of the points of similarity between formalist and functionalist arguments, see generally William N. Eskridge, Jr., "Relationships between Formalism and Functionalism in Separation of Powers Cases" (1988) 22 Harvard J. L. & Pub. Pol. 21.

[191] Vile, *supra* note 108 at 16-17, 237.

[192] Sargentich, *supra* note 166 at 460.

Chapter V: Deliberative Decision-Making: An Alternative Separation of Powers Theory

A Deliberative Processes Approach

Executive, legislative, and judicial powers are a functional typology of the deliberative processes by which government institutions, whether independent branches or inferior administrative bodies, seek to make reasonable decisions for the public good and so fulfill their fiduciary obligations within the Lockean constitutional paradigm. The separation of powers doctrine itself grows out of the connections between the various ways by which institutions can deliberate about their decisions, with questions about which government branches (due to their unique institutional characteristics) are the most competent to deliberate according to those processes. Further, the separation doctrine rests upon the notion that some particular kinds of decisions, under certain circumstances, are best resolved, and the public good thereby best attained, by certain deliberative processes and the branches most institutionally suited to use them. Consequently, the typology of a power as executive, legislative, or judicial grows, ultimately, not out of exclusive groupings of specific government actions allocated between the branches, but out of the processes through which government bodies arrive at their decisions. Responsibility for certain government actions therefore usually rests with the branch or branches institutionally best suited to resolve a matter-at-hand, based upon a branch's structure and competence in using the appropriate deliberative processes.[193]

The formalist, accordingly, might agree with this idea of the separation of powers, arguing for example that the doctrine mandates that rule-making

[193] For an overview of the relationship between a branch's structure and its deliberative competency, see 85, below.

should only be done by the legislature, a democratically elected body that can debate and politically compromise among various societal interests. However, government actions often defy clear definition as being executive, legislative, or judicial, and can exhibit mixed characteristics of each. What the formalist has difficulty with is in determining with certainty just what actions are conclusively rule-making, for example, and therefore exclusively within the authority of the legislature. As seen in *Mistretta*,[194] for instance, the establishment of sentencing guidelines might show both rule-making and adjudicative qualities. Such definitional ambiguity only indicates that all government actions in their most fundamental sense are part of a general decision-making power for the public good, where the branches have interlocking trusts. The separation of powers doctrine, then, cannot rest upon clear, exclusive lists of actions, with each assigned solely to one branch. Rather, the doctrine rests upon Lockean grounds, separating out the deliberative processes by which the branches can make the decisions entrusted to them and check the actions of the others.[195] This approach therefore denies clear distinctions between executive, legislative, and judicial powers.

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[194] 488 U.S. 361 (1989).

[195] Redish, *supra* note 160 at 117, appears to recognize the importance of deliberative processes to the separation of powers, before then retreating back into a pragmatic formalist analysis:

"With relatively narrow, historically base exceptions, 'legislative' power includes not only the authority to promulgate generalized standards and requirements of citizen behavior or to dispense benefits, for the purpose of achieving, maintaining, or avoiding particular social policy results. So broadly phrased, of course, such a standard could conceivably be employed to describe the functions performed by the judicial and executive branches, as well. However, the difference is the structural 'baggage' that the exercise of the judicial and executive powers are required to carry – baggage which does not affix itself to the exercise of the legislative power. The judicial branch may establish such rules of behavior only in the context of the performance of the 'traditional' judicial function of the adjudication of live cases or controversies."

For Congress, such "structural baggage" includes the necessity to show political commitment when legislating, thereby retaining democratic accountability for delegated authority. Such a principle guides courts in determining whether executive or judicial exercises of delegated authority are legislative in nature. While Redish recognizes the functional mixing of branch powers, he nevertheless still relies upon formalistic definitions and allocations of branch powers. Still, his pragmatic approach nevertheless does allow more flexibility than strict formalism, as Congress might pass a statute that evidences its political commitment and maintains democratic accountability, while still permissibly delegating some rule-making authority to the executive as incidental to statutory implementation. See *ibid.* at 136-37, 142-43, 156-57.

For example, the making of statute law is best left to Congress because it is institutionally suited for allowing debate among law-makers, politically reconciling different constituency interests, and ensuring the democratic legitimacy of the law generally. Some administrative rule-making, however, like environmental regulation or military governance, might be better left to the executive's discretion, as it can draw upon subject-matter expertise and more efficiently make regulatory or strategic policy choices. In the latter sort of cases, the separation of powers doctrine permits the executive to exercise considerable rule-making discretion as authorized by Congress. That discretion, however, remains subject to judicial review in order to ensure that the executive acts only within its delegated powers, as well as according to standards of due process and reasonableness in its rule determinations. In such cases, branch powers to decide certain issues, based on their deliberative competencies, can overlap. The separation doctrine is therefore Lockean, in that it promotes the public good by encouraging reasonable decision-making and allowing the branches to hold one another to their fiduciary obligations, based upon which branch or branches together can best decide certain matters using executive, legislative, or judicial processes.

A Lockean, process-oriented approach to separation of powers becomes clearer in the context of British administrative law, where parliamentary sovereignty and responsible government resist formalistic divisions between the branches and rest upon mixing of powers.[196] Eric Barendt, for example, citing Ivor Jennings, thus observes the following:

> For instance, the differences between judicial and administrative decisions are in his [Ivor Jennings'] view not really ones of substance, but are only formal or procedural. It is better that some decisions are taken by persons or bodies which observe formal legal procedures – impartial tribunals considering a case in public and on the evidence – rather than by administrators who are concerned to execute policies which they have developed. But we cannot say that some decisions are inherently judicial rather than administrative.[197]

[196] Eric Barendt, "Separation of Powers and Constitutional Government" [1995] Pub. L. 599 at 615.

[197] *Ibid.* at 603, and 604-05, 616.

Barendt's understanding of government power therefore rejects formalistic characterizations. Nevertheless, it does not preclude a functional analysis of government action in determining whether certain similar kinds of decisions are better handled by, for example, the judicial or executive branch. Barendt continues:

> [I]t is perfectly coherent to claim, for instance, that decisions on personal rights and liberties are inherently suitable for judicial resolution, and so must be made by a court, while the distribution of other goods and benefits may be regarded as a matter for administrative decision. . . . [E]ven within the context of an unwritten, or codified, constitution, courts are able to draw a clear line between administrative and judicial functions.[198]

British courts have relied upon such process-oriented, functional analysis, outside of the guiding presence of a written constitution, in developing judicial review doctrines that restrain Crown discretion. Courts will therefore review the executive's decisions according to standards of legality, procedural propriety, and reasonableness, when it acts in a way that is functionally legislative or judicial.

Despite the functional mixing of powers attendant upon parliamentary sovereignty and responsible government, "an approach to the study of British government that rules out all reference to the 'separation of powers' is an inadequate one."[199] Rather, British jurisprudence reflects a flexible notion of separation of powers, not premised upon the clear definition and allocation of certain powers between the branches. The separation doctrine in British experience has a strong historical component, based on long-established institutions and their functions. Thus, having no written constitution on which to base formalist theory, courts instead must remain focused upon the normative goals of separation of powers principles, upon which British

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[198] Functional differentiation also, of course, allows recognition of legislative processes. *Ibid.* at 605.

[199] Vile, *supra* note 108 at 8.

government, like that of the United States, is based.[200] Such goals, behind the Lockean constitutional paradigm, are the promotion of the public good through reasonable decision-making, the diffusion of government power among the branches, and their mutual checks upon one another. The deliberative processes approach to the separation of powers allows the different branches to exercise authority based upon considerations about which one of them is most institutionally suited to decide certain matters. The branches might also have overlapping, concurrent authority, which not only accommodates the definitional ambiguity of some actions but also encourages the branches to check the others and hold them to their fiduciary obligations. Judicial review, for instance, recognizes that the executive might functionally legislate or adjudicate, but maintains the separation of powers by preventing unfettered, arbitrary executive discretion. Review ensures that the executive branch acts in trust for the public good, by making such decisions according to legislative or adjudicative standards more likely to lead to a reasonable decision in the matter at hand.[201]

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[200] Barendt, *supra* note 196 at 606-07.

[201] See *ibid.* at 608-09; One approach to judicial review that tries to account for the problems inherent in both formalism and functionalism is one of great judicial restraint. Jesse H. Choper, *Judicial Review and the National Political Process: A Functional Reconsideration of the Role of the Supreme Court* (Chicago: Univ. of Chicago Press, 1980), has suggested that separation of powers issues, as well as those of federalism, are always non-justiciable political questions, to be resolved between Congress and the President, or the national government and the states. The Court should instead preserve its political capital in focusing on individual rights. See also John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, Mass.: Harvard Univ. Press, 1980), advocating judicial abstention as long as political processes are open to equal participation. Flaherty, *supra* note 163 at 1828-1834, suggests that courts should passively examine separation of powers disputes, deferring to the political process and intervening only in those instances, as he describes at *ibid.* at 1828, "confined either to violations of clear textual provisions relating to the apex of the three branches or to clear breaches of underlying separation of powers principles themselves." Flaherty loosely draws upon judicial "passive virtues," first formulated by Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Indianapolis, Ind.: Bobbs-Merrill, 1962), see 107, below, and advocates judicial restraint on controversial issues through reliance upon the standing, ripeness, and political question doctrines. In so far as such a deferential approach would support, for example, considerable congressional delegation of authority to the President unless it violates an express constitutional provision or the most basic purposes of the separation of powers, it has much in common with functionalism. However, it would allow far less judicial review of government action than is generally the case under functionalism, and risks rendering the separation of powers doctrine meaningless as a legally enforceable, rather than politically idealistic, principle. For a criticism of Choper's abstention argument, see Redish, *supra* note 160 at 16-21.

Under a process-oriented approach, then, the key issue is not necessarily the subject matter of a decision *per se* or the branch taking it, but the way in which decisions are made and remain accountable to the other branches. It is not impossible, for example, for the executive functionally to adjudicate a matter, even though the judiciary is in most circumstances institutionally better suited for that kind of deliberation. Institutions sometimes make decisions by blending deliberative processes, which shade into one another. A branch's exercise of "quasi" powers, partially resembling those often associated with a different branch, explains the difficulties in reaching neat, formalistic definitions of executive, legislative, and judicial powers. Alex Tuckness makes this point in the context of Locke's dualistic model of executive and legislative power, placing judicial power as a midpoint and composite variant between them.[202] Tuckness writes, "[i]n place of a three-part distinction along legislative, executive, and judicial functions, it is better to think of a continuum between the pure legislative and the pure executive case."[203] According to Tuckness, judicial power rests along this continuum, as courts essentially make law through developing new common-law doctrines or interpreting the meaning of statute, or executing the law through its application and enforcement.[204] While radical formalism, based as it is upon clear definitions of branch powers and hard positivist jurisprudence, asserts that courts only apply and do not make law, such a position also conflicts with the common-law tradition of fashioning rules through case precedent. Furthermore, the executive and legislature must each interpret existing law in the course of acting, a function usually reserved for adjudicatory determination in the courts.[205] Tuckness' observation about judicial power can be applied to the executive and legislative, as well; branch powers shade into one another, making it difficult to define with certainty and exclusivity the spheres of branch authority.

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[202] Alex Tuckness, *Locke and the Legislative Point of View: Toleration, Contested Principles, and the Law* (Princeton: Princeton University Press, 2002) at 118-19.

[203] *Ibid.* at 127.

[204] *Ibid.*

[205] *Ibid.*; Dunn, *supra* note 12 at 148.

Tuckness' understanding of executive-legislative dualism, based on functional concepts of rule-enforcement and rule-making, illustrates the significance of deliberative processes. However, it remains difficult to dichotomize even executive and legislative powers in practice. Indeed, Tuckness admits that "[t]he pure cases of legislative or executive action are rare if they exist at all."[206] What executive and legislative, as well as judicial, processes have in common, though, is that they fit within a Lockean structural model. The judiciary does not figure in the *Two Treatises*, not because adjudication is unimportant, but because Locke, like Tuckness, subsumes it under executive-legislative structural dualism. In any case, what Tuckness' explanation illustrates is the importance of structurally employing deliberative processes through the branches, without imposing strict formalistic definitions of their powers. Tuckness touches upon the centrality of deliberative processes to the separation of powers doctrine, and the relationship between deliberative processes and the branches as institutions: "Since a Lockean theory does not assume a simple one-to-one correspondence between functions and institutions, courts can, as institutions, perform both legislative and executive functions at different times. Insofar as they approximate one or the other, the institutional roles of that ideal type will apply to judges."[207] Likewise, for example, insofar as the executive might perform adjudicative functions (such as through administrative agencies), it must honor the deliberative standards of the judge, such as impartiality and procedural fairness. Thus, the separation doctrine does not rest upon strict formalistic divisions of powers. Rather, it differentiates between and utilizes the different deliberative processes by which each branch fulfills its own fiduciary obligation, upholds those of the others, and is in turn checked by them should it act improperly.

Tuckness argues that government powers resist clear definition and deliberative processes themselves often blur, with judicial power being a

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[206] Tuckness, *ibid.* at 127.

[207] *Ibid.* at 128.

species of the executive and legislative. Tuckness' position leads, perhaps unintentionally on his part, to an inverse perspective on government power, being the idea that executive and legislative decisions are themselves ones of judgment.[208] From this perspective, all government power is generally judicial in nature. Such a view reflects older notions of law and government, obscured by the rise of positivism and emphasis upon legislative power in Great Britain and the United States during the eighteenth and early nineteenth centuries. Previous to these jurisprudential developments, the conceptual distinction between statute, common law, and the executive discretion used in their enforcement was, at best, weak. As Vile writes:

> The connection between modern theories of law and sovereignty and the emergence of the concepts of the legislative, executive, and judicial functions of government is very close. The idea of an autonomous 'legislative power' is dependent upon the emergence of the idea that law could be *made* by human agency, that there was a real power to make law, to legislate. In the early medieval period this idea of making law by human agency was subordinated to the view that law was a fixed unchanging pattern of divinely-inspired custom, which could be applied and interpreted by man, but not *changed* by him. In so far as men were concerned with 'legislation' they were in fact declaring the law, clarifying what the law really was, not creating it. Legislation was in fact part of the judicial procedure. . . . There could, therefore, be only one 'function' of government – the judicial function; all acts of government were in some way justified as aspects of the application and interpretation of the law.[209]

Under this view, all government decision-making resembles adjudication in that legitimate authority is exercisable only to realize transcendent ideals of justice. Importantly, this focus upon adjudication suggests that the executive and legislative branches differ not in their functions so much as in their unique compositions as institutional forums for doing justice. Thus, for example, not only is the King the fount of justice, but Parliament is also a high court. The

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[208] William B. Gwyn, "The Indeterminancy of the Separation of Powers and the Federal Courts" (1989) 57 Geo. Wash. L. Rev. 474 at 476, 494-502, explains historically, for example, how criminal prosecutions straddle the executive and judicial functions; Philip B. Kurland, "The Rise and Fall of the 'Doctrine' of Separation of Powers" (1986) 85 Mich. L. Rev. 592 at 603.

[209] Vile, *supra* note 108 at 24, citing C. H. McIlwain, *The High Court of Parliament and Its Supremacy* (New Haven, 1910) at 109-10.

ambiguity of judicial power appears in British constitutional structure, where courts historically emanated from the Crown, the highest court of appeal is the House of Lords, and the Chancellor is not only head of the judiciary but sits in Parliament and is a Crown minister.[210] Although institutional mixing to this degree is missing in republican government under the United States Constitution, the judicial nature of government power remains inherent within it. The judicial nature echoes in the selection of judges, involving presidential appointment and the approval of the Senate. It also appears more starkly in the executive branch's functional adjudication of some administrative matters, and in the idea that both the President and Congress to some degree must interpret their constitutional and legal obligations for themselves, often in ways that impact upon individual legal rights.[211] Whether laying down a general rule, interpreting it in deciding disputes under specific facts, or enforcing it, all government institutions assert themselves in some sense as a judge acting for the public good.

Whether exercised by executive, legislative, or judicial institutions, all lawful authority is conceptually similar in Lockean terms in that it must serve the public good. Branch powers differ not in purposes, but in the ways each branch can deliberate in making decisions. Because all branches have a fiduciary duty to act for the public good, Lockean structuralism depends upon them to cooperate with as well as check one other, using different deliberative processes as they are best able, and thereby increasing reasonableness and reducing arbitrariness in decisions. Executive, legislative, and judicial processes remain associated, but not exclusively linked, with their respective branches, because each branch is particularly suited, due to its institutional attributes, to deliberate and make decisions according to the particular processes normally associated with them.[212] Deliberative processes

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[210] But see *supra* note 101, for a description of pending constitutional reforms to the judiciary in the United Kingdom.

[211] For example *Chevron U.S.A., Inc.* v. *National Resources Defense Council, Inc.*, 467 U.S. 837 (1984), mandates in certain circumstances that courts defer to an agency's reasonable construction of its own powers under an enabling act.

[212] Vile, *supra* note 108 at 290, 317, 326, 329, finds four functions that account for the processes of the three branches, and support the Lockean notion of government's general

nonetheless often shade into one another, so that at times a branch appears to be deliberating in ways not characteristic of it, but functionally associated with another branch. For example, the determination of criminal culpability is best determined through the adjudicative process, and so usually left to courts. In cases of military justice, however, the executive is also well-suited to make such determinations, in many circumstances, due to their impact upon military discipline and operations. The separation of powers recognizes these overlapping competencies and the functionally mixed nature of such decision-making. The executive's functional adjudication of culpability, and any subsequent deprivation of personal liberty, would constitutionally require that it follow certain procedures indicative of the judicial process, lest the resulting decision be arbitrary, unreasonable, and so not conducive to the public good. Courts-martial, then, well illustrate the mixing of deliberative processes and their institutional relationship to the branches, which under the separation of powers can lead to the executive acting in a functionally judicial manner. Were civilian courts to decide cases of military law, it might also be argued that they, in turn, would to a degree act in a functionally executive way by enforcing military discipline and might dispense with certain adjudicative procedures afforded to civilians.

The separation of powers doctrine, based upon a structural model that ensures the interplay of deliberative processes among the branches, therefore accounts for what Victoria Nourse has termed "constitutive aspects of political power." That is, the United States Constitution (like others such as those of the United Kingdom or Canada, for example) "is a means of both limiting and creating political power."[213] The legitimizing, or positive, aspect of separation of powers utilizes multiple deliberative processes, both between and within the branches, in government's effort to make reasonable decisions that serve the

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decision-making power for the public good. These are rule-making, a discretionary function (corresponding to the prerogative), rule-application, and rule interpretation. Similarly, Almond, *supra* note 161 at 17, explains that "the three authoritative governmental functions, *rule-making*, *rule application*, and *rule adjudication*, are the old functions of 'separation of powers,' except that an effort has been made to free them of their structural overtones. . . ." [emphasis original].

[213] Victoria Nourse, "The Vertical Separation of Powers" (1999) 49 Duke L.J. 749 at 758.

public good. This positive aspect complements the negative diffusion and checking of government power as a prophylactic to its accumulation and arbitrary exercise.[214] The constitutional legitimization and limitation of power correspond to the positive and negative roles that branches occupy when fulfilling their fiduciary duties. The formalist versus functionalist debate reflects, respectively, the negative and positive roles in terms of their counter-emphasis upon either a strict division between or sharing of branch powers. However, the public good and the reasonableness it requires in government exercises of power are equally constraining and justificatory factors in decision-making, leading to the constitution's constitutive aspects of which Nourse writes.[215] A Lockean sense of efficiency therefore requires a balance between overly rigid or porous institutional arrangements, whereby a branch might come to make inappropriate and unaccountable decisions beyond its deliberative competence. Alfange warns against over-emphasis, for example, upon clear distinctions between branch powers:

> The separation of powers principle was seen by the framers as an important mechanism for the preservation of liberty and the achievement of governing efficiency. Insofar as it excuses the legislature from administering the laws, it promotes efficiency; and insofar as it prevents any branch of the government from amassing a monopoly of authority, it protects liberty. But it is not an end in itself. Indeed, strict adherence to the doctrine can be a barrier to the attainment of the ends for which it was embraced. To the extent that it renders cooperation between the branches difficult, it can hinder efficient government functioning; and to

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[214] See Verkuil, *supra* note 159 at 303-04; Sargentich, *supra* note 166 at 452, notes that separation of powers and the rule of law share negative and positive aspects, but characterizes them in terms of liberal and democratic commitments: "Liberalism's stress on the restraint or control of government may conflict, to a certain degree, with democratic theory's emphasis on the affirmative aims of public life: to realize public values and to achieve greater coherence with the popular will." Sargentich thus understands the branches' positive and negative roles in the separation doctrine as based upon the conflicting normative goals. Under the Lockean paradigm, the goals of the separation of powers reduce further, however, into just the reasonable decision-making for the public good. A branch's positive and negative roles represent the ways in which it employs those deliberative powers *vis-à-vis* the others, while the tensions that Sargentich identifies go to the structural problems present in erecting a government serving the public good. Nevertheless, the difference between positive and negative roles as conceptualized here and by Sargentich is one of analytical perspective only. In the end, under either view, the positive role is related to a branch's active pursuit of the public good, while the negative role checks the activities of the other branches in order to prevent abuses of power.

[215] See Barendt, *supra* note 196 at 602, 607.

> the extent that it precludes the development of checks and balances, it may endanger liberty.[216]

Insofar as a deliberative processes approach promotes inter-branch dynamics, where one branch might sometimes appropriately make the kinds of decisions usually associated with another, subject to oversight, it promotes a Lockean structural model that seeks both to enable and limit exercises of government power for the sake of the public good.

Understanding the place of deliberative processes, then, attempts to reconcile the tensions between the limiting and legitimizing aspects of power, as emphasized by formalism and functionalism. It does so by going beyond this theoretical dichotomy,[217] so that neither particular kinds of decisions nor the deliberative processes used to reach them are linked exclusively and synonymously with particular branches. Such an understanding of the separation of powers doctrine, based upon decision-making processes within government administration, goes beyond what Thomas Sargentich has called the "rule of law ideal." This ideal, related to the definitional endeavors of both formalist and functionalist theories, seeks predictably to regulate political behavior and conflicts of interest through clear doctrinal rules about the institutional division and exercise of government power.[218] Attention to deliberative processes necessarily centers upon the rule of law, as well, but attempts to go beyond its narrower implementation within formalist and functionalist theory. Rather than attempting either formulaic or *ad hoc* distributions of government powers based upon unworkable definitions, attention to deliberative processes looks to the normative goals attached to both the rule of law and separation of powers principles. This approach focuses on government's rational pursuit of the public good, linking it not only

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[216] Alfange, *supra* note 160 at 760; For the efficiency concerns of the American constitutional framers, see Louis Fisher, "The Efficiency Side of Separated Powers" (1971) 5 J. Amer. Stud. 113 and Gwyn, *Meaning*, *supra* note 113 at 34-35.

[217] See Vile, *supra* note 108 at 36.

[218] See Sargentich, *supra* note 166 at 449-54, 459-60; Verkuil, *supra* note 159 at 304-05, emphasizes the natural occurrence of government conflicts of interest. But see Redish, *supra* note 160 at 128-30, criticizing Verkuil and his approach for over-valuing efficiency and collapsing separation of powers analysis into a due process evaluation.

to democratic responsiveness through administrative flexibility, but to a Lockean structural model that empowers and limits government by holding the branches to their fiduciary obligations.[219] As Sargentich recognizes, the goals of rational decision-making and democratic accountability – in his terms the public purposes and democratic processes ideals – can be "contrasting, while partially complementary, visions."[220] Accordingly, a deliberative processes theory encompasses an idea of checks and balances, where "different branches of government use their complementary resources to identify and solve social problems."[221] A deliberative processes approach to the separation of powers is thus juxtaposed with formalistic, and less so functionalist, notions of the rule of law, both preoccupied with defining and allocating branch powers as discreet objects. The deliberative processes approach relates to the rule of law in a richer, substantive sense, by balancing the positive and negative roles of the branches in both acting and limiting one another on behalf of the public good, but without confining them to doctrinally defined and rigid spheres of power. The ways in which the branches can and do make decisions – leading to which branches make what decisions and how – maintains both a separation and a balance, and importantly recognizes the Lockean structural model as a means to respect, not itself embody, the rule of law and the public good.

Institutional Reasoning

The deliberative aspects of the separation of powers doctrine grow out of the Lockean political trust that each branch has to act reasonably for the public good. However, the theoretical construction of the separation doctrine is intertwined with the historical development of government institutions in both the United Kingdom and the United States. The early English prototype of the doctrine was the mixed constitution of the feudal estates of Crown, Lords, and

[219] See Sargentich, *ibid.* at 464-67.

[220] *Ibid.* at 486.

[221] *Ibid.* at 478.

Commons, represented in the Monarchy and the houses of Parliament.[222] Partly because the mixed constitution institutionalized the interests of old feudal estates, the judiciary remained a subordinate branch. Popular sovereignty, at the foundations of modern democratic constitutionalism, rejects however the idea that government represents any other interests than those of the public. As such, the modern separation doctrine is "deeply opposed to the ideas of the balanced constitution, in which important elements were independent of popular power, and able to check the representatives of that power."[223] No longer representative of competing estates, the executive and legislative branches differ now only in their constitutional composition and the ways in which they act for the popular sovereign that they represent. That is, their institutional competencies, based upon their composition, permit them to employ some deliberative processes better than others in coming to reasonable decisions for the public good.[224] Although the separation of powers originated in the balance of the estates, it still represents a structural model that regulates power through its division and utilization of decision-making processes. Moreover, the separation doctrine now comprehends the judiciary as an independent branch, intended to resolve certain matters through the deliberative process of adjudication.[225] The executive, legislative, and judicial branches, therefore, have become institutional means for the public empirically to assess its own good, both at the corporate and individual levels,

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[222] The idea of a mixed or balanced government between the many, the few, and the one has long roots in western political thought, going back to Plato's *Laws* and Aristotle's *Politics*. Gwyn, *Meaning*, *supra* note 113 at 24.

[223] Vile, *supra* note 108 at 137.

[224] See *ibid.* at 33, Brown, *supra* note 154 at 1533, n. 82, and Gwyn, *Meaning*, *supra* note 113 at 26-27.

[225] Redish, *supra* note 160 at 103, explains the difference between the old idea of mixed government and a modern idea separation of powers: "Mixed government was designed to prevent absolutism – the arbitrary use of power – by avoiding the concentration of all state power in one body. Separation of powers has the same function, but operates on different assumptions. Two major changes are required to transform mixed government into a government based on separation of powers. First, particular departments must be restricted to certain functions. Second, an independent judiciary must be established." Of course, Redish's idea of restricting functions to respective branches is fundamentally a formalistic one. A process-oriented approach would instead suggest that particular departments are primarily responsible for, but not necessarily restricted to, certain functions; Vile, *ibid.* at 14-17.

in response to political experience.[226] The empirical nature of the separation doctrine structurally separates the branches not just to prevent tyranny through the diffusion of power, but to manage the institutional advantages and disadvantages of the branches so that they can positively contribute to reasonable decision-making.[227]

The separation of powers ensures an inter-branch dialogue that depends upon cooperation and conflict among the branches, each having its own perspective on what the public good requires and each suited to make that determination through particular deliberative processes. The separation doctrine does not protect branch interests for their own sake, nor require formalistic definitions of executive, legislative, or judicial powers that are then allocated between the branches. Rather, the relationship between the branches' fiduciary obligations, institutional composition, and deliberative capabilities points towards a unity between the public good, constitutional structure, and a substantive rule of law premised upon reasonable decision-making.[228]

By ensuring that the three branches each have some manner of input into government decision-making, either positively or negatively through different deliberative processes, the separation doctrine diversifies the analytical perspectives which the branches use in acting for the public good. The

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[226] For Locke's epistemology of empiricism, see his *An Essay Concerning Human Understanding* (1690); Lutz, *supra* note 168 at 165, remarks: "When reading *The Federalist* and other writings from the founding era, one cannot but be struck by the appearance of three widely held assumptions: that there is order in the universe; that we can know that order through observation and reason; and that we can use that natural order in constructing our political institutions." The Constitution accordingly blends empiricism with rationalism and tradition, as noted by Lutz, *ibid.* at 166: "Blackstone's legal language, Locke's political terminology, and the scientific terms found in Montesquieu and Hume all informed American political discourse and helped shape the contents of the Constitution."

[227] Lockean empiricism and structural mechanisms for deliberating are therefore related, rational enterprises. Political society as a corporate entity, like individuals, must act based upon perceived experience. Also, freedom of individual action requires freedom from unjustifiable coercion or subordination to another's will. Liberty and reason are therefore also related, so that government does not just promulgate rules for public order, but makes reasonable decisions that promote individual freedom as a constituent part of the public good. See Grant, *supra* note 7 at 12-15, 49-50, 80, 195.

[228] See Brown, *supra* note 154 at 1518-20, and Sargentich, *supra* note 166 at 450, 453.

separation of powers in this way "measures government against the ideal of reasoned political deliberation"[229] and promotes the rule of law in that no single institution or magistrate can exercise absolute and arbitrary power. The doctrine also ties officials more closely to the popular will, and equally subjects all members of civil society to fair laws.[230] Inter-branch dialogue, based upon deliberative processes, not only dissuades magistrates from self-serving or otherwise arbitrary action, but also remedies unconscious biases and institutional predilections that might skew a branch's reasoned assessment of the public good. Ruth Grant points to the Lockean concern over impartiality and rational judgment, necessary for the branches to uphold their public trusts:

> We are apt to be partial in our judgments through either passion, interest, or an unwarranted trust in the opinion of others. A single passion can establish a tyranny in the mind so that our thoughts are no longer free to consider a wide variety of things, or we may simply ignore rational argument and evidence in areas where we have allowed our passions to dominate. Interest also can lead men to stop their inquiries at the point where they have reached an opinion suitable to their interest or lead them to adopt the opinions of a party that suits their interest without ever subjecting those opinions to a reasoned examination. Custom, education, and the constant influence of their party also blinds whole societies and sects, even where men are sincere and are not influenced by their own interests. Party loyalty is an example of placing an unwarranted trust in others' opinions. But whether we subject our minds to the opinions of party leaders, to those of our friends, neighbors, parents, or nurses, or to those of men of great reputation, the effect is the same; our reasoning is then based on false foundations.[231]

Inter-branch dialogue addresses these concerns, as the differing deliberative processes which the branches bring to decision-making work together positively to ensure reasoned results and negatively to check each other from abusing their trusts. Interaction between the branches accordingly prevents one branch from dangerously monopolizing or manipulating government decision-making, and insures that all three branches have opportunity to bring

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[229] Grant, *supra* note 7 at 189.

[230] *Ibid.* at 74, 77.

[231] *Ibid.* at 183, and generally at 188-92, for the connection between impartiality and reasoned decision-making.

their institutional expertise to bear on decisions, as appropriate under the circumstances.

J. Mitchell Pickerill has observed the importance of inter-branch dialogue as it exists between the legislative and judicial branches, in what he calls "constitutional deliberation." Such deliberation is a "collective and interactive phenomenon in which the [Supreme] Court and Congress both articulate reasons for and against legislation, and in which each institution has a specialty with respect to the types of reasons it brings to the table."[232] The President, through his veto power, political influence, and enforcement of legislation, is an additional actor in this process. Each branch has a unique role in government according to the deliberative means by which it makes decisions. As part of their interaction, the branches check one another as they assert themselves in the dialogue. However, checks are accompanied by balance, which as Donald Lutz has noticed, are distinct, if closely related, ideas. Whereas checks counterpoise the branches against one another, balance "refers to a mechanism or mechanisms for regulating the speed at which something occurs. This definition resembles the one used during the eighteenth century by clockmakers, or by physicists such as Isaac Newton."[233] Although Lutz specifically points to terms of office, constituency responsibilities, and the number of office-holders that comprise the branches, he recognizes that all three factors interact to affect the speed at which Congress makes decisions. Such factors affect the way in which a branch is institutionally capable of employing any of the functionally executive, legislative, or judicial deliberative processes.[234] These same factors would impact decision-making by the Supreme Court and President, and affect the manner and appropriate degree to which every branch might deliberate using decision-making processes functionally associated with it or the other branches. Far from a necessarily formalistic approach, the separation of

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[232] J. Mitchell Pickerill, *Constitutional Deliberation in Congress: The Impact of Judicial Review in a Separated System* (Durham, N.C.: Duke University Press, 2004) at 30.

[233] Lutz, *supra* note 168 at 162.

[234] *Ibid.* at 163-65.

powers doctrine can depend upon a functional mixing of deliberative processes as used by the branches, promote reasonable decision-making through their interaction and allow them to hold one another to their fiduciary obligations. Rather than having exclusive, bounded spheres of authority, each branch exercises power based upon its institutional advantages for utilizing certain deliberative processes in deciding certain matters. For these same reasons, branch authority can overlap in different ways and to varying degrees.

The Deliberative Virtues of the Branches

A branch's "deliberative virtues" recognizes a correspondence between its institutional composition and the deliberative process by which it ideally makes decisions. Thus, a representative assembly, where members can debate and promote their constituency interests, is particularly suited for political compromise and rule-making that binds the community in shared obligations. This association between institutional structure and deliberative process is what gives rise to the functional characterization of rule-making as "legislative" power. However, as evidenced by executive regulation, rule-making is not monopolized by the legislature. Nevertheless, rule-making presupposes that the executive should ideally follow certain processes in doing so rather than issue edicts, which risks arbitrary, unreasonable action where competing policy choices lack sufficient consideration. As Vile writes, "[t]he fact that a particular task of government is regulated by 'legislation' rather than by some other procedure reflects the determination that certain values shall predominate in the ordering of society rather than others."[235] These values apply even where the executive possesses statutory or prerogative discretion to make rules. The danger that the executive will accumulate government power and violate its public trust exists, not in the executive acting in a way functionally legislative, but in acting arbitrarily without regard for the standards of rule-making and free from checks by the other branches. This does not mean that the executive is forbidden, as in strict formalism, from

[235] Vile, *supra* note 108 at 317-18.

sometimes acting in a functionally legislative or judicial manner. As the issuance of environmental regulations and courts martial illustrate, functional rule-making and adjudication might in some circumstances be most appropriately left to the executive branch, subject to oversight by the other branches. However, the executive must nevertheless act in ways that resemble legislative and judicial processes, such as by following administrative procedures and using fair tribunals. The executive would then exercise its power in a quasi-legislative or quasi-judicial manner, combined with the dispatch and expertise to be hoped for in executive action. Such quasi-legislative and quasi-judicial power remains politically and legally accountable through the existence of statutory limitations upon and judicial review of exercises of discretion.[236] The other branches might similarly use mixed deliberative processes, where certain matters fall best within their institutional competence. As demonstrated by Article I legislative courts, such as the United States Tax Court, Congress can itself erect tribunals in order to dispose of certain matters for which it is institutionally responsible, but are better handled through adjudicatory processes. As Fisher notes, for example, "[f]unctions therefore float from one branch to another as Congress searches for the most effective means of discharging its duties. What is 'legislative' at one stage becomes 'administrative' at another and 'judicial' still later."[237]

Management of functions floating between the branches, depending upon their deliberative virtues, lies at the heart of judicial review. Such review is a means by which courts not only fulfill their own fiduciary obligations and uphold those of the other branches, but maintain the rule of law and the separation of powers. Vile writes, "[t]he gradual evolution of the King's 'courts' can be seen as the movement from the position where all [government] business was dealt with in a judicial fashion to one involving a 'division of labor' and 'specialization', but not a specialization concerned merely with 'efficiency' – rather one concerned with placing emphasis upon

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[236] Fisher, *Constitutional Dialogues*, *supra* note 143 at 127-31, 134.

[237] *Ibid.* at 129-30.

different values."[238] The deliberative processes, as employed by the branches, promote these values depending upon their institutional advantages, the subject matter of the decision, and the factual context. Vile continues:

> . . . [T]he history of constitutional development is the history of the attempt, often hesitant and vague, to articulate government in such a way that a particular structure plays a dominant or important, but not exclusive, role in the performance of a given function. . . . Although it is impossible to develop a thoroughgoing separation of powers . . . , this does not mean that there is no importance in the attempt to assign the primary or dominant concern with the performance of a particular function to one agency of government rather than another.[239]

Separation of powers doctrine, then, requires government branches to utilize and combine the executive, legislative, and judicial deliberative processes in the most effective way. Because each branch has unique institutional advantages in the ways that it assesses the public good and makes reasonable decisions in fulfillment of its trust, the deliberative and structural aspects of the separation doctrine coincide without them being formalistically synonymous.[240] Each branch has primary, but not exclusive, responsibility to exercise a particular deliberative process over certain matters. Each branch must also exercise oversight of other branches where its institutional capabilities allow, as part of the "interactive, sequential, and alternative nature of lawmaking."[241]

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[238] Vile, *supra* note 108 at 328.

[239] *Ibid.* at 329. As Vile suggests, *ibid.* at 15, "[t]he growth of three separate branches of the government system in Britain reflected in part the needs of the division of labour and specialization, and partly the demand for different agencies, and in the representation of varying interests in the three separate branches. This aspect of the doctrine, although usually assumed by political theorists rather than explicitly developed, is clearly central to the whole pattern of Western constitutionalism."

[240] Deliberative and structural unity results from the demands of the public good itself. Like Locke's view of morality, in this case a political morality, knowledge of it is not innate but is discoverable through practical reason based upon experience. Harrison, *supra* note 31 at 178-79; Moreover, even though all branches represent one popular sovereign, the institutional structure of each branch is representative in its own way. Nourse, *supra* note 213 at 758-59, emphasizes the representative functions of each branch in a "vertical approach" to separation of powers, which characterizes each branch as serving different "constituencies" of the people. Accordingly, each branch is particularly suited to deal with certain matters based on evaluation of which constituencies should be heard on the matter.

[241] Pickerill, *supra* note 232 at 152.

Executive, legislative, and judicial processes are for these reasons associated with the ability of the respective branches to demonstrate action, will, or judgment in making decisions for the public good.[242] The executive, as Locke made clear, possesses the discretion necessary to make decisions where the law is silent, as well as to quickly respond to sudden events.[243] Executive authority, most usually united in the hands of a single magistrate, is characterized by action in implementing the will of the legislature, as expressed in law, and in protecting the public against external threats in federative matters. In these areas, it can act not only with decisiveness and dispatch, but with expertise in the many areas of public administration. However, at the same time that the executive can so act for the public good, it might be tempted to exercise its discretion in an unreasonable manner, or turn its formidable federative powers inward in a way that threatens the liberty of members of the public. As Montesquieu wrote:

> Great is the advantage which a monarchical government has over a republic: as the state is conducted by a single person, the executive power is thereby enabled to act with greater expedition. But as this expedition might degenerate into rapidity, the laws should use some contrivance to slacken it. They ought not only to favour the nature of each constitution [democracy or monarchy], but likewise to remedy the abuses that might result from this very nature.[244]

Thus, the virtues of executive power also reveal its weaknesses, necessitating a structural model that negatively checks its tendencies to abuses, as well as positively promotes its institutional advantages for taking action.

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[242] The characterization of the executive authority as action, contrasted with legislative will and judicial judgment is an extrapolation from a passage in Hamilton, *The Federalist* No. 78: "It can be of no weight to say that the courts, on the pretense of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature. This might well happen in the case of two contradictory statutes; or it might as well happen in every adjudication upon any single statute. The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body. The observation, if it proved anything, would prove that there ought to be no judges distinct from that body."

[243] Locke, *Second Treatise*, §§ 144, 158-61.

[244] Montesquieu, *supra* note 118, bk. V, ch. 10, para. 1.

While the executive is constitutionally suited for action, the legislative body projects the will of the community. As an elected representative assembly, the legislature expresses the needs and desires of the public, for the good of which the government as a whole must act. The representational nature of the legislature, Locke pointed out, justified its supremacy over the executive branch, and consequently the ability of statute to define prerogative and limit discretion. The legislature is a forum where representatives can openly deliberate public concerns, politically resolve disparate interests among society's many factions, and formulate forward-looking, binding rules upon the society for which it acts. Legislative power nevertheless also has drawbacks, contrasting with action by the executive, as the legislature can produce a multiplicity of laws, micro-manage administrative affairs, and retard the political action necessary to implement the laws or respond to external threats. Locke drew attention to these disadvantages in support of executive prerogative, in regard to both domestic and federative matters.[245] With his executive-legislative dualism, the respective deliberative processes complement one another, as do the institutional compositions. Because this dualistic structure is premised upon the institutions' deliberative virtues, however, it is compatible with a tri-partite structural model that permits functional overlap of branch authority. This overlap itself provides flexibility in how the branches fulfill their negative and positive roles in checking one another and asserting themselves so as positively to contribute to reasonable decision-making.

Whereas executive authority rests upon action, and that of the legislature upon will, the judicial power is one of judgment over individual rights and interests, whenever they conflict with each other or with community needs. Courts adjudicate rights and obligations in private suits, criminal prosecutions, or administrative matters. In various ways, they can review executive, and sometimes even legislative, actions that have disproportionate impact upon individual rights. Courts might act in ways resembling rule-making or the execution of laws, through the development of legal doctrines and the

[245] See Ch. 1.

imposition of penalties. However, their constitutional role lies in coming to such decisions within the context of specific controversies and through the adversarial adjudicatory process of the common-law system.[246] Thus, "judicial independence, legal training and culture, and the justices' own conception of their roles make it more likely that the [Supreme Court] justices engage in a deeper deliberation than lawmakers in Congress [or the President] who are concerned with numerous other factors."[247] Adjudication allows courts to restrain government decisions that generally violate express constitutional provisions or unjustifiably infringe individual liberties in specific cases,[248] while also giving effect to those government actions that otherwise comply with standards of procedural propriety and reasonableness. The institutional capacity of courts to deliberate by adjudication and within this structural context distinguishes it from the legislature and executive.[249]

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[246] See Vile, *supra* note 108 at 318, 327, 339-40. As Vile further notes, *ibid.* at 328-29, judicial procedure is unique from that of the other branches in that, generally, "facts are ascertained by a special procedure, the law is announced in an authoritative way, and, of course, a single judge may be entrusted with both these functions when a jury is not considered necessary." Judicial independence is important, compared to the political branches, because the judge will not be swayed to favor parties to a dispute, nor prefer partisan considerations of expediency or policy.

[247] Pickerill, *supra* note 232 at 59. Pickerill goes on to explain, *ibid.* at 59-60, that judicial review means that "amended statutes [in response to judicial interpretation or invalidation] may be viewed as having incorporated a deeper deliberation. Second, the 'interpretive' level of deliberation engaged in by Congress in congressional responses may be an improvement over the 'policymaking' deliberation that led to the initial passage of the law. Even if it is only the 'legalistic' view of the Constitution that is being incorporated, the role of the Constitution as a legal document is an important one. Finally, because we are a 'republic of reasons,' interaction, or bargaining, between Court and Congress over these statutes have resulted . . . in a more careful consideration and articulation of the reasons that justify the statutory policy and the content of the legislation." Pickerill's suggestion would be just as applicable to the judicial review of executive actions.

[248] See Hamilton, *The Federalist* No. 78.

[249] This contrasts with the view of Tuckness, *supra* note 202 at 128-29, that such adjudicative processes do not significantly distinguish the judicial power. Tuckness' focus on law-making brings to light the common commitment of the legislative and executive branches to make reasoned decisions based upon constitutional principles. Yet it fails to appreciate the ways in which executive, legislative, and judicial processes represent distinct threats to and advantages for the public good, best described by the branches' positive and negative roles within the Lockean structural model. Tuckness, *ibid.* at 158-59, recognizes the essence of constitutional adjudication through two functions: "One function is to make sure that clear, principled pronouncements are applied in cases where they yield unpopular results. . . . A second function is to define the focal meanings of key abstract terms, like speech." Courts, of course, would perform both of these functions in the course of first and second-order decision-making. See 92, below. Tuckness criticizes this latter judicial function as intruding upon majoritarianism, and so presumably the province of the legislature. However, he fails to consider the judiciary's independent fiduciary duty.

Such adjudicatory competence for enforcing government's trust obligations, without need of any formalistic demarcation between branch powers, justifies the independence of the judiciary and its participation in inter-branch decision-making through judicial review.

The political branches accordingly determine the public good in a somewhat utilitarian manner through democratic majoritarianism, political compromise, and expediency. Against such political considerations, the courts remain a bulwark for individual rights and the rule of law. The courts' overriding fiduciary duty to the public good requires that it use its adjudicative competence to give effect to executive or legislative decisions when possible, but with consideration for procedural fairness and substantive rights, such as those of free speech, enjoyment of property, and freedom from arbitrary constraint.[250] The Lockean conception of the public good that animates the courts' judgment is not a majoritarian one, but one that unifies communitarian and individual interests. Courts must balance the propriety of yielding to the virtues of executive action or legislative will in any particular case, with the extent to which adjudicatory processes are necessary in order to protect rights. The structural and deliberative aspects of judicial power thereby complement executive-legislative dualism in permitting the functional overlap of deliberative processes as exercised by the several branches. The separation of powers doctrine uses the branches' deliberative virtues to effect not a formalistic identification between structure and deliberative processes, but a functional and flexible relationship supporting a Lockean constitutional paradigm.

Judicial Review, and First and Second-Order Decision-Making

Courts, in exercising judicial review, are part of a Lockean structural model for deliberating about the public good, whereby the branches must

[250] Huyler, *supra* note 112 at 170.

assess public policy against fundamental constitutional principles.[251] The courts assess executive discretionary actions for consistency with such principles, as well as against legal limitations, but quash actions that are irreconcilable. Judges, in these ways, engage in what Tuckness calls "second-order" and "first-order" decision-making. Second-order decision-making involves assessing policy or value judgments made by the legislature, by interpreting statutory meaning and applying it to specific facts. This manner of decision-making fills in gaps in the written law, not just by interpreting statutory language, but by evaluating whether executive discretion is reasonable in light of it, complying with both the law and Constitution.[252] However, second-order decision-making remains subject to formalist criticisms. Courts themselves might find themselves making second-order decisions that resemble rule-making or enforcement, such as when American federal district courts have enforced decisions for school desegregation.[253] This example, when considered alongside "reading in," reading down," and severance of constitutionally troubling statutory provisions, only further demonstrates the functional ambiguity of some judicial actions.[254] Second-order decision-making, moreover, is not restricted to the judiciary, but also characterizes executive rule-making and enforcement actions taken under statute. In some instances, courts might appropriately give deference to the executive's second-order decisions about what the law and Constitution permits.[255] Such executive action, insofar as it might functionally resemble

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[251] See Charles L. Black, *Structure and Relationship in Constitutional Law* (Baton Rouge: Louisiana State University Press, 1969) at 67.

[252] Tuckness, *supra* note 202 at 118-19, 132, 158-59.

[253] See Fisher, *Constitutional Dialogues*, *supra* note 143 at 40-43.

[254] See for example *R.* v. *A*, [2001] 3 All ER 1 (H.L.) and *R.* v. *Lambert*, [2001] 3 All ER 577 (H.L.) for statements by the House of Lords about how British courts should flexibly interpret statutory language so as to arrive at a construction compatible with the *European Convention*, *infra.* note 278, as incorporated by the *Human Rights Act 1998* (U.K.), 1998, c. 42.

[255] See *Chevron*, 467 U.S. 837 (1984), *United States* v. *Mead Corp.* 533 U.S. 218 (2001), and *Skidmore* v. *Swift*, 323 U.S. 134 (1944); Black, *supra* note 251 at 76-82, makes two points about such deference. Conflict between the judiciary and executive does not necessarily impugn the validity of the act itself, and thereby avoids a judicial-congressional conflict, bringing into question the statute and the scope of legislative power. Furthermore, the degree of appropriate deference to executive action depends upon the level of the executive official making the decision. Thus there is the need to assess the deference due to the executive branch, as wrongly done in *Korematsu* v. *United States*, 323 U.S. 214 (1944) according to

rule-making and adjudication both, typifies the complex institutional dynamics between the branches and the place of judicial review to ensure that the executive does not abuse its discretion.

Judges engage in first-order decision-making when they pronounce fundamental constitutional values which bind all levels of the government. The United States Supreme Court regularly engages in first-order decision-making by establishing generally applicable rules of constitutional behavior through judicial review. Moreover, ostensibly second-order interpretive undertakings might so strain statutory meaning or interfere with policy determinations that it essentially becomes first-order decision-making, by substantially altering them to reflect constitutional principles with which they might otherwise conflict. Tuckness comments on the first-order character of some judicial activity:

> First, much of what the Supreme Court does is define the focal meanings of the moral terms of the Constitution. On Lockean grounds this is a legislative function. Consider, for example, when the Court must decide what speech should receive constitutional protection. . . . Second, the Supreme Court must be considered part of the legislature because it is institutionally supreme; there is no higher institutional body that can overturn its decisions. This is part of the very definition of the legislative power.[256]

Tuckness finds such first-order judicial decision-making to resemble legislative power, fitting within a structural model of executive-legislative dualism.[257] However, the judicial nature of some executive and legislative

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Black, based upon whether it is the President himself or a low-level official, such as a military officer or bureaucrat, who exercises the discretion given. This question arose again in the cases of Hamdi and Padilla, where the government's factual averments justifying the President's designation of Hamdi and Padilla as unlawful combatants were certified by a special advisor to the Under Secretary of Defense for Policy. See 165, 168, below.

[256] Tuckness, *supra* note 202 at 132. However, while the Court's judgment might be immediately immune from review, Congress can rewrite a law that sometimes overturns the decision or remedies the constitutional defects in the statute. The executive can also revisit its decisions and make them within the confines of the enabling statute, according to procedural requirements, or with justificatory reasons. Also, the appointment process for federal judges is a long-term remedy for adjusting the prevailing values within the judiciary; Fisher, *Constitutional Dialogues*, *supra* note 143 at 38-39.

[257] Tuckness, *ibid.* at 118-19.

actions just demonstrates that all three branches engage in first and second-order decision-making, in which their authority often overlaps. They ways in which they interact and check one another depends upon their institutional virtues for utilizing different deliberative processes.

Certain subject matters find best resolution through a particular deliberative process, meaning they will fall within the authority of one branch. Such a stable relationship between the kind of decision, the deliberative process, and institutional forum represent "core" branch functions, including, as an example, the power to tax, command field armies, or determine constitutional rights. The existence of core functions does not compel formalistic definitions of powers, however; each branch sometimes engages in first and second-order decision-making even while performing its core functions, thereby still blurring lines between executive, legislative, and judicial power. Through first and second-order decision-making the branches accordingly maximize their own abilities to make the most reasonable decisions possible, while checking the others. In this way, judicial review forces the executive to consider past court decisions and anticipate future judicial reaction to its exercises of discretion.[258] In turn, a court might defer to the executive's interpretation of the law or fact-finding when exercising review over its decisions. As the legislature will also anticipate judicial responses to its actions, based upon constitutional principles or possible interpretations of statutory language, it too participates in inter-branch dialogue. First and second-order decision-making thus reflects an institutional dynamic, where the branches rely upon their deliberative virtues and utilize different deliberative processes in ways that promote reasonable decision-making for the public good, diffuse government power, and allow the branches to check one another.

The judiciary's fiduciary duty to act for the public good, then, justifies both its deference to and its review of executive and legislative actions, based

[258] For discussion of how the three branches subtly interact and influence each other's decision-making, see Pickerill, *supra* note 232 at 27-28, 35-36, 131, 146-9. See also Black, *supra* note 251 at 71, in regard to judicial influence upon congressional deliberation.

upon considerations of deliberative processes. The unique institutional capabilities and deficiencies of the executive, legislative, and judicial branches all complement one another, in that each is a forum with different deliberative virtues suited to different circumstances and purposes. The three branches therefore have inter-related positive and negative roles in a Lockean structural model. Each branch promotes the public good and so fulfills its trust when positively acting within its institutional competency and deferring to other branches when they are better suited to deal with the matter. Concomitant to this positive role, each branch must negatively check the others by ensuring that do not abuse their power and that they abide by ideal deliberative standards when acting in other functional ways. The judiciary fulfills its positive role against the executive, for example, by reviewing executive decisions against constitutional principles and standards such as legality, procedural propriety, and reasonableness. At the same time, the judiciary acts negatively by checking executive actions that disrespect adjudicative standards. In either respect, the branches all engage in first and second-order decision-making, resulting from and attempting to manage the functional overlap of their powers.

As Peter Josephson writes, "we should expect that [Locke's] conclusion for popular government will include some demonstration of the way in which such a 'Constitution' will lead the people to express their will moderately and rationally. In constitutional government the voice of the people is brought into accord with the voice of reason."[259] Executive, legislative, and judicial powers area accordingly functional characterizations of deliberative processes, respectively associated with the deliberative virtues of each branch. Through these processes, the branches interact in coming to reasonable decisions about what the public good requires under the circumstances, and in so doing balance policy with principle, and communitarian with individual needs. The separation of powers doctrine, based upon deliberative processes, seeks not only to restrain government through the diffusion and checking of power, but

[259] Josephson, *supra* note 4 at 208, and 225.

direct its energies towards achieving the public good.[260] Because the Lockean constitutional paradigm is a rational enterprise, the branches use deliberative processes in the ways best calculated to achieve the public good. The judicial review of executive discretion grows out of these processes, reflects the deliberative virtues of the courts in maintaining the rule of law and adjudicating individual rights, and inheres in the courts by nature of their own fiduciary obligations. Judicial review of the executive's discretion is therefore essential under the separation of powers doctrine, whenever it makes decisions that are functionally adjudicative. In all cases, courts must review executive exercises of discretion for legality (to ensure the primacy of the Constitution and the law), procedural propriety (to ensure that the executive respects rule-making and adjudicatory standards where necessary), and reasonableness (to prevent arbitrary, disproportionate, or improper use of power).[261] Questions about the application of these standards and branch conflicts are most likely to occur, however, when a certain decision seems to implicate the core functions of two or more branches. Such is the problem when the need for courts to adjudicate questions about individual liberty arises in the course of the executive's prosecution of war.

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[260] With the need to balance these structural tensions, Lockean separation of powers therefore cannot be a rigid, formalistic doctrine, as suggested by Laski, *supra* note 68 at 45, without equating the public good and the rule of law with doctrinal certainty and strict delineations of branch powers.

[261] Through these standards, individual liberty is bound up with institutional structure and the public good. These standards are constitutionally free-standing, principled bases for the judicial review of executive discretion, existing alongside any specific textual guarantees, such as the due process clause of the U.S. Constitution's Fifth Amendment. Therefore, as Black, *supra* note 251 at 63, points out in regard to criminal procedure, the concept of "ordered liberty" as freedom from certain kinds of unjustified government coercion and the very notion of citizenship infers, for example, "immunity from arbitrary arrest, oppressive interrogation, unfair trial, and the like. . . ."

Part II: Political Questions, War Powers, and Judicial Review

Introduction

A separation of powers theory based upon deliberative decision-making raises the question of the competencies, and the thus the constitutional authority, of the three branches in regard to war-making. In the Lockean structural model, the making of war is the epitome of the executive's federative power, where it wields the greatest discretion. Nevertheless, the legislature retains power to check executive military actions that breach the executive's fiduciary responsibilities. Under the Constitution, Congress has the power to declare war, as well as to raise revenue and provide for the armed forces. These congressional powers often collide with the war powers of the President, as Commander-in-Chief, to deploy and command military forces. The result is an ambiguity in the scope of the President's discretion to engage in and conduct hostilities, in light of Congress' authority to commit the nation to war and limit military resources. The Constitution therefore implicitly recognizes the differing deliberative competencies of the executive and legislative branches in assigning them different but complementary roles in military decision-making. Overlap and friction between the Congress' and President's war-making powers, and the deliberative processes they use, allow for considerable political maneuvering, compromise, and sometimes conflict between them.

The courts, through the political question doctrine, have recognized the special competencies of the Congress and President, and the institutional limitations of the judiciary, to make decisions about war. When faced with congressional and presidential decisions about the initiation and conduct of military operations, courts typically will invoke the political question doctrine to avoid review and address only a clear conflict between the political branches. In this way, judicial review respects and upholds political

resolutions about issues of war, a point where congressional and presidential war powers overlap. Analysis of past war powers cases reveals that the political question doctrine itself rests upon judicial evaluations of which deliberative processes are best employed in military decisions, and so reflects a court's separation of powers analysis in any given circumstances.

The courts' normal deference to the President's military discretion, and their preference that Congress limit it by political means, therefore respect the deliberative virtues of the legislative and executive branches, the deliberative processes they use, and the unsuitability of military matters to resolution by adjudication. However, while a deliberative processes approach to separation of powers explains the refusal of federal courts to review executive military actions in past cases, it also accounts for the Supreme Court decision in *Hamdi* v. *Rumsfeld*.[262] When the President uses the war powers in a justiciable way to infringe individual rights or impact upon domestic matters, separation of powers principles require that courts increasingly exercise review. In a case such as *Hamdi*, where the President acts in a functionally judicial way under the war powers to designate, detain, and try a United States citizen as an unlawful combatant, the judiciary has a free-standing constitutional power to review the executive's decision-making processes and hold him to adjudicative standards of deliberation.

[262] 542 U.S. 507; 124 S. Ct. 2633 (2004).

Chapter VI: War as a Political Question

War, Foreign Affairs, and the Separation of Powers

Edward Corwin describes the Constitution's allocation of authority over American foreign relations, a subject encompassing the initiation and conduct of war, in terms reflecting Lockean executive-legislative dualism. Corwin's position, as might be expected with structural dualism, is that the Constitution entrusts war and foreign affairs to concurrent congressional and presidential authority. Corwin argues, simply enough, that the Constitution only issues to Congress and the President, in light of the tension between their respective powers to declare war and command the armed forces, "an invitation to struggle for the privilege of directing foreign policy."[263] He further writes:

> What the Constitution does, *and all that it does*, is to confer on the President certain powers capable of affecting our foreign relations, and certain other powers of the same general kind on the Senate, and still other such powers on Congress [as a whole]; but which of these organs shall have the decisive and final voice in determining the course of the American nation is left for events to resolve.[264]

Although the executive branch possesses the attributes of institutional unity, secrecy, dispatch, and information access that give it advantages in conducting foreign affairs and commanding the armed forces, Congress nevertheless retains influence over policy choices through its power of the purse, power to declare war, and power to raise and maintain armies.[265] The Constitution accordingly divides power over foreign affairs, and thus war, between the executive and legislative branches in a manner that is politically volatile,

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[263] Edward Corwin, *The President: Office and Powers, 1787-1984*, 5th rev. ed. by Randall W. Bland, Theodore T. Hindson, and Jack W. Peltason (New York: New York Univ. Press, 1984) at 201 [hereinafter *The President*].

[264] *Ibid.* at 201 [emphasis original].

[265] *Ibid.* at 201.

contingent upon factual circumstances, and functionally dependent upon which branch is institutionally better able to decide upon a certain matter.

H. Jefferson Powell has taken partial issue with Corwin's assessment, agreeing that history has demonstrated continuing struggle between Congress and the President over the conduct of foreign affairs, but disagreeing with Corwin that the Constitution has nothing further to say about the matter.[266] Powell admits that neither Congress nor the President seems to have exclusive or plenary authority over foreign affairs and that legally formalistic arguments do not clearly refute Corwin's suggestion that the Constitution opens the way to political struggle between the legislature and executive. Nevertheless, Powell argues that the "best reading" of the Constitution lodges in the President the power to formulate and execute foreign policy, while leaving such issues to political rather than judicial resolution.[267] Powell's position does not mean that Congress does not possess considerable influence over such matters, only that it is "institutionally incapable of taking the leading role in formulating foreign policy."[268] Powell extends this argument to war-making, where the President, as Commander-in-Chief, possesses a concurrent authority with Congress to commit the nation to hostilities. He differs from Corwin in that he believes that the Constitution tips the balance of initiative in favor of the President, thereby relegating Congress to a more restrained, reactive role in foreign affairs.

Executive initiative notwithstanding, Powell admits that the declare war clause sets some "outer boundary" on unilateral presidential action and requires congressional authorization once hostilities reach "some point of severity" in which they become a full war, as opposed to limited military action, in the constitutional sense.[269] Powell recognizes that war is an

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[266] H. Jefferson Powell, *The President's Authority over Foreign Affairs: An Essay in Constitutional Interpretation* (Durham, N.C.: Carolina Academic Press, 2002) at 4-5.

[267] *Ibid.* at 17, 25, 95-97, 147-49.

[268] *Ibid.* at 102-04.

[269] *Ibid.* at 113-22.

exception to presidential power to formulate and execute foreign policy, even where it permits some executive use of limited force: "If the anticipated or actual severity, scope or duration of hostilities rises to the level of 'war' in a constitutional sense, congressional authorization is constitutionally necessary. Furthermore, to the extent that Congress has acted to prohibit the use of the armed forces in a given conflict, area or set of circumstances, that prohibition is binding."[270] The Constitution "provides for autonomous foreign-policy initiative in the executive as well as ensuring that Congress has the means of addressing wayward or antidemocratic behavior by the executive," thereby establishing branch interdependence.[271] Powell thus disagrees with Corwin's complete dismissal of the Constitution as disposing of the power over foreign affairs in finding a "best reading" that favors presidential initiative. Nevertheless, their positions are consistent in so far as they both characterize foreign affairs and war as matters for political resolution through concurrent executive and legislative authority. What Powell's position offers is justification for judicial deference to executive actions, indeed a presumption in favor of executive power, over foreign affairs and war. This position emphasizes *Curtiss-Wright*[272] as authority for a broad executive discretion in federative matters, and potentially favors executive actions that impact upon individual rights and stray into domestic affairs.

Notwithstanding judicial deference to or non-interference in the political struggles between the executive and legislative branches, a necessary implication of both Corwin's and Powell's positions is that there must be cases when executive actions under the war power indeed become justiciable. Otherwise, there would be no legal arbitration between of the outcome of the political process, potentially leading to a constitutional crisis between the legislative and executive branches. In such instances, therefore, courts must enforce the outcome of the political process and police whatever outer boundaries might exist to each branch's powers, based either upon

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[270] *Ibid.* at 139.

[271] *Ibid.* at 139-42.

[272] 299 U.S. 304 (1936). For a summary and discussion of *Curtiss-Wright*, see 18, above.

congressional acts or constitutional restrictions such as guaranteed rights. Otherwise, political processes could themselves be legally meaningless, as there would be no enforcement mechanism to restrain executive actions that violated any existing constitutional or statutory restrictions. These limitations must all be judicially considered under the context of war, however. As Corwin writes:

> War does not of itself render constitutional limitations liable to outright suspension by either Congress or President, but does frequently make them considerably less stiff – the war emergency infiltrates them and renders them pliable. Earlier constitutional absolutism is replaced by constitutional relativity; it all depends – a result that has been definitely aided in the case of substantive rights by the modern conception of due process of law as "reasonable law" – that is to say, what the Supreme Court finds to be reasonable in the circumstances.[273]

Corwin suggests that such "constitutional relativity," while not leading to automatic suspension of individual rights in emergency situations such as war, in some circumstances might nevertheless sometimes reduce them to the "vanishing point," and that judicial protection of rights might be supplanted by congressional delegation of quasi-judicial authority to administrative processes under executive control.[274] Under Corwin's own thesis, however, the executive might assert such control and await congressional challenge. Either

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[273] Edward S. Corwin, *Total War and the Constitution* (New York: Alfred A. Knopf, 1947) at 80 [hereinafter *Total War*]. See also Corwin, *The President*, *supra* note 263 at 271.

[274] See Corwin, *Total War*, *ibid.* at 127-31(criticizing *Yakus* v. *United States* 321 U.S. 414 (1944)), and *The President*, *ibid.* at 297. But compare Corwin, *Total War*, *ibid.* at 117-22, and *The President*, *ibid.* at 292-93, discussing the *Quirin* case, 317 U.S. 1, and arguing that the President possesses plenary authority as Commander-in-Chief to deal with unlawful combatants, including those who are United States citizens. His position in this instance conflicts with his idea of "constitutional relativity" and reflects the same misunderstanding of *Quirin* as shown by the Fourth Circuit Court of Appeals in *Hamdi*, 316 F.3d 450, and the New York District Court in *Padilla*, 233 F. Supp. 2d 564. See 228, below. Corwin's analysis of *Quirin* erects an absolute barrier to judicial review over an executive claim of authority to designate and detain a citizen as an unlawful combatant by advancing a formalistically defined, inherent executive war power immune from congressional limitation or judicial scrutiny. Corwin accordingly fails to consider the individual circumstances of the case, the predicate factual determination of whether an individual is in fact an unlawful combatant thus falling under executive authority, and whether the President acts with congressional authorization. This view is incompatible with his notion of "constitutional relativity" and relevant case law, discussed below, which requires congressional authorization for executive actions under the war power that infringe individual rights and impact upon domestic matters, and permits judicial review of such actions.

way, the judiciary would refrain from treading upon political judgment by interpreting rights as elastic in wartime. Of course, to what extent rights are malleable and courts defer to the executive is the very question to be answered by judicial evaluation of branch competencies to deal with the particular situation. However, Corwin's "vanishing point" for rights exists with the near or complete absence of any recognized justiciability of the controversy, due to the judiciary's over-deference to political branches and refusal to enter into any controversy over war powers. Corwin's thesis, as well as Powell's, would suggest that the primacy of the political branches in foreign affairs and war becomes increasingly difficult to justify as executive actions stray from strategic military decisions, either to impact upon individual rights and domestic affairs, or violate clear statutory prohibitions that result from the political process.

Consequently, executive action under the war powers does not foreclose judicial review where such action impacts individual rights or potentially conflicts with domestic law. This was the case in *Hamdi*,[275] where the President ordered the detention of an American citizen as an unlawful combatant, thereby functionally adjudicating a citizen's legal status and rights under guise of the war powers. The Supreme Court recognized such an executive detention power, but asserted judicial review and imposed due process requirements where the liberty of the citizens was at stake. *Hamdi*, as well as other precedents on government war power, reflects such "constitutional relativity" in so far as it is based upon the branches' deliberative competencies in particular circumstances. The Supreme Court's approach accepts Corwin's and Powell's arguments by advocating deference to executive discretion in strategic military matters. However, the Court retains authority to review those actions that impact individual rights or domestic affairs, or otherwise collide with statutory restrictions, when facts present justiciable issues. "Constitutional relativity" therefore permits deference, but stops short of Corwin's "vanishing point," where the executive could functionally adjudicate without any check by the judicial branch. The

[275] 542 U.S. 507; 124 S. Ct. 2633 (2004).

justification for executive discretion in war and foreign affairs conversely provides the grounds for the judicial review of the war powers in certain cases.

British cases have taken a similar approach to the judicial review of executive discretion in matters of war, and are illustrative in the American context due to the shared Lockean foundations of those constitutional systems. However, in the U.K., the courts function outside of a written constitution that can offer formalistic premises for or against judicial review of executive discretion. As such, British cases highlight the deliberative virtues and processes at the heart of the separation of powers, and demonstrate the courts' willingness to recognize the functionally legislative or judicial character of many executive decisions, whether they are exercises of statutory or prerogative discretion. The House of Lords made this clear in the *G.C.H.Q.* case,[276] by holding that prerogative decisions were amenable to review under a reasonableness standard, when the particular subject matter was justiciable. More recently, in *A and Others*,[277] the House of Lords found that the executive's statutory discretion to detain non-deportable aliens as national security threats was a justiciable question, despite the national security implications. Such discretion was incompatible under the United Kingdom's obligation under the *European Convention on Human Rights* not to discriminate on grounds of national origin.[278] Courts in both the United States and United Kingdom have therefore applied similar notions of the "political question" to those military and national security matters they have found to be non-justiciable.[279] As a corollary to that doctrine, however, American and British courts have demonstrated the willingness to review such executive actions as they take on functional characteristics rendering them justiciable.

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[276] *Council of Civil Service Unions* v. *Minister for the Civil Service*, [1984] 3 All ER 935, [1985] AC 374 (H.L.) [hereinafter *G.C.H.Q.*].

[277] *A and Others* v. *Secretary of State for the Home Department*, [2005] 2 AC 68 (H.L.).

[278] See *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 U.N.T.S. 221 at 223, Eur. T.S. 5, art.14 [hereinafter *European Convention on Human Rights* or *European Convention*], as incorporated by the *Human Rights Act 1998*, *supra* note 254.

[279] See 126, below.

Justiciable matters are not only those where the legislature has statutorily prohibited the executive from acting, giving clear grounds for review based upon legality. They would also encompass those executive decisions taken not in commanding military forces in the field, but in curtailing individual rights of citizens or other individuals within the country as part of a larger war effort off the battlefield. In the latter case, executive discretion deserves less judicial deference, even if legal under statute, as a court's institutional competency to review the matter increases when the executive acts in a functionally judicial manner to adjudicate individual rights. The executive's deliberative virtues in deciding military affairs thus conflict with those of the judiciary in adjudicating rights, necessitating modification of the executive's decision-making processes and legitimizing the judiciary's review power. The judiciary's fiduciary duty, indeed, mandates that it gradually shift from deference to deepening levels of review, as appropriate.[280] In the United States, the application of the political question doctrine to such questions masks a fundamental judicial determination of the branches' relative decision-making competencies, and, thus, their constitutional authority under the separation of powers.

The Political Question Doctrine

American federal courts have consistently made clear that decisions over the initiation and conduct of hostilities are political questions unsuitable for judicial resolution, and are therefore constitutionally relegated to the political branches. However, closer examination of the political question doctrine shows that it does not categorically preclude review of the President's war powers, but rather requires that a court abstain from exercising review only in those circumstances when their exercise is non-justiciable and so outside of

[280] Harold Hongju Koh, "Judicial Constraints: The Courts and War Powers," [hereinafter "Judicial Constraints"] in Gary M. Stern and Morton H. Halperin, eds., *The U.S. Constitution and the Power to Go to War: Historical and Current Perspectives* (Westport, Conn.: Greenwood Press, 1994) 121 at 124.

the courts' deliberative competence. The political question doctrine, as articulated most prominently in *Baker* v. *Carr*,[281] assesses the competence of a court to adjudicate the merits of a case, and whether decision should be left to the executive and legislative branches.

In *Baker*, the Supreme Court heard a claim that the State of Tennessee misapportioned state legislators among the population, in a way that debased the votes of the plaintiffs and denied them equal protection under the Fourteenth Amendment. In rejecting the argument that legislative apportionment was a non-justiciable political question, thus not subject to judicial review, the Court set forth criteria for justiciability under the political question doctrine. Writing the majority opinion, Justice Brennan first stated that non-justiciability and the political question were functions of the separation of powers.[282] He then explained further:

> It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.
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> Unless one of these formulations is inextricable from the case at bar, there should be no dismissal for nonjusticiability on the ground of a political question's presence. The doctrine of which we treat is one of "political questions," not one of "political cases." The courts cannot reject as "no law suit" a bona fide controversy as to whether some action denominated "political" exceeds constitutional authority. The cases we have reviewed show the necessity for discriminating inquiry into the

[281] 369 U.S. 186 (1962).

[282] *Ibid.* at 210.

> precise facts and posture of the particular case, and the impossibility of resolution by any semantic cataloguing.[283]

Brennan's analysis of the political question doctrine inextricably links it with a contextual assessment of justiciability and the resolution of separation of powers questions. As such, it rejects formalistic typologies of actions, which might insulate all executive exercises of war powers from judicial review. Rather, application of the political question doctrine depends upon functional and substantive considerations about the virtues of the branches in utilizing different deliberative processes to decide particular cases.

The *Baker* criteria, however, have not dispelled questions about the political question doctrine, depending as they do upon contextual considerations. Academic debates about the political question doctrine lead to two main conclusions. First, as to the requirements of the doctrine, "no lawyer has ever understood exactly what it means,"[284] and second, commentators "assume that there is a close and necessary relationship between the legitimacy of judicial review and the theories that might explain the political question cases."[285] Although the *Baker* criteria attempt to shed some light on the confusing properties of the doctrine, by explaining under what circumstances the courts should refuse to decide an issue, the criteria themselves remain open to considerable interpretation. *Baker* left, if not highlighted, questions about just what implications the political question doctrine has for judicial review, the constitutional allocation of decision-making between the three branches, and the structural protections for individual rights. Two main theories attempt to discern both the meaning of the political question doctrine, and explain its intimate relationship to judicial review generally. These theories might be termed the "classical" one, set out by Herbert Wechsler, and its "prudential"

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[283] *Ibid.* at 217.

[284] Charles L. Black, Jr., *The People and the Court: Judicial Review in a Democracy* (Englewood Cliffs, N.J.: Prentice-Hall, 1960) at 29. Although Black made this comment two years before the *Baker* decision, subsequent confusion about the doctrine proves the pertinence of his observation.

[285] Fritz W. Scharpf, "Judicial Review and the Political Question: A Functional Analysis" (1966) 75 Yale L.J. 517 at 519.

alternative, captured by Alexander Bickel's analysis of the "passive virtues" of judicial review.

The "classical" view builds upon Chief Justice Marshall's pronouncement in *Marbury* v. *Madison* that it is "emphatically the province and duty of the judicial department to say what the law is," whenever a federal law potentially conflicts with the Constitution.[286] Because of this constitutional responsibility, Wechsler suggests, courts cannot avoid deciding a constitutional issue whenever the procedural and jurisdictional requirements are satisfied.[287] This means that, whenever courts invoke the political question doctrine, they "judge whether the Constitution has committed to another agency of government the autonomous determination of the issue raised, a finding that itself requires an interpretation."[288] The criteria used to support deployment of the political question doctrine, such as those that *Baker* proposed a few years after the appearance of Wechsler's article, are themselves "standards that should govern the interpretive process generally."[289] A judicial determination that an issue is a political question is, according to Wechsler, a decision about the relative constitutional powers of the branches, which "is *toto caelo* different from a broad discretion to abstain or intervene."[290] This judicial duty rests upon the character of the judicial function and the responsibility of the courts to dispense with all cases and controversies upon "neutral principles." These principles rest upon "analysis and reasons quite transcending the immediate result that is achieved," rather than a court's desire to reach a certain a decision in the case before it.[291]

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[286] 5 U.S. (1 Cranch) 137, 177-78 (1803).

[287] Herbert Wechsler, "Toward Neutral Principles of Constitutional Law" (1959) 73 Harvard L. Rev. 1 at 6.

[288] *Ibid.* at 7-8.

[289] *Ibid.* at 9.

[290] *Ibid.*

[291] *Ibid.* at 11, and 15, 19.

Bickel, however, disagrees with Wechsler that application of the political question doctrine is an act of constitutional interpretation as to which branch has authority to decide certain matters.[292] Bickel suggests that actual practice of the Supreme Court shows that it invokes the political question doctrine as a unique way to avoid deciding constitutional issues at all, because of prudential concerns about the propriety or wisdom of judicial involvement in the matter in question. According to Bickel's position, Wechsler's interpretation of the doctrine would mean that a court would actually legitimate a legislative measure that it had declared to be a political question, and in so doing "will not only tip today's political balance but may add impetus to the next generation's choice of one policy over another."[293] Bickel thus criticizes Wechsler, relying upon Charles Black's view that the Supreme Court takes an "affirmative" role when validating or legitimating governmental action, in contrast to a "negative" declaration of unconstitutionality.[294] Rather, Bickel argues, the political question doctrine is a means of "not doing," in that the Court avoids either condemning or legitimating government action.[295] Bickel points to several "passive" techniques for such avoidance, for example standing requirements or ripeness, insuring that a constitutional issue comes to a court only in a factually developed, sufficiently concrete form. A court might then be better placed to deliver a principled decision at a more propitious time.[296] The political question doctrine itself is a passive device, according to Bickel, which a court can use to avoid the substantive merits of a constitutional claim.

Bickel indicates several concerns that shadow the *Baker* criteria. These are 1) the strangeness of the issue and its intractability to principled resolution, 2) the "momentousness" of the decision, which unbalances judicial judgment,

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[292] Bickel, *supra* 201 at 125.

[293] *Ibid.* at 129, 131.

[294] *Ibid.* at 87.

[295] *Ibid.* at 169, 200-01.

[296] *Ibid.* at 205-06.

3) anxiety that a judgment should be ignored, 4) and the Court's own self-doubts as to its democratic, electoral irresponsibility.[297] When these concerns exist with a case, a court should prudentially abstain from deciding the constitutional issue based upon the political question doctrine. Abstention in these instances will avoid unwise judicial interference in matters politically resistant to adjudication, even though they are perhaps functionally justiciable. Use of the doctrine thereby preserves a court's ability to issue authoritative, principled judgments on more appropriate occasions. Judicial application of the political question doctrine itself, under Bickel's view, is not a principled decision about the constitutional allocation of branch powers, but rather a refusal to decide the issue at all, based upon innumerable, subjective variables. While the political question doctrine and other passive virtues are devices that allow a court not to do anything in a particular case, they nevertheless complement direct decisions, made at other times, to legitimate or condemn government actions, and so form "points on a continuum of judicial power."[298] Bickel's continuum includes "lesser" principled, constitutional doctrines to curb legislative or executive power in a particular case without disposing of the substantive issue. Judicial decisions that a government action is vague, implicates improperly delegated authority, or lacks due process do not actually foreclose action by the political branches but only require that they conform to previously established rules of constitutional form or process.

Bickel, too, is not without his critics. As Fritz Scharpf has pointed out, Bickel's prudential argument might apply to standing, ripeness, or other "procedural and jurisdictional techniques of avoidance,"[299] but does not explain the political question doctrine itself. While a decision on standing, for example, does indeed only affect the case at hand and so allows a court to return to the issue at a later time, Scharpf argues that the finding of a political question "attaches to the issue itself."[300] Consequently, "[o]nce the political

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[297] *Ibid.* at 184.

[298] *Ibid.* at 207.

[299] Scharpf, *supra* note 285 at 534-35.

[300] *Ibid.* at 537.

question doctrine has been applied to a particular issue, the rules of precedent and of *stare decisis* come into play and will prevent a judicial determination of this issue in future cases."[301] This position seems to reflect Wechsler's formulation of the classical theory. However, Scharpf goes further and suggests that the determination that an issue is a political question permanently removes certain classes of government action from review altogether. Such removal abdicates the very responsibility that courts have under the classical view to review constitutional issues as they arise.[302] Scharpf's interpretation of the political question doctrine accordingly conflicts with Wechsler's assertion that a court's refusal to adjudicate is an act of constitutional interpretation. Citing the Supreme Court's decisions in *Hirabayashi* v. *United States*[303] and *Korematsu* v. *United States*,[304] upholding the curfew, mass relocation, and internment of ethnic Japanese during the Second World War, Scharpf claims that the Court has often decided questions of branch power as contextually dependent upon extra-legal factors, like the exigencies of war. In doing so, it has not condoned legislative or executive action as permissible under a broader, unlimited constitutional discretion. Scharpf thus presupposes that a court cannot or should not decide certain issues despite the existence of discernible legal standards. In regard to *Hirabayashi* and *Korematsu*, then, the Court might have made wrong decisions in deferring to executive action under the circumstances, but it did not decide that the curfew or detentions, as a constitutional matter, rested permanently within the President's absolute discretion.

In light of these criticisms, then, what sense does Scharpf make of the political question doctrine? Scharpf's explanation is a highly functional one. Through it, he avoids broad pronouncements that place subject matter into categories of non-justiciable and justiciable questions, where the former fall into legislative or executive spheres of power isolated from judicial review:

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[301] *Ibid.* at 536-38.

[302] *Ibid.* at 538-39.

[303] *Hirabyashi* v. *United States*, 320 U.S. 81 (1943).

[304] *Korematsu* v. *United States*, 323 U.S. 214 (1944).

> I am persuaded that much, if not all, of the Court's political question practice should, like the procedural and jurisdictional techniques of avoidance, be explained in functional terms, *as the Court's acknowledgment of the limitations of the American judicial process*. But the difficulties encountered by the broader theories should serve as a reminder of the pitfalls of all generalizations in this field. *A satisfactory explanation of the political question doctrine is necessarily tied to the specifics of individual cases*.[305]

Under this view, a court's invocation of the doctrine rests upon several factors, which share common concerns with the criteria offered by Bickel and the Supreme Court in *Baker*. These include judicial difficulties of access to information, the need for uniformity of decision, deference to the responsibilities of the political branches, normative limitations on the doctrine posed by considerations such as individual rights or separation of powers, and other additional factors that might arise in a given situation.[306]

Scharpf's functional analysis of the political question doctrine simultaneously departs from and corresponds with elements of both the classical and prudential theories, depending upon the level of comparison. On the surface, Scharpf's view might appear not to differ much from Bickel's idea of the passive virtues, in that Scharpf sees the political question doctrine as an attempt by a court to avoid deciding cases where it would be ill-advised to do so for various reasons. Nevertheless, Scharpf's justification for the political question doctrine goes beyond, and indeed rejects, the solely prudential concerns of Bickel. Judicial involvement in cases exhibiting Scharpf's criteria would not only be unwise, but institutionally dysfunctional given that branch's limitations for certain kinds of decision-making. Just what characteristics of a case render it functionally unsuitable for adjudication, and thus a political question constitutionally left to legislative or executive decision-making, are varied and factually dependent. According to such a functional position, the *Baker* criteria are guidelines for assessing a court's competency to adjudicate

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[305] Scharpf, *supra* note 285 at 566-67 [emphasis added].

[306] *Ibid.* at 567 *et seq.*

particular cases, rather than for generally classifying subject matter as permanently justiciable or not. For Scharpf, the political question therefore depends upon a court's contextual, case-by-case analysis of its own institutional competency to adjudicate an issue. Scharpf's functional analysis rests upon deliberative considerations that similarly justify avoidance techniques like standing or ripeness; the criteria involved assess whether the case is one in which the deliberative capabilities of the judiciary are appropriate in making a rational decision for the public good. Nevertheless, despite a common basis with Bickel's passive virtues, Scharpf's assessment of a court's decision not to resolve a case runs deeper than discretionary abstention for the sake of prudence in any one instance. For Scharpf, a court is not just ill-advised to decide some cases, but is institutionally incompetent to do so because they are not amenable to resolution by judicial processes.

Judicial assessment of the branches' decision-making competencies would seem, then, to involve an interpretive decision about the separation of powers, in line with Wechsler's view. Importantly, however, Scharpf's functionalism would not conclusively relegate certain subject matter to another branch and so foreclose judicial review over it in the future. Rather, the determination of justiciability rests not upon subject matter alone, but upon the particular decision itself, the interests involved, and the factual context. Notwithstanding this difference between Scharpf and Wechsler, however, their positions still have some root similarities. Because the functional application of the political question doctrine requires that a court contextually assess its own institutional competency to adjudicate a particular case, it is at the same time determining the relative – and thus constitutional – authority for the branches to decide the issue in question. When Scharpf's criteria compromise a court's ability to adjudicate an issue, the political branches will receive increasingly greater judicial deference to their actions. This deference is appropriate because the deliberative advantages of the executive and legislative branches make them constitutionally better placed to decide the matter at hand. The application of the political question doctrine would not, however, prevent a court from adjudicating the same subject matter, such as the war power, when circumstances make an issue more conducive to judicial

resolution. In this way, a court's determination of its functional capacity to "say what the law is" in each particular case again begins to show similarities to Bickel's prudential approach. Such determination, as Scharpf himself suggests in taking exception to such a view, is able to "coexist with the premises of the classical theory of judicial review."[307] Under Scharpf's version of the political question doctrine, courts must make a principled decision about the relative institutional capabilities of the three branches, in order to determine which ones are constitutionally empowered under the particular circumstances to make decisions most reasonably calculated best to achieve the public good. Judicial deference to the political branches in one case, however, while thereby interpreting what the constitution requires in that instance, does not foreclose review of similar exercises of legislative or executive power in future cases, more suitable for resolution by judicial processes.

Under Scharpf's analysis, a court's assessment of the propriety of review under the political question doctrine belies a separation of powers theory, arising from the Lockean structural model and resting upon the branches' deliberative virtues.[308] When finding a matter to be a political question, a court determines that the deliberative considerations of the separation of powers doctrine places the matter outside of judicial competence, and leaves it

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[307] *Ibid.* at 59. Scharpf qualifies his position by disclaiming that a functional understanding of the political question doctrine is an act of constitutional interpretation. In a lengthy footnote, *ibid.*, n. 275, he explains: "It would, of course, be theoretically possible to elevate the functional factors which in my opinion explain the Court's political question practice to the dignity of constitutional imperatives. But even if it were clearly understood that this assertion would be no more than a conclusionary label attached to considerations which focus upon the limitations of the American judicial process, rather than upon the constitutional grants of power to the political departments of the government, I would regard such an 'escalation' as undesirable. . . . If the Court's judgment that a particular question under the particular circumstances should be regarded as 'political' is expressed in terms of constitutional command, this statement will almost inevitably obscure the need for a close functional analysis in the next case dealing with a seemingly similar question. The Court has often demonstrated its readiness to use the political question label uncritically in situations where the functional reasons for avoidance were far from compelling, and it appears to me that the exceptional character as well as the flexibility of the political question is better described and better maintained if it is not characterized as a constitutional rule."

[308] Separation of powers remains the basis for the political question doctrine, whether one takes a classical textual or prudential view of the doctrine. Francis D. Wormuth and Edwin B. Firmage, with Francis P. Butler, *To Chain the Dog of War: The War Power of Congress in History and Law* (Dallas: Southern Methodist Univ., 1986) at 229-30.

to resolution by Congress or the President. Such a finding does not dispense with the fiduciary duties of the political branches. Rather, a branch's fiduciary duty becomes under the circumstances a political one not legally enforceable in the courts, for the very reason that the executive and legislative branches, and the deliberative processes functionally associated with them, can best determine just what actions are in the public good. The initiation and conduct of hostilities present just such political questions. While the complexities of warfare justify leaving such decisions to the political branches, they might also occasionally lead the executive branch to make certain off-battlefield decisions – like the detention of unlawful combatants – that demonstrate a functional mixing of deliberative processes, and so greater overlap between branch authority. As the justiciability of such functionally mixed executive actions increase, however, the judiciary's own fiduciary obligation is to review the case as far as it is institutionally competent to do so.

Varying judicial deference to the decision-making competencies of the political branches, based upon the judiciary's own institutional limitations under the circumstances, might actually mean, as Louis Henkin has dared to suggest, "that there may be no doctrine requiring abstention from judicial review of 'political questions.'"[309] Rather, the political question doctrine and criteria like those in *Baker* "seem rather to be elements of the ordinary respect which the courts show to the substantive decisions of the political branches."[310] The political question, as a constitutional doctrine, therefore seems to be nothing more than a court's functional assessment of its, and the other branches', deliberative competencies in a particular case. *Baker* itself suggests this, in emphasizing the importance of justiciability:

> [D]eference rests on reason, not habit. The question in a particular case may not seriously implicate considerations of finality – *e.g.*, a public

[309] Louis Henkin, "Is There a 'Political Question' Doctrine?" (1976) 85 Yale L.J. 597 at 600.

[310] *Ibid.* at 605. Henkin also suggests, like Bickel, that there might be situations in which it is prudent, for whatever reasons, for the Court not actively to intervene in the decisions taken by the political branches. It should do this, he argues *ibid.* at 617-19, not necessarily by abstaining from judicial review under the political question doctrine, but by withholding relief under equity principles.

> program of importance (rent control) yet not central to the emergency effort. Further, clearly definable criteria for decision may be available. In such case the political question barrier falls away. . . .[311]

The court's level of scrutiny will be variable and dependent upon the nature and circumstances of the executive decision, and the extent to which it functionally mixes executive, legislative, and judicial processes of decision-making. Consequently, where executive exercises of the war power are justiciable, a court can go on to evaluate their legality, procedural fairness, and reasonableness. Judicial review of the war powers, and the application of the political question doctrine, requires a constitutional interpretation about the requirements of the separation of powers, but one contextually based upon the relative deliberative virtues of the branches. These deliberative considerations explain the great deference that U.S. courts have shown to both Congress and the President in many war powers cases, while justifying greater judicial scrutiny in cases such as *Hamdi*.

[311] 369 U.S. at 213-14.

Chapter VII: Judicial Review of Presidential War Powers

The Political Question Doctrine and the War Powers

Federal cases dealing with the Vietnam War and subsequent military conflicts, taken as a whole, demonstrate judicial authority to review executive exercises of the war powers, based upon a deliberative processes approach to the separation of powers. These cases suggest that executive decisions made under the war powers are not automatically exempt from judicial review, by reason of a formalistic division of branch authority. Rather, judicial review flows from a court's fiduciary obligation to evaluate its own institutional competency, under the circumstances, to resolve the particular issue through adjudicatory processes. The nature of the executive decision and its functional mixing of deliberative processes, along with its justiciability, will accordingly result in varying levels of judicial scrutiny.

In the United States, the unpopularity of the Vietnam War resulted in a series of legal challenges to the war's constitutionality. The resulting cases form the main corpus of jurisprudence on the scope of presidential war powers, and their relationship to the powers of Congress and the courts. In early cases, federal courts gave an indication of the judiciary's reluctance to involve itself in matters relating to the government's conduct of war, summarily dismissing challenges to it as unreviewable political questions.[312] However, in *Atlee* v. *Laird*,[313] a three judge panel of the Eastern District Court in Pennsylvania retreated from a strictly formalistic application of the political question doctrine. The *Atlee* court applied the *Baker* criteria in a way that highlighted their functional aspects and the importance of justiciability. In

[312] See *Mora* v. *McNamara*, 387 F.2d 862 (D.C. Cir. 1967), cert. denied 389 U.S. 934 (1967) and *Luftig* v. *McNamara*, 373 F.2d 664 (D.C. Cir. 1967), cert. denied 387 U.S. 945 (1967).

[313] 347 F. Supp. 689 (E.D. Pa. 1972).

Atlee, several young men challenged the military action in Vietnam, arguing that the conflict was not a war in the constitutional sense of the clause requiring a congressional declaration of war, that Congress had not declared war, and that the President's prosecution of the war was consequently illegal. Even should a formal declaration of war not be required, plaintiffs argued, congressional appropriation of funds and extension of the draft were constitutionally insufficient forms of authorizing military action. The court made clear at the outset of its opinion that it indeed had jurisdiction over the subject matter. The court assumed that the political question doctrine required it to assess the issue's justiciability, thereby rejecting an interpretation of the doctrine that would deny courts the jurisdiction to consider the question in any capacity whatsoever.[314] Two of the three judges decided, however, that the subject matter of the cases, under the circumstances, presented non-justiciable political questions unsuitable for judicial resolution. A federal court, according to the District Court, was incapable of making a factual determination whether the country was at war for purposes of Article I, section 8, what actions short of a formal declaration of war sufficiently expressed Congress' approval for hostilities, and whether the executive conduct of war was therefore legal or not.[315] The court therefore exercised jurisdiction over the subject matter, despite its martial nature, but under the political question doctrine refrained from deciding the case upon its merits.

In applying the political question doctrine, the *Atlee* court made clear that it was not a jurisdictional one that foreclosed all review. The political question doctrine, according to the District Court, "limits the exercise, not the existence, of federal judicial power."[316] This doctrine, the court put forward, was one of judicial abstention from issues it was not suited to decide, as assessed under the *Baker* criteria.[317] These concerns reach their height in the initiation and conduct of war, making them inappropriate subjects for

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[314] *Ibid.* at 691.

[315] *Ibid.* at 705-07.

[316] *Ibid.* at 701.

[317] *Ibid.* at 702-03; See *Baker*, 369 U.S. 186 at 217.

adjudication and so placing them outside of the judiciary's deliberative competence.[318] The court recognized the functional roots of the political question doctrine when examining its origins. Citing *Baker*, the court in *Atlee* emphasized that the political question doctrine grew out of the separation of powers and attempted to manage the coordinate relationship of the three branches.[319] Moreover, application of the doctrine to a case was contextual, with the assessment of justiciability being fact-dependent. Thus, "the political question doctrine does not appear to have consistent attributes, but rather, as a grouping of considerations, applies with differing emphasis in various phases of the law."[320] The District Court hinted that a court might apply the political question doctrine depending upon the particular context of the case, and in ways potentially allowing different facets of review. One significant factor in applying the political question doctrine and determining the appropriate level of review, the District Court recognized, was "the distinction between those cases dealing with foreign affairs and those dealing with internal affairs,"[321] the same "critical distinction"[322] made by the Supreme Court in *Curtiss-Wright* and *Youngstown*. Although the District Court found that the authorization and conduct of war under the facts raised political questions unsuitable for judicial review, its reasoning left open the possibility for some scrutiny of war powers should an issue actually be justiciable in different circumstances. Looking back to *Youngstown*, such circumstances might be, for example, if the executive attempted to use the war powers to infringe individual rights, manage internal affairs usually left to Congress, or act without or contrary to congressional authorization.

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[318] The District Court also suggested that the political question doctrine required that, even in reviewing administrative rather than war powers decisions, federal courts should abstain from adjudicating any foreign policy issues involved. See 347 F. Supp. at 697-98, citing *C. & S. Air Lines* v. *Waterman S.S. Corp.*, 333 U.S. 103 (1948).

[319] 347 F. Supp. at 699, citing *Baker*, 369 U.S. at 210; See also *DaCosta* v. *Laird*, 471 F.2d 1146, 1153 (2nd Cir. 1973) [hereinafter *DaCosta III*].

[320] 347 F. Supp. at 700.

[321] *Ibid.* at 701.

[322] *Ibid.* at 696. The court further contrasted *Curtiss-Wright* with *Youngstown* at *ibid.*, 701-03.

Thus, even where the political question doctrine in principle disallows judicial review of executive action, the doctrine still assumes that the political process might yet result in a situation where courts would have to review, and so enforce or strike down, congressional limitations upon presidential power. Leaving certain questions, such as those present in *Atlee*, for political resolution, requires legal enforcement if such resolution is not to be meaningless. In such a situation, judicial enforcement of legislative restrictions respects the political resolution mandated by the political question doctrine; in assessing the legality of executive actions against congressional statute, courts merely enforce the will of the legislature. The courts' interpretation of congressional authorization would, considering *Curtiss-Wright* and *Youngstown*, contract or expand depending upon what actions the executive tried to take under the war powers.

In a brace of cases, *Berk* v. *Laird* and *Orlando* v. *Laird*,[323] decided shortly before *Atlee*, the Second Circuit Court of Appeals considered the existence of congressional authorization, but showed a broad interpretation of it. In both *Berk* and *Orlando*, Army personnel unsuccessfully sought injunctions to restrain the executive from deploying them to Vietnam. Like the plaintiffs in *Atlee*, those in *Berk* and *Orlando* challenged the constitutionality of the Vietnam War itself. In *Berk*, the court began its brief opinion by indicating the relevance of the *Baker* factors throughout all stages of its review. The threshold question of whether the President had conducted the war pursuant to congressional authorization possessed a "general attribute of justiciability" even if the political question doctrine would foreclose judicial scrutiny of the means by which the President exercised lawful authority.[324] Reconciliation of the President's constitutional role as Commander-in-Chief with Congress' power to declare war, however, required that there only be "*some* mutual participation by Congress." This was a standard easily met, according to the court, by the Gulf of Tonkin Resolution and other

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[323] *Berk* v. *Laird*, 429 F.2d 302 (2nd Cir. 1970); *Orlando* v. *Laird*, 443 F.2d 1039 (2nd Cir. 1971).

[324] 429 F.2d at 305.

congressional appropriations supporting the military action in Vietnam. Nevertheless, and somewhat confusingly, *Berk* begged the question as to whether judicial review of the sufficiency of congressional authorization, where it seemed absent or unclear, did not itself present a non-justiciable political question *per Baker*.[325] The *Berk* court paradoxically found that, having reviewed the possible sources of congressional authorization and determined them to be constitutionally sufficient, it did not need to address whether the political question doctrine would foreclose such review in a case where a court found authorization lacking.

In *Orlando*, decided less than a year after *Berk*, the Second Circuit elaborated upon its reasoning in the earlier case. As the *Orlando* court stated, it had "held in the first *Berk* opinion that the constitutional delegation of the war-declaring power to the Congress contains a discoverable and manageable standard imposing on the Congress a duty of mutual participation in the prosecution of war. Judicial scrutiny of that duty, therefore, is not foreclosed by the political question doctrine."[326] However, the court in *Orlando* again stated that courts should only look to find "*some* mutual participation between the Congress and the President" and no further.[327] This position still left open the question of what congressional actions were sufficient to qualify as "some mutual participation," a standard that would have to be judicially applied on a case by case basis. As in *Berk*, the Circuit Court had no problem in finding that Congress' Tonkin Gulf Resolution, appropriations, and extension of the draft demonstrated Congress' authorization for and collaboration with the President's conduct of the war in Vietnam. The court, however, found that the means by which Congress supported the military action in Vietnam, and thereby satisfied the constitutional requirement of some participation, were themselves political questions which courts should not decide.[328] Again, the

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[325] *Ibid.* at 305-06.

[326] 443 F.2d at 1042.

[327] *Ibid.* at 1043.

[328] *Ibid.* at 1042-43; See also *DaCosta* v. *Laird*, 448 F.2d. 1368, 1369 (2nd Cir. 1971), cert. denied 405 U.S. 979 (1972) [hereinafter *DaCosta I*] (deciding that appropriations and

Second Circuit seemed to contradict itself. It reviewed whether Congress had in some way authorized presidential military action in Vietnam (finding that it had and describing how), and then curiously interpreted the political question doctrine to disallow a judicial determination of whether Congress' actions were indeed qualitatively sufficient to satisfy the justiciable threshold requirement of "some mutual participation."

According to *Berk* and *Orlando*, federal courts are fully competent, in spite or perhaps because of the political question doctrine, to ensure that the President takes military actions with at least some mutual congressional participation. This standard, though thin, seeks to ensure that the President does not assert himself as the sole arbiter of the public good in unilaterally initiating and conducting war. Although Congress has constitutional power to approve or disapprove war, a formalistic view of the political question doctrine limits judicial inquiry to a determination of whether it has said "yes," "no," or stipulated conditions, without second-guessing the executive actions that fall within the legal parameters. *Berk* and *Orlando* did not settle, however, the question of just what congressional actions would satisfy the participatory requirement. Under the particular facts of both cases, the Second Circuit accepted that Congress' appropriations and conscription laws complied with the Constitution's war declaration clause.[329] These cases indicate that federal courts will readily infer congressional authorization both to avoid constitutional confrontation between the Congress and President, and to accommodate those branches' institutional advantages in deciding military policy. It is unnecessary for Congress formally to declare war in order to authorize executive military action,[330] but it can instead opt for a use-of-force resolution, financial appropriations, conscription, or whatever other measures it deems political expedient.[331] Nevertheless, *Berk* and *Orlando* leave open

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conscription alone constituted sufficient authorization for military action even after repeal of Gulf of Tonkin Resolution).

[329] See 443 F.2d at 1043.

[330] See also *Mitchell* v. *Laird*, 488 F.2d 611, 615 (D.C. Cir. 1973); *Atlee*, 347 F.Supp. at 706.

[331] See *Orlando*, 443 F.2d 1039 (finding congressional approval for the Vietnam War in the Tonkin Gulf Resolution, appropriation of funds to military operations, and extension of the

the question as how strictly they would interpret purported congressional authorization in a case under a *Youngstown* scenario, where the President would act under the war powers to restrict the rights of citizens or otherwise impact upon domestic affairs.

Review for legality under the political question doctrine would, under a formalistic view, seem to foreclose inquiry into the procedural fairness or reasonableness of executive military decisions. The judgments in *Berk* and *Orlando*, on the surface, seem to suggest that political question doctrine rests upon such a formalistic determination of legality, placing the President's authorized military decisions squarely within the power of the executive branch and isolating them from further judicial scrutiny. However, the need for courts to look for some congressional authorization, and the potentially flexible interpretation of it in light of the particular executive actions taken under the war powers, mean that review for legality, procedural fairness, and reasonableness eventually collapse into the threshold inquiry of whether and just how Congress has authorized or limited executive military discretion.[332] In other words, application of the political question doctrine depends upon the functional justiciability of the issue and substantively laden questions about the sufficiency of congressional authorization for the particular executive actions in question. *Doe* v. *Bush*,[333] for example, hints at this position. In that case, the First Circuit Court of Appeals followed the Vietnam era precedents in rejecting a complaint seeking to enjoin the President from beginning war against Iraq in 2002. Similarly to previous cases, the plaintiffs in *Doe* were military personnel, who argued that Congress' *Authorization for Use of Military Force Against Iraq*[334] was constitutionally inadequate to authorize offensive invasion, for which the President was making preparations. The

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Selective Service Act) and *DaCosta I*, 448 F.2d 1368 (means by which Congress and President wind down from military operations are political questions).

[332] See Edward Keynes, *Undeclared War: Twilight Zone of Constitutional Power* (University Park, Penn.: Pennsylvania State Univ. Press, 1982) at 82.

[333] 323 F.3d 133 (1st Cir. 2003).

[334] *Authorization for Use of Military Force Against Iraq*, Pub. L. No. 107-243, 116 Stat. 1498 (16 Oct. 2002).

court, referring to its 1971 decision in *Massachusetts* v. *Laird*,[335] recognized that only clear conflict between the Congress and President might present an issue for judicial resolution. Where there was no such branch conflict, as when Congress had mutually participated with or silently acquiesced in the President's military decisions, the case was not yet ripe and courts should not intervene.[336]

Importantly, the *Doe* court differed from *Berk* and *Orlando* by explaining that its "analysis is based on ripeness rather than the political question doctrine," adding that the political question doctrine "is a famously murky one."[337] The court stressed that the President had not yet initiated military action against Iraq. Thus, "[t]he mere fact that the October Resolution grants some discretion to the President fails to raise a sufficiently clear constitutional issue" that would present the court with a justiciable case or controversy.[338] Because the First Circuit concluded that "courts are rightly hesitant to second-guess the form or means by which the coequal political branches choose to exercise their textually committed constitutional powers,"[339] lack of branch conflict meant that the case was not ripe for review and did not present a justiciable issue. In comparing the ripeness and political question doctrines in war powers cases, the Court of Appeals concluded that "[u]ltimately, however, the classification matters less than the principle. If courts may ever decide whether military action contravenes congressional authority, they surely cannot do so unless and until the available facts make it possible to define the issues with clarity."[340] Thus, under the reasoning in *Doe*, determinations of legality, ripeness, and justiciability under the political question doctrine coincided in principle, even if the lines of inquiry remained

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[335] 323 F.3d at 137, citing *Massachusetts* v. *Laird*, 451 F.2d 26, 34 (1st Cir. 1971).

[336] *Ibid.* at 138.

[337] *Ibid.* at 140.

[338] *Ibid.* at 143.

[339] *Ibid.* at 144, citing *Orlando*, 443 F.2d at 1043.

[340] *Ibid.* at 140.

doctrinally distinct. The case was not ripe because it was not yet justiciable (or alternatively perhaps also non-justiciable because not yet ripe), the same principle under the political question doctrine that would foreclose review in any case. This approach resembled a use of Bickel's "passive virtues," in that the court seemed to use ripeness to avoid deciding the issue at all. However, one might also read *Doe* to suggest that under the circumstances the court was constitutionally incompetent to adjudicate the case, but could do so as the justiciability of the case increased.

The District Court for the District of Columbia's decision in *Dellums* v. *Bush*,[341] from the first Gulf War, gives further insight into the relationship between the political question doctrine and a threshold inquiry of justiciability. *Dellums* addressed a suit by members of Congress seeking to enjoin the President from invading Iraq in 1990 without first obtaining explicit congressional authorization, which Congress had not given. The D.C. court defended the judiciary's authority to determine when a *de facto* state of war existed or was imminent for purposes of a constitutional controversy about the relative powers of the Congress and President.[342] It thereby departed from the position of the Eastern District Court of Pennsylvania in *Atlee*, which found the factual issue of war to be a political question. However, as in *Doe*, the D.C. District Court found the case unripe for review in the absence of both imminent war and some congressional attempt to exercise its war-declaring power, in a negative sense, by forbidding future military action by the President.[343] *Dellums*, like *Doe*, conflated the ripeness and political question doctrines by foreclosing further review not necessarily because Congress had shown some approval for the President's actions, but because Congress had failed actively to oppose executive military initiatives. Both *Doe* and *Dellums*

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[341] 752 F. Supp. 1141 (D. D.C. 1990).

[342] *Ibid.* at 1145-46, citing *Mitchell*, 488 F.2d at 614. The court in *Dellums*, *ibid.* at 1146, recognized "the fact that courts have historically made determinations about whether this country was at war for many other purposes – the construction of treaties, statutes, and even insurance contracts [citing *New York Life Ins. Co.* v. *Bennion*, 158 F.2d 260 (10th Cir. 1946)]".

[343] 752 F. Supp. at 1149-52.

suggested that a controversy would remain unripe when Congress had not directly confronted the President, at least in the preparatory stages for war, thereby finding legislative acquiescence in silence and potentially granting the President political initiative for beginning a major conflict. Congress would consequently not so much have power to authorize or withhold approval for the initiation of war under the declare war clause, so much as a responsibility to check presidential actions before they were first taken.[344] While *Dellums* certainly seemed to offer institutional initiative to the executive branch in committing the nation to war, it nevertheless reserved judicial power to review a dispute where the President potentially violated the law. Again, the court found itself to be incompetent to adjudicate where there was no clear dispute between parties. The ambiguities in determining what congressional actions constitute "some mutual participation" or impose legal limitations upon presidential war powers also require that courts consider the full factual context and substantive aspects to the case. The existence, scope, and effect of legislative authorization is bound up with a court's assessment of justiciability and its interpretive approach, which themselves will vary according to circumstances. At the heart of *Doe* and *Dellums*, then, was the authority of the court to review the legality of executive action under the particular circumstances, and in light of a broad understanding of congressional authorization.

The relationship between the separation of powers and the political question doctrine in the United States also shows through more clearly in light of British cases dealing with the Crown's statutory powers and prerogative for the defence of the realm. Without the textual analysis of a written constitution, courts in the United Kingdom have more openly relied upon the relative deliberative competences of the branches in reviewing exercises of executive war powers, whether made under statute or prerogative. In consequence, they highlight the theoretical basis behind the American political question and separation of powers doctrines. In contrast to the U.S. President,

[344] But see Koh, "Judicial Constraints," *supra* note 280 at 121-22, characterizing Judge Green's language about justiciability and potential injunctive relief against unauthorized presidential war-making as an "unappealable declaratory judgment."

the British Crown needs no approval of Parliament to declare war or otherwise engage in military conflict. As with American federal courts' review of presidential war powers, British courts have long practiced restraint in examining military decisions made under the prerogative. Lord Reid evoked the concept of the political question in the House of Lords case of *Chandler* v. *Director of Public Prosecutions*, writing that "the question whether it is beneficial to use the armed forces in a particular way or prejudicial to interfere with that use would be a political question – a question of opinion on which anyone actively interested in politics . . . might consider his own opinion as good as that of anyone else. . . ."[345] Because of the policy and strategic issues attendant upon the use of military force, Lord Reid suggested, the question of war is a non-justiciable one best left to political processes within and between the legislative and executive branches.

In both the United States and the United Kingdom, matters of war find resolution within the complex political interplay between the executive and legislative branches. American and British courts are similarly reluctant to review such matters, resistant as they are to resolution by adjudicative processes. In *Chandler*, Lord Reid spoke to the reliance upon political determinations of military matters, and the relative deliberative competencies of branches in matters of war:

> Who then is to determine what is and what is not prejudicial to the safety and interest of the State? The question more frequently arises as to what is or is not in the public interest. I do not subscribe to the view that the Government or a Minister must always or even as a general rule have the last word about that.
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> But here we are dealing with a very special matter . . . [the disposition and armament of the armed forces]. Anyone is entitled, in or out of Parliament, to urge that policy regarding the armed forces should be changed; but until it is changed, on a change of Government or otherwise, no one is entitled to challenge it in court.[346]

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[345] [1964] AC 763 at 791 (H.L.).

[346] *Ibid.* at 790.

Lord Reid's statement suggested principles of deliberative decision-making common to American and British separation of powers. The executive and legislative branches, in making war, remain under trust to act for the public good. Because matters of war are ill-resolved through adjudicatory processes, however, the legislature is often best situated to check the executive and set limits on its military discretion.

Courts can enforce legal restrictions upon the executive, while the justification for judicial deference weakens as executive actions increase in justiciability. Where no such limitations exist, and the subject-matter is non-justiciable, however, courts will decline review. The Court of Queen's Bench followed this approach in the *C.N.D.* case.[347] This case involved an application for a declaratory judgment that international law prevented the British Government from invading Iraq without U.N. Security Council approval. While the prohibition against the aggressive use of force might be customary international law and thus part of the common law, the Court explained, these did not bind the Crown absent their statutory enactment. In any case, it was for the executive, not the judiciary, to interpret the U.K.'s obligations under international law and the purposes of military action, especially in light of unpredictable world events and diplomatic considerations. Richards J. stated bluntly that "it is unthinkable that the national courts would entertain a challenge to a Government decision to declare war or to authorise the use of armed force against a third country. That is a classic example of a non-justiciable decision."[348] Like the U.S. President's war powers, the Crown's exercise of the prerogative receives considerable judicial deference, when Parliament has not imposed clear limitations and the particular decision is non-justiciable. Questions about the initiation and conduct of hostilities, like those in *C.N.D.*, are unsuitable for resolution by adjudicatory processes. However, justiciability will increase and

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[347] *R. (on application of Campaign for Nuclear Disarmament)* v. *The Prime Minister*, [2002] All ER (D) 245 (Q.B.) [hereinafter *C.N.D.*].

[348] *Ibid.* at para. 59 ii.

deference to executive decisions decrease should the executive act in a way that is functionally judicial and infringes individual rights.

British jurisprudence reflects the underlying principles of the political question doctrine, as it is in the United States: that is, matters of war should usually be left to the executive and legislative branches, the deliberative virtues of which make them better suited to decide matters of war.[349] In the absence of statutory restriction, the Crown exercises legal authority over the military's deployment, disposition, and use. "[T]he disposition and armament of the armed forces are and for centuries have been within the exclusive discretion of the Crown," explained Lord Reid in *Chandler*, declaring that "no one can seek a legal remedy on the ground that such discretion has been wrongly exercised. . . ."[350] Prerogative authority, as Locke made clear, exists only in the absence of lawful restrictions. From a formalistic viewpoint, British courts must make a threshold determination of legality, to see whether the Crown has transgressed any law limiting the prerogative. In *Attorney General* v. *De Keyser's Royal Hotel*,[351] for example, the House of Lords held that the Crown could not, simply at its discretion, grant or withhold compensation for the expropriation of private property under the prerogative for the defence of the realm, where a statutory scheme for compensation existed. *Burmah Oil Co.* v. *Lord Advocate*,[352] moreover, established that non-statutory, common-law restrictions on the prerogative might exist, such as the requirement that the Crown's destruction of private property in a theatre of war can carry with it a legal duty to compensate the owner. The *C.N.D.* case complemented these cases by affirming that the Crown's prerogative power to

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[349] The Crown's treaty-making power illustrates that prerogative does not mean lack of accountability, dispensation from the law, or law-making authority. The Ponsonby Rule is a convention requiring the Crown to lay certain treaties before Parliament prior to ratification, allowing time for legislative debate and input. Also, treaties cannot change domestic law without act of Parliament, nor can the Crown conclude a treaty in face of a statutory requirement of parliamentary assent thereto. See A. W. Bradley and K. D. Ewing, *Constitutional and Administrative Law*, 13th ed. (London: Longman, 2003) at 316.

[350] [1964] AC at 790, citing *China Navigation Co. Ltd.* v. *Attorney General*, [1932] 2 KB 197 (C.A.).

[351] [1920] All ER 80; [1920] AC 508 (H.L.).

[352] [1965] AC 75 (H.L.).

initiate and conduct hostilities is non-justiciable, where it exists and its exercise does not infringe individual rights.[353] Where prerogative does infringe rights, courts will more strongly interpret relevant law so as to limit Crown authority. Even where the Crown clearly acts under the prerogative, unwritten common-law rules might constrain executive decision-making, should rights be at stake and the decision is a justiciable one.[354] Judicial review of war and national security matters in the U.K. consequently takes on substantive considerations, as under the American political question doctrine. Such review will vary in intensity depending upon the circumstances and the deliberative competencies of the branches. The British example, also set within a Lockean constitutional paradigm, thus highlights the deliberative processes that similarly lie beneath the American political question doctrine.

Theoretical Ambiguities in the Political Question Doctrine

The political question doctrine's reliance upon political checks means that the President's need for congressional approval and the latent power of the sovereign Parliament present opportunity for U.S. and U.K. courts to interject into government war-making, through the process of interpreting legal boundaries to executive discretion. In this way, the courts maintain the constitutional separation of powers by enforcing the results of the political process. Any executive power to begin or define the scope of conflict remains alterable by statute,[355] and the resulting limitations are subject to review by the courts should they be sufficiently clear. Courts nonetheless possess considerable latitude in their interpretation of the legal boundaries to executive

[353] As Kay J. stated, [2002] All ER (D) 245 (Q.B.) at para. 50, "[f]oreign policy and the deployment of the armed forces remain non-justiciable." The court in *C.N.D.* thus found that courts should not interfere with the prerogative, based upon customary international law or an unincorporated international treaty, where their interpretation would be unnecessary to determine individual rights.

[354] See, for example, the *G.C.H.Q.* case, *supra* note 276, and accompanying text.

[355] For further discussion, see Wormuth and Firmage, *supra* note 308 at 111-21.

military discretion, and the ostensibly formalistic process quickly leads to substantive examination of the decision itself.

In the U.S., early federal cases demonstrate the judiciary's power of review over executive military decisions, based upon the interpretation of congressional authorization. In the 1800 case of *Bas* v. *Tingy*,[356] the Supreme Court made clear that Congress could constitutionally authorize military hostilities short of a fully declared war, as with the then naval "quasi-war" against revolutionary France.[357] Action was "limited as to places, persons, and things,"[358] and only "[a]s far as congress tolerated and authorised the war on our part, so far may we proceed in hostile operations."[359] Accordingly, in *Little* v. *Barreme*[360] in 1804, the Navy's capture of a vessel sailing *from* a French port was unlawful, despite compliance with executive order, where Congress had suspended trade with France and provided for seizure of ships bound *to* a French port. Similarly, in *United States* v. *Smith*[361] in 1806, a federal circuit court upheld the criminal indictment of an individual for violating the *Neutrality Act* by committing hostile acts against Spain, then at peace with the United States. In was no matter that the defendant's action "was begun, prepared, and set on foot with the knowledge and approbation of the executive department . . . ," which "cannot control the statute, nor dispense with its execution, and still less can . . . authorize a person to do what the law forbids."[362] A court's restrictive interpretation of use-of-force

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[356] 4 Dallas (4 U.S.) 37 (1800).

[357] Washington J. termed the distinction as between "solemn" and "imperfect" war, 4 U.S. at 40, while Chase J. characterized it as "general" versus "partial" war, *ibid.* at 43. According to its own "circumspection and prudence," *ibid.* at 45, *per* Chase J., Congress could authorize limited war through various means short of open declaration, such as by statutorily raising an army, equipping a navy, and regulating hostilities and captures at sea, *ibid.* at 41, *per* Washington J.

[358] *Ibid.* at 40, *per* Washington J.

[359] *Ibid.* at 45 per Paterson J; See also *Talbot* v. *Seeman*, 1 Cranch (5 U.S.) 1, 28 (1801), *per* Marshall C.J.

[360] 2 Cranch (6 U.S.) 170 (1804).

[361] 27 Fed. Cas. 1192 (C.C.N.Y. 1806) (No. 16, 342).

[362] *Ibid.* at 1229-30.

authorizations and readiness to find implied statutory restrictions on the President's military discretion, therefore, suggest that Congress has the preeminent constitutional role in initiating hostilities, under the declare war clause, and provide a foundation for strong judicial review of the legality of executive military decisions. Such textually based review respects the political nature of war-making decisions, and accords with the separation of powers. The interpretive approach of the early federal courts, while obviously much less deferential to executive power than modern decisions, nevertheless reflects the underlying principles of the political question doctrine. That is, courts should enforce political resolutions about matters of war. Although the early decisions seem formalistic and strictly textual in reasoning, they proceeded from a pro-congressional view, dealt with a very limited naval "quasi-war" having a strong commercial aspect, and reviewed executive actions in light of congressional statutes that sought to place considerable limitations upon American military engagements.

In contrast to the early pro-Congress cases, the post-World War II period has seen both the courts and Congress increasingly look to the "imperial Presidency"[363] for leadership in international and military affairs. Unlike the early federal judiciary, courts now liberally construe congressional acts to authorize, rather than restrict, executive conduct of hostilities. The President receives great judicial deference for his actions, meaning that Congress must give far clearer expressions of limitations for them to present legally enforceable standards. The pre-World War II case of *Curtiss-Wright*[364] recognized that Congress could broadly delegate power to the President in matters of foreign affairs,[365] thereby emphasizing the executive's "federative" power. *Curtiss-Wright* forwarded a position that courts have subsequently

[363] Arthur M. Schlesinger famously coined this term with *The Imperial Presidency* (Boston: Houghton Mifflin, 1973).

[364] 299 U.S. 304.

[365] Compare *Youngstown*, 343 U.S. 579 (denying the President power, without clear statutory authorization, to seize the nation's steel mills in order to avert a strike during the Korean War) with *Dames and Moore* v. *Regan*, 453 U.S. 654 (1981) (finding implied legislative approval for Pres. Carter's suspension of claims against Iran).

followed in liberally construing congressional authorization for the use of military force. In drawing attention to a history of congressional cooperation with the President during the Vietnam War, the First Circuit Court of Appeal in *Massachusetts* v. *Laird* declared that courts might entertain a challenge to executive war policy only "[s]hould either branch be opposed to the continuance of hostilities . . . and present the issue in clear terms. . . ."[366] Recent courts have maintained this deference to executive military leadership. As said by the District Court in *Drinan* v. *Nixon*, Congress and President must be "clearly and resolutely in opposition"[367] before a challenge will be ripe for review. This standard gives considerable deference to executive military action taken without express authorization, and unlike the early cases, broadens the allowable scope of the President's military discretion.

Nevertheless, none of these cases stand for the proposition that executive war powers are never reviewable, either for legality or upon more substantive grounds. As discussed above, the political question doctrine hinges upon a judicial assessment of the justiciability of executive action, even while courts are prepared to defer to the President's exercises of the war powers. Thus, for example, while reserving its authority to determine just what circumstances constitute "war" to trigger the "declare war" clause, the D.C. District Court in *Dellums* found in 1990 that President Bush could unilaterally prepare for offensive operations against Iraq, in the absence of overt congressional disapproval.[368] Pointing out the judiciary's long experience with interpreting treaties, statutes, and even insurance contracts touching upon acts of war, the D.C. court still asserted that it was not "excluded from the resolution of cases merely because they may touch upon foreign affairs. The court must instead look at 'the particular question posed' in the case."[369] In doing so, the court emphasized the deference due to executive military decisions, and preferred reliance upon Congress to check the executive, while maintaining its own

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[366] 451 F.2d at 34.

[367] *Drinan* v. *Nixon*, 364 F.Supp. 854, 858 (D. Mass. 1973).

[368] 752 F.Supp. 1141.

[369] *Ibid.* at 1146, quoting *Baker*, 369 U.S. at 211.

authority to review war powers cases as they became justiciable.[370] Courts would only intervene in face of a congressional majority opposing the President's clear commitment actually to initiate war on his own initiative, and would not interfere with a military build-up in preparation for eventualities or to strengthen a diplomatic position.[371] The decision in *Dellums*, therefore, took notice of the particular military and diplomatic circumstances, to determine which branch was better suited to deal with the situation. The Court did not discount review of executive decisions should the situation change, or should the executive exercise the war powers in a different way. Later, in *Campbell* v. *Clinton*,[372] the D.C. Court of Appeals for the same reasons refused to declare unlawful President Clinton's air strikes on Yugoslavia, absent Congress' direct confrontation with his policy. Finally, in *Doe* v. *Bush*, the First Circuit Court of Appeal found that a congressional resolution, authorizing the President to ensure Iraq's compliance with U.N. Security Council resolutions implied Congress' support for full military invasion at the President's discretion.[373] In contrast to the restrictive constitutional and statutory interpretation of the early nineteenth-century cases, the prevailing jurisprudence now gives the President clear initiative over Congress in taking the U.S. to war. The President accordingly possesses wider discretion in determining what military actions are necessary for the public good and so also what are the boundaries of his own fiduciary duty. This wide discretion has limits, nonetheless, which courts will enforce should conflict occur between the President and Congress. However, presidential actions might make it politically inopportune or militarily inadvisable for Congress to challenge executive war policy as wrongly motivated or ill-advised, thus upsetting the separation of powers in favor of executive power and against legislative or judicial interference.

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[370] *Ibid.* at 1149.

[371] *Ibid.* at 1151-52.

[372] *Campbell* v. *Clinton*, 203 F.3d 19 (D.C. Cir. 2000).

[373] *Doe* v. *Bush*, 322 F.3d 109 (1st Cir. 2003).

Modern judicial deference to executive military action has continued despite Congress' attempt to reign in presidential war-making with the *War Powers Act of 1973*.[374] This *Act* requires the President to submit a report to Congress, within forty-eight hours, whenever armed forces are introduced into hostilities or are in a situation where involvement in hostilities is imminent.[375] Unless Congress has declared war or otherwise authorized such action within sixty days, the President must withdraw American forces.[376] In attempting to control judicial interpretation, the *Act* also declares that congressional authorization shall not be inferred from any law, including appropriations, "unless such provision specifically authorizes the introduction of United States Armed Forces into hostilities . . . and states that it is intended to constitute specific authorization within the meaning of this joint resolution."[377] Despite this interpretive clause, in no case since the *Act's* passage have courts construed it to bind Congress' constitutional discretion in the manner of authorizing hostilities, or deviate from the rule that a subsequent legislative act will prevail over a prior, inconsistent one.[378] Moreover, it is debatable whether the *War Powers Act* is even a limitation upon presidential war-making or is instead a sixty day "blank check" that would allow the President to make

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[374] *War Powers Act of 1973*, Pub. L. No. 93-148, 87 Stat. 555 (7 Nov. 1973), codified at 50 U.S.C. § 1541 *et seq.* (2000).

[375] *Ibid.*, § 4(a)(1).

[376] *Ibid.*, § 5(b).

[377] *Ibid.*, § 8(a).

[378] See Powell, *supra* note 266 at 124-25. The *Act's* own enforcement clause, § 5(c), which allows Congress to require withdrawal of forces by a concurrent resolution not subject to presidential veto, might likely run afoul of *Immigration and Naturalization Service* v. *Chadha*, 462 U.S. 919 (1983). That case declared such a "legislative veto" of executive action to be unconstitutional under the requirement that any bill passing the House of Representative and Senate be presented to the President for signature or veto (U.S. Const. art. I, § 7). In the event of such a conflict between the *Act* and *Chadha*, should the President veto a proposal to end or prevent hostilities, Congress could act only by a veto override of two-thirds majority in each House. This situation would radically shift the decision to go to war into executive hands, arguably rendering the declare war clause, *ibid.* art. I, § 8, almost meaningless. It would also disarm Congress' ability to counter executive misconduct short of disbanding or not funding the military forces (which would still be subject to veto) or perhaps even impeaching the President. Fisher, *Presidential War Power*, *supra* note 18 at 270-72, however, suggests that the *War Powers Act* does not delegate any congressional authority over war to the President, as expressly stated by § 8(d)(2). Thus, the decision in *Chadha* would not apply to the *Act*, and Congress could halt executive military action through concurrent resolution without presidential signature.

war without any legislative authorization and render unripe any challenges to the legality of the war before expiration of the time period. Under current case law, in any event, the *Act* seems to be of little practical use in otherwise limiting presidential military action. It does not solve the problem of excessive judicial deference in determining either just what legislative acts constitute authorization or what executive actions fall within its boundaries, and Congress must still affirmatively challenge the President even under the *Act's* own provisions.[379] The *War Powers Act* notwithstanding, in matters of war the President now maintains political initiative to determine what military actions are necessary and in the public good. Limitations upon these actions can result only from more direct legislative challenge, or from judicial review more attuned to functional considerations and so less deferential to executive discretion where the President functionally adjudicates individual rights.

Despite the judiciary's interpretive shift in assessing which branch best should have initiative in military decisions, the justification for judicial deference to executive decisions thus lessens as the President acts in ways that are functionally legislative or judicial, and infringes individual rights and impacts upon domestic matters. This jurisprudential shift reflects the differences between the *Curtiss-Wright* and *Youngstown* cases. The separation of powers doctrine actually requires increased judicial review in the latter type of case, to respect the role of deliberative processes in reasonable decision-making and the branches' own deliberative virtues. The constitutional risk in an excessively deferential judicial approach is that, if taken too far and cloaked in a formalistic approach to the separation of powers, it might permanently accrete war-making power in the President and foreclose realistic opportunity for any judicial review of the war powers, even in cases amenable to adjudication.[380] Although the political question doctrine is not a jurisdictional

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[379] Koh, "Judicial Constraints," *supra* note 280 at 125, writes that "what the Resolution does not specifically say is that the courts should enforce it. This statutory silence has played into the perverse incentives of all three branches: the President's incentive to act, Congress's incentive to avoid responsibility, and the courts' incentive to defer."; Wormuth and Firmage, *supra* note 308 at 215-16 refer to the *War Powers Act* as a "blank check" that unconstitutionally delegates congressional war power.

[380] Abraham D. Sofaer, *War, Foreign Affairs and Constitutional Power: The Origins* (Cambridge, Mass.: Ballinger Publishing Co., 1976) at 5; But see Powell, *supra* note 266 at

one, excessive, formalistic judicial deference to war powers decisions might in effect, if not in doctrine, completely disengage federal courts from any meaningful review absent unequivocal statutory language. Indeed, this was the import of the Fourth Circuit's decision in *Hamdi*,[381] which affirmed its jurisdiction to review unlawful combatant detentions under a liberal finding of congressional authorization. The court then refused to review the detentions themselves under a formalistic application of the political question doctrine, characterizing such detentions as an absolute discretion under the war power.[382] Despite a worrisome deferential trend, however, federal cases applying the political question doctrine and interpreting congressional authorization remain premised upon judicial assessment of the branches' relative deliberative competencies, within a factual context. As matters become justiciable, a more restrictive judicial interpretation of congressional authorization and executive discretion under it become appropriate, a point that the Supreme Court took up in the *Hamdi* appeal,[383] when it considered due process requirements for unlawful combatant detentions. Judicial review of legal limitations upon executive military decisions, emanating from the separation of powers doctrine, thus implicates substantive questions about the deliberative virtues of the branches and the decision-making processes they use.

Just as federal courts have conflated the political question doctrine with those of standing and ripeness, their determination of when and how Congress has limited presidential war powers brings with it examination of Congress' purposes and the reasonableness of the President's decisions. In *Mitchell* v. *Laird*,[384] in which some member of the House of Representatives challenged the legality of the war in Vietnam, the Court of Appeals for the District of

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144-45, arguing that criticisms of presidential initiative on such grounds underestimate Congress' formal powers and devalue its political judgment.

[381] 316 F.3d 450 (4th Cir. 2003), denied rehearing *en banc* 337 F.3d 335 (4th Cir. 2003).

[382] See 164, below.

[383] 124 S. Ct. 2633. See 171, below.

[384] 488 F.2d 611.

Columbia Circuit evaluated the sufficiency of congressional authorization for the war in a way that delved into the merits of the case. The court found that a declaration of war was unnecessary, that Congress could choose its means of authorization, and even suggested that the President could unilaterally wage war without congressional authorization in certain exceptional situations, such as in immediate response to an armed attack.[385] Notwithstanding this position, the court departed from *Berk*, *Orlando* and other cases[386] in finding that congressional appropriations and draft extensions by themselves were not necessarily constitutionally sufficient to authorize the President's conduct of war. Instead, the court opined that, when faced with hostilities initiated by a President without clear authorization, "[a] Congressman wholly opposed to the war's commencement and continuation might vote for the military appropriations and for the draft measures because he was unwilling to abandon without support men already fighting. . . . We should not construe votes cast in pity and piety as though they were votes freely given to express consent."[387] The court thus recognized that judicial deference to executive action, giving the executive the institutional initiative in taking the nation to war, could potentially upset the separation of powers and unduly burden Congress with a reactionary rather than complementary political role in war-making. The court also seemed willing to go beneath statutory language and forms to examine legislative intent, and indicated that it might in appropriate circumstances loosen the requirement that Congress directly confront the President over exercise of the war powers.

Despite looking behind the form of legislative authorization to discern Congress' purpose in acting, which did not seem sufficiently supportive of the

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[385] *Ibid.* at 613-15; See also *Massachusetts*, 451 F.2d at 31-32.

[386] 488 F.2d at 615, citing *Massachusetts*, 451 F.2d. 26 and *United States* v. *Sisson*, 294 F. Supp. 511 (D. Mass. 1968).

[387] 488 F.2d at 615. Compare *Mottola* v. *Nixon*, 318 F. Supp. 538, 550-51 (N.D. Cal. 1970) (finding that the question of the sufficiency of congressional authorization was an issue of "plain constitutional interpretation," from which courts ought not "shy away on 'political question' grounds"). But see *Campbell*, 203 F.3d 19 (finding that, in light of Congress' possession of and failure to exercise its powers in challenging ongoing military action against Yugoslavia, congressmen seeking an injunction against such executive action had no standing).

executive's policy, the *Mitchell* court nevertheless did not enjoin the President's military operations in Vietnam. Except where the President might act in bad faith, or presumably also where Congress imposed clear limitations, the executive's political and military strategies for ending hostilities were political questions unsuitable for judicial review. Although a court might find Congress to imply a limitation or withhold authorization, it would still be hesitant to find the President's own purposes in acting as inconsistent with his legal obligations. The District Court refused to "substitute its judgment for that of the President, who has an unusually wide measure of discretion in this area, and who should not be judicially condemned except in a case of clear abuse amounting to bad faith."[388] The court found that Congress and the President shared purposes to conclude the war in Southeast Asia. The executive remained better placed than the judiciary to judge the necessity and expediency of certain war measures or policies for disengagement, subject only to more specific directives for Congress. Although it refused to enjoin the war in Indo-China and cautioned about judicial interference in matters of war, however, the D.C. Court of Appeal's inquiry into legislative intent and executive good faith hinted at descending layers of judicial review based upon factual context, and revealed substantive underpinnings beneath an apparently formalistic review for legality.

The substantive aspect to the political question doctrine showed through more clearly in the First Circuit Court of Appeals' decision in *Massachusetts* v. *Laird*.[389] In that case, plaintiffs were not only military personnel, but included the state of Massachusetts itself, of which the men were residents. They all sought to enjoin the military operations in Vietnam due to the absence of a formal congressional declaration of war. In refusing the injunction, the Court of Appeals found that the text of the Constitution did not clearly commit authority to conduct undeclared military action either to the Congress or the President. Rather, "the Constitution, in giving some essential powers to Congress and others to the executive, committed the matter to both branches,

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[388] 488 F.2d at 616.

[389] 451 F.2d. 26.

whose joint concord precludes the judiciary from measuring a specific executive action against any specific clause in isolation."[390] The Circuit Court's interpretive approach, which has much in common with Corwin's argument,[391] appears to ground the political question doctrine in textual terms, albeit with the overlapping allocation of branch powers depending upon political factors, factual circumstances, and competition between Congress and the President. In the case before it, the court found that Congress' appropriations were constitutionally sufficient support of the President's conduct of hostilities in Southeast Asia. It refused to speculate about a situation in which the executive acted without any legislative approval at all, and also noted that Congress possessed several powers under the Constitution that would allow it to restrict presidential action in a way such as to present standards for judicial enforcement.[392] The First Circuit seemingly appreciated the substantive and contextual aspects to the political question doctrine in deciding *Massachusetts*. The court stated: "In arriving at this conclusion we are aware that while we have addressed the problem of justiciability in the light of the textual commitment criterion [of *Baker*, 396 U.S. at 217], we have also addressed the merits of the constitutional issue. We think, however, that this is inherent when the constitutional issue is posed in terms of scope of authority."[393] Assessment of justiciability under the political question doctrine required a court to reach the substantive merits of the case; by determining the branches' relative competencies to decide a particular issue, the court would determine their constitutional authority.[394]

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[390] *Ibid.* at 33.

[391] See 99, above.

[392] 451 F.2d. at 34.

[393] *Ibid.* at 33-34.

[394] See Ann Van Wynen Thomas and A. J. Thomas, Jr., *The War-Making Powers of the President: Constitutional and International Law Aspects*, fwd. by Charles O. Galvin (Dallas: Southern Methodist University Press, 1982) at 93-94, 97; Keynes, *supra* note 332 at 69, 77-78.

Under the above precedents, courts will not question the manner in which the President conducts military operations,[395] nor the merits of military action generally,[396] once they have determined such decisions to be within congressionally authorized and so legal bounds. This veneer of formalism rests upon the non-justiciability of the initiation and conduct of war – the issues involved in all of the above cases – even though the determination of justiciability, and thus application of the political question doctrine, itself reveals substantive considerations. Courts have also readily presumed reasonableness and good faith on the parts of both Congress and the President in leading the nation in war. While such a presumption defers to political decisions, it also implies that reasonableness and good faith are preconditions for lawful exercise of the war powers, and are potentially rebuttable. As the court in *Atlee* suggested:

> [M]odern technology has so altered global relations that it is at least arguable by reasonable men of good faith that our military presence in Vietnam is necessary to protect the security interests of the United States. Under these circumstances . . . a court should refrain from determining whether the President in making war has properly done so under the power committed to him by the Constitution.[397]

Nevertheless, judicial application of the political question doctrine presupposes that Congress can set limits to presidential military action, limits that can only be ascertained with reference to the particular facts of the case and in light of the political purposes of military actions. The highly strategic nature of the issues in the case history and lack of direct conflict between the political branches, however, have prevented courts from fully exploring the limits of the political question doctrine in a justiciable case, where the deliberative processes involved are more complex. Accordingly, the cases

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[395] *DaCosta III*, 471 F.2d at 1155 ("Judges, deficient in military knowledge, lacking vital information upon which to assess the nature of battlefield decisions, and sitting thousands of miles from the field of action, cannot reasonably or appropriately determine whether a specific military operation constitutes an 'escalation' of the war or is merely a new tactical approach within a continuing strategic plan.").

[396] *Atlee*, 347 F. Supp. at 706-07.

[397] *Ibid.* at 706-07.

remain fixed in formalistic language at times, even though they demonstrate or recognize substantive qualities. Judicial review therefore requires substantive inquiries not only into the purposes of congressional and presidential actions, but also the way in which the President exercises the war powers to impact upon individual rights or domestic affairs. These contextual considerations all combine with the assessment of justiciability and the branches' relative deliberative competencies in leading to resolution of the separation of powers issue of a case.

The Second Circuit Court of Appeals, in the third *DaCosta* v. *Laird* case,[398] demonstrated the flaws in maintaining a formalistic appearance of the political question doctrine, by drawing attention to the deliberative competency of the courts. In that case, the appellant invited the Second Circuit "to extend the reach of judicial inquiry with respect to the Vietnam war into the domain of tactical and strategic military decision. . . ."[399] The court found that the President's strategic reasons for mining North Vietnamese waters and continuing air attacks were non-justiciable political questions about how best to disengage from the Vietnam War. Still, the court recognized that "[a]s a general rule, we see no reason why Executive fact-finding must be totally insulated from judicial review. We have always demanded that there be, at the very least, some reasonable or rational basis for a finding of fact, whether made by an administrative agency, the Congress, or the Executive." In certain matters such as the one at issue in *DaCosta III*, however, a court institutionally was "incapable of assessing the facts," rendering the issue non-justiciable under the political question doctrine.[400] What the Second Circuit did, then, was actually to review the case, make a decision upon the branches' deliberative competencies to decide the matter in question, and thereby resolve the separation of powers issue. The court went so far as openly to assert that,

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[398] *DaCosta III*, 471 F.2d 1146. For *DaCosta I*, see *supra* notes 328 and 331. *DaCosta* v. *Laird* (*DaCosta II*), 456 F.2d 1335 (2d. Cir. 1972), affirmed without opinion in unpublished memorandum and order, Docket No. 72 C. 207 (E.D.N.Y., 16 Feb. 1972) (cited in 471 F.2d at 1147, n. 4).

[399] 471 F.2d at 1147.

[400] *Ibid.* at 1155.

should an executive exercise of the war powers be justiciable, courts could then review it substantively not only for legality but for reasonableness.[401]

Justice Marshall later echoed the Second Circuit in *Holtzman* v. *Schlesinger*,[402] when refusing to vacate that Circuit's stay of a district court injunction restraining the executive's military actions in Cambodia. The decision came just two weeks before a congressional deadline cutting off all funding for military operations in Southeast Asia. Justice Marshall wrote, "[w]hile we have undoubted authority to judge the legality of executive action, we are on treacherous ground when we attempt judgments as to its wisdom or necessity."[403] He therefore refused to enjoin military action without hearing by the full Supreme Court, despite expressing his opinion that the President's conduct of military operations in Cambodia was likely unconstitutional on the merits.[404] Marshall's opinion therefore appears to have prudential elements, like those argued by Bickel.[405] However, the opinion was particularly based upon the fact that a clear deadline had not yet elapsed; not only were Congress and President not yet in direct conflict, but Congress' own deadline arguably implied a time period in which it authorized the executive to continue to use broad military discretion in its policy of disengagement. Marshall therefore continued to respect the terms of the political compromise that had been reached, and was prepared for the Court to enforce the deadline once it had passed. Marshall also expressed a personal opinion that the full Court might substantively review the President's military decisions, even before expiry of the deadline, in order to assess whether they indicated presidential compliance with a congressionally mandated policy of disengagement.

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[401] Presumably, review for reasonableness of executive decisions would suggest that courts could also examine the antecedent decision-making process, thus raising a standard of procedural fairness where the executive functionally adjudicates individual rights under the war powers.

[402] 414 U.S. 1304 (1973) [hereinafter *Holtzman I*].

[403] *Ibid.* at 1309-10.

[404] *Ibid.* at 1313-14.

[405] See 109, above.

However, plaintiffs' reapplied to vacate the stay, this time to Justice Douglas, who granted it and reinstated the original injunction.[406] Douglas considered vacation of the stay, against Marshall's prior ruling, appropriate considering the "capital" nature of the case. The certainty of civilian or combatant deaths could not be equitably balanced against possible harm to foreign policy interests attendant upon an injunction of the Cambodian campaign. Referring to *Youngstown*, Douglas argued that the deprivation of life was a more substantial individual interest than the seizure of property. He also made clear that vacation of the stay was not a decision on the merits, though he expressed his opinion that Cambodian action likely was unauthorized and unconstitutional. The government's subsequent application for another stay was then considered again by Justice Marshall, who, after polling his colleagues and receiving approval, issued a second stay.[407] Nevertheless, like Marshall, Douglas emphatically stressed that exercises of the war powers were reviewable when justiciable. Marshall's and Douglas' *dicta* upon the merits of the case illustrated how a court could apply the political question doctrine in a way that contextually focused upon justiciability and deliberative processes, opening up review of the war powers to standards of legality, procedural propriety, and reasonableness, as they increasingly infringed individual rights or impacted upon domestic affairs.[408]

As with those in the U.S, courts in the U.K. have also refused to question executive decisions relating to the initiation and conduct of war, upon similar separation of powers principles. The British cases show that two potential avenues nevertheless exist for the judiciary to develop a supervisory role over

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[406] *Holtzman* v. *Schlesinger*, 414 U.S. 1316 (1973) [hereinafter *Holtzman II*].

[407] *Holtzman* v. *Schlesinger*, 414 U.S. 1321 (1973), Douglas J. dissenting [hereinafter *Holtzman III*].

[408] But see *Holtzman* v. *Schlesinger*, 484 F.2d 1307 (2d Cir. 1973), which overruled the district court injunction. The Court of Appeals did so on grounds that the determination as to whether military action in Cambodia was a basic change in the Vietnam War requiring new congressional authorization, or was instead within the existing tactical discretion of the President, was a nonjusticiable political question. Nevertheless, the court went on to state that the congressional deadline constituted authorization for executive military action in Cambodia until expiry of the statutory date, thereby broadly interpreting the applicable law as authorization for a limited duration of hostilities.

executive military actions. British courts, theoretically, might have to enforce statutory restrictions on the Crown's prerogative, or independently review its military decisions *ad hoc* if they present justiciable issues. Review under either approach goes beyond formalistic notions of legality to consider also the procedural propriety and reasonableness of executive decisions. The general approach of British law to executive war powers is one that, like American law, fundamentally relies upon political processes to govern their exercise. In *China Navigation Co. Ltd.* v. *Attorney General*[409] Slesser L.J. stated "at no time has Parliament derogated from the prerogative with regard to the command of the forces as it was declared in the time of Charles II. It has declared the standing army illegal in time of peace without the consent of Parliament, but has abstained from interfering with the command by the Crown over a legalized army."[410] This remark makes two observations about the Crown's military authority, still valid since the 1932 decision. First, the executive enjoys historical prerogative discretion over military affairs, which would normally present non-justiciable political questions. Second, Parliament may limit or abolish the prerogative, and instead delegate a statutory discretion to the executive.

De Keyser's Royal Hotel[411] suggests the importance of statutory interpretation in determining the extent of the executive military prerogative.[412] In that case, the House of Lords considered whether a hotel owner had a right to compensation, when the military expropriated the hotel in order to billet personnel during World War I. The Crown argued that it possessed a prerogative power to requisition private property in defense of the realm, making any compensation *ex gratia* even though Parliament had enacted expropriation measures with a compensation scheme. The House of

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[409] [1932] 2 KB 197 (C.A.).

[410] *Ibid.* at 239.

[411] [1920] All ER 80.

[412] In military as in other areas, "[c]ases that deal directly with the royal prerogative are rare." Sebastian Payne, "The Royal Prerogative" in *The Nature of the Crown: A Legal and Political Analysis*, ed. Maurice Sunkin and Sebastian Payne (Oxford: Oxford University Press, 1999) 77 at 79.

Lords decided that the statute pre-empted whatever prerogative expropriation power formerly existed. Therefore, "if the whole ground of something which could be done by the prerogative is covered by the statute it is the statute that rules."[413] The prerogative in such instance goes into abeyance and Crown actions are subject to whatever limitations the statute imposes.[414] *De Keyser's Royal Hotel* indicates that a statute might restrict the prerogative not only by express words, but also "by necessary implication, or . . . where an Act of Parliament is made for the public good . . . ."[415] Courts are therefore in the position, when interpreting a statute, to determine its extent and purpose *vis-à-vis* the war prerogative. However, it is significant that in *De Keyser's Royal Hotel* the House of Lords dealt with the seizure of private property off the battlefield, for which the common law has traditionally presumed a right to compensation. The case suggests the principle that whenever a claimed prerogative action over an individual liberty interest or domestic matter potentially conflicts with a statutory regime, courts will favor a statutory construction that binds the Crown.[416] Courts can then review the statutory action upon the established grounds for review, such as procedural propriety and reasonableness. This interpretive approach recognizes that Parliament will more strongly define the Crown's fiduciary responsibility where individual rights or domestic affairs are at issue. With cases of high policy not directly implicating individual rights, but involving more abstract policy determinations or having foreign effect, the prerogative would prevail in the absence of a statute's clear language or necessary implication. The British interpretive approach to determining whether Parliament as restricted the Crown prerogative in military matters is therefore somewhat similar to the

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[413] [1920] All ER at 86, *per* Lord Dunedin. For more on compensation for the prerogative taking of private property during war, see *Burmah Oil*, [1965] AC 75. Regarding conflict between prerogative and legislative schemes, see *Laker Airways Ltd.* v. *Department of Trade*, [1977] 2 All ER 182, 192-94 (H.L.).

[414] [1920] All ER at 92-93, *per* Lord Atkinson. See also *R.* v. *Secretary of State for the Home Department, ex parte Fire Brigades Union*, [1995] 2 All ER 244 (H.L.).

[415] [1920] All ER at 110, *per* Lord Parmoor. See also *Province of Bombay* v. *Municipal Corporation of Bombay*, [1947] AC 58 (P.C.) (a statute will bind the Crown by implication only if its purpose would otherwise be wholly frustrated).

[416] See [1920] All ER at 109, *per* Lord Parmoor.

Curtiss-Wright and *Youngstown* paradigm in U.S. law, premised as it is upon Lockean notions of domestic versus federative executive discretion. In any case, however, judicial review for legality is an interpretive enterprise, leading to consideration of many substantive considerations about the context and way in which the executive lawfully exercises military discretion.

The prerogative in some instances, however, might also co-exist with and be complementary to statute. This was the situation in *Chandler*.[417] The House of Lords found that the Crown could determine under the prerogative that an airbase and the weapons situated there were part of the military disposition, with the consequence that interference with such an installation fell under a statute making it unlawful to enter into a prohibited place for a purpose prejudicial to the state's safety and interest. In this way, the House of Lords read the act in question so as to avoid raising any political question or conflict with the prerogative.[418] *De Keyser's Royal Hotel* dealt with a statute granting authority to expropriate private property subject to certain procedures, while *Chandler* concerned a statute that required a predicate policy determination for its operation, *i.e.* the determination of military installations which should be off-limits for national security purposes. Importantly, in the latter case, criminal liability was not established by the prerogative, but by the statute, and guilt was adjudged by regular jury trial. The prerogative decision about the status of the airbase only detailed a location covered by the statute and so did not functionally adjudicate individual rights. In any event, these cases demonstrate that it falls to the courts to determine Parliament's intent with the statute and how it binds the Crown. This decision will be within the context of what (if any) rights are at stake and how executive action impacts upon them, and the domestic versus foreign exercise of executive power. It will also involve an assessment of justiciability, based upon which branches are the appropriate forums for decision-making, considering the general public interests involved and the facts of the case.

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[417] [1964] AC 763 (H.L.).

[418] *Ibid.* at 791, *per* Lord Reid.

Judicial review of the sort in *De Keyser's Royal Hotel* and *Chandler* examines as a threshold matter whether the Crown is bound by legislation. Having decided that the Crown is bound and ascertained the statutory limits, a court can then rely upon established judicial review doctrines. These can delve into substantive aspects of the executive's decision-making processes, and allow searching review by a court. British courts have long reviewed statutory executive decisions under an *ultra vires* theory, ensuring that executive decision-making does not go beyond the parliamentary grant of authority. Orthodox *ultra vires* review upholds the sovereignty of Parliament not only by ensuring that the Crown does not act illegally, but by finding an implied legislative intent that it act reasonably,[419] under fair procedures,[420] and not in frustration of the statutory purpose.[421] However, the legislative intent that is the formalistic basis of *ultra vires* review is largely a fiction. Such review – especially given its richly substantive aspects – more accurately reflects normative rule of law considerations that subject executive action to fundamental principles of natural justice, and promote fair and reasonable decision-making for the sake of the public good. The judicially formulated standards of review, developed at common law, demonstrate an inherent review power in the courts that flows from their fiduciary duty under the separation of powers to hold the Crown to adjudicative standards in its deliberations.

In contrast to statutory powers, exercise of the prerogative long remained unreviewable; it was by definition non-justiciable, except to the preliminary extent necessary to define its limits. In *Chandler*, however, Lord Devlin suggested possible judicial supervision over use of prerogative powers, noting that "[t]he courts will not review the proper exercise of discretionary power but they will intervene to correct excess or abuse."[422] In the *G.C.H.Q.* case,[423]

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[419] See *Associated Provincial Picture Houses Ltd.* v. *Wednesbury Corp.*, [1947] 2 All ER 680 (H.L.).

[420] *Ridge* v. *Baldwin*, [1964] AC 40 (H.L.).

[421] See *Padfield* v. *Minister of Agriculture, Fisheries and Food*, [1968] AC 997 (H.L.).

[422] [1964] AC at 810.

the House of Lords determined that actual justiciability of the subject matter, rather than the prerogative nature, of executive action was determinative of a court's competence to review the particular decision in question. Formerly unreviewable prerogative decisions, such as the issuance of passports,[424] the granting of mercy,[425] or even regulations governing military service[426] are now subject to review in the same manner as statutory powers. The courts' continuing refusal to review non-statutory executive discretion regarding the initiation of hostilities or the use of the armed forces, then, rests solely upon the character of those decisions as political questions unsuitable for legal resolution. The non-justiciability of such decisions is no longer based upon their prerogative classification, but upon substantive considerations about the functional use of deliberative processes. The House of Lords has pointed this out, beginning with *G.C.H.Q.*[427] Courts can therefore hold the Crown to its fiduciary obligation when it acts under prerogative as well as statutory powers, by ensuring that it acts within its deliberative competency and respects adjudicative standards where appropriate.

Consequently, while courts have categorically declared the conduct of hostilities and the deployment of the armed forces to be non-justiciable political questions, such powers cannot now automatically be excluded from all review without consideration of the circumstances surrounding their exercise.[428] British courts retain jurisdiction to examine the exercise of a

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[423] [1984] 3 All ER 935.

[424] See *R.* v. *Secretary of State for Foreign and Commonwealth Affairs, ex parte Everett*, [1989] 1 All ER 655 (C.A.).

[425] *R.* v. *Secretary of State for the Home Department, ex parte Bentley*, [1993] 4 All ER 442 (Q.B.).

[426] *R.* v. *Ministry of Defence, ex parte Smith*, [1996] 1 All ER 257 (C.A.).

[427] See, for example, [1984] 3 All ER at 948, *per* Lord Scarman, 951, *per* Lord Diplock, and 956, *per* Lord Roskill.

[428] B. V. Harris labels this distinction in review as between primary and secondary determinations of justiciability, the former based upon set categories of executive decisions, *i.e.* prerogative issuance of passports, and the latter upon a contextual examination of particular decisions. A primary finding of categorical non-justiciability is potentially arbitrary by failing to hold certain kinds of decisions accountable under the rule of law, even when they might be appropriately reviewable. Under a secondary determination, otherwise unreviewable categories would be reviewable if satisfying certain conditions of justiciability under the

prerogative military decision in its specific context, and may review it upon a threshold finding of justiciability. The guidelines for justiciability now seem to be the absence of high policy factors, suitability for judicial rather than political resolution, and the impact of the executive decision upon individual rights.[429] The criteria are similar in kind to those of *Baker*, reflecting shared principles regarding the courts' exercise of judicial power. Still, the possibility of such review of the prerogative suggests a far-reaching judicial claim to supervise executive military actions for breaches of fiduciary duty, even when Parliament has chosen not to challenge executive actions. Judicial review of the prerogative offers the public another bulwark against abuses by an executive that can politically manipulate or dominate Parliament through party control. Review is also important, as there is no constitutional requirement, as in the United States, that the Crown must act with affirmative legislative approval in matters of war. Finally, prerogative review rejects unsustainable, formalistic classifications of executive decisions in favor of a functional analysis that contextually assesses the branches' relative deliberative competencies. As the courts have intimated, it is difficult to hypothesize a situation in which a challenged prerogative decision to go to war or command the armed forces in the field would present judicially identifiable standards not best left to political resolution.[430] Nevertheless, after *G.C.H.Q.*, the legal possibility now exists that other, more justiciable exercises of the war prerogative are amenable to judicial review. Any executive decisions that stray from military policy and strategy to directly impact upon individual

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circumstances. B. V. Harris, "Judicial Review, Justiciability and the Prerogative of Mercy" (2003) 62 Cambridge L.J. 631 at 644.

[429] Hadfield, *supra* note 83 at 228. See also Harris, *ibid.* at 634-46, who suggests five somewhat fuller considerations in any assessment of the justiciability of executive action. These are: 1) appreciation of the subject matter, 2) reservation for legislative determination, 3) constitutional propriety, in terms of separation of powers, 4) suitability of the court's personnel and processing to the decision-making required, and 5) availability of objective criteria. Evaluation of any substantive individual right would be bound up with these considerations.

[430] As Bradley and Ewing further note, *supra* note 349 at 258: "The right to enforce [European] Convention rights against an exercise of prerogative power does not formally depend on the power in question being justiciable. But in view of the fact that many prerogative powers deal with issues such as defence of the realm and national security, it may be expected that the courts would exercise caution in response to any claim under the Human Rights Act."

rights and domestic affairs will certainly be subject to such review on principled grounds of legality, procedural propriety, and reasonableness.

The above American and British cases suggest that, the political question doctrine notwithstanding, courts can enforce limitations upon exercises of the executive's war powers whenever a particular case presents justiciable standards. By reviewing executive actions for legality, courts respect the results of the political processes that justify the political question doctrine.[431] However, the concept of legality is complex one; interpretation of possible statutory limitations and the threshold assessment of justiciability depend upon substantive considerations. The substantive aspects to the political question doctrine create theoretical confusion about the doctrine's constitutional purpose. Confusion is most evident where the executive branch uses the war powers in functionally legislative or adjudicative ways to impact upon individual rights or domestic affairs. The deliberative virtues of the courts justify them in reviewing these kinds of executive exercises of the war powers against the standards of the adjudicative deliberative process, that include legality, procedural fairness, and reasonableness. The formalistic justifications for the political question doctrine, accordingly, cannot bear the weight of its deliberative foundations. The resulting cracks reveal that the judicial analysis necessary to apply the political question doctrine in a particular case leads to a constitutional decision about the branches' relative deliberative competencies, and so the scope of their authority under the separation of powers.

Judicial Review of Presidential War Powers: Challenges and Implications

In the United States, judicial determination of the existence of "some" congressional participation authorizing executive war-making and application of the political question doctrine blur formalistic lines of legality. Under a formalistic approach, the political question doctrine permits courts to

[431] Keynes, *supra* note 332 at 77.

determine that Congress has somehow approved military action,[432] as the Constitution mandates, but thereafter requires it to abstain from scrutinizing Congress' chosen means of constitutional authorization and the President's military decisions under it. Nevertheless, judicial review for legality and determination of justiciability of the matter are factually dependent; combined with other doctrines, such as standing or ripeness, application of the political question doctrine has a substantive under-layer opening opportunities for varying degrees of judicial review of the war powers. However, the Vietnam era cases and their progeny did not go beyond the judicial review of issues stemming from the initiation and conduct of hostilities, matters of high policy and strategic judgment unsuitable for adjudicatory resolution. Nor did these war powers cases clarify how broadly courts might interpret congressional actions to qualify as "some mutual participation" with the President, when his exercises of the war powers increasingly impact upon individual rights and domestic affairs in a *Youngstown* scenario. Cases indicated, but did not settle, that justiciable exercises of the war powers would be subject to review under adjudicatory standards not just of legality, but also procedural propriety and reasonableness. Functionally judicial exercises of the war powers by the President, as with the designation, detention, or trial of unlawful combatants, would accordingly be subject to considerable scrutiny by the courts. The war powers cases, taken as a whole, demonstrate that, in making a threshold determination about justiciability under the political question doctrine, courts actually assess the relative deliberative competencies of the branches, and consequently their authority under the separation of powers. The assessment of justiciability engages the fiduciary obligations of the courts, and legitimizes their constitutionally free-standing authority to review executive war powers as appropriate. The Lockean constitutional paradigm that underlies the deliberative processes approach to the separation of powers only becomes more evident in the British context, where courts must review executive decisions and uphold the rule of law outside of a written constitution.

[432] However, the President does retain constitutional authority to repel invasion, suppress insurrection, or otherwise respond to pressing national emergencies without need of Congress' support. See *Holtzman I*, 414 U.S. at 1311-12 and *The Prize Cases*, 67 U.S. 635, 668 (1862). Just what circumstances would present such emergency remain undefined, and under a formalistic approach might themselves be non-justiciable political questions.

A theoretically untenable, formalistic application of the political question doctrine, in contrast, potentially leads to a three-fold constitutional problem in the United States, as identified by Corwin. First, the judiciary's excessive deference to executive war powers and political processes can effectively amount to its abdication of review. Such abdication requires an assumption that the government as a whole possesses an inherent power to wage war, with no constitutional distribution of decision-making authority between the executive and legislative branches, other than what they themselves determine it to be. This would undermine the Lockean structural model of distributing government power among the branches, and having them hold one another to their fiduciary obligations. Second, the premise of a unified national war power would mean that the President's role as Commander-in-Chief could then evolve from the command of forces in the field, to the power to take whatever military action he sees necessary, so long as not directly challenged by Congress. The President would then be in much the same position as the British Crown with its prerogative, despite the declare war clause, although the deference given by American courts would again bring into question whether and how they might enforce unambiguous congressional limitations. If not, then the political question doctrine itself becomes meaningless, as even clear congressional limitations are legally unenforceable. Last, under a national war power, Congress could delegate to the President its own legislative power to declare war and take emergency measures for the country, greatly upsetting checks and balances, expanding executive discretion over any matter connected to warfare, and thereby foreclose any meaningful judicial review of presidential war measures under a legality standard. By abdicating judicial interference with the war powers in a formalistic attempt to preserve a presidential sphere of authority over war, courts can facilitate the executive branch in gathering vast legislative and judicial power unto itself. The political question doctrine, in that way, can actually upset the separation of powers, just as it purports to preserve it. The great risk in a formalistic application of the political question doctrine, therefore, is that courts will abdicate their constitutional role and continue to set aside "principal canons of constitutional interpretation," as well as statutory ones, so as to allow the

executive branch to gather unto itself the entirety of the national government's formidable war power.[433] Not only could the executive branch then unaccountably act upon matters and with deliberative processes for which it is not always the most institutionally competent, but the lack of judicial involvement could further dissuade Congress from limiting presidential war-making unless it is prepared to provoke a serious constitutional conflict between it and the President. The reticence of both Congress and the courts to restrict presidential exercises of the war power can thus become mutually reinforcing. The executive branch can thereby not only increase its own powers, but become the sole determiner as to when, how, and where they will be exercised. Such concentration of power undermines the Lockean structural protections for the public good, where the branches hold one another to their trusts by cooperating in reasonable decision-making and checking abuses.

Thus, a judicial approach to review that too readily finds congressional authorization for executive military actions would give the President the primary constitutional responsibility for taking the nation to war, relegating Congress to a responsive rather than initiating role. Not only might the President present Congress with a *fait accompli* that requires some continued military commitment or presents Congress with political difficulties in ordering disengagement,[434] but any such orders or cutting of funds would then be subject to a presidential veto, requiring a two-thirds vote in both houses to override.[435] This situation would effectively nullify the Constitution's declare war clause, as well as betray the principle that Congress is institutionally better able and more appropriately suited in a republic to authorize war. Moreover,

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[433] Corwin, *The President*, *supra* note 263 at 296-97.

[434] The Court of Appeals for the D.C. Circuit expressed this same concern in *Mitchell*, 488 F.2d at 615.

[435] Peter Raven-Hansen, "Constitutional Constraints: The War Clause" in *The U.S. Constitution and the Power to Go to War: Historical and Current Perspectives*, ed. Gary M. Stern and Morton H. Halperin (Westport, Conn.: Greenwood Press, 1994) 29 at 34-35; President Nixon vetoed just such a congressional cut-off of funding for the bombing of Cambodia in 1973. Unable to muster a two-thirds vote in each house to override the veto, Congress instead passed a compromise measure that the President signed. That measure gave the President another month and a half before a deadline to halt bombing, at which time funding for the operation would cease. Keynes, *supra* note 332 at 153. See also *Holtzman II*, 414 U.S. at 1320, *per* Douglas J.; See *supra* note 378.

whatever the courts' lack of competency to review strategic military decisions, their fiduciary (and thus constitutional) duty to act increases as the President strays from battlefield judgment and exercises the war power to alter the legal obligations of citizens or other individuals within the country itself. Such matters are squarely within the deliberative competencies of the judicial branch, and the domestic rights concerns undercut the justifications for the broad deference usually given in matters of war and foreign affairs. In such cases, application of the *Baker* criteria in assessing justiciability, and an appreciation of *Youngstown*'s distinction between domestic and foreign exercises of discretion, indicates that the political question doctrine permits, if not requires, an evaluation of executive actions based upon the deliberative processes involved. This evaluation will itself be context dependent and will assess the branches' relative deliberative competencies and the deliberative processes used in any particular case. Substantive considerations are bound up with the determination of justiciability, and inform the adjudicative standards of legality, procedural propriety, and reasonableness. In imposing these standards upon the executive when it uses the war powers in a functionally judicial way, the judiciary keeps its fiduciary duty to uphold the rule of law and protect individual rights, check the other branches, and maintain the separation of powers.

The interaction between justiciability, the political question doctrine, and a deliberative processes approach to the separation of powers becomes especially evident in the context of unlawful combatant detentions, a matter implicating core executive and judicial functions. Executive decisions under the war powers to designate an individual as an unlawful combatant and imprison him or her without trial in a civilian court are of a highly adjudicatory nature, but are ancillary to the executive disposition of hostile enemy forces. A detention decision, unlike those about the initiation or conduct of war at issue in the Vietnam era and later cases, presents an issue in which the powers of the Congress, President, and judiciary clearly overlap depending upon the public interests emphasized (*e.g.*, rules for criminal liability, protection of national security, and preservation of individual rights). With these considerations in mind, the President's functionally judicial

designation, detention, and trial of individuals as unlawful combatants reveals an exceptionally high degree of justiciability. Consequently, the constitutional separation of powers permits the executive detention of unlawful combatants pursuant to congressional authorization, but nevertheless demands thorough and substantive judicial review. Such review ensures that the President makes detention decisions according to the adjudicative standards of legality, procedural propriety, and reasonableness.

Part III: Judicial Review of Unlawful Combatant Detentions

Introduction

In waging the "war against terrorism," President Bush designated both citizens and non-citizens to be unlawful combatants, having violated the laws of war. While the Government held two citizens and one non-citizen in military brigs within the United States, it also detained hundreds of aliens at Guantanamo Bay Naval Base in Cuba. As authority for his actions, the President relied upon the Supreme Court case *Ex parte Quirin*,[436] in which the Court upheld the power of President Roosevelt to try alleged Nazi saboteurs as unlawful combatants, even if citizens, before a military commission. Upon petitions for writs of habeas corpus, federal courts wrestled with the separation of powers issues presented by such detentions. Lower courts divided upon whether such detentions were lawful, or whether they even possessed jurisdiction to hear the Guantanamo claims. Finally, the Supreme Court determined in *Hamdi* v. *Rumsfeld*[437] that the President indeed had the power to detain citizens as unlawful combatants, but that they were entitled to due process under the Fifth Amendment to the Constitution. In *Rasul* v. *Bush*,[438] a companion case, the Court also found that courts could hear the habeas petitions of non-citizens held in Guantanamo Bay.

Nevertheless, the rulings in *Hamdi* and *Rasul* left unresolved many questions about the constitutional foundations for both the executive's detention power and the judicial review of them. Indeed, the Supreme Court's *Hamdi* decision in particular seemed to depart from past jurisprudence, in which courts refused to review exercises of the war powers as political

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[436] 317 U.S. 1 (1942).

[437] 542 U.S. 507; 124 S. Ct. 2633 (2004).

[438] 542 U.S. 466; 124 S. Ct. 2686 (2004).

questions. *Hamdi* raised questions particularly in light of the *Quirin* holding, which seemed to give considerable deference to presidential unlawful combatant determinations. Unlawful combatant status itself fit uncomfortably into a dichotomous paradigm of crime and war. Detainees stood accused of having committing hostile, belligerent acts against the United States, which were in violation of the international laws of war. The Government contended that unlawful combatants did not fulfill the requirements for lawful belligerency under the *Third Geneva Convention*,[439] and therefore were not entitled to the *Convention's* protections of Prisoner of War status. Instead, the President could detain them, as well as try and punish them before military commissions, at his discretion. Accordingly, unlawful combatant status, as well as the executive's treatment of individuals so designated, exhibited mixed criminal and martial aspects that did not fit easily into formalistic spheres of executive or judicial power.

While some courts found that the President had an almost absolute executive discretion to detain unlawful combatants, an analysis of *Quirin* and other precedents, in light of the deliberative processes approach to the separation of powers, suggests otherwise. While, under *Quirin*, the President might indeed have possessed a power to detain unlawful combatants subject to congressional authorization as well as limitations, the lawfulness of such detention depended upon predicate facts and due process requirements that defined the executive's jurisdiction to detain. The factual context of *Quirin* revealed the importance of a habeas review sensitive to the circumstances of the case, and the functional judicial aspects attendant upon an executive decision to designate, detain, and try an individual as an unlawful combatant. The Supreme Court, in its *Hamdi* decision, thus rejected a formalistic approach to the separation of powers that would have categorized an unlawful combatant detention as an unreviewable exercise of the war powers. Instead, *Hamdi*, and the habeas cases that followed it, suggested that when the President exercised the war powers so as to adjudicate individual rights and impact domestic affairs, courts were constitutionally empowered to scrutinize

[439] *Geneva Convention Relative to the Treatment of Prisoners of War*, *infra* note 442.

his decisions to an increasing degree. In reviewing the lawfulness of unlawful combatant detentions, the *Hamdi* Court imposed the commonly used due process test of *Mathews* v. *Eldridge*,[440] demonstrating a conceptual unity between such a justiciable exercise of the war powers and other administrative decision-making using mixed deliberative processes. The lawfulness of unlawful combatant detentions therefore depended upon substantively enriched principles of legality, procedural fairness, and reasonableness, which courts must use to uphold the rule of law, protect individual rights, preserve the separation of powers and prevent abuses of executive power.

[440] 424 U.S. 319 (1976).

Chapter VIII: Unlawful Combatant Detentions and the "War Against Terrorism"

Detentions at Guantanamo Bay

Responding to the terrorist attacks of September 2001, the following month the United States led a multi-national coalition to invade Afghanistan, target Osama bin Laden and al-Qaeda's operational bases located there, and overthrow the Taliban regime.[441] As a result of the military operations in Afghanistan, the United States took captive hundreds of Taliban, as well as other al-Qaeda fighters and suspected terrorists. The American Government detained these individuals, along with other suspected terrorists subsequently taken into military custody, at Guantanamo Bay Naval Base, Cuba. As of August 2005, the military was still holding over five-hundred prisoners at the base. These individuals had uncertain status under both domestic and international law for two main reasons. First, President Bush designated captives of Guantanamo Bay as so-called "enemy combatants," falling outside of the *Third Geneva Convention's* protections for prisoners of war.[442] He also

[441] Osama bin Laden was, and at the time of writing remains, the ostensible and self-declared leader of Islamic fundamentalist terrorism. A Sunni fundamentalist of Saudi nationality, bin Laden was a prominent leader of Mujahadeen resisting the Soviet invasion and occupation of Afghanistan during the 1980s. As the apparent leader of the terrorist organization al-Qaeda, he claimed responsibility for the attacks against the United States on 11 September 2001, and has continued to act as the main spokesman for jihad against Western powers. Bin Laden and al-Qaeda also had close ties with the Taliban, a Sunni Islamic ultra-fundamentalist group that effectively ruled most of Afghanistan from the late 1990s until an American-led military coalition ousted it from power. The refusal of the Taliban to expel bin Laden from Afghanistan, and close al-Qaeda-sponsored terrorist camps located there, prompted American and allied military action in that country. The coalition against the Taliban included, most notably, the United Kingdom, Canada, and the rebellious Northern Alliance faction within Afghanistan itself.

[442] President Bush refused to recognize the Taliban, along with al-Qaeda fighters, as prisoners of war under the *Geneva Convention Relative to the Treatment of Prisoners of War*, Aug. 12, 1949, art. 5, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter *Geneva III* or *Third Geneva Convention*] (ratified by the United States). The President did, however, express the intention to treat Taliban prisoners consistently with *Geneva III*, without conceding their POW status. U.S. White House, "Fact Sheet: Status of Detainees at Guantanamo" (7 Feb. 2002), online: The White House <www.whitehouse.gov/news/releases/2002/02/20020207-13.html>.

issued a Military Order, subjecting foreign unlawful combatants to trial by special military commissions.[443] The President's actions, under the war powers, raised questions about the existence of an executive power to detain and try alleged unlawful combatants (foreigners as well as United States citizens) outside of the civil courts. Second, because Guantanamo Bay was on sovereign Cuban territory, the Government contended that detainees there were ineligible to file habeas corpus petitions in the federal district courts. Following the 1950 Supreme Court decision in *Johnson* v. *Eisentrager*,[444] denying district court jurisdiction over non-citizens held outside of sovereign American territory, some federal courts refused to hear such habeas petitions.[445] This meant that the Guantanamo prisoners existed in what Lord Steyn, a Lord of Appeal of the British House of Lords, notably criticized as a "legal black hole" that denied them fundamental due process.[446] A detainee could challenge in the courts neither the lawfulness of the President's detention order, nor conditions of treatment, which in some circumstances have allegedly amounted to serious physical and psychological abuse.[447]

Finally, on 28 June 2004, the Supreme Court addressed the jurisdictional issue of Guantanamo Bay in *Rasul* v. *Bush*.[448] The Court found that federal district courts had jurisdiction to hear habeas corpus petitions from Guantanamo detainees. In an opinion by Justice Stevens, the Court found that the *Eisentrager* decision did not control petitions originating from

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[443] U.S. White House, Military Order: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism (13 Nov. 2001), online: The White House <http://www.whitehouse.gov/news/releases/2001/11/20011113-27.html>[hereinafter "Military Order"].

[444] 339 U.S. 763 (1950).

[445] See for example *Al-Odah* v. *United States*, 321 F.3d 1134, 1141 (D.C. Cir. 2003). But compare *Gherebi* v. *Bush*, 374 F.3d 727 (9th Cir. 2003) (finding court had habeas jurisdiction due to exclusive United States control over Guantanamo Bay).

[446] Lord Steyn, "Guantanamo Bay: The Legal Black Hole" Twenty-Seventh F. A. Mann Lecture, London, 25 Nov. 2003, (2004) 53 I.C.L.Q. 1.

[447] See *O.K.* v. *Bush*, 344 F. Supp. 2d 44 (D. D.C. 2005) and *O.K.* v. *Bush*, 377 F. Supp. 2d 102 (D. D.C. 2005).

[448] 124 S. Ct. 2686.

Guantanamo Bay. Instead, the federal habeas corpus statute allowed district courts to exercise habeas jurisdiction based upon the location of the effective custodian, rather than the prisoner.[449] The habeas statute applied to Guantanamo because the United States enjoyed complete jurisdiction and control over the territory; the United States essentially exercised *de facto*, if not legal, sovereignty.[450] The ruling of *Rasul* meant that the President's detention of unlawful combatants at Guantanamo Bay, for purposes of the Constitution, had an essentially domestic impact. Although petitioners were foreign nationals, the geographical coverage of the habeas statute applied to them equally as with American citizens.[451] In this way, the Supreme Court continued to respect the *Curtiss-Wright* and *Youngstown* paradigm, distinguishing between executive exercises of Lockean "federative" and domestic discretion. By characterizing Guantanamo Bay as *de facto* United States territory, the Court invoked the logic of *Youngstown*, justifying greater judicial scrutiny of those executive exercises of the war powers infringing upon individual rights. Foreign detainees at Guantanamo could therefore petition for a writ of habeas corpus in the federal district courts, challenging the legality of their imprisonment. The general rule in *Eisentrager* that district courts did not have habeas jurisdiction over non-citizens held abroad, however, continued to stand,[452] thus continuing *Curtiss-Wright* deference in "federative" matters. *Rasul's* jurisdictional decision did not itself examine, as to substantive lawfulness, the President's designation and detention of unlawful combatants under the war powers. Rather, the Supreme Court addressed those issues in the case of *Hamdi* v. *Rumsfeld*,[453] decided the same day. Unlike *Rasul*, *Hamdi* concerned the habeas petition of an American

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[449] 124 S. Ct. at 2695. See also *Braden* v. *30th Judicial Circuit Court of Kentucky*, 410 U.S. 484 (1973) and 28 U.S.C. § 2241 (2000). Compare with 124 S. Ct. at 2701 *et seq.* (Scalia J. dissenting), *Rumsfeld* v. *Padilla*, 542 U.S. 426 (2004) and *Al-Marri* v. *Rumsfeld*, 360 F.3d 707 (7th Cir. 2004), cert. denied 125 S. Ct. 34 (2004).

[450] 124 S. Ct. at 2696-98.

[451] *Ibid.* at 2996.

[452] Tung Yin, "The Role of Article III Courts in the War on Terrorism" (2005) 13 Wm. and Mary Bill of Rts. J. 1035 at 1056.

[453] 542 U.S. 507; 124 S. Ct. 2633.

citizen, whom the Government had captured in Afghanistan, designated as an unlawful combatant, and ordered detained at a military prison within the continental United States. In *Hamdi*, the Court decided that citizen detainees were constitutionally entitled to due process. The *Hamdi* decision would be the precedent potentially governing subsequent hearings upon the habeas petitions of foreign detainees held in Guantanamo or the United States, should a court also find that such foreigners were constitutionally entitled to similar due process protections as American citizens designated as unlawful combatants.

Detentions within the United States: the Prelude to Hamdi

As part of "the war against terrorism," as of August 2005 the President had designated and detained two American citizens, Yaser Esam Hamdi and José Padilla, as unlawful combatants. The President similarly designated Ali Saleh Kahlah al-Marri, a non-citizen living legally within the United States. The American military claimed to have captured Hamdi as an armed belligerent in Afghanistan, while the Federal Bureau of Investigation arrested both Padilla and al-Marri in the United States in connection with suspected terrorist activities. The situation of Hamdi and Padilla differed significantly from that of the Guantanamo detainees. In addition to being citizens, both were militarily imprisoned on United States territory. Furthermore, Padilla and al-Marri were actually arrested within the country, pursuant to criminal terrorist investigations, before then being designated as unlawful combatants and transferred to military custody. Executive detention of these three men was therefore a direct domestic application of the war powers, and a functional adjudication of their individual rights. Unlike its position towards the Guantanamo detainees, the Government at no time disputed that these individuals, as citizens or an alien present within the country, had a right to petition for a writ of habeas corpus. Instead, the Government asserted that the detentions of Hamdi, Padilla, and al-Marri were lawful exercises of the executive's constitutional war powers. These cases therefore avoided the jurisdictional issues presented by the Guantanamo detentions. Nevertheless,

they raised even more troublesome controversy about the separation of powers. In detaining Hamdi, Padilla, and al-Marri, as with the foreign detainees in Guantanamo, the President functionally adjudicated individual rights, but acted outside of normal criminal laws and judicial processes – indeed, outside of the judicial institutions – normally applicable to citizens or non-citizens within the United States. These cases not only illustrated the mixing of deliberative processes in executive detention decisions, but involved the President's redirection of formidable war powers to adjudicate individual rights and bypass the domestic legal system.

1. Hamdi

Yaser Esam Hamdi was born to Saudi parents in Louisiana, where his father worked in the oil industry. He lived in the United States only very briefly as a child, however, before his family returned to the Middle East. The Government took him into custody during the military operations in Afghanistan. The Government alleged that, upon capture by Northern Alliance forces in fall 2001,[454] Hamdi was armed and with Taliban forces,[455] which the President refused to recognize as covered by the *Third Geneva Convention's* protections for POWs.[456] After the Northern Alliance transferred Hamdi to American custody, military officials determined that he was an enemy combatant, based upon undisclosed criteria and screening processes. The Government transported him first to Guantanamo Bay, Cuba, before transferring him to the Norfolk Naval Brig in Virginia after discovering that he was an American citizen.[457] The Government subsequently held Hamdi incommunicado without legal counsel, without charges, and without a

[454] *Hamdi* v. *Rumsfeld*, 316 F.3d 450, 460 (4th Cir. 2003), denied rehearing *en banc* 337 F.3d 335 (4th Cir. 2003).

[455] *Ibid.* at 472.

[456] See *supra* note 442.

[457] Hamdi was located at the Norfolk Naval Brig from April 2002 until the time of his release in Sept. 2004. 316 F.3d at 460.

hearing of any kind. Furthermore, Hamdi underwent ongoing interrogation for any information he might have regarding terrorist operations.

Hamdi was personally unable to bring a legal challenge to his confinement due to restrictive detention conditions. Accordingly, his father filed on his behalf a habeas corpus petition in federal court for the Eastern District of Virginia. The District court found, over Government objections to the petition, that given the conditions of Hamdi's detention his father qualified as a "next friend" legally competent to represent Hamdi's interests. It additionally appointed a federal public defender to Hamdi's case, and ordered the Government to grant counsel access to Hamdi. Although the Fourth Circuit Court of Appeals agreed that Hamdi's father was a proper next friend for purposes of filing a habeas petition for his son, it reversed the District Court order granting counsel access to Hamdi based upon deference to the Government's assertions that such access would irreparably disrupt the ongoing interrogation process.[458]

The District Court subsequently undertook a probing examination of the Government's proffered evidence in support of detention, which consisted solely of the "Mobbs Declaration."[459] This document, submitted by Michael Mobbs, a "Special Advisor to the Under Secretary of Defense of Policy," set out the alleged circumstances of Hamdi's capture and reiterated the Government position that he was affiliated with the Taliban, was a belligerent, and qualified as an unlawful combatant. Judge Doumar of the District Court recognized that, "[t]his case appears to be the first in American jurisprudence where an American citizen has been held incommunicado and subjected to an indefinite detention in the continental United States without charges, without any findings by a military tribunal, and without access to a lawyer."[460] In trying to balance the deference due to the executive in national security

[458] *Hamdi* v. *Rumsfeld*, 294 F.3d 598, 600 (4th Cir. 2002) (rejecting next friend status for public defender and third party, but recognizing it for Hamdi's father); *Hamdi* v. *Rumsfeld*, 296 F.3d 278, 282-83 (4th Cir. 2002).

[459] *Hamdi* v. *Rumsfeld*, 243 F. Supp. 2d 527 (E.D. Va. 2002).

[460] *Ibid.* at 528.

matters with individual rights, the court asserted the necessity of "meaningful judicial review"[461] of the detention. The court found that Fifth Amendment due process applied and that the assertions of the Mobbs Declaration, with nothing more, was insufficient justification for the executive's designation and detention of Hamdi as an enemy combatant.[462] Accordingly, the court ordered the Government to deliver, for *in camera* inspection, further information, such as the screening criteria for enemy combatants and contact information about those individuals responsible for making such determinations.[463]

The Court of Appeals for the Fourth Circuit reversed the District Court's order for production, finding it undisputed that Hamdi was captured in a foreign theater of conflict and that the Mobbs Declaration was a sufficient showing of the legal basis upon which the President could detain Hamdi under the war powers.[464] The court found that the separation of powers required great judicial deference to the President's exercise of the war powers. Broad deference was appropriate due to executive expertise in and political accountability for matters of war, while the courts lacked competence in such matters.[465] Thus, the Fourth Circuit found that the Government's proffered factual justifications on their face demonstrated the legality of Hamdi's detention, and separation of powers concerns prohibited further judicial inquiry testing those assertions. Thus, "[t]he factual averments in the [Mobbs] affidavit, if accurate, are sufficient to confirm that Hamdi's detention conforms with a legitimate exercise of the war powers given the executive by Article II, Section 2 of the Constitution and . . . that it is consistent with the Constitution and laws of Congress,"[466] referring particularly to Congress' *Authorization for Use of Military Force* following the September eleventh

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[461] *Ibid.* at 532.

[462] *Ibid.* at 534-35.

[463] *Ibid.* at 528-29.

[464] 316 F.3d at 459.

[465] *Ibid.* at 463.

[466] *Ibid.* at 473.

attacks.[467] The Fourth Circuit later denied rehearing *en banc*,[468] and Hamdi petitioned the Supreme Court for a writ of certiorari, which it granted. The Supreme Court's decision on the case, discussed below,[469] overturned the Fourth Circuit and opened the door to substantive judicial review of the President's functionally adjudicative war powers decisions.

2. Padilla

Authorities originally arrested José Padilla on May 8, 2002 in Chicago on a material witness warrant issued by the court for the Southern District of New York,[470] to which state he was returned and assigned public defense counsel. On June 9, 2002, however, the Department of Justice transferred Padilla to military custody pursuant to a presidential designation of the same day that he was an enemy combatant. This designation declared that Padilla was 1) "closely associated with al Qaeda," 2) had "engaged in war-like acts, including conduct in preparation for acts of international terrorism" against the United States, 3) possessed information useful in preventing further attacks, and 4) was a continuing threat to national security.[471] The Government imprisoned him in the Consolidated Naval Brig in Charleston, South Carolina. Refusing Padilla access to his counsel, the Government justified his arrest based upon alleged contacts with al-Qaeda in the Middle East and his participation in terrorism plots within the United States.[472]

Proceeding as next friend, Padilla's counsel petitioned on his behalf for a writ of habeas corpus. The Southern District Court for New York allowed the

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[467] *Ibid.* at 467-69; *Authorization for Use of Military Force*, *supra* note 82.

[468] *Hamdi* v. *Rumsfeld*, 337 F.3d 335 (4th Cir. 2003), denying rehearing *en banc* of 316 F.3d 450 (4th Cir. 2003).

[469] See 171, below.

[470] *Padilla* v.*Bush*, 233 F.Supp.2d 564, 571 (S.D. N.Y. 2002).

[471] *Ibid.* at 569, 571; U.S. White House, Presidential Order Designating Jose Padilla as an Enemy Combatant (9 June 2002), online: The White House <http://news.findlaw.com/hdocs/docs/padilla/padillabush60902det.pdf>.

[472] 233 F.Supp.2d at 572-73.

petition and addressed threshold issues of jurisdiction and legal authorization for detention. The District Court rejected Government arguments that it lacked habeas jurisdiction over petitioner's custodian, based upon Padilla's transferal from civilian custody in New York to military prison in South Carolina. Rather, the court interpreted the federal habeas statute to reach the Secretary of Defense as the ultimate, rather than immediate, custodian reachable by service of process in the Southern District of New York. [473] The Court also found, as did the Fourth Circuit in *Hamdi*, that the President possessed authority, under his war powers and Congress' *Authorization for Use of Military Force*, to designate and detain American citizens, even within the United States, as unlawful combatants.[474] Again, as with Hamdi, the Government relied upon a declaration by Michael Mobbs as to the factual allegations supporting Padilla's unlawful combatant status.[475] However, the District Court ordered the Government to allow Padilla to meet with legal counsel for purposes of pursuing his petition. Additionally, it established a review standard of "some evidence" that was extremely deferential to executive discretion, but at least permitted Padilla to controvert the Government's factual allegations behind the unlawful combatant designation.[476] The District Court thereby made a weak gesture in balancing the relative competencies of the executive and judicial branches in determining the appropriate scope of judicial review under the separation of powers. After the Government refused Padilla access to counsel under the court's order (which the court affirmed upon reconsideration pursuant to Government motion),[477] it filed an interlocutory appeal upon all issues to the Second Circuit Court of Appeals.

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[473] *Ibid.* at 583-87.

[474] *Ibid.* at 569, 589-90; *Military Force Authorization*, *supra* note 82.

[475] See 165, above.

[476] That is, the Government needed only to present "some evidence" supporting a finding that Padilla was an unlawful combatant. 233 F. Supp. 2d at 607-08.

[477] *Padilla* v. *Rumsfeld*, 243 F. Supp. 2d 42 (S.D. N.Y. 2003).

The Court of Appeals upheld the District Court's ruling that the Secretary of Defense was the proper respondent within the jurisdiction of the court despite Padilla's physical location in South Carolina.[478] It parted with the lower court, however, by expressly finding no inherent presidential power to detain enemy combatants under the war power, and characterizing such a claim as an assumption of legislative power belonging to Congress alone under the separation of powers doctrine. Furthermore, it interpreted relevant statutes strictly against presidential war powers. According to the Court, the *Military Force Authorization* did not permit detention of American citizens on U.S. territory,[479] while also finding that the plain language of the *Non-Detention Act of 1971* at 18 U.S.C. § 4001(a) (forbidding imprisonment of a citizen except pursuant to congressional act) was an absolute bar to the detention of enemy combatants absent express congressional authorization.[480] The Court of Appeals remanded the case to the District Court with orders to issue a writ of habeas corpus.[481] The Government responded by filing a petition for writ of certiorari to the Supreme Court, which granted it and set the case for hearing along with the *Hamdi* appeal. The Court, however, would not consider the merits of the case, finding instead that Padilla had filed his petition in the wrong district, given his detention in South Carolina.

3. Al-Marri

In addition to Hamdi and Padilla, the President also designated and detained one non-citizen as an enemy combatant within the United States. Ali Saleh Kahlah al-Marri, a Quatari graduate student in Illinois, was in the same position for habeas purposes as Hamdi and Padilla because of his presence on American soil. The Government did not dispute his right to petition for a writ

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[478] *Padilla* v. *Rumsfeld*, 352 F.3d 695, 707, 710 (2d Cir. 2003).

[479] *Ibid.* at 712.

[480] *Ibid.* at 718-19; The *Non-Detention Act of 1971*, Pub. L. No. 92-128, 62 Stat. 847 (1971), codified at 18 U.S.C. § 4001(a) (2000), provides: "No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress."

[481] 352 F.3d at 699, 724.

of habeas corpus. Al-Marri was lawfully present in the country on a student visa when authorities first arrested him on a material witness warrant on December 12, 2001 in connection with federal criminal investigations into the attacks of September 11, 2001. Federal prosecutors subsequently indicted him for, among other things, lying to the Federal Bureau of Investigation and for committing credit card fraud.[482] On June 23, 2003, shortly before his scheduled trial in the Central District Court of Illinois, President Bush designated him an enemy combatant.[483] The Department of Defense then took custody of al-Marri, interning him in the Consolidated Naval Brig at Charleston, South Carolina. Federal prosecutors, as a result, dismissed the criminal indictments against him.[484] The Government denied al-Marri access to his legal counsel, who filed a habeas petition on his behalf in the Central District for Illinois. The District Court found itself to be the improper venue for al-Marri's petition, due to his physical detention in South Carolina, despite the Government's swift and purposeful removal of him from the district.[485] Thus, the Illinois District Court decided the jurisdictional issue against petitioner, unlike the New York District Court in the *Padilla* case. Upon appeal, the Court of Appeals for the Seventh Circuit affirmed the District Court's dismissal of the petition for improper venue.[486] The Supreme Court in turn denied certiorari, reflecting its ruling on the jurisdictional issues in *Padilla*.

4. The Supreme Court Appeals

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[482] *Al-Marri* v. *Bush*, 274 F. Supp. 2d 1003, 1004-05 (C.D. Ill. 2003).

[483] *Ibid.*; U.S. White House, Presidential Order Designating Ali Saleh Kahlah al-Marri as an Enemy Combatant (23 June 2003), online: The White House <http://news.findlaw.com/hdocs/docs/almarri/almarri62303exord.pdf>.

[484] 274 F. Supp. 2d at 1004-05; See "Bush Declares Student an Enemy Combatant" *New York Times* (24 June 2003), A-15.

[485] Compare 274 F. Supp. 2d at 1004-05 with *Padilla*, 233 F.Supp.2d 564 (finding that the Secretary of Defense was a proper habeas custodian for purposes of venue despite petitioner's internment in South Carolina).

[486] *Al-Marri* v. *Rumsfeld*, 360 F.3d 707 (7th Cir. 2004), cert. denied 125 S. Ct. 34 (2004).

The Supreme Court, upon appeal, overturned the Circuit Court decisions in both the *Padilla* and *Hamdi* cases. In *Rumsfeld* v. *Padilla*,[487] the Court found that the warden of the Charleston Naval Brig, and not the Secretary of Defense, was the proper respondent and that the District Court for Southern New York therefore had no jurisdiction over Padilla. The Supreme Court disposed of *Padilla* as had the Seventh Circuit in *Al-Marri*, for which the Court later refused to grant certiorari.[488] The Court therefore did not decide upon the merits of Padilla's habeas petition, but required him to petition in the district of his physical confinement. However, the Supreme Court heard arguments in the *Hamdi* case on the same day as *Padilla*, and released the judgments together. *Hamdi* addressed much the same substantive issues presented in *Padilla*, and provided the framework for the future judicial review of any unlawful combatant detentions.

In *Hamdi* v. *Rumsfeld*,[489] the Supreme Court vacated the judgment of the Fourth Circuit Court of Appeal and remanded the case to the District Court for the Eastern District of Virginia. A plurality of justices[490] found, in an opinion by Justice O'Connor, that Congress had authorized detentions of enemy combatants with the *Authorization for Use of Military Force*.[491] However, constitutional due process required a balancing of the individual's fundamental liberty interests and the Government's interests in protecting national security. These interests required consideration in light of the governmental burden in

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[487] 542 U.S. 426; 124 S. Ct. 2711, 2721-22, 2724 (2004).

[488] See *supra* note 485.

[489] 542 U.S. 507; 124 S. Ct. 2633 (2004).

[490] Chief Justice Rehnquist, Justice O'Connor, Justice Kennedy, and Justice Breyer.

[491] "The Government maintains that no explicit congressional authorization is required, because the Executive possesses plenary authority to detain pursuant to Article II of the Constitution. We do not reach the question whether Article II provides such authority, however, because we agree with the Government's alternative position, that Congress has in fact authorized Hamdi's detention, through the AUMF [*Authorization for Use of Military Force*, *supra* note 82]." 124 S. Ct. at 2639, *per* 'Connor J.; A majority of justices agreed that Congress had authorized the President to detain citizens as unlawful combatants. Thomas J., while dissenting with the plurality's due process analysis, nevertheless concurred with its finding that Congress had authorized the detention of unlawful combatants through the *Military Force Authorization*, making it unnecesarry to consider the question of inherent executive power. *Ibid.* at 2679.

affording added procedures relative to the value of those procedures in protecting the private interest at stake.[492] This balancing test was the same one for due process that the Court had articulated in *Mathews* v. *Eldridge*.[493] Applying this test, the Court determined that "a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker."[494] Separation of powers, rather than precluding judicial review, instead mandated that courts scrutinize executive detention decisions for compliance with due process. Concurring with the judgment were Justices Souter and Ginsburg, who agreed with the plurality's due process analysis, but found that neither the *Military Force Authorization* nor any inherent war powers of the President authorized detention of citizens as enemy combatants under the circumstances. Dissenting were Justice Thomas, who would have affirmed the decision of the Fourth Circuit, and Justices Scalia and Stevens, who interpreted the Constitution as requiring the President to prosecute Hamdi in the civil courts either for treason or other criminal charges, or alternatively persuade Congress to suspend the writ of habeas corpus. The President, according to these two dissenters, otherwise had no authority under the war powers to detain a citizen as an unlawful combatant. The *Hamdi* plurality, while finding that the President did indeed have statutory authority to designate and detain individuals as unlawful combatants, nevertheless did not concede to him absolute discretion free from judicial review. Rather, the executive acted in a functionally judicial manner, constitutionally requiring it to adhere to adjudicative standards of due process, subject to judicial review. The *Hamdi* decision provided the basis upon which detainees could ground their

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[492] 124 S. Ct. at 2646-49.

[493] 424 U.S. 319 (1976); See generally Jesselyn A. Radack, "You Say Defendant, I Say Combatant: Opportunistic Treatment of Terrorism Suspects Held in the United States and the Need for Due Process" (2005) 29 N.Y.U. Rev. L. and Soc. Change 525 (written before but published after the Supreme Court decision in *Hamdi*, and suggesting adoption of the *Mathews* test in unlawful combatant cases).

[494] 124 S. Ct. at 2648.

subsequent habeas petitions, and the District Courts would review unlawful combatant detentions.[495]

Unlawful Combatant Detentions as a Separation of Powers Issue

The federal courts, in reviewing the unlawful combatant detentions, dealt not only with individual rights but with fundamental separation of powers issues. Courts had to assess the existence and scope of executive authority to detain unlawful combatants, pursuant to congressional authorization and the Constitution, and their own power to review the executive's detention decisions. In considering these questions, all made within the context of the so-called "war against terrorism,"[496] the lower federal court cases divided on formalistic and more functional approaches to the separation of powers doctrine. The Supreme Court's decisions in *Rasul* and *Hamdi*, in contrast, remained sensitive to the mixed deliberative processes involved in the determination of unlawful combatant status, as well as the relative deliberative virtues of the branches. *Rasul* highlighted the distinction between executive discretion in "federative" and domestic matters, while *Hamdi* in turn asserted the role of judicial review when the executive directed justiciable war powers inward against American citizens and to impact upon domestic affairs. Both cases, arising from habeas petitions, presumed a special constitutional role for the courts whenever the executive sought to deprive a citizen or resident of personal liberty and bypass the civil courts.

Rasul complemented *Hamdi*, in so far as they both distinguished between domestic and foreign exercises of the war powers. *Rasul* found that the right

[495] Subsequent to the Supreme Court's decision, the Government chose not to detain Hamdi any longer, but released him in return for his agreement to renounce his American citizenship and immediately leave the country for Saudi Arabia. See *Hamdi* v. *Rumsfeld*, Settlement Agreement (17 Sept. 2004), online: FindLaw <http://news.findlaw.com/hdocs/docs/hamdi/91704stlagrmnt.html>. Padilla and al-Marri remained in custody, pursuing their habeas petitions in the proper districts. Several alien detainees in Guantanamo would subsequently file habeas petitions based upon the rulings in *Rasul* and *Hamdi*. See Ch. 12, below.

[496] For questions regarding the existence of war, for constitutional purposes, see *supra* notes 82, 328 and 331.

to file a habeas corpus petition ran to foreign territory where the United States exercised plenary and exclusive jurisdiction, but not ultimate sovereignty. Giving the Guantanamo detainees a right to get into federal court to challenge the legality of their detention, *Rasul* ostensibly put foreign detainees in the same position (for purposes of access to judicial process) as if they had been citizens or located in sovereign United States territory. The *Rasul* decision, however, rested upon the peculiar status of Guantanamo Bay, and, though it might apply to analogous territory in the future, it did not undo the basic jurisdictional premise of *Eisentrager*.[497] That is, non-citizens detained in foreign territory, where the United States did not exercise a plenary and exclusive jurisdiction amounting to *de facto* sovereignty, still would have no right to petition for the habeas writ in federal courts. *Rasul* was an exception that proved the *Eisentrager* rule.

Not only did *Rasul* respect *Eisentrager*, but it complied with the *Curtiss-Wright* and *Youngstown* distinctions between foreign and domestic exercises of executive discretion. First, *Rasul* distinguished between foreign and domestic exercises of the war powers in that, absent Congress' statutory extension of district court jurisdiction, the President presumably could still detain non-citizen, unlawful combatants abroad with possibly absolute discretion. Second, in cases of citizens, sovereign United States territory, or exceptional territories such as Guantanamo Bay (where Government control amounted to *de facto* sovereignty), courts had jurisdiction to review executive detentions and therefore check those exercises of the war powers as essentially having a domestic impact. *Youngstown* stood for just such a war powers review. In settling the jurisdictional issues surrounding the Guantanamo Bay detentions, *Rasul* implicitly reinforced the *Curtiss-Wright* and *Youngstown* paradigm that would favor an executive authority to detain unlawful combatants, while at the same time supporting judicial review of such

[497] The Supreme Court's determination of Guantanamo Bay's status thus depended upon a contextual judicial assessment of the base's peculiar characteristics, for purposes of a habeas corpus petition. Non-citizens located at military bases abroad or other foreign areas under American control would therefore still fall outside of district court jurisdiction, unless that control was so complete as to resemble the *de facto* American sovereignty over Guantanamo Bay.

detentions when domestically-oriented against citizens or within United States territory. *Rasul* therefore intersected with *Hamdi* by promoting the distinction between "federative" and domestic executive power. Furthermore, it gave the Guantanamo detainees the same access to judicial process as Hamdi, Padilla, and al-Marri, and raised the possibility (though did not decide) that the lawfulness of their detention as unlawful combatants would be tested under the due process standards established in *Hamdi*.

The Supreme Court's decision in *Hamdi* responded to conflicts between the lower federal courts in the cases of both Hamdi and Padilla. No court went so far as to deny habeas jurisdiction over a citizen detainee, but some so broadly deferred as to make a showing of legality sufficient upon the executive's word alone. Finding that the authority to detain unlawful combatants arose under the President's war powers, the Fourth Circuit and New York District Court in the *Hamdi* and *Padilla* cases, respectively, were extremely reluctant to restrict, in any degree, executive discretion. Misapplying the precedent of *Ex parte Quirin*,[498] which supported executive authority to detain unlawful combatants, the Fourth Circuit in *Hamdi* and the New York District Court in *Padilla* accepted broad presidential discretion to designate, indefinitely detain, and possibly militarily try both citizens and non-citizens within the United States as unlawful combatants. These courts exhibited an approach to judicial review stunted by broad interpretation of statutory authorization, excessive deference to executive war powers, and a formalistic conception of the separation of powers doctrine. This approach allowed the President effectively to determine the scope and application of his own war powers, and then insulated their exercise from meaningful judicial review as a non-justiciable political question. Furthermore, these lower court decisions failed to appreciate the *Curtiss-Wright* and *Youngstown* distinction between the executive's discretion in foreign versus domestic affairs. The courts did so by formalistically categorizing any and all exercises of the war powers as political questions beyond judicial competency. Rather than

[498] 317 U.S. 1. See 228, below, for analysis of how the Fourth Circuit Court of Appeals and the Southern District Court of New York misapplied *Quirin*.

preserving the separation of powers, such deferential review instead weakened structural protections against inwardly-directed war powers. Moreover, the formalistic approach of the Fourth Circuit and New York District Court disregarded the importance of deliberative processes to the separation of powers doctrine. By classifying unlawful combatant detentions as political questions, solely on account of their inclusion in the war powers, these courts permitted the President to exercise functionally judicial processes and infringe individual rights without effective check by the courts. Such broad and unfettered presidential discretion threatened the separation of powers and undermined Lockean structural protections for the public good.

The Supreme Court's plurality decision in *Hamdi* differed from the formalistic one taken by the Fourth Circuit below and the New York District Court in the *Padilla* case. This contextual approach to review respected the *Curtiss-Wright* and *Youngstown* distinction between foreign and domestic exercises of executive discretion. The Court's reasoning was sensitive to deliberative processes, and recognized that presidential detention of citizens as unlawful combatants had functionally judicial aspects that triggered the courts' own competency to adjudicate individual rights and so justified judicial review. Because of the functionally judicial nature of unlawful combatant detentions, the Supreme Court imposed upon the executive's decision-making process the due process analysis of *Mathews*, which derived procedural requirements by contextually balancing individual liberty with government interests, and took into account the relative values and burdens of procedural safeguards. The Court imposed fair hearing requirements, but left to the lower courts the responsibility of evaluating the constitutional sufficiency of the executive's detention decisions in any particular case. Thus, the President had constitutional power under the war powers to detain unlawful combatants, but could only do so subject to congressional authorization, the adjudicative standards of due process, and judicial review – all dependent upon factual context and substantive considerations. *Hamdi's* due process test, in its richer sense, therefore required that an executive detention decision be legal, procedurally fair, and reasonable. Judicial application of these standards belied a deliberative processes approach to the separation of powers, under

which the decision to detain an unlawful combatant implicated overlapping core executive and judicial functions, respectively to prosecute war and adjudicate individual rights.

Chapter IX: Judicial and Executive Aspects of Unlawful Combatant Detentions

Unlawful Combatancy as Criminal and Military Status

Leading up to the Supreme Court's *Hamdi* decision in 2004, as part of the military response to the "war against terrorism," the President designated and detained under his war powers both citizens and non-citizens as "enemy combatants." This status was a synonym for so-called "unlawful combatants,"[499] who fail to satisfy the *Third Geneva Convention's* criteria for lawful belligerency[500] and are subject to trial by special military commissions pursuant to act of Congress. However, as shown by the federal cases dealing with Hamdi, Padilla, and the Guantanamo detainees, the executive branch's treatment of unlawful combatants raises separation of powers concerns: the President thereby uses a broad discretion under his war powers – whether inherent or statutory in origin – in a way that infringes individual rights and impacts upon domestic affairs. In so designating, detaining, and possibly trying unlawful combatants, the President therefore acts in a functionally judicial manner, purportedly through his military capacity. Such cases engage the core decision-making functions of both branches, each possessing deliberative virtues suited to the matter depending upon the war-making or adjudicative aspects emphasized. As such, unlawful combatant cases display a high degree of justiciability, at the same time that they fall under the executive's war powers. Under the deliberative processes approach to the separation of powers doctrine, while the President might detain unlawful combatants under the color of statute or possibly even inherent constitutional authority, the quasi-judicial nature and justiciability of such decisions enable

[499] See *Padilla*, 233 F. Supp. 2d at 593.

[500] *Geneva III, supra* note 442, art. 4(2).

courts to review them, and hold the executive to deliberative standards of adjudication.

While the Supreme Court later recognized the justiciability and permit review of detentions in *Hamdi*, the lower courts first conflicted on the ambiguous criminal and martial status of unlawful combatancy, as it came before them. The Fourth Circuit Court of Appeals' decisions in *Hamdi* illustrated the difficulties associated with characterizing unlawful combatancy as a strictly criminal or belligerent status. The Court of Appeals rejected Hamdi's claim that his detention was unlawful because the President had exceeded his constitutional powers and held petitioner without due process. The court found that the President's discretionary authority to detain a citizen as an unlawful combatant, without hearing or trial, was a lawful exercise of the war powers pursuant to congressional authorization, and so deserved broad judicial deference as a matter of national security.[501] Furthermore, the question of indefinite detention was untimely as hostilities in Afghanistan continued.[502] In its opinion, however, the Fourth Circuit insufficiently addressed a crucial aspect of petitioner's detention, in so far as it related to the justifiable nature of executive interference with petitioner's liberty. That is, the Government held Hamdi neither as a prisoner of war under the *Third Geneva Convention* nor as a criminal under domestic laws, but as an unlawful combatant who had violated the laws of war, exempting him from protection as a POW and subjecting him to criminal punishment.

Analysis of detention status in the circumstances reveals a tension between the President's duty to protect the United States as Commander-in-Chief, and to execute the domestic criminal laws and uphold the Constitution as the Chief Executive. These potentially conflicting duties engage, on the one hand, a broad discretion to make decisions for the national security, with a responsibility to prosecute alleged criminals in courts and cooperate with them in preserving the rule of law. The ambiguities of unlawful combatant status

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[501] 316 F.3d at 474.

[502] *Ibid.* at 476.

therefore suggest the overlapping institutional competencies of the executive and judicial branches to resolve such cases according to executive or judicial deliberative processes. In dealing with this tension, however, the Fourth Circuit refused to question the executive's factual allegations in support of Hamdi's detention, or to inquire into the actual conditions of internment. In that way, the court gave the President almost unreviewable discretion to detain an individual under onerous conditions, ignoring the punitive, as opposed to merely preventive, characteristics of the incarceration:

> Hamdi and the amici make much of the distinction between lawful and unlawful combatants, noting correctly that lawful combatants are not subject to punishment for their participation in a conflict. But for the purposes of this case, it is a distinction without a difference, since the option to detain until the cessation of hostilities belongs to the executive in either case. It is true that unlawful combatants are entitled to a proceeding before a military tribunal before they may be punished for the acts which render their belligerency unlawful. *Quirin*, 317 U.S. at 31. But they are also subject to mere detention in precisely the same way that lawful prisoners of war are. *Id.* The fact that Hamdi might be an unlawful combatant in no way means that the executive is required to inflict every consequence of that status on him.[503]

The court went on to say that "[w]e are not here dealing with a defendant who has been indicted on criminal charges in the exercise of the executive's law enforcement powers. We are dealing with the executive's assertion of its powers to detain under the war powers of Article II."[504] The Fourth Circuit formalistically categorized unlawful combatant detentions as executive war powers, paying attention neither to the criminal aspects of unlawful combatant status nor to the functionally mixed executive and judicial deliberative processes involved.

Designation as an unlawful combatant, in contrast to the Fourth Circuit's formalistic understanding of the status, is in its nature akin to a criminal charge, in which the individual remains subject to detention, trial, and punishment at the President's personal discretion. The decision of the Circuit

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[503] *Ibid.* at 469.

[504] *Ibid.*

Court would mean that the executive could unilaterally designate an individual as an unlawful combatant, and not only detain him for the duration of a conflict to prevent further belligerency, but hold him at pleasure under punitive conditions without ever bringing the person to trial before either a civil court or even a military commission. The Supreme Court, however, reversed the Fourth Circuit, showing attention to the ambiguous status of unlawful combatants and the deliberative processes involved in their designation, detention, and possible trial. The Supreme Court in *Hamdi* agreed that the President can detain and try citizens as unlawful combatants under the war powers, but reaffirmed the power of the courts to review such decisions due to their inherent justiciability, thereby accommodating the deliberative processes of both the executive and judicial branches.

The criminal, punitive aspects of an unlawful combatant designation arise under the international laws of war. While regularly used in legal literature, however, the term "unlawful combatant" appears nowhere in the relevant international instruments.[505] It instead represent the implied status of those individuals failing to conduct warfare lawfully, as defined by the *Hague* and *Third Geneva Conventions*.[506] The *Third Geneva Convention* of 1949 incorporated the definition of lawful combatants contained in the earlier *Hague Convention*, with some modifications, and both treaties now represent customary international law.[507] These treaties establish four criteria identifying those belligerents who are lawful and protected by their respective provisions. Lawful combatants are 1) to be commanded by a person responsible for his subordinates, 2) to have a fixed distinctive emblem recognizable at a distance, 3) to carry arms openly, and 4) to conduct their operations in accordance with

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[505] Knut Dörmann, "The legal situation of 'unlawful/unprivileged' combatants" (2003) 85 (no. 849) *International Review of the Red Cross* 45 at 46.

[506] *Ibid.* at 46-47; See *Convention Respecting the Laws and Customs of War on Land, with Annex of Regulations*, 18 Oct. 1907, Annex art. 1, 36 Stat. 227, T.S. 539 (26 Jan. 1910) [hereinafter *Hague Convention*] (ratified by the United States) and *Geneva III*, *supra* note 442, art. 4(2).

[507] René Provost, *International Human Rights and Humanitarian Law* (Cambridge: Cambridge University Press, 2002) at 34-35; Horst Fischer, "Protection of Prisoners of War," ch. 7 in *The Handbook of Humanitarian Law in Armed Conflicts*, ed. Dieter Fleck (Oxford: Oxford Univ. Press, 1995) 321 at 325.

the laws and customs of war.[508] Members of national militaries are, as a general rule, qualified combatants under these criteria.[509] Lawful combatants need not be part of a regular national military force, however, and can include civilians; militia, partisans, popular resistance movements, and other irregular forces are entitled to POW protection as long as they operate under the four criteria and in so doing represent a party to an armed conflict.[510] Neither the *Hague* nor *Geneva Convention* explicitly discusses the status of those belligerents failing to meet these conditions, so-called "unlawful" combatants. However, the implication of this silence is that such combatants are not entitled to protection as prisoners of war under the *Third Geneva Convention*, and so are subject to punishment for their actions.[511]

Lawful combatants are entitled to POW status upon capture. The *Third Geneva Convention* guarantees, among other things, that prisoners are to be interned together under specified humane conditions,[512] are entitled to mail communication,[513] and may not suffer punishing interrogation.[514] Perhaps

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[508] *Hague Convention*, *supra* note 506, Annex art. 1; *Geneva III*, *supra* note 442, art. 4(2); For further explanation of the protection due to POWs, see generally Fischer, *ibid.*

[509] Knut Ipsen, "Combatants and Non-Combatants," ch. 3 in *The Handbook of Humanitarian Law in Armed Conflicts*, ed. Dieter Fleck (Oxford: Oxford Univ. Press, 1995) 65 at 66-67.

[510] G. I. A. D. Draper, "The Development of International Humanitarian Law," in *Reflections on Law and Armed Conflicts: The Selected Works on the Laws of War by the late Professor Colonel G.I.A.D. Draper, OBE*, eds. Michael A. Meyer and Hilaire McCoubrey (The Hague: Kluwer International, 1998) 69 at 73 [hereinafter *Selected Works*]; *Geneva III*, *supra* note 442, art. 4A(6), also grants POW status to civilians participating in a *levée en masse*, where the civilian population spontaneously resists invaders in situations where organization is not possible, and civilian resistance otherwise follows the laws of war. However, *Geneva III* only protects such resistance in territory *not yet occupied* by an invading force, after which unorganized civilian resistance becomes unlawful. Ipsen, *ibid.* at 70-72, 79-80; As for the relationship between combatants and a party to the conflict, "[t]he exact nature or quality of this nexus is far from certain." G. I. A. D. Draper, "The Status of Combatants and the Question of Guerilla Warfare" (1971) 45 Brit. Yearbook Int'l. L. 173 at 200 [hereinafter "Status of Combatants"].

[511] Dörmann, *supra* note 505 at 46-47; As mentioned at 185, below, this does not mean that unlawful combatants lack all protection under international humanitarian or human rights law; Regarding unlawful combatant status under international law, see for example the Privy Council case of *Mohamed Ali and Another* v. *Public Prosecutor* [1968] 3 All ER 488 (P.C.), discussed in R. R. Baxter, "The Privy Council on the Qualifications of Belligerents" (1969) 63 Amer. J. Int'l. L. 290 at 294-96.

[512] *Geneva III*, *supra* note 442, arts. 22, 25-30.

[513] *Ibid.*, art. 71.

most importantly, under the *Third Geneva Convention*, the capturing power may not punish lawful combatants for their hostile and violent acts during war, but only hold them for the duration of the conflict to prevent their further belligerency, after which the captor must promptly free and repatriate them.[515] Offenses committed by POWs are punishable only under the rules for courts martial that apply to members of the captor's own military forces.[516] A competent tribunal is to resolve any doubt as to whether a captured belligerent qualifies as lawful and is thus protected under the *Third Geneva Convention*, or is unlawful and so falls outside of the treaty.[517] Captives whose lawful status the capturing power questions are to be accorded full protection as POWs until the tribunal determines otherwise.[518]

The protection guaranteed to POWs by the *Third Geneva Convention* contrasts markedly with that due to captured "unlawful" belligerents not meeting the *Hague* and *Geneva III* criteria. Unprotected status is dependent upon the individual's lack of compliance with these criteria; thus they may be "either members of the regular forces or members of resistance or guerilla movements who do not fulfil the conditions of status as lawful combatants."[519]

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[514] This requirement is the well-known rule that a POW is obligated to give no more information than his or her name, rank, date of birth, and serial number, and may not be punished for failure to say more. *Ibid.*, art. 17.

[515] *Ibid.*, arts. 13, 99, 118.

[516] *Ibid.*, arts. 82, 84, 102.

[517] *Ibid.*, art. 5.

[518] *Ibid.*; The President unilaterally determined that Taliban fighters and al-Qaeda associates did not qualilfy as POWs under the *Third Geneva Convention*. See *supra* note 442. In response to the Supreme Court's *Hamdi* decision that detainees must be afforded due process in confronting the factual allegations against them, the Government established the Combatant Status Review Tribunal. The Tribunal, composed of three officers, would conduct status hearings for each detainee, who could make representations before the Tribunal with benefit of militarily assigned counsel. U.S. Department of Defense, Order Establishing Combatant Status Review Tribunal (7 July 2004), online: Department of Defense <http://www.defenselink.mil/news/Jul2004/d20040707review.pdf>. Such Tribunals only considered whether the detainee was an unlawful combatant under the terms of the President's Military Order, *supra* note 443, instead of the *Third Geneva Convention's* provisions for POWs. The Court of Appeal for the D.C. Circuit, however, found that absence of a *Geneva III*, art. 5 hearing did not preclude trial before military commission. *Hamdan* v. *Rumsfeld*, 415 F.3d 33 (D.C. Cir 2005), overruling 344 F. Supp. 2d 152 (D.C. 2004).

[519] Ingrid Detter, *The Law of War*, 2d ed. (Cambridge: Cambridge University Press, 2000) at 136.

Unlike lawful combatants entitled to protection as POWs, unlawful combatants are subject to punishment by the capturing power simply on account of their belligerency, even without the commission of any other act constituting a war crime.[520] In further contrast to the *Third Geneva Convention*, the precise standards of treatment to which unlawful combatants are subject in detention and punishment are uncertain. In times not long past, these individuals enjoyed no protection under the laws of war, even to the extent that capturing states were entitled summarily to execute them.[521] This extreme disparity in treatment of POWs and unlawful combatants underlies the significance that the latter designation traditionally had under the laws of war. "The principle of distinction is of importance. If a person fulfils the requirements for [lawful] combatant status he is entitled to the 'rights' of a soldier, notably to enjoy prisoner of war status if captured; if he does not fulfil these requirements, he is an 'unlawful combatant' and may be shot."[522] The possibility of harsh treatment places unlawful combatants, as criminals in wartime, on a dividing line between legal paradigms of crime and war, meaning that the capturing state can both punish them as criminals and deal with them as belligerent enemies.[523]

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[520] "It is generally accepted that unlawful combatants may be prosecuted for their participation in hostilities, even if they respect all the rules of international humanitarian law. . . . If unlawful combatants furthermore commit serious violations of international humanitarian law, they may be prosecuted for war crimes." Dörmann, *supra* note 505 at 70-71; "Unlawful combatants must not be confused with war criminals." Yoram Dinstein, "The Distinction Between Unlawful Combatants and War Criminals" in *International Law at a Time of Perplexity – Essays in Honour of Shobtai Rosenne*, ed. Yoram Dinstein, (Dordrecht, Netherlands: Nijhoff, 1989) 105 at 107; Ipsen, *supra* note 509 at 68; See also R. R. Baxter, "So-Called 'Unprivileged Belligerency': Spies, Guerillas, and Saboteurs" (1951) 28 Brit. Yearbook Int'l. L. 323 at 330-31, 339-40 [hereinafter "Unprivileged Belligerency"], for the proposition that while spies, guerillas, and saboteurs are unprotected under *Geneva III*, such activities are not *per se* war crimes. Baxter criticizes *Ex parte Quirin*, 317 U.S. 1, for implying the contrary position, that actions leading to a failure to qualify for POW status under *Geneva III* are war crimes. The brutality and scale of war crimes typically differs from less serious violations of the laws of war, as by the failure to fight under a command structure. Because such individuals are unprotected, the capturing state can nonetheless punish them for their belligerent acts. *Ibid.* at 342.

[521] Detter, *supra* note 519 at 148.

[522] *Ibid.* at 145.

[523] Bruce Ackerman, "The Emergency Constitution" (2004) 113 Yale L.J. 1029, and "This is not War" (2004) 113 Yale L.J. 1871, suggests that the unique nature of terrorism illustrates the need for a new constitutional framework that goes beyond the crime and war paradigm, and would give the President more specific emergency powers to detain individuals subject to special safeguards. A legally defined emergency regime somewhere between peace and war,

Although unlawful combatants might not be subject to the protections of *Geneva III*, the notion of summary execution is now an unacceptable one even under the exigencies of war, and does not reconcile with modern developments in international humanitarian and human rights law. Thus, "it can hardly be maintained that unlawful combatants are not entitled to any protection whatsoever under international humanitarian law."[524] For this proposition, the District Court in *Padilla* cited the United Kingdom's *Manual of Military Law*, which provides that "[n]o law authorizes [officers] to have [any disarmed enemy] shot without trial; and international law forbids summary execution absolutely."[525] Accordingly, before a capturing state imposes punishment, "[i]t is uncontroverted that a person accused of hostile conduct other than as a member of those forces which are entitled to treatment as prisoners of war must be granted a trial."[526] Indeed, the *Hague Convention* entitles spies, for example, to judicial proceedings before punishment.[527] Similarly, *Protocol I* of the *Third Geneva Convention* mandates some degree of due process rights for individuals not qualifying for any other kind of protected status.[528]

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which does not currently exist under the Constitution, would thus prevent executive resort to far more sweeping war powers. Mark Tushnet, "Controlling Executive Power in the War on Terrorism" (2005) 118 Harv. L. Rev. 2673, similarly queries whether a new "constitutional design" or "institutional mechanism" other than the separation of powers and judicial review is necessary to deal with the threat of terrorism, without however formulating an alternative. For criticisms, see Laurence H. Tribe and Patrick O. Gudridge, "The Anti-Emergency Constitution" (2004) 113 Yale L.J. 1801, David Cole, "The Priority of Morality: The Emergency Constitution's Blindspot" (2004) 113 Yale L.J. 1753, and Curtis A. Bradley and Jack L. Goldsmith, "Rejoinder: The War on Terrorism: International Law, Clear Statement Requirements, and Constitutional Design" (2005) 118 Harv. L. Rev. 2683 at 2694-97 [hereinafter "Rejoinder"]; See Frederic Block, "Civil Liberties During National Emergencies: The Interactions between the Three Branches of Government in Coping with Past and Current Threats to the Nation's Security" (2005) 29 N.Y.U. Rev. L. and Soc. Change 459, for a review of statutory powers available to the executive branch for fighting terrorism and other national security threats.

[524] Dörmann, *supra* note 505 at 73.

[525] U.K. War Office, *Manual of Military Law* (1914) at 242, cited in *Padilla*, 233 F. Supp. 2d at 592.

[526] Baxter, "Unprivileged Belligerency," *supra* note 520 at 340.

[527] *Hague Convention*, *supra* note 506, Annex arts. 29-31.

[528] *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protections of Victims of International Armed Conflicts*, 8 June 1977, 1125 U.N.T.S. 3, art. 75 [hereinafter *Protocol I* or *First Protocol*] (signed but not ratified by the United States).

Although the United States has yet to ratify *Protocol I*, despite being a signatory, the extension of minimum due process protections to prisoners falling outside of *Geneva III* meets minimum humanitarian requirements, to prevent the arbitrary and inhumane treatment of detainees.[529] Moreover, an unlawful combatant covered under *Protocol I*, under some circumstances, might be better protected as a civilian under the *Fourth Geneva Convention*.[530] Most fundamentally, the view that unlawful combatants could be summarily executed without any semblance of judicial process "cannot be reconciled with modern ideas about human rights, in particular the rights to life and to a fair trial, even in time of war. Yet, even if such drastic treatment is prohibited and the resistance fighter therefore spared his life, it makes quite some difference whether he remains liable to be put on trial for his warlike activities."[531] While a capturing state might detain and punish an unlawful combatant as

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[529] As Gary D. Solis, "Military Commissions and Terrorists," in Eugene R. Fidell and Dwight H. Sullivan, eds., *Evolving Military Justice* (Annapolis, Md.: Naval Institute Press, 2002) 195 at 197, points out, the Military Order establishing military commissions does not of itself violate *Protocol I*, as it requires that unlawful combatants receive a "full and fair trial." Military Order, *supra* note 443, § 4(c)(2). As such, Solis explains, *ibid.*, the compatibility of a military commission with *Protocol I* (even though the United States might not formally be bound) will depend upon actual procedures used, which should include informing the defendant of reasons for detention, and conviction by an impartial court presuming the defendant's innocence, admitting him to proceedings, precluding self-incrimination, the hearing of friendly witnesses, and permitting of cross-examination. Such process would be required before subjection to punitive detention conditions. See also Ruth Wedgwood, "Agora: Military Commissions: Al Qaeda, Terrorism, and Military Commissions" (2002) 96 Amer. J. Int'l. L. 328 at 336.

[530] *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter *Geneva IV* or *Fourth Geneva Convention*] (ratified by the United States); Because *Geneva IV*, art. 4(4) excepts coverage to nationals of the party or power in which hands they are, as well as to nationals of a state which is not a party to the Convention, it is inapplicable to Hamdi and Padilla as United States citizens. However, it might well have applied to al-Marri as a Qatari. See generally Dörmann, *supra* note 505; Ipsen, *supra* note 509 at 68. However, the D.C. Circuit in *Hamdan*, 415 F.3d 33, interpreted *Geneva III* as not applying to al-Qaeda members. It did not address the possibility that *Geneva III* might apply based upon the nationality of the detainee, even though the home nation was not a party to the conflict.

[531] Frits Kalshoven and Liesbeth Zegveld, *Constraints on the Waging of War: An Introduction to International Humanitarian Law*, 3d ed. (Geneva: International Committee of the Red Cross, 2001) at 40-41; The primary representation of due process as a basic human rights norm is found in the *International Covenant on Civil and Political Rights*, 23 Mar. 1976, 999 U.N.T.S. 171, art. 14 (ratified by the United States) [hereinafter *I.C.C.P.R.*]; Unlawful combatants still possess basic individual rights, as humanitarian law does not necessarily parallel the protections of human rights law, and under the *I.C.C.P.R.* military commissions might require state derogation for a lesser standard of due process. Provost, *supra* note 507 at 41-42; Joan Fitzpatrick, "Agora: Military Commissions: Jurisdiction of Military Commissions and the Ambiguous War on Terrorism" (2002) 96 Amer. J. Int'l. L. 345 at 350-52.

having unprotected status under the *Third Geneva Convention*, it must still respect the prisoner's human rights. Human rights abuses can, if severe enough, themselves amount to severe breaches of international law or perhaps even war crimes, while wrongful denial of POW status alone would be a grave breach of the *Convention*.[532] "Unlawful combatant" status, then, denotes individual behavior that violates the laws of war, is criminal, and is subject to punitive treatment under international law.[533]

A presidential designation under the war powers[534] that an individual qualifies as an unlawful combatant alleges unlawful combatant status and violations of the international laws of war, through failure to satisfy the conditions of lawful belligerency in the *Hague* and *Third Geneva Conventions*.[535] As the Southern District Court of New York observed in *Padilla*, "when the President designated Padilla an 'enemy combatant,' he necessarily meant that Padilla was an unlawful combatant, acting as an associate of a terrorist organization whose operations do not meet the four criteria necessary to confer lawful combatant status on its members and adherents."[536] Unlawful belligerency, however, is also a domestic offense under U.S. law, according to the reasoning of *Quirin* and its progeny, because of Congress' incorporation of the laws of war and its authorization of special military commissions through the *Uniform Code of Military Justice*.[537]

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[532] For a brief historical overview of those human rights violations constituting war crimes, see Howard S. Levie, "Violations of Human Rights in the Time of War as War Crimes" in *War Crimes in International Law*, ed. Yoram Dinstein and Mala Tabory (The Hague: Nijhoff Publishers, 1996) at 123.

[533] Acts giving rise to unlawful combatant status are therefore, like war crimes, "a special case of a crime, committed in violation of the international order of the law of war, while in pursuit of war against a particular enemy." Noah Feldman, "Choices of Law, Choices of War" (2002) 25 Harv. J. L. Pub. Pol. 457 at 465. But see *supra* note 520, regarding the distinction of unlawful combatancy from war crimes.

[534] U.S. Const. art. II, § 2.

[535] *Hague Convention*, *supra* note 506, Annex art. 1; *Geneva III*, *supra* note 442, art. 4(2).

[536] 233 F. Supp. 2d at 593.

[537] See *Quirin*, 317 U.S. at 30; *Uniform Code of Military Justice*, Pub. L. No. 81-506, 64 Stat. 107 (1950), codified as amended at 10 U.S.C. § 801 *et seq.* (2000) [hereinafter *U.C.M.J.*]. See 215, below.

Accordingly, as the Fourth Circuit suggested in *Hamdi*,[538] the dual criminal/belligerent status of unlawful combatants means that the President has authority either to detain them as a preventive measure or punish them for their belligerent actions. What the Circuit Court failed to do, however, is draw attention to the President's discretion in dealing with unlawful combatants, and the need for judicial review to prevent abuse of that authority. That is, the President must administratively detain an unlawful combatant during the conflict in ways that are humane, respectful of the prisoner's basic human rights, and not punitive. Alternatively, he can punitively incarcerate them only after they have been adjudged guilty through some fair process or trial, even if before a military commission. In any case, if the President chooses to detain an individual as an unlawful combatant rather than seek prosecution in a civil court, he must comply with fundamental due process. Indeed, the *Third Geneva Convention* itself mandates a fair status determination before designating someone as an unlawful combatant outside of the treaty's protections.[539] Formalistic categorizations of unlawful combatant detentions as non-justiciable war powers not only ignores the judicial and criminal aspects involved, but upsets the separation of powers by allowing the President to act without effective check by the courts, and in disregard of deliberative standards of adjudication. The Supreme Court's decision in *Hamdi*, in contrast, restrained executive discretion by requiring that all unlawful combatant designations, detentions, and trials indeed meet adjudicative standards of due process, subject to judicial review. As such, the Supreme Court rejected a formalistic understanding of the separation of powers doctrine, in favor of a deliberative processes approach recognizing the overlapping institutional competencies of both the executive and judicial branches in making unlawful combatant detention decisions.

Military Commissions

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[538] 316 F.3d at 469, quoted at 180, above.

[539] *Geneva III*, *supra* note 442, art. 5.

On November 13, 2001, President Bush issued an order for the "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism."[540] Section 2 of the Order applies to non-citizens whom the President determines 1) are members of al Qaeda, 2) are international terrorists acting detrimentally to the United States, or 3) have harbored individuals falling into the first two categories. The President could order the detention of those persons whom he suspected to be within the scope of the order.[541] Until the Supreme Court decision in *Hamdi*, it was unclear as to whether an individual could be so detained without benefit of hearing or any other process. Furthermore, the President might criminally prosecute such individuals, directing that they "when tried, be tried by military commission for any and all offenses triable by military commission that such individual is alleged to have committed, and may be punished in accordance with the penalties provided under applicable law, including life imprisonment or death."[542] The legal basis for the Order rested upon the President's authority as Commander-in-Chief,[543] Congress' *Authorization for Use of Military Force* and provisions of the *U.C.M.J.*[544] However, because there was no law requiring trials of designees, prosecution remained within the President's discretion. Furthermore, the executive power to arrest and detain unlawful combatants did not rely upon the laying of formal criminal charges or actually convening a commission. In this way, the President claimed authority to arrest

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[540] Military Order, *supra* note 443.

[541] *Ibid.*, § 3.

[542] *Ibid.*, § 4(a); Several non-citizen detainees at Guantanamo Bay were subsequently charged for trial by military commissions, pursuant to the Military Order. The first military commission was actually convened on 24 August 2004 in the case of *United States* v. *Salim Achmed Hamdan*, a short time after the Supreme Court's decision in *Hamdi*. U.S. Department of Defense, News Release, "First Military Commission Convened at Guantanamo Bay, Cuba" (24 Aug. 2004), online: Department of Defense <http://www.defenselink.mil/releases/2004/nr20040824-1164.html>.

[543] U.S. Const. art. 2, § 2.

[544] *Military Force Authorization*, *supra* note 82; *U.C.M.J.*, art. 21 at 10 U.S.C. § 821 (reserving to military commissions concurrent jurisdiction with courts martial) and art. 36 at § 836 (authorizing President to establish rules of procedure for military commissions). For their text, see *infra* note 580.

and detain an individual indefinitely without trial or other adjudicatory process.

Military commissions of the type authorized by the Military Order are exceptional, quasi-judicial tribunals that differ from civil courts established under Article III of the U.S. Constitution. As typified by the Defense Department's Order No. 1 establishing implementation regulations for the Military Order, such commissions would consist of a panel of military officers instead of a life-tenured judge appointed by the President and confirmed by Senate.[545] Commissions also "derive their basic grant of authority from Articles I and II of the United States Constitution," and there proceedings are means by which Congress can therefore exercise its power to "define and punish . . . offenses against the Law of Nations."[546] Based upon the *Quirin* precedent, which the Supreme Court followed in *Hamdi*, Congress authorized commissions and simultaneously incorporated the laws of war through the language of the *U.C.M.J.*, which at section 821 provides: "The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost court, or other military tribunal."[547] Additionally, section 836 enables the President to establish rules of procedure for commissions.[548] Some federal courts, including the Supreme Court in *Hamdi*, also interpreted Congress' *Authorization for Use of Military Force* to be a general authorization for whatever measures the President found

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[545] U.S. Department of Defense, Military Commission Order No. 1 (21 March 2002), § 4(A)(3), online: Department of Defense <http://www.defenselink.mil/news/Mar2002/d20020321ord.pdf> [hereinafter "Order No. 1"], provides that: "Each member and alternate member [of the commission] shall be a commissioned officer of the United States armed forces ("Military Officer"), including without limitation reserve personnel on active duty, National Guard personnel on active duty in Federal Service, and retired personnel recalled to active duty."; Jennifer Elsea, "Terrorism and the Law of War: Trying Terrorists as War Criminals before Military Commissions," Report for Congress, Congressional Research Service (11 Dec. 2001) at 16 [hereinafter "Terrorism and the Law of War"].

[546] U.S. Const. Art. I § 8; Jeffrey Addicott, "Legal and Policy Implications for a New Era: The 'War on Terror'" (2002) 4 Scholar: St. Mary's L. Rev. Minority Issues 209 at 243.

[547] *U.C.M.J.*, art. 21 at 10 U.S.C. § 821; See Addicott, *ibid.* at 243-44.

[548] *U.C.M.J.*, art. 36 at 10 U.S.C. § 836.

necessary to take as Commander-in-Chief, which included the detention of unlawful combatants, in response to the terrorist attacks of September 11, 2001.

That the President possesses some authority under the war powers to detain individuals and try them by military commission is clear, as in the past the executive branch has employed commissions for such things as the governance of territory under military occupation or the imposition of martial law in times of emergency, as well as for punishing violations of the laws of war.[549] However, it is unclear to what extent, if any, the President possesses inherent discretionary authority to detain and try unlawful combatants. Authority for commissions and detentions potentially arises *sui generis* from the Constitution, the common law of war, as well as from statute. It is therefore uncertain whether a statutory basis for commissions and the incorporation of international law is the sole source for their existence, or is merely legislative recognition of a presidential war power that arises from the Constitution and the nature of executive power itself. These distinctions raise important questions about the source and extent of executive discretion, the personal and subject matter jurisdiction of commissions, as well as the judicial interpretation of the potential legal sources of such power.[550] In *Hamdi*, the Government argued that no congressional authorization to detain was required, as the President possessed plenary authority to do so under Article II of the Constitution. However, the Supreme Court found it unnecessary to reach the question of inherent authority, in light of Congress' *Military Force Authorization*.[551]

During World War II, the Supreme Court in *Quirin* elaborated upon the jurisdiction of military commissions to allow the President to detain and punish enemy belligerents for violating the laws of war. This case remains the

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[549] Maj. L. K. Underhill, "Jurisdiction of Military Tribunals in the United States over Civilians" (1924) 12 Cal. L. Rev. 75 at 84-85; See Elsea, "Terrorism and the Law of War," *supra* note 545 at 18; See 205, below.

[550] A. Wigfall Green, "The Military Commission" (1948) 42 Amer. J. Int'l. L. 832 at 834.

[551] 124 S. Ct. at 2639.

main precedent on the existence of executive power to detain and try unlawful combatants, although the Court's later opinion in *Hamdi* would explore due process limitations upon the exercise of that power and the judicial role in reviewing it. Based upon *Quirin* and the historical use of military commissions, the constitutional permissibility of commissions intertwines with their personal and subject matter jurisdictions, and arises out of wartime circumstances.[552] The exceptional jurisdiction of commissions distinguishes them from Article III courts, which have general jurisdiction over federal crimes and an exclusive one over civilians, but for the rare exceptions of the imposition of martial law and the occupation of foreign territory.[553] The military nature of commissions and unlawful combatant detentions, having origins in Articles I and II of the Constitution, also exempts them from some procedural protections normally mandated by the Bill of Rights in civil courts, such as trial by jury.[554] Detentions and use of military commissions thus differ from regular criminal processes in that they are unique instruments of military power. Commissions can maintain civil order in areas under martial law or that are militarily occupied. Alternatively, discretionary detentions and military trials can project military force against individuals off the battlefield, as in the case of spies, saboteurs, unlawful combatants failing to obey the laws of war, or perpetrators of war crimes. Military commissions might be constitutionally appropriate to maintain military government or punish violations of the laws of war, but their use is dangerous when they target civilian criminal activity for the purposes of ensuring swift and certain punishment, and avoiding structural checks on executive power that prevent arbitrary interferences with personal liberties. [555] Therefore, in their purposes

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[552] Maj. Timothy C. MacDonnell, "Military Commissions and Courts-Martial: A Brief Discussion of the Constitutional and Jurisdictional Distinctions Between the Two Courts," (March 2002) Army Lawyer 19 at 26, classifies these three types of military commissions as martial law courts, military government courts, and war courts for specific violations of the laws of war. For detailed discussion of these three types of commissions, see generally Col. William Winthrop, *Military Law and Precedents*, 2d rev. and enl. ed. (Washington, D.C.: Government Printing Office, 1920) at 798-841.

[553] See 205, below.

[554] See 197-98, 219, below.

[555] Fitzpatrick, "Jurisdiction of Military Commissions," *supra* note 531 at 345. See for example *Ex parte Milligan* 71 U.S. (4 Wall.) 2 (1866).

and character, military commissions and detentions bridge the gap between the pursuit of military objectives and the enforcement of criminal law.

Personal and Subject Matter Jurisdiction: Executive Authority to Detain and Try

The Military Order and Order No. 1, however, gave only a superficial impression of executive authority to detain unlawful combatants or otherwise convene military commissions. The Military Order made clear that it did not "limit the lawful authority of the Secretary of Defense, any military commander, or any other officer or agent of the United States or of any State to detain or try any person who is not an individual subject to this order."[556] This savings clause might first suggest the continued availability of prosecution before the civil courts for any number of federal crimes. Its reference to detention and prosecutorial authority in the Defense Secretary and military commanders, however, implied the broader reach of military commissions and the detention power. Military Commission Order No. 1 was more explicit, stating that "[n]othing in this Order shall affect the authority to constitute military commissions for a purpose not governed by the President's Military Order."[557] The Military Order was therefore neither a complete declaration of nor the source for the presidential authority to detain and try unlawful combatants for violations of the laws of war. It was instead a policy statement only, which by its own terms disclaimed creating any enforceable legal rights or expectations for those subject to it.[558]

Substantively, the Military Order (and so also Order No. 1) placed an unenforceable restriction on the personal jurisdiction that commissions have,

[556] Military Order, *supra* note 443, § 7(a)(3).

[557] Order No. 1, *supra* note 545, § 8.

[558] Military Order, *supra* note 443, § 7(c) provides: "This order is not intended to and does not create any right, benefit, or privilege, substantive or procedural, enforceable at law or equity by any party, against the United States, its departments, agencies, or other entities, its officers or employees, or any other person."

while narrowing and enlarging its subject matter jurisdiction for the offenses for which the President might detain and try an individual. The Order applied to non-citizens the President had reason to believe 1) are members of al Qaeda, 2) participated in terrorism directed against the United States, or 3) knowingly harbored such individuals.[559] "Thus we have an Executive Order designed to apply (1) just to foreigners who (2) engage in international terrorism."[560] The personal jurisdiction of commissions under the Military Order, like that of any military commission, was closely related if not identical to the substantive offenses for which the President might detain and try an individual before it.[561] The offenses subject to military commissions under the Order, however, were problematic in three respects. First, the Order automatically conflated membership with al-Qaeda, absent any other individual action, with a violation of the laws of war.[562] Second, the Order treated terrorism generally as violations of the laws of war, committed during an armed conflict, with no consideration of the location or circumstances of the act.[563] Third, by including those who aid terrorism or harbor individuals subject to the Order, it reached persons who might not only be civilians, but who were non-belligerents outside of any zone of conflict, and had not violated the laws of

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[559] *Ibid.*, § 2(a)(1).

[560] George P. Fletcher, "On Justice and War: Contradictions in the Proposed Military Tribunals" (2002) 25 Harv. J. L. Pub. Pol. 635 at 649.

[561] Neal A. Katyal and Laurence H. Tribe, "Waging War, Deciding Guilt: Trying the Military Tribunals" (2002) 111 Yale L. J. 1259 at 1259.

[562] Diane F. Orentlicher and Robert K. Goldman, "The Military Tribunal Order: When Justice Goes to War: Prosecuting Terrorists Before Military Commissions," (2002) 25 Harv. J. L Pub. Pol. 653 at 658; American Bar Association, "American Bar Association Task Force on Terrorism and the Law: Report and Recommendations on Military Commissions" (March 2002) Army Lawyer 8 at 13 [hereinafter "ABA Task Force"] (finding that "it is not clear that membership, alone, in al Qaida or harboring terrorists violates the law of war – the necessary predicate to the jurisdiction of a military commission under both common law and Article 21, UCMJ."); Jordan J. Paust, "Antiterrorism Military Commissions: Courting Illegality" (2001) 23 Mich. J. Int. L. 1 at 8, n. 16.

[563] Orentlicher and Goldman, *ibid.* at 654; "ABA Task Force," *ibid.* at 11-12 (finding strong support for the proposition that the September 11 attacks, at least, were acts of War); Fletcher, *supra* note 560 at 651-52; Paust, *ibid.* at 8, n. 16, and 9, n. 17; Katyal and Tribe, *supra* note 561 at 1261 (commenting that "[t]he Order's terms sweep so broadly that they reach a Basque separatist who kills an American citizen in Madrid, or a member of the Irish Republican Army who threatens the American embassy in London.")

war.[564] It thereby "treat[ed] virtually any foreign national whom the President suspects of terrorist-related activity as an enemy belligerent, regardless of whether the United States is engaged in armed conflict."[565] The Military Order extended presidential authority over civilians, generally equating a wide range of possible criminal activities with belligerent acts against the laws of war, and so redefined both domestic criminal and international law. This was a significant intrusion upon the law-making power of Congress, as well as the province of the courts, and constituted an expansion of military authority at the expense of the civil. As such, the Order actually went beyond the jurisdiction of commissions and possibly exceeded the President's authority to detain or try individuals under the laws of war.

The Military Order also limited its applicability to non-citizens. In *Quirin*, however, the Supreme Court made clear that military commissions could try citizens as unlawful combatants, if they violated the laws of war.[566] The Military Order's applicability to non-citizens was therefore not a restriction of the personal jurisdiction of military commissions, but was rather an unenforceable statement of official executive policy. Distinction based upon citizenship also raised two equal protections concerns of disparate treatment based upon nationality, having no rational connection to the purpose of the Military Order, that being the punishment of violations of the laws of war. First, it would permit military trial of an alien within the United States, while a citizen committing the same action would receive a civil trial with full protections under the Bill of Rights. Second, U.S. citizens fighting abroad with terrorists would receive treatment more favorable than, for example, a Taliban Afghani fighting against the Northern Alliance or foreign troops.[567] Such criticism notwithstanding, executive power over unlawful combatants is

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[564] Orentlicher and Goldman, *ibid.* at 658-59; "ABA Task Force," *ibid.* at 13; Katyal and Tribe, *ibid.* at 1263.

[565] Orentlicher and Goldman, *ibid.* at 653.

[566] See also *Colepaugh* v. *Looney*, 235 F.2d 429 (10th Cir. 1956), cert. denied 352 U.S. 1014 (1957).

[567] Katyal and Tribe, *supra* note 561 at 1298.

potentially exempted from some Fifth Amendment due process restraints, as applied in criminal cases, while aliens in general do not enjoy full constitutional protections.[568] The Military Order therefore did not prevent the President from designating, detaining, and trying by military commission, at his discretion, those U.S. citizens whom he believed had violated the laws of war. The mere threat of military detention and trial, moreover, would intensely pressure a citizen prosecuted by civil authorities to plea bargain or cooperate in other ways, for fear of removal to military custody.[569] Even without an instrument like the Military Order, the President possesses authority under the war power to designate, detain, and try both citizens and non-citizens as unlawful combatants. Consequently, the President, by redirecting the war powers against citizens or other individuals within American territory, could detain a person as an unlawful combatant in an attempt to circumvent due process and checks by the other branches. The Supreme Court decision in *Hamdi* attempted to prevent just this, by imposing due process and permitting judicial review of those exercises of the war powers that were contextually justiciable and so within the deliberative competency of the courts.

Procedure Before Military Commissions

Military commissions are not courts martial. The authority of both originates in the military powers of Articles I and II of the Constitution, rather than in Article III. Nevertheless, they are not the same sort of entity:

> [S]ubstantial differences exist between military commissions and courts-martial. Although both courts have existed since the beginning of the United States, they have existed for different purposes, based on

[568] See *United States* v. *Verdugo-Urquidez*, 494 U.S. 259 (1990).

[569] Indeed, after the Supreme Court decision in *Hamdi*, 124 S. Ct. 2633, the Government released Hamdi on the condition that he surrender his U.S. citizenship and return to Saudi Arabia, a deal he accepted rather than face further military detention. See *supra* note 495. John Walker Lindh, a U.S. citizen captured in Afghanistan while fighting for the Taliban, also pleaded guilty to federal criminal charges rather than be detained as an unlawful combatant. See *infra* note 698.

> different sources of constitutional authority, and with different jurisdictional boundaries. These differences can affect who may order a trial, who may be tried, what types of cases the court can hear, and the pretrial, trial, and appellate procedures applied in a particular case.[570]

Article 21 of the *U.C.M.J.* at 10 U.S.C. § 821 underscores these functional differences. By reserving concurrent jurisdiction in some cases to both courts martial and military commissions, Congress implied that there are indeed other areas in which military commission jurisdiction goes beyond that of courts martial. Commission jurisdiction includes spies, saboteurs, civilians engaged in hostilities and others (which could include terrorists and war criminals) who violate the laws of war and so fall outside court martial jurisdiction over U.S. military personnel and prisoners of war.[571] Commissions thus "close the gap that might otherwise preclude trial of these categories of alleged offenders."[572] Congress further reserved concurrent jurisdiction, with the implication that courts martial and commissions have different procedural characteristics. While "cases arising in the land or naval forces"[573] are constitutionally exempt from certain requirements of the Bill of Rights,[574] courts martial nevertheless afford considerable procedural protections to an accused that closely replicate,

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[570] MacDonnell, *supra* note 552 at 19; Maj. Gen. Michael J. Nardotti, Jr., "Military Commissions" (March 2002) Army Lawyer 1; See Evan J. Wallach, "Afghanistan, Quirin, and Uchiyama: Does the Sauce Suit the Gander?" (Nov. 2003) Army Lawyer 18 (arguing that trial of POWs by military commissions, with procedures such as those in the *Quirin* case, violate international law), and also Kevin J. Barry, "Military Commissions: Trying American Justice" (Nov. 2003) Army Lawyer 1 (criticizing the procedures established for military commissions under the President's Military Order), compared with Frederic L. Borch, "Why Military Commissions are the Proper Forum and Why Terrorists Will Have "Full and Fair" Trials: A Rebuttal to Military Commissions: Trying American Justice" (Nov. 2003) Army Lawyer 10 (defending commission procedures).

[571] Daryl A. Mundis, "Agora: Military Commissions: The Use of Military Commissions to Prosecute Individuals Accused of Terrorist Acts" (2002) 96 Amer. J. Int'l. L. 320 at 321; See Henry W. Halleck, "Military Tribunals and their Jurisdiction" (1911) 5 Amer. J. Int'l. L. 958 at 965, and Underhill, *supra* note 549 at 84- 90; Solis, *supra* note 529 at 196.

[572] Mundis, *ibid.* at 321.

[573] U.S. Const. amend. V.

[574] See *Daigle* v.*Warner*, 490 F.2d 358 (9th Cir. 1973) and *Middendorf* v. *Henry*, 425 U.S. 25 (1976) (Constitution does not require appointed counsel in every case of summary court martial), as well as *United States* v. *Graf*, 35 M.J. 450 (Ct. Mil. Appeals 1992) (Constitution does not require military judges to be appointed for fixed terms).

and in some cases might surpass, those in a civil court.[575] In contrast, the right to jury trial, for example, is inapplicable to military commission proceedings and Fifth Amendment due process rights might also be more restricted.[576] Courts martial, as well as Article III civil courts, therefore mainly differ from military commissions in that the latter are relatively free from the rigorous procedural rights applicable to the former two.[577] Unlike courts martial under the *U.C.M.J.*, "no such statutory procedures exist to codify due process rights for defendants before military commissions."[578] Constitutional due process governing commissions must therefore arise independently of any express statutory guarantees. The Supreme Court took this position, by imposing the *Mathews* test upon unlawful combatant detentions and, so by extension, trials by military commissions of citizens or non-citizens present in the United States.

The Military Order and Order No. 1 illustrated the procedural freedom characteristic of military commissions. Military commissions could be convened under the authority of the President as Commander-in-Chief, or through designated executive officers.[579] However, as shown by the Military Order's invocation of both the constitutional power of the Commander-in-Chief and his statutory authorization, the extent to which such commissions arise from or are limitable by statute, as opposed to inherent executive power,

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[575] See *United States* v. *Jacoby*, 29 C.M.R. 244 (Ct. Mil. Appeals 1960) and *United States* v. *Bell*, 40 C.M.R. 807 (Army Board of Review 1969); David L. Herman, "A Dish Best not Served at all: How Foreign Military War Crimes Suspects Lack Protection Under United States and International Law" (2002) 172 Mil. L. Rev. 40 at 71; Juan R. Torruella, "On the Slippery Slopes of Afghanistan: Military Commissions and the Exercise of Presidential Power" (2002) 4 U. Pa. J. Const. L. 648 at 713-14.

[576] See 219, below.

[577] Elsea, "Terrorism and the Law of War," *supra* note 545 at 35.

[578] Jennifer Elsea, "Trying Terrorists as War Criminals," Report for Congress, Congressional Research Service (29 Oct. 2001) at 4; Solis, *supra* note 529 at 197.

[579] Halleck, *supra* note 571 at 965-66; Congress, however, may also specially create a military commission under U.S. Const. art. I, § 8, just as it has authorized the President to convene commissions under 10 U.S.C. § 821. "ABA Task Force," *supra* note 562 at 8-9.

remains unsettled.[580] Supported by both executive and legislative sources, the Military Order gave to the Secretary of Defense the power to appoint military commissions, as well as all rules and regulations to govern its operation.[581] Such executive appointment power arises from the "military function"[582] of the commissions, as a response to a terrorist threat against the United States.[583] Accordingly, it was not "practicable to apply in military commissions under this order the principles of law and the rules of evidence generally recognizable in the trial of criminal cases in the United States district courts."[584] Commissions therefore differ most importantly in three main ways from civil courts, as well as courts martial, based upon evidentiary rules, appellate procedures, and right to jury trial.

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[580] The Military Order, *supra* note 443, specifically mentions, in addition to the authority vested in the President as Commander-in-Chief, the *Military Force Authorization*, *supra* note 82, and 10 U.S.C. §§ 821, 836.

10 U.S.C. § 821 provides: "The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals."

10 U.S.C. § 836 provides: "(a) Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States District courts, but which may not be contrary to or inconsistent with this chapter. (b) All rules and regulations made under this article shall be uniform as practicable."

Halleck, *supra* note 571 at 965-966, a General and Chief of Staff during the Civil War, writes that military commissions "are established by the President, by virtue of his war power as commander-in-chief, and have jurisdiction of cases arising under the laws of war. . . . Congress has recognized the lawfulness of these tribunals, and, in a measure, regulated their proceedings, but it has not defined or limited their jurisdiction. . . ." See also Elsea, "Terrorism and the Law of War," *supra* note 545 at 18. For uncertainty over the respective legislative and executive power to govern military commissions, see *Quirin*, 317 U.S. at 29, 47-48.

[581] Military Order, *supra* note 443, § 4(b); The Secretary of Defense subsequently promulgated Order No. 1, *supra* note 545.

[582] Military Order, *ibid.* The language of the Military Order designating commissions to have a military function would also serve to exclude its proceedings from judicial review under the *Administrative Procedure Act*, Pub. L. No. 79-404, 60 Stat. 237 (1946), codified as amended at 5 U.S.C. § 550 *et seq.* (2000), §§ 553(a)(1), 554(a)(4) [hereinafter *A.P.A.*], which does not apply to agency action involving military or foreign affairs. Torruella, *supra* note 575 at 709. For further discussion of the *A.P.A.* and its relevance to military commissions, see 265, below.

[583] Military Order, *ibid.*, §§ 1, 4(b).

[584] *Ibid.*, § 4(b); See also *ibid.*, § 1(f).

First, military commissions are not subject to common rules of evidence, instead usually allowing evidence simply considered by the commission to be probative to a reasonable person.[585] This considerably relaxes evidentiary burdens upon the prosecution, particularly in light of claimed inconveniences resulting from possible battlefield conditions. An evidentiary standard like that established by the Military Order and Order No. 1 could have unanticipated and far-reaching consequences for due process. "Almost any rumor or hearsay, no matter how far removed, could have some probative value and would, thus, theoretically be sufficient for admission, since the rule gives no standard as to how much probative value is required to convince 'a reasonable man,' that most elusive of legal fictions."[586] However, lack of evidentiary rules and restriction of judicial review over commission proceedings could on the contrary risk due process violations due to unreliable factual determinations.

Second, trial judgments of commissions are not reviewable under regular civil or military appellate procedures,[587] instead requiring submission of the record directly to the President for final review and decision. In the case of the Military Order, the President could allow the Secretary of Defense to review commission findings.[588] Order No. 1 required the commission record to be forwarded to a review panel that could order further proceedings by the commission or send a recommendation to the Secretary of Defense. The Secretary of Defense then would review the record before forwarding to the

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[585] *Ibid.*, § 4(c)(3), allows the "admission of such evidence as would, in the opinion of the presiding officer of the military commission (or instead, if any other member of the commission so requests at the time the presiding officer renders that opinion, the opinion of the commission rendered at that time by a majority of the commission), have *probative value to a reasonable person*" [emphasis added]. On the use of relaxed evidentiary rules in past trials before military commissions, see *Quirin*, 317 U.S. at 47-48 and *In re Yamashita*, 327 U.S. 1 at 19-20 (1946) (upholding trial by military commission of Japanese general accused of atrocities in the Philippines).

[586] Torruella, *supra* note 575 at 715.

[587] See also *Yamashita*, 327 U.S. at 8.

[588] Military Order, *supra* note 443, § 4(c)(8).

President for final decision.[589] Because military commissions are not courts but instruments of military authority, strictly speaking "their report can only be a recommendation, or a statement of facts – never a finding or sentence."[590] Their trial determinations therefore are merely advisory to the President, who officially deals with (according to his personal discretion) with the individual cases they "investigate." This discretion is grounded in his war powers and represents an extraordinary application of that power towards the determination of an individual's interests in his personal liberty. Juan Torruella calls the review procedures established by the Military Order and Order No. 1 "the single most radical departure from the type of procedure usually present in a criminal trial," likening it to an administrative review process.[591] Thus, commission findings are not final, but remain subject to personal, executive modification potentially motivated not by legal merits, but by political or military considerations. Properly considered, the mixed executive and judicial aspects of such proceedings, far from disengaging the courts under the separation of powers, reinforce the importance of their role in insuring that the executive comply with certain adjudicative standards, where executive action combines with quasi-judicial deliberative processes.

Despite the Military Order's provision ousting commission proceedings from review in civil courts or any other tribunals,[592] a petition for a writ of habeas corpus nevertheless constitutionally remains as a mechanism for seeking judicial review. While courts might not have an appellate review of commission proceedings, through the writ of habeas corpus they can nevertheless ensure that the President acts according to law. With the writ, they can give a remedy for executive excesses of jurisdiction, notably those that violate separation of powers principles and unjustifiably infringe upon individual rights. Grounds for habeas review in these circumstances would

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[589] Order No. 1, *supra* note 545, § 6(H).

[590] Halleck, *supra* note 571 at 967; Harold Hongju Koh, "Agora: Military Commissions: The Case Against Military Commissions" (2002) 96 Amer. J. Int'l. L. 337 at 339 [hereinafter "Case Against Military Commissions"].

[591] Torruella, *supra* note 575 at 722.

[592] Military Order, *supra* note 443, § 7(b).

include not only legality, but procedural propriety. Both grounds for review have substantive elements, particularly in the determination of jurisdictional facts, which lead to considerations of reasonableness. Citizens, as well as aliens on American soil (as contrasted with aliens abroad), are always entitled to seek habeas corpus review of detention.[593] Habeas review is available in these circumstances regardless of an ouster clause in an executive order authorizing military commissions. President Roosevelt's military order, authorizing the trial of German saboteurs in World War II, contained such an ouster clause, which the Supreme Court ignored in the *Quirin* decision.[594] Similarly, the Military Order declared that "the individual shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on the individual's behalf, in (i) any court of the United States, or any State thereof, (ii) any court of any foreign nation, or (iii) any international tribunal."[595] However, any unilateral attempt by the President to foreclose habeas corpus review would most likely be an unconstitutional suspension of the writ, a drastic measure generally considered reserved to Congress under Article I, section 9 of the Constitution.[596] In response to these concerns, White House Counsel publicly admitted that the Order would not foreclose habeas corpus review, and that under the order, anyone arrested, detained or tried in the United States by a military commission would be able to challenge the lawfulness of the commission's jurisdiction through a habeas corpus proceeding in federal court.[597]

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[593] See *Quirin*, 317 U.S. 1, *Yamashita*, 327 U.S. 1, and *Eisentrager*, 339 U.S. 763.

[594]U.S. White House, Presidential Proclamation No. 2561 (2 July 1942), 7 Fed. Reg. 5101 (7 July 1942); U.S. White House, Appointment of Military Commission (2 July 1942), 7 Fed. Reg. 5103 (7 July 1942).

[595] Military Order, *supra* note 443, § 7(b)(2).

[596] Paust, *supra* note 562 at 21-23; See Justice Scalia's dissent in *Hamdi*, 124 S. Ct. at 2660 *et seq.*, taking this position.

[597] Alberto R. Gonzales, "Martial Justice, Full and Fair" *The New York Times* (20 Nov. 2001) A27; As for the ouster clause prohibiting review by foreign courts or international tribunals, it is "both surplusage and irrelevant. The President has as much control over those entities as they have over us: none." Torruella, *supra* note 575 at 724. See also Elsea, "Terrorism and the Law of War," *supra* note 545 at 33-34.

Third, military commissions differ from criminal trials or courts martial in that they are free from the Sixth Amendment right to a jury trial.[598] The commission members are solely responsible for making decisions and determining sentences. Military Commission Order No. 1, for example, provided that two-thirds of commission members could find a defendant guilty and pass sentence, except that unanimity would be required for capital punishment.[599] There was also some uncertainty as to how Fifth Amendment due process applied, until the Supreme Court's application of the *Mathews* balancing test in *Hamdi*. Even after *Hamdi*, the exact contours of due process required further elaboration by the lower courts. Moreover, military commissions may proceed wholly or partially in secret in the interests of national security.[600] These procedural aspects make military commissions (and unlawful combatant detentions generally) formidable executive tools for directing the war powers, through functionally judicial processes, against an individual belligerent in furtherance of military objectives off the battlefield.[601]

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[598] See *Quirin*, 317 U.S. at 40-45.

[599] Military Order, *supra* note 443, §§ 4(c)(6)-(7); Order No. 1, *supra* note 545, § 6(F); Commissions are to consist of between three and seven officers. *Ibid.*, § 4(2).

[600] See *Quirin*, 317 U.S. 1, and Louis Fisher, *Nazi Saboteurs on Trial: A Military Tribunal and American Law* (Lawrence, Kansas: University Press of Kansas, 2003) at 53-56 [hereinafter *Nazi Saboteurs*], for an account of the media restrictions on the *Quirin* trial; Order No. 1, *ibid.*, § 6(B)(3).

[601] "The commission is simply an instrumentality for the more efficient execution of the war powers vested in Congress and the power vested in the President as Commander-in-chief in war." Winthrop, *supra* note 552 at 831; See Wedgwood, *supra* note 529 at 330 (arguing that for these reasons, "military commissions may be the most practicable course" for trying terrorists). Compare with Koh, "Case Against Military Commissions," *supra* note 590 (arguing that military commissions undermine the rule of law, and that Article III courts are the most appropriate forum for trying individuals for terrorism or war crimes). Michael J. Matheson, "Agora: Military Commissions: U.S. Military Commissions: One of Several Options" (2002) 96 Amer. J. Int'l. L. 354 (suggests that military commissions are indeed a valid option for trying members of al-Qaeda or the Taliban, but that the government should consider the possibly greater utility of using other less controversial forums).

Chapter X: The Precedent of *Ex Parte Quirin*

The Importance of Quirin

Ex parte Quirin is the basis upon which later federal courts, in the *Hamdi* and *Padilla* cases, would find an executive power to detain unlawful combatants. *Quirin* shows that such detentions fall under the executive's power to conduct military hostilities. Nevertheless, analysis of *Quirin*, like the laws of war, highlights the mixed executive and judicial aspects of unlawful combatant detentions and trials by military commissions. The significance of *Quirin* to the separation of powers, therefore, is that it tried to manage the different deliberative processes attendant upon unlawful combatant detentions, as well as the branches' relative strengths in employing them. Contrary to the interpretation given to it by some later courts,[602] *Quirin* did not draw formalistic lines around the war powers, which on their face would support an effectively absolute executive discretion to detain outside of meaningful judicial review. The case instead supports a presidential authority under the war powers to designate, detain, and try unlawful combatants, but existing concurrently with a power in the courts to exercise judicial review and hold the executive to adjudicative standards. Furthermore, a look behind the scenes of the Supreme Court's decision reveals troublesome irregularities in the Justices' disposal of the case. These irregularities caution against an overly broad reading of *Quirin* in favor of executive power, while also suggesting that the Justices did not discount, in other factual circumstances, more intensive judicial review of the President's detention decisions.

Historical Background

[602] See the decision of the Fourth Circuit in *Hamdi*, 316 F.3d 450, and the Southern District Court of New York in *Padilla*, 233 F. Supp. 2d 564.

The use of military tribunals to try spies, saboteurs, guerillas, and the like has a long history in American law, peaking in intensity during the Civil War and Reconstruction era of the 1860s and '70s.[603] One of the earliest examples of the use of a military commission occurred during the American Revolution, when General Washington ordered the trial of British Major John André on charges of spying for the enemy in disguise behind American lines. The commission convicted Major André "as a Spy from the enemy, and that agreeably to the law and usage of nations . . . he ought to suffer death."[604] The trial of Major André is the first prominent American usage of military commissions to try offenses against the law of war, and, because it predates the Constitution, shows the long-standing relationship of commissions to the laws of war.

With the Mexican War in the 1840s came the first widespread use of military commissions under the Constitution. General Winfield Scott, commander of American forces in Mexico, instituted martial law in those areas of Mexico under military occupation. In keeping order following the breakdown of Mexican civil authority, General Scott authorized special military tribunals to try three types of offenses. These were crimes of Mexican civilians against American troops, crimes of U.S. soldiers not covered by the disciplinary provisions of the *Articles of War*, and offenses against the law of war.[605] Unlike the case of Major André, in which a commission tried a specific military offense, the commissions in Mexico supplanted civil authority altogether as an instrument of martial law and military occupation.

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[603] For a good history of military commissions in American law, from the Revolution to the "war against terrorism," see Louis Fisher, "Military Tribunals: A Sorry History" (2003) Presidential Studies Quarterly 484; See also Winthrop, *supra* note 552 at 832-34; Solis, *supra* note 529 at 199-201, Green, *supra* note 550 at 832-33.

[604] Proceedings of a Board of General Officers Respecting Major John Andre (29 Sept. 1780), quoted in *Quirin*, 317 U.S. at 31-32, n. 9.

[605] Michael R. Belknap, "A Putrid Pedigree: The Bush Administration's Military Tribunals in Historical Perspective" (2002) 38 Cal. W. L. Rev. 433 at 447-48 [hereinafter "Putrid Pedigree"].

The most extensive use of executive detentions and military commissions was, without equal before or since, during the Civil War. Immediately following his assumption of office and the outbreak of the South's armed rebellion in 1861, President Lincoln unilaterally suspended the writ of habeas corpus and ordered arrests of those suspected of disloyalty to the Union. Although Lincoln's suspension of habeas was unconstitutional,[606] Congress ratified the President's action by authorizing his actions after the fact. Throughout the war, the Lincoln Administration detained thousands for a variety of alleged offenses or sympathy for the rebellion, tried many by military commissions, and on several other occasions suspended habeas corpus either upon the President's unilateral order, or with the prior or subsequent approval of Congress. The heavy hand of Lincoln's Administration, and of his successors during the Reconstruction period, led to several cases regarding the constitutional limits to executive military detentions, but which conflicted and did not settle the issue.[607]

In 1866, the Supreme Court decided the landmark case of *Ex parte Milligan*,[608] which remained the most important case on military detention and trial until *Quirin*. Coming after the end of the war, amidst the fallout from the Lincoln assassination, and when attention had turned from fifth columns in the

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[606] See *Ex parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9, 487), in which Chief Justice Taney, on circuit, ruled that the President had no independent constitutional authority to suspend the writ of habeas corpus, but that such power belonged exclusively to Congress. The Constitution does not expressly reserve such power to Congress. However, U.S. Const. art. I, § 9, in setting out the restrictions upon the powers of Congress, declares: "The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it." See also the dissenting opinion of Justice Scalia in *Hamdi*, 124 S. Ct. at 2660 *et seq.*, arguing that the President has no constitutional authority to detain and try citizens or aliens within United States territory as unlawful combatants, without Congress' express suspension of habeas corpus. For extended analysis of the *Merryman* decision, see Jeffrey D. Jackson, "The Power to Suspend Habeas Corpus: An Answer from the Arguments Surrounding Ex Parte Merryman" (2004) 34 U. Balt. L. Rev. 11.

[607] See *Merryman*, 17 Fed. Cas. 144, *Ex parte Vallandigham*, 68 U.S. 243 (1864) (holding that Court had no jurisdiction to hear appeals from military courts), and *Ex parte McCardle*, 74 U.S. 506 (1869) (affirming that Congress could withdraw Court's jurisdiction from hearing appeals from military commissions operating in the occupied South); Much has been written about Lincoln's use of executive arrests and military commissions to suppress political dissention in the Northern states. The most extensive treatment of the subject to date is Mark E. Neely, Jr., *The Fate of Liberty: Abraham Lincoln and Civil Liberties* (Oxford University Press, 1991) [hereinafter *Fate of Liberty*].

[608] *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866).

North to the occupation of the defeated South, *Milligan* represented a significant judicial pronouncement on the limitations of executive detention power. The Government in 1865 had accused Lambdin Milligan, a resident of Indiana, of participation in a pro-southern organization, whereupon a military commission tried, convicted, and sentenced him to hang. Upon Milligan's appeal on a petition for a writ of habeas corpus, the Supreme Court declared that military commissions lacked jurisdiction over citizens having no connection with enemy forces and residing in an area with functioning civil courts. *Milligan* thus sought to make sure that the executive could not use military commissions, under its war powers, to circumvent the law and civil courts. It also affirmed military detentions and commissions as unique means to govern militarily where civil order had broken down, or to deal with irregular belligerents. *Milligan*, however, left open further inquiry about just what criteria defined a citizen as opposed to a belligerent, upon which *Quirin* and *Hamdi* would later elaborate. Despite *Milligan*, however, the U.S. military continued to detain individuals and try them by commissions during the occupation of the South, as part of the Government's Reconstruction efforts to restore civil order and curb both racial and anti-Union violence in the aftermath of the Civil War. Military commissions also tried the conspirators to the Lincoln assassination.[609]

Obviously, the circumstances motivating the exceptional executive intrusions upon civil liberties during the Civil War were in response to extreme national crisis. The United States was engaged in a civil war for preservation of the Union, fighting against formidable Southern armies in the field and some considerable Confederate sympathy within the North. With military conquest and occupation of the South came the collapse of civil authority there and the challenging task of national political reunification. Thus, the detentions and use of military trials in the South were generally in accordance with the laws of war regarding military governance of occupied

[609] See for example *McCardle*, 74 U.S. 506; U.S. White House, Order of the President Establishing a Military Commission (1 May 1865) and U.S. Attorney General's Office, Opinion on the Constitutional Power of the Military to Try and Execute the Assassins of the President (July 1865); *Reconstruction Act*, ch. 153, 14 Stat. 428 (2 March 1867) (dividing the South into military districts and authorizing trial by military commissions).

enemy territory, with the anomaly that occupation was not of foreign soil, but rebellious American States. Furthermore, Congress statutorily authorized executive detentions and military commissions in the South pursuant to its policy of military Reconstruction.[610] The Civil War and Reconstruction era was thus the high-water mark of military detentions and trials, the law of which would not see any further significant development until the Supreme Court's decision in *Quirin* during the Second World War.[611]

The Quirin *Case*

In June of 1942, eight German saboteurs landed on American shores. Trained by the German Army in infiltration and sabotage techniques, the individuals had the mission of attacking industries and other infrastructure within the United States. All of the men had lived in the United States at some point in their lives, while one would later claim American citizenship in his trial before the military commission.[612] After completing their training, all eight went to the United States. Four men landed on a Long Island beach on June 13, 1942, while the others arrived on the coast near Jacksonville, Florida on June 16, 1942.[613] Members of both parties disembarked from German submarines and wore articles of German military uniforms, burying them after

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[610] See for example *Reconstruction Act*, *ibid.*

[611] In *Hirabayashi* v. *United States*, 320 U.S. 81 (1943), the Supreme Court upheld a curfew imposed upon individuals of Japanese ancestry, while in *Korematsu* v. *United States*, 323 U.S. 214 (1944), it found constitutional the executive internment of such individuals pursuant to congressional authorization. However, in *Ex parte Endo*, 323 U.S. 283 (1944), the Court made clear that upon a petition for habeas corpus it would review whether an individual subject to detention was, in fact, loyal and so falling outside of the executive's power to detain under congressional authorization. See *infra* note 796.

[612] The eight men were George Dasch, Ernest Burger, Heinrich Heinck, Richard Quirin, Edward Kerling, Werner Thiel, Hermann Neubauer, and Herbert Haupt. In challenging the jurisdiction of the military commission, Haupt claimed American citizenship as his parents had immigrated to the United States when he was five years old and then became naturalized while he was a minor. 317 U.S. at 20. For biographical background on the eight saboteurs, see Fisher, *Nazi Saboteurs*, *supra* note 600 at 6-16.

[613] The Supreme Court opinion in *Quirin*, 317 U.S. at 21, gives the date of the Florida landing as "[o]n or about June 17, 1942," while Fisher, *Nazi Saboteurs*, *ibid.* at 35, dates the landing as June 16; Burger, Heinck, Quirin, and Dasch landed on Long Island, while Kerling, Thiel, Neubauer, and Haupt landed in Florida. 317 U.S. at 21.

landing. Changing into civilian clothing and carrying large quantities of cash, the men dispersed in pairs to different points in the United States. By June 27, however, all men were in the custody of the F.B.I. without committing any sabotage, a remarkably quick roundup that was as strange as most of the case's history.

Shortly after one party landed on Long Island, a Coastguardsman on patrol spotted and confronted the men. After a bribery attempt, the party let the Coastguardsman depart, whereupon he reported the incident at his station. Although the saboteurs had disappeared by the time the Coastguard investigated, its personnel discovered the German uniforms along with explosives and other materials buried in the sand. The Coastguard informed the F.B.I. of these events, which soon after took up the investigation. Nevertheless, the Coastguard's discovery of the men did not directly lead to their arrest. Instead, apprehension of the saboteurs resulted from betrayal by one of their own. George Dasch, the leader of the group which landed on Long Island and the one who had tried to bribe the Coastguard patrol, called the F.B.I. office in New York to report the conspiracy.[614] Surprisingly, the duty officer recorded the call but the F.B.I. took no action upon it. Five days later, on June 18, Dasch actually traveled from New York City to Washington D.C. and physically turned himself in to the F.B.I. The information that Dasch provided led to the quick arrests of the other saboteurs. In the publicity that followed, the F.B.I. promoted its capture of the saboteurs without recognizing the role of either the Coastguard or Dasch's surrender. It certainly did not reveal its embarrassing failure to act upon Dasch's initial call to its New York desk. Instead, the Government continued to closely control all information regarding the event and the subsequent secret military trial, and exploited the situation as a propaganda opportunity to show the skill of America's security establishment. Thus, immediately upon capture of the saboteurs, the Government's actions demonstrated concern with public image both at home and abroad.

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[614] Dasch apparently made the call with the knowledge and approval of his partner, Burger. David J. Danelski, "The Saboteurs' Case," (1996) 1 J. Sup. Ct. Hist. 61 at 64.

After capture of the saboteurs, the Administration swiftly settled on a special military trial, with little internal disagreement. Encouraged by the Attorney General Francis Biddle, President Roosevelt signed a Proclamation[615] on July 2 designating the captives as unlawful combatants and authorizing their trial by military commission. President Roosevelt's Proclamation specifically addressed those enemies, whether citizens or otherwise, who entered United States territory to commit sabotage, other hostile acts, or violations of the law of war. Claiming authority under the Constitution and unspecified statutes, the President subjected all such individuals to the law of war and the jurisdiction of military tribunals. By generally invoking the laws of war, and being vague in his reliance upon statutory authority, the President avoided any overt claim to inherent power while at the same time maximizing his legal maneuverability as Commander-in-Chief.[616] The Proclamation went further, however, by purporting to deny the saboteurs all access to the civil court system.[617] President Roosevelt issued an Order[618] on the same day establishing the military commission to try the offenses against the law of war. The Order empowered the commission to set rules for its own procedure, consistent with Congress' *Articles of War* governing military justice, but free from the procedures for courts martial.[619] The commission could forego regular rules of evidence in order to admit anything having "probative value to a reasonable man." Also, the commission could convict and condemn to death upon concurrence of two-thirds of its members, as opposed to the unanimity required for capital sentences in courts

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[615] U.S. White House, Presidential Proclamation No. 2561 (2 July 1942), 7 Fed. Reg. 5101 (7 July 1942) [hereinafter "Proclamation"].

[616] See Fisher, *Nazi Saboteurs*, *supra* note 600 at 51.

[617] President Roosevelt's Proclamation, *supra* note 615, provided that "such persons shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on their behalf, in the courts of the United States, or of its states, territories, and possessions, except under such regulations as the Attorney General, with the approval of the Secretary of War, may from time to time prescribe."

[618] U.S. White House, Executive Order No. 9185 (2 July 1942), 7 Fed. Reg. 5103 (7 July 1942) [hereinafter "Order"].

[619] Fisher, *Nazi Saboteurs*, *supra* note 600 at 52.

martial. In a final departure from standard procedure of military justice, the decision of the commission was to go directly to the President for review rather than to the usual review panel used in courts martial.

The Government formally charged the saboteurs with violating the laws of war and the provisions of the *Articles of War* related to communicating intelligence to and spying for the enemy, along with conspiracy to do the same.[620] With the eight men defended by appointed military counsel, the trial before the military commission began on July 8. The trial remained closed to the public and proceeded in secret. About two weeks after the start of the trial, defense counsel sought to challenge the commission's jurisdiction through petition for a writ of habeas corpus in direct challenge to President Roosevelt's Proclamation, closing defendants' access to the civil courts.[621] The resulting procedural steps for the habeas petition were both hurried and confused. When the federal District Court for the District of Columbia immediately denied the defendants' petition, their counsel filed a habeas petition with the Supreme Court in special session.

The Supreme Court Decision

The Supreme Court agreed to hear oral arguments on the habeas corpus petition while the petitioners perfected an exceptional application for certiorari to the D.C. Court of Appeals before the D.C. court had actually rendered a judgment.[622] On July 31, the Supreme Court granted the petition for certiorari, and in a short *per curiam* opinion also upheld the District Court's denial of habeas.[623] The Supreme Court upheld all charges against the petitioners and

[620] *Articles of War*, 81, 82 (codified at 10 U.S.C. § 1471 *et seq.* (1940)).

[621] Dasch, in cooperating with the government, would not be a party to the habeas petition. Danelski, *supra* note 614 at 68.

[622] Petitioners applied for a writ of certiorari under 28 U.S.C. § 347(a). Upon stipulation of counsel for petitioners and respondent, the record for the habeas petition in the Supreme Court applied to the certiorari proceedings. See 317 U.S. at 18, *per curiam* opinion.

[623] "Thus the Court's jurisdiction caught up with the Court just at the finish line." Danelski, *supra* note 614 at 58.

the authority of the military commission to try them; it specifically reserved "the preparation of a full opinion which necessarily will require a considerable period of time for its preparation. . . ."[624] After the Supreme Court's issuance of the *per curiam* opinion, the commission reconvened for final arguments on August 1, and on August 3 it convicted all defendants and sentenced them to death. President Roosevelt, however, granted clemency to Dasch and Burger.[625] The Court's formal opinion would not come until October 29, 1942, in which it clearly recognized the President's power to try an unlawful combatant, even if a U.S. citizen, by military commission.

The Court, in issuing its formal opinion, faced the *fait accompli* of its *per curiam* opinion and the resulting execution of six of the saboteurs. While this predicament and the politicization of the case conceivably influenced the Court's justifications for its decision, which deferred to the President, *Quirin* was far from a blank endorsement of an executive detention power. The Court had exercised its habeas jurisdiction, in spite of the ouster clause in the President's Proclamation. The Government indeed argued that the President, by virtue of his office as Commander-in-Chief and Chief Executive, had power to deny habeas corpus to invading alien enemies.[626] Nevertheless, the Court ignored the Proclamation's injunction that the petitioners "shall not be privileged to seek any remedy or maintain any proceeding" in the civil courts. Without further explanation, it instead asserted that:

> . . . there is certainly nothing in the Proclamation to prevent access to the courts for determining its applicability to the particular case. And neither the Proclamation nor the fact that they are enemy aliens forecloses consideration by the courts of petitioners' contentions that the Constitution and laws of the United States constitutionally enacted forbid their trial by military commission.[627]

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[624] See 317 U.S. at 18-19, *per curiam* opinion.

[625] Dasch received a sentence of 30 years and Burger one of life. Danelski, *supra* note 614 at 72. President Truman would later commute the sentences of both and repatriate them to Germany. Fisher, *Nazi Saboteurs*, *supra* note 600 at 175.

[626] 317 U.S. at 11-13.

[627] *Ibid.* at 25.

The Court's review asserted the independent role of the judicial branch to check the executive and not let it determine its own jurisdiction.[628] The Court realized the importance of habeas review, when it stated: "Constitutional safeguards for the protection of all who are charged with offenses are not to be disregarded in order to inflict merited punishment on some who are guilty."[629] Thus, "duty . . . rests on the courts, in time of war as well as in time of peace, to preserve unimpaired the constitutional safeguards of civil liberty. . . ."[630] The *Quirin* Court, far from advocating an absolute executive discretion to detain under the war powers, reaffirmed its constitutional power of review.

Thus, the Court in *Quirin* followed the *Milligan* decision, which had summed-up the judicial role in checking executive detention by declaring that "[i]f there was law to justify this military trial, it is not our province to interfere; if there was not, it is our duty to declare the nullity of the whole proceedings."[631] In other respects, *Quirin* distinguished *Milligan* upon its facts, but did not overrule it. Milligan, the Court explained, was a citizen having no association with the armed forces of the enemy and a non-belligerent not subject to the law of war. Milligan had also never lived in any of the rebellious states, but resided in Indiana, where there was no martial law in force and the civil courts were open. For these reasons, a military commission had no jurisdiction to try Milligan. The Court accordingly "construe[d] the [earlier] Court's statement as to the applicability of the law of war to Milligan's case as having particular reference to the facts before it."[632] In contrast, all petitioners in *Quirin* were associated with the military forces of a State with which the United States was at war. The fact that the saboteurs

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[628] But see Fisher, *Nazi Saboteurs*, *supra* note 600 at 121-22, observing that "the message was largely a fiction," and that the Supreme Court, "[i]nstead of functioning as an independent institution, . . . served more as a wing of the White House."

[629] 317 U.S. at 25.

[630] *Ibid.* at 19.

[631] *Milligan*, 71 U.S. at 119.

[632] 317 U.S. at 45.

trained under the military and wore uniforms upon their initial landing from enemy submarines demonstrated their status as combatants. They were thus subject to the law of war, which they violated upon entering the United States and shedding uniform in order to commit hostile acts. It was petitioners' alleged military affiliation that the *Quirin* Court emphasized in distinguishing *Milligan*. As Attorney General Biddle advised President Roosevelt: "Practically . . . the Milligan case is out of the way and should not plague us again."[633] It is worth noting, however, that the petitioners in *Quirin* did not challenge the facts of the case, which therefore "leaves open the important question of how to proceed should these 'jurisdictional' facts be disputed."[634] *Milligan* is still good law, and would prohibit military detention or trial of an individual who could controvert the Government's factual assertions regarding his alleged belligerency. *Milligan* and *Quirin*, taken together then, point to the importance of judicial review based upon procedural fairness and reasonableness; Government errors in its factual justifications are jurisdictional ones, denying it authority to detain or try.

Quirin also took an expansive approach to constitutional and statutory authorization of executive war measures. This approach favored a broad executive power to detain arising from vague and brief statutory reference to military commissions, rather than provisions expressly authorizing military detention and trial. The Court explained the legislative basis of the President's authority to detain and try the petitioners:

> By the Articles of War, 10 U.S.C. §§ 1471-1593, Congress has provided rules for the government of the Army. It has provided for the trial and punishment, by courts martial, of violations of the Articles by members of the armed forces and by specified classes of persons associated with the Army. Arts. 1, 2. But the Articles also recognize the "military commission" appointed by military command as an appropriate tribunal for the trial and punishment of offenses against the law of war not ordinarily tried by court martial. See Arts. 12, 15. Articles 38 and

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[633] Francis Biddle, Memorandum for the President, 29 Oct. 1942, OF 3602, F.D.R. Papers, quoted in Danelski, *supra* note 614 at 79.

[634] Robert E. Cushman, "*Ex parte* Quirin *et al* – The Nazi Saboteur Case" (1942) 29 Cornell L.Q. 54 at 64.

> 46 authorize the President, with certain limitations, to prescribe the procedure for military commissions. Articles 81 and 82 authorize trial, either by court martial or military commission, of those charged with relieving, harboring or corresponding with the enemy and those charged with spying. And Article 15 declares that "the provisions of these articles conferring jurisdiction upon courts martial shall not be construed as depriving military commissions . . . or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by statute or by the law of war may be triable by such military commissions . . . or other military tribunals." Article 2 includes among those persons subject to military law the personnel of our own military establishment. But this, as Article 12 provides, does not exclude from that class "any other person who by the law of war is subject to trial by military tribunals" and who under Article 12 may be tried by court martial or under Article 15 by military commission.
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> Similarly the Espionage Act of 1917, which authorizes trial in the district courts of certain offenses that tend to interfere with the prosecution of war, provides that nothing contained in the act "shall be deemed to limit the jurisdiction of the general courts-martial, military commissions, or naval courts-martial." 50 U.S.C. § 38.[635]

These provisions of the *Articles of War* and the *Espionage Act* satisfied the Court that Congress had authorized military commissions. The *Hamdi* and *Padilla* courts would later follow this broad interpretive approach to the *U.C.M.J.*, which matched that taken to congressional authorization for military force under the Vietnam War cases.

Further elaboration of the form and jurisdiction of commissions was unnecessary, as they applied to all "offenders or offenses that . . . by the law of war may be triable by such military commissions. . . ."[636] Congress thus "incorporated by reference . . . all offenses which are defined as such by the law of war . . . ,"[637] which determined the nature and use of military commissions. As the Court explained, Congress had power under Article I, section 8, clause 10 to "define and punish . . . Offences against the Law of Nations." The exercise of such power required neither codification of international law nor statutory enumeration of its offenses, but contemplated

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[635] 317 U.S. at 26-27.

[636] *Articles of War*, 15.

[637] 317 U.S. at 30.

blanket incorporation by reference.[638] Congress' authorization of military commissions, then, was premised upon its adoption of the "common law of war," defined by the Government prosecution as "a centuries-old body of largely unwritten rules and principles of international law which governs the behavior of both soldiers and civilians during time of war."[639] This left open the question, for resolution in the courts, as to just what was the content of the international law of war. Congress had thus adopted "all offenses" defined by "the system of common law applied by military tribunals *so far as it should be recognized and deemed applicable by the courts.*"[640] The Court thereby strongly suggested that the judiciary, not the President or military authorities, had the final say as to the requirements of international law. Wholesale incorporation of the international law of war also raised the interesting possibility, not addressed by the *Quirin* Court, that such law could change over time, without modification by Congress. If so, such changes would presumably result from evolving "usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience," and recognized by the civil courts.[641] Moreover, *Quirin* begged the question, also left unaddressed in later cases, as to whether the law of war, as incorporated by Congress, included protective principles that actually restrained executive exercises of military power. The Court, however, did not speculate on larger issues arising from Congress' general adoption of the laws of war. Instead, it simply declared that the international laws of war, by custom and usage[642] as well as the *Hague Convention*,[643] recognized the offense of crossing into

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[638] *Ibid.* at 29-30.

[639] Argument of Attorney General Biddle, 317 U.S. at 13-14, citing Winthrop, *supra* note 552 at 17, 41, 42, 773 ff.

[640] 317 U.S. at 30 [emphasis added].

[641] *Hague Convention*, Preamble, *supra* note 506, quoted at 317 U.S. at 35. The *Quirin* Court, *ibid.* at 29, qualified the operation of the law of war, stating that "[w]e may assume that there are acts regarded in other countries, or by some writers on international law, as offenses against the law of war which would not be triable by military tribunal here, either because they are not recognized by our courts as violations of the law of war or because they are of that class of offenses constitutionally triable only by a jury."

[642] 317 U.S. at 35, n. 12.

[643] 317 U.S. at 34-35, citing *Hague Convention*, *supra* note 506. The Court also explained, *ibid.* at 34, that the War Department had incorporated the *Hague* definition of lawful

enemy territory, out of uniform, in order to commit hostile acts.[644] The President, it decided, could lawfully punish such acts by military commission.

Although the Court found statutory authorization for the President's detention and trial of unlawful combatants, it offered a vague hint about whether the President might possess inherent power for his actions. In dealing with the saboteurs, the Court concluded, President Roosevelt exercised a congressional conferral of authority over unlawful combatants. However, he also wielded "such authority as the Constitution itself gives the Commander in Chief, to direct the performance of those functions which may constitutionally be performed by the military arm of the nation in time of war."[645] Just what might be the extent of his full authority remained unresolved:

> It is unnecessary for present purposes to determine to what extent the President as Commander in Chief has constitutional power to create military commissions without the support of Congressional legislation. For here Congress has authorized trial of offenses against the law of war before such commissions. We are concerned only with the question whether it is within the constitutional power of the National Government to place petitioners upon trial before a military commission for the offenses with which they are charged.[646]

Quirin accordingly addressed not inherent executive power, but the President's proper exercise of congressionally delegated authority. There was no need to consider Roosevelt's authority standing alone, either in the midst of legislative silence or in the face of conflicting statute.

In *Quirin*, the Supreme Court foreshadowed its *Youngstown* decision of a few years later. In his *Youngstown* concurrence, Justice Jackson found the President's authority at its maximum when proceeding from express or

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combatancy in its Rules of Land Warfare, citing those of 1914, paras. 369-77 and of 1940, paras. 8-9, 345-57.

[644] 317 U.S. at 34-35.

[645] *Ibid.* at 28; Green, *supra* note 550 at 837, is of the opinion that "[t]he authority of the military commission transcends the authority contained in the Articles of War. . . ."

[646] 317 U.S. at 29.

implied congressional authorization, while descending into "twilight" with the absence of legislation or being limited only to what was constitutionally intrinsic in the presence of conflicting statute.[647] Based upon its interpretation of congressional authorization in *Quirin*, the President was therefore acting at full authority under the war powers, although such authority itself could not oust the Court's own constitutional jurisdiction to review upon a habeas petition. *Quirin* also followed the reasoning of *Curtiss-Wright*, which stood for judicial deference to executive actions in foreign affairs pursuant to broad interpretation of congressional authorization. Although it failed to cite *Curtiss-Wright*, the *Quirin* decision resonated with the earlier case by finding congressional authorization for executive detentions and military commission trials in the course of conducting the war. The Court thus demonstrated sensitivity to the distinctions between domestic and foreign exercises of executive power, as well as the functionally mixed deliberative processes the executive used in trying petitioners as unlawful combatants. Under the circumstances, however, it showed a willingness to find an executive authority to detain. In addition to responding to the pressures of world war, the case came to the Supreme Court "at a time when its separation of powers jurisprudence, in both the foreign relations and domestic realms, was in a state of flux."[648] While *Quirin* was replete with language alluding to the Commander-in-Chief's war powers, and spoke in terms favorable to executive authority, it nevertheless remained squarely premised upon a congressional delegation of power. *Quirin* explicitly refused to examine a claim of inherent executive authority to detain unlawful combatants, and evidenced considerable judicial consideration of the President's legal bases for action.

An Irregular Precedent

[647] 343 U.S. at 635-38.

[648] G. Edward White, "Felix Frankfurter's 'Soliloquy' in Ex parte Quirin: Nazi Sabotage and Constitutional Conundrums" (2002) 5 Green Bag 2d 423 at 429.

Aside from the question of whether or not the President had legal authority to try the petitioners by military commission, *Quirin* also raised issues of procedural propriety. Proceedings against the saboteurs were swift. The Government apprehended the last of the saboteurs by June 27, President Roosevelt ordered a military commission on July 2, the trial began on July 8, and, except for final arguments, closed on July 27. Oral argument before the Supreme Court began on July 29, and it delivered the *per curiam* decision on July 31. Although the efforts made by defense counsel were admirable given these time constraints, the proceedings were extremely hurried. Along with considerations of time, procedure differed considerably from that of a civil trial, and even a regular court martial. Notably, the Government charged the petitioners without indictment by grand jury, and denied them trial by jury. Furthermore, the trial was not only secret, but the commission could admit any evidence having probative value to a reasonable man, rather than being admissible under the rules of evidence for courts-martial or civilian trials. Finally, conviction and sentencing (including capital) required only a two-thirds majority of the commission members, and judgment went directly to the President rather than to a board of review like that usually used in courts martial.

The *Quirin* Court had no difficulty in deciding that Fifth and Sixth Amendment rights to grand jury and trial by jury were inapplicable to military commissions. Significantly, however, the Court restricted its discussion of the Fifth and Sixth Amendments to their provisions on grand jury indictment and trial by jury. The Supreme Court did not consider the fundamental due process concern of preliminary access to a judicial process, as petitioners had received a timely (although perhaps too quick) trial and access to counsel.[649]

[649] Defense counsel also did not make a procedural due process argument, preferring instead to assert the applicability of the procedures contained in Congress' *Articles of War*. See 220, below. Interestingly, in his draft opinion, Chief Justice Stone briefly suggested that some legal process would always be required for any punishment under the law. Justice Douglas, however, persuaded Stone to delete the sentence, arguing that it "is susceptible to the interpretation that it would have been unlawful for the executive to have disposed of the petitioners summarily without a trial by a tribunal." Since the President's power to order summary execution, and thus deny fundamental due process, were not in issue, Douglas saw no need to raise the point in the formal opinion. Danelski, *supra* note 614 at 76.

The Court explained that the Fifth and Sixth Amendments guaranteed indictment and jury trial only as practiced at common law, excluding petty offenses and contempt for example.[650] Under the common law, indictment and jury trial were likewise "procedures unknown to military tribunals, which are not courts in the sense of the Judiciary Article . . . ."[651] For this reason, the Court concluded that "the Fifth and Sixth Amendments did not restrict whatever authority was conferred by the Constitution to try offenses against the law of war by military commission, and that petitioners, charged with such an offense not required to be tried by jury at common law, were lawfully placed on trial by the Commission without a jury."[652] So while *Quirin* limited the application of the Fifth and Sixth Amendments in trials by military commissions, it did so only in regard to indictment and jury trial. *Quirin* did not directly address Fifth Amendment due process, nor did it have to broach Sixth Amendment rights to speedy trial and counsel. The Supreme Court would not address the due process issue until the *Hamdi* case, in which it adopted the *Mathews* balancing test.

Defense counsel challenged the procedural peculiarities of the commission by relying upon the *Articles of War*, suggesting that the procedures for courts martial likewise applied to special military tribunals.[653] Specifically, the defense argued that the *Articles* established rules of evidence,[654] required a three-fourth majority for conviction,[655] mandated a preliminary hearing,[656] and provided for appeal including submission of the

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[650] 317 U.S. at 39-40.

[651] *Ibid.* at 39 [citations omitted]; The Court also emphasized that trial of unlawful combatants did not present exceptions to the U.S. Const. Amends. V, VI as "cases arising in the land or naval forces," as such exception was to allow courts martial for offenses that otherwise might be triable in the civil courts. This is because "[n]o exception is necessary to exclude from the operation of these provisions cases never deemed to be within their terms." 317 U.S. at 41, 43.

[652] *Ibid.* at 45.

[653] See *ibid.* at 10-11.

[654] *Articles of War*, 38.

[655] *Ibid.*, 43.

[656] *Ibid.*, 70.

trial record to a board of review.[657] The trial before the military commission lacked in all of these aspects. The Government, in contrast, took the position that "[w]hatever privilege may be accorded to such enemies is accorded by sufferance, and may be taken away by the President,"[658] whose power over unlawful combatants was "absolute."[659] The Court saw no need to determine whether the *Articles of War*, or constitutional due process and international law, required some kind of trial for detainees.[660] However, it summarily rebuffed the defense argument with little explanation, while revealing tensions among the Justices. Unanimously agreeing that the *Articles of War* afforded no basis for a writ of habeas corpus, the Justices divided on the reasoning behind their conclusion. Some members believed that the *Articles of War* simply did not apply to military commissions, while others found that the *Articles* applied, but did not conflict with the commissions' procedures.[661]

Although Chief Justice Stone had little difficulty accommodating the members of the Court on most issues in the case, he encountered trouble on the question of the *Articles of War*. Faced with stubborn disagreement over the application of the *Articles* to military commissions, the Chief Justice circulated two memorandums offering different justifications. "Memorandum A" suggested that even if the *Articles*[662] required submission of the commission's record to a board of review before the President's final decision, the issue was not before the Court and could not be a basis for the writ. This argument raised doubt, however, as to whether the President's subsequent failure to utilize a board of review was a potential jurisdictional defect only

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[657] *Ibid.*, 46, 50½.

[658] 317 U.S. at 12.

[659] *Ibid.*; "The position of the Attorney General was that the President could lawfully have ordered the prisoners shot as soon as they were arrested, that trial before the Military Commission was given as an act of grace and not of necessity, and that as belligerents the prisoners had no right of access to any court." Cushman, *supra* note 634 at 63.

[660] 317 U.S. at 47.

[661] *Ibid.* at 47-48.

[662] *Articles of War*, 46, 50½.

now apparent after execution of petitioners.[663] "Memorandum B" asserted that the *Articles of War* simply did not apply at all to military commissions trying violations of the law of war. This was not only a larger question not before the Court, but could support a broader executive power to militarily try citizens for any unspecified offense under the law of war.[664] Justice Jackson complicated matters by then writing his own memorandum claiming that the civil courts had no jurisdiction to review the President's treatment of unlawful combatants pursuant to the exercise of his war powers, and that the *Articles of War* did not apply. Jackson not only fragmented the Court further, but also asserted a claim of inherent executive authority to detain and try unlawful combatants by military commission.[665] Unanimous decision increasingly seemed unlikely. Nevertheless, a final unanimous opinion ultimately glossed over these internal disagreements, which were symptomatic of the Court's highly unusual and belated decision-making in the case.[666] Resolution of the problem resulted, however, from what must be one of the more unusual incidents in the Supreme Court's history, the "soliloquy" of Justice Frankfurter. Justice Frankfurter's memorandum, commenting on the Court's quandary, belied an infectious politicization of the case and highlighted its context of desperate, total war.

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[663] White, *supra* note 648 at 431; Danelski, *supra* note 614 at 71; In a letter to Justice Frankfurter, Chief Justice Stone worried that it "seems almost brutal to announce this ground of decision for the first time after six of the petitioners have been executed and it is too late for them to raise the question if in fact the articles as they construe them have been violated." Letter from Harlan Fiske Stone to Felix Frankfurter, 10 Sept. 1942, Felix Frankfurter Papers, quoted in Louis Fisher, *Nazi Saboteurs*, *supra* note 600 at 110.

[664] White, *ibid.* at 431.

[665] *Ibid.* at 432; Danelski, *supra* note 614 at 76; Fisher, *Nazi Saboteurs*, *supra* note 600 at 114-16.

[666] In an unpublished interview in 1962, Justice Douglas commented: "Our experience with [the Saboteurs' Case] indicated . . . to all of us that it is extremely undesirable to announce a decision on the merits without an opinion accompanying it. Because once the search for the grounds . . . is made, sometimes those grounds crumble." Transcription of interviews of William O. Douglas, by Walter F. Murphy, pp. 204-05, Seeley G. Mudd Manuscript Library, Princeton University, Princeton, N.J., quoted in Danelski, *ibid.* at 80.

Upset at the course the Court was taking in coming to a formal decision, Justice Frankfurter sent around a memorandum entitled "F.F.'s Soliloquy,"[667] taking the form of an imaginary conversation between him and the saboteurs. The Justice criticized the differences in reasoning regarding the applicability of the *Articles of War*, writing that he could not "find enough room in the legal differences between them to insert a razor blade." Responding to the petitioners' request for a writ of habeas corpus, Justice Frankfurter attacked the "damned scoundrels" as "low-down, ordinary, enemy spies" subject to summary execution, but instead "humanely" tried by military Commission upon order of the Commander-in-Chief. While the *Articles of War* authorized the President's actions, Articles 46 and 50½ simply did not apply in the circumstances of the case. Justice Frankfurter, however, refused to be "seduced into inquiring what powers the President has or has not got, what limits the Congress may or may not put upon the Commander-in-Chief in time of war, when, as a matter of fact, the ground upon which you claim to stand – namely, the proper construction of these Articles of War – exists only in your foolish fancy." It was unnecessary any further to justify a conclusion shared by the Justices and reachable with "intellectual self-respect," thereby avoiding "needless rows." Justice Frankfurter contemptuously dismissed the petitioners as having "done enough mischief already without leaving the seeds of a bitter conflict involving the President, the courts and Congress after your bodies will be rotting in lime." After damning the saboteurs, Frankfurter included in his imaginary conversation some of the "very best lawyers" he knew who were in battle "to lick the Japs and the Nazis." These fictional lawyers castigated the Justices for their "internecine conflict," and advised them not to be "too engrossed in . . . verbalistic conflicts because the inroads on energy and national unity that such conflict inevitably produce, is a pastime we had better postpone until peacetime." The soliloquy was an acidic and blatant call for patriotic unity at the expense of objective and reasoned legal analysis, but had the desired effect. Having already painted themselves into a corner with the premature *per curiam* opinion, and faced with justifying the execution of six

[667] "F.F.'s Soliloquy," October 1942, Jackson Papers, reprinted in Fisher, *Nazi Saboteurs*, *supra* note 600 at 118-21.

men, the Justices fell into line. Following some further correspondence, Justice Jackson agreed not to write a separate concurrence, while the other justices settled on a compromise. Chief Justice Stone, in drafting the Court's unanimous opinion, offered the reasoning of neither his Memorandum A or B. He instead inserted only a paragraph concluding that *Articles of War* 46 and 50½ did not provide grounds for habeas relief, while finding it unnecessary to decide in just what way Congress might restrict the President's power over such enemy belligerents.

Justice Frankfurter's soliloquy, as biased and politicized as it was, was just one extraordinary event in a case that was rife with irregularities. Shortly after apprehension of the saboteurs, Frankfurter had also advised Secretary of War Henry Stimson that a military commission should be composed entirely of military officers. The Court had other connections with the executive branch, as well. Justice Byrnes had worked so closely within the Administration itself that he would leave the Court in October of 1942, before issuance of the formal opinion, in order to direct the Office of Economic Stabilization.[668] Chief Justice Stone's son, an Army major and judge advocate, had actually been a member of the defense counsel before the military commission, although Attorney General Biddle asked the Chief Justice not to recuse himself on that account. The only justice to disqualify himself from the case was Justice Murphy, on active duty as a lieutenant colonel in the Army Reserves; he did so at the suggestion of Justice Frankfurter.[669]

From the beginning, aside from the naturally unpopular cause of the Nazi saboteurs, the Court sought to avoid a constitutional crisis through a confrontation with President Roosevelt, who had declared to his Attorney General Francis Biddle, "I won't give them up . . . I won't hand them over to any United States marshall armed with a writ of habeas corpus."[670] Members

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[668] Fisher, *ibid.* at 96.

[669] Danelski, *supra* note 614 at 69.

[670] Francis Biddle, *In Brief Authority* (1962) at 331, quoted in Danelski, *ibid.* at 68.

of the Court were aware of Roosevelt's position, as during a preliminary conference on the case Justice Roberts expressed fear that the President would execute the petitioners regardless of the Court's decision.[671] The justices likely remained wary of a constitutional showdown during wartime, a sentiment Justice Frankfurter expressed in his soliloquy pleading for unanimity in *Quirin's* formal opinion.[672] The purposes behind Justice Frankfurter's curious memorandum seem to have motivated the Supreme Court as a whole. The Court "sought to achieve two potentially conflicting goals: swift and drastic punishment for the Nazi-sponsored saboteurs, and the avoidance of any public constitutional clashes that might produce open ideological divisions within the Court,"[673] as well as direct challenge to the President. These goals colored the Court's view of the case. While *Quirin* upholds an executive detention power, it also stands for some degree of judicial review over its exercise. The irregularities in the case strongly caution against reading *Quirin* more broadly than necessary, in support of an absolute executive discretion to designate, detain, and try an unlawful combatant by military commission.

The circumstances recounted above underscore the exceptional nature of the *Quirin* case, its deep and troubling politicization, and its inseparability from the context of the Second World War. Far from isolated, *Quirin* grew in the same war-poisoned atmosphere in which the Supreme Court decided *Korematsu* v. *United States*,[674] upholding the Administration's mass internment of Japanese-Americans. *Quirin* also occurred in a period before contemporary human rights law, further developments in the law of war, and the due process revolution of the Supreme Court under Chief Justice Earl Warren. Certainly, the fact that a formal state of war – a total war – existed

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[671] Danelski, *ibid.* at 69.

[672] Fisher, *Nazi Saboteurs*, *supra* note 600 at 121.

[673] White, *supra* note 648 at 433.

[674] *Korematsu*, 323 U.S. 214; For a review of major Supreme Court decisions during the war, see David P. Currie, "Lecture: The Constitution in the Supreme Court: The Second World War, 1941-1946" (1987) 37 Cath. U.L. Rev. 1.

between Nazi Germany and the United States might go a long way to explain the Court's troubled deliberations in *Quirin*. Moreover, use of military commissions indisputably has a long history in the United States, as well as support in the international laws of war. However, the constitutionality of executive detentions and trial depends upon such circumstances. Military detentions and commissions during actual invasion or the occupation of foreign territory differ in kind from those domestically used against citizens accused of offenses against the law of war. In interpreting congressional authorization for such commissions and the degree, if any, to which the President can redirect his war powers to infringe individual rights and impact domestic affairs, courts must evaluate the factual context in a way which leads into substantive considerations. Courts accordingly have a constitutional responsibility not to be "more executive-minded than the executive," but to scrutinize carefully particular detention decisions. Because of its factual and procedural peculiarities, *Quirin* is, as Justice Frankfurter later characterized it, "not a happy precedent."[675] Chief Justice Stone indeed emphasized the limited, fact-dependent scope of the *Quirin* decision:

> We have no occasion now to define with meticulous care the ultimate boundaries of the jurisdiction of military tribunals to try persons according to the law of war. It is enough the petitioners here, upon the conceded facts, were plainly within those boundaries, and were held in good faith for trial by military commission, charged with being enemies who, with the purpose of destroying war materials and utilities, entered, or after entry remained in, out territory without uniform – an offense against the law of war. *We hold only that those particular facts constitute an offense against the law of war which the Constitution authorizes to be tried by military commission.*[676]

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[675] Justice Frankfurter, Memorandum, *Rosenberg* v. *United States*, 4 June 1953, Box 655, Frankfurter Papers, Harvard Law School, quoted in Danelski, *supra* note 614 at 80.

[676] 317 U.S. at 45-46 [emphasis added]; However, *Quirin* was not the only case of its kind to come out of the war. In 1956, the Tenth Circuit Court of Appeals decided a belated habeas petition in *Colepaugh* v. *Looney*, 235 F.2d 429 (10th Cir. 1956), cert. denied 352 U.S. 1014 (1957). That case involved two Nazi saboteurs landing on the Maine coast, and had facts very similar to those in *Quirin*. While the Tenth Circuit denied the writ based upon *Quirin*, it is interesting to note that the military commission proceedings had less visible involvement of the Roosevelt Administration. The Administration also complied with the review procedures in the *Articles of War* that were so troubling to the Supreme Court in *Quirin*.

Borrowing from Chief Justice Stone's language in distinguishing *Milligan*, one should construe the Court's statement as to the applicability of the law of war to the *Quirin* case as having particular reference to the facts before it.[677] Accordingly, *Quirin* does not support a broad executive power to detain, but one that is fact-dependent and subject to potentially searching judicial review.

Quirin left it to *Hamdi* to address questions about the review standards for unlawful combatant detentions, while its own irregularities caution against any misapplication of it that would erode procedural protections or restrict judicial review on substantive grounds. *Quirin* affirmed an executive detention power, but, like *Milligan* before it, explored the definitional (and thus jurisdictional) criteria for belligerents subject to it. Other than rejecting rights to grand jury indictment and jury trial, the Court did not address procedural or substantive due process issues, partly due to the irregularities of the Justices' deliberations. However, because jurisdiction to detain and try unlawful combatants depended upon factual predicates about the state of war and the alleged belligerents' conduct, procedural and substantive issues lay beneath *Quirin's* reasoning. In formalistically reading *Quirin* to stand for a detention power effectively unlimited by any meaningful judicial review, lower federal courts in *Hamdi* and *Padilla* misapplied *Quirin*. They failed to appreciate the larger context of the case and its somewhat awkward attempts to manage deliberative processes, while they also ignored the irregularities that warned against it as a precedent for an overly broad detention power. In contrast, the Supreme Court in *Hamdi* picked up on the deliberative qualities of its earlier *Quirin* decision, going on to articulate a strong standard of review accommodating both executive and judicial processes in the designation, detention, and trial of unlawful combatants.

[677] See 317 U.S. at 45.

Chapter XI: *Hamdi*, *Padilla*, and the Scope of Judicial Review

The Application of Quirin

The Fourth Circuit Court of Appeals in *Hamdi*[678] and the District Court for the Southern District of New York in *Padilla*,[679] it is submitted, both incorrectly applied *Quirin* to the factual circumstances of those cases and misread it for supporting a broad executive detention power unburdened by judicial review. While recognizing *Quirin* as supporting an executive detention power over unlawful combatants, the Court of Appeals and District Court did not grapple with the conceptual difficulties presented by the adjudicative aspects of such an exercise of presidential war powers. The courts inadequately considered the unconventional nature of the "war against terrorism" compared to the world war in which *Quirin* was decided, and what, if any, impact it had on triggering executive war powers. They likewise failed critically to examine terrorism as an ambiguous criminal and martial phenomenon, and to assess just how certain non-state organizations, such as al-Qaeda, and their members are covered by the laws of war. The courts instead formalistically applied *Quirin* as marking out an executive detention power resistant to meaningful judicial review and dependent upon the President's own determinations about whether the factual circumstances justified exercise of such a power. The Fourth Circuit and the New York District Court overlooked the factual context upon which the President's detention power depends, and ignored the important *Curtiss-Wright/Youngstown* distinction between foreign and domestic exercises of executive discretion. In doing so, both courts disregarded the mixed executive and judicial deliberative processes involved in an unlawful combatant detention decision.

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[678] 316 F.3d 450.

[679] 233 F. Supp. 2d 564.

In comparison, the Second Circuit Court of Appeals in *Padilla* and the Supreme Court plurality in *Hamdi* were more sensitive to the factual context of *Quirin* and the deliberative processes that lay beneath the separation of powers issues it presented. Stressing differences between the status of Padilla and the *Quirin* petitioners, and finding the absence of congressional authorization to detain in the former case, the Second Circuit went so far as to declare that "[w]e do not agree that *Quirin* controls."[680] The Supreme Court did not go so far in *Hamdi*, but rather relied upon *Quirin* in finding that the President indeed had power under the circumstances, and pursuant to congressional authorization, to designate and detain unlawful combatants. Nevertheless, such power was not an absolute discretion, but was subject to judicial review for compliance with due process. The Supreme Court applied *Quirin* in a way that regarded the factual context, remained attentive to foreign and domestic exercises of the war powers, and accommodated mixed deliberative processes involved in a detention decision, in fashioning strong judicial review based upon the *Mathews* due process test.[681]

There are therefore three points useful for comparing how all of the above courts applied *Quirin* to the cases of Hamdi and Padilla, and which reveal how an executive detention decision involves functionally judicial deliberative processes that trigger review by the courts. These points concern the legal nature of "the war against terrorism"[682] and non-state belligerents, the locus of capture and personal status of alleged unlawful combatants, and the actual conditions of their detention. Examination of these issues indicates how the courts ignored or considered the factual dependence of the executive's detention power, while refusing or exercising review based upon determination of its justiciability. This analysis shows that the Supreme Court properly applied *Quirin* in its *Hamdi* decision, leading to two fundamental conclusions about the judicial review of unlawful combatant detentions, or

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[680] 352 F.3d at 715.

[681] See 171, above.

[682] See *supra* note 496.

possibly any justiciable exercise of the war powers that infringes upon individual rights or domestic matters.

First, justiciable factual predicates, subject to judicial review, trigger the President's lawful authority under the war powers to designate, detain, and try unlawful combatants. The contextual dependence of such authority means that a court's determination of legality under habeas corpus, application of the political question doctrine, and constitutional resolution of separation of powers issues all combine. The executive's claim of jurisdiction over unlawful combatants invites judicial inquiry into the very facts that allegedly justify the detention decision itself. Because the facts that support the executive's legal authority to detain and justify the detention decision are the same, courts have a free-standing constitutional power to review the President's detention decisions. Second, the separation of powers doctrine, based upon deliberative processes, means that executive authority to detain also depends upon it respecting adjudicative ideals when it acts in a functionally judicial manner. Courts are therefore not limited to scrutinizing the factual predicates for an unlawful combatant detention, but they can also review the sufficiency of the executive's decision-making processes. That is, in addition to reviewing the facts supporting the President's decision to detain an individual as an unlawful combatant, courts can assess both the procedural due process afforded to the individual and evaluate the reasonableness of the executive's detention decision.

The "War Against Terrorism," the Taliban, and Al-Qaeda

The President's authority under the war powers to detain an unlawful combatant depends upon the existence of a congressionally authorized armed conflict. In the absence of an authorized conflict, the President must prosecute saboteurs, armed infiltrators, terrorists, or other individuals committing violent acts against the State under regular criminal laws and judicial procedures. In the cases of Hamdi and Padilla, the conflicts supporting exercise of the detention power were that in Afghanistan and, more generally, the "war

against terrorism." The Fourth Circuit in *Hamdi* and the New York Southern District Court in *Padilla* at times seemed, however, as argued by Hamdi before the Fourth Circuit, to "confuse [...] the international armed conflict that allegedly authorized Hamdi's detention in the first place with an on-going fight against individuals whom [Government] Respondents refuse to recognize as 'belligerents' under international law."[683] Hamdi and Padilla, in their petitions, emphasized the open-ended duration of the "war against terrorism" and the uncertain legal status of the enemy. Thus, their detention was potentially indefinite during an unconventional conflict that could "have no clear end,"[684] as Padilla submitted before the New York District Court. These observations drew attention to the peculiar nature of the "war against terrorism," and the implications for individual rights should it justify the President's exercise of the war powers to detain alleged unlawful combatants under such circumstances.

The Fourth Circuit and New York District Court avoided addressing the question of hostilities directly as "one that need not be addressed,"[685] in the words of the District Court, because American troops were still involved in combat or occupation duties in Afghanistan.[686] The military measures necessary in conducting the hostilities were matters for the political branches, not the courts. Neither did the absence of a declaration of war matter, as Congress had approved executive military actions against terrorists pursuant to the *Authorization for Use of Military Force*. As the New York District Court stated, "a formal declaration of war is not necessary in order for the executive to exercise its constitutional authority to prosecute an armed conflict. . . ."[687] When reviewing whether the President had authority to detain pursuant to the

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[683] 316 F.3d at 476; The Second Circuit in *Padilla* had no reason to address this question as to whether there existed a conflict triggering the war powers, as it was unnecessary given the court's finding that the *Non-Detention Act*, 18 U.S.C. § 4001(a), forbade detention of citizens absent express congressional authorization. See 169, above.

[684] 233 F. Supp. 2d at 588.

[685] *Ibid.* at 590.

[686] See also *Hamdi*, 316 F.3d at 476.

[687] 233 F. Supp. 2d at 589.

congressional authorization, however, the courts first had to assess whether a military conflict actually existed to trigger the President's war powers as Commander-in-Chief. Nevertheless, the Fourth Circuit and New York District Court made it clear that they would defer to the President's strategic assessments about the military situation, essentially allowing him to determine whether an authorized conflict existed to trigger his detention power. Neither court was willing to consider the legal nature of the "war against terrorism," upon which the applicability of *Quirin* might depend. The Court of Appeals, for example, refused to reach Hamdi's arguments about the indefinite and ambiguous nature of the "war against terrorism," as "under the most circumscribed definition of conflict hostilities [in Afghanistan] have not yet reached their end, this argument is without merit."[688]

Despite finding it unnecessary to look beyond the Afghan conflict as support for the President's detention power, the Fourth Circuit and New York District Court nevertheless reflected upon the "war against terrorism." The Fourth Circuit, in *Hamdi*, demonstrated the deference courts were prepared to give to the executive's determination that a conflict existed as a predicate to its exercise of the detention power:

> These interests do not carry less weight because the conflict in which Hamdi was captured is waged less against nation-states than against scattered and unpatrioted forces. We have emphasized that the "unconventional aspects of the present struggle do not make its stakes any less grave." *Hamdi II*, 296 F.3d at 283. Nor does the nature of the present conflict render respect for the judgments of the political branches any less appropriate. We have noted that the "political branches are best positioned to comprehend this global war in its full context," *id.*, and neither the absence of set-piece battles nor the intervals of calm between terrorist assaults suffice to nullify the warmaking authority entrusted to the executive and legislative branches.[689]

The New York District Court in *Padilla* did suggest that "when operations against al Qaeda fighters end, or the operational capacity of al Qaeda is

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[688] *Ibid.* at 476.

[689] 316 F.3d at 464.

effectively destroyed, there may be occasion to debate the legality of continuing to hold prisoners based on their connection to al Qaeda. . . ."[690] The degree of deference that both courts were willing to show to executive military decisions, however, would severely limit, if not foreclose, review of the existence or constitutional sufficiency of a conflict for detention purposes. The courts' held out the possibility that an open-ended, unconventional conflict, considerably different from the kind of declared conventional war behind the *Quirin* case, could justify the President's detention power. The ambiguous character of the "war against terrorism" thus raised concerns about how far the President could go in invoking his own war powers, and to what degree *Quirin* applied outside of conventional warfare.[691]

The Supreme Court in *Hamdi*, in contrast to the Fourth Circuit and the New York District Court, recognized "that the national security underpinnings of the 'war on terror,' although crucially important, are broad and malleable."[692] As such, Hamdi's claim that his detention was possibly of indefinite duration, given the unconventional nature of the conflict, was "not far-fetched."[693] However, the Court found that Congress' *Authorization for Use of Military Force* permitted detention only for the duration of the conflict in Afghanistan. The Court therefore found no need to consider further the unconventional "war against terrorism," but asserted that was a "clearly established principle of the law of war that detention may last no longer than active hostilities."[694] Since the Court, like the Fourth Circuit and New York District Court, found that hostilities in Afghanistan were still not concluded, detention of unlawful combatants pursuant to the congressional authorization was lawful. However, the clear implications of the Court's position was that

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[690] 233 F. Supp. 2d at 590.

[691] While distinguishing *Quirin's* applicability to citizens or aliens within the United States, based upon the nature of the conflict, it remains arguable that "aliens outside the United State surely fall within the jurisdiction of commissions" based upon the reasoning of *Eisentrager*, 339 U.S. 763. Solis, *supra* note 529 at 201.

[692] 124 S. Ct. at 2641.

[693] *Ibid.*

[694] *Ibid.*

the courts, while perhaps appropriately deferring to the executive's military judgment about a conflict, nevertheless could independently determine as a predicate factual matter whether a congressionally authorized conflict existed for purposes of triggering the President's detention power.[695]

Judicial consideration of whether a military conflict exists for purposes of triggering the President's detention power encounters several conceptual difficulties in regard to the "war against terrorism." American and international law has long dealt with terrorism as a special criminal, rather than martial, phenomenon. Terrorism, though notoriously resistant to uniform definition, generally encompasses 1) the use or threat of violence against civilian targets, 2) motivated by political, religious, or other ideological beliefs, 3) to coerce or influence government policies. This core definition, in varying forms, lies at the center of domestic criminal, anti-terrorism legislation in the United States, the United Kingdom, and Canada, for example.[696] Several international conventions and Security Council resolutions similarly define terrorism, and characterize it as international criminal behavior punishable by all nations.[697] Interestingly, the United States Government chose to prosecute some individuals – such as the infamous "American Taliban" John Walker Lindh and alleged September eleventh bomber Zacarias

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[695] Justice Scalia (joined by Stevens J.) and Justice Thomas both dissented from the Court's decision, using formalistic reasoning to come to radically different, but logically consistent, conclusions. Justice Scalia, *ibid.* at 2660 *et seq.*, found that where a citizen allegedly wages war against the United States, the executive must criminally prosecute him in the courts for treason or other offenses. The executive branch could otherwise hold the individual without criminal charge only if Congress had suspended the writ of habeas corpus. Justice Thomas, *ibid.* at 2674 *et seq.*, on the other hand, asserted that the President could detain unlawful combatants under his war powers, and courts lacked the "expertise and capacity to second-guess that decision." The federal government's war powers could not be "balanced away" under the *Mathews* test. *Ibid.* at 2674. Both approaches similarly depended upon formalistic classifications of unlawful combatant detentions as either uniquely criminal or martial in nature, leaving such detention decisions for resolution exclusively by either the judicial or executive branches. Except for textually explicit constitutional exceptions, such with the legislative suspension of habeas corpus, no branch could infringe upon the others' demarcated spheres of authority. The dissenting views of Justices Scalia and Thomas, despite their opposite conclusions, similarly rested upon a highly formalistic approach to the separation of powers doctrine, which denied the functional mixing of deliberative processes.

[696] See David Jenkins, "In Support of Canada's Anti-Terrorism Act: A Comparison of Canadian, British, and American Anti-Terrorism Law" (2003) 66 Sask. L. Rev. 419 at 433-40.

[697] *Ibid.* at 427-29.

Moussaoui– under criminal terrorism laws, rather than treat them as unlawful combatants under the laws of war.[698] In many domestic and international legal regimes, then, terrorism is an unusual species of crime, and its peculiar characteristics fit uneasily into the traditional, dualistic paradigms of crime versus war. As such, the "war against terrorism" raises questions about the extent of executive authority under the war powers to deal with terrorists as unlawful combatants, and the relative deliberative virtues of the executive and judicial branches in making such detention decisions.

Shifting terrorism from a criminal to war paradigm could have far-reaching impact upon future legal, political, and strategic responses to terrorism,[699] as well as the separation of powers. The prosecutions of Lindh and Moussaoui, when compared with the detention of Hamdi and Padilla, for example, illustrate how executive detention of unlawful combatants blurs the functional lines between executive and judicial deliberative processes. The ambiguous nature of terrorism within the crime/war paradigms raises concerns about whether it is best dealt with through either regular criminal procedure in Article III courts or under the executive's war powers. The uncertain place of terrorism between crime and war also opens greater possibilities that the executive branch can infringe individual rights and impact upon domestic affairs, by using its war powers to adjudicate and punish individual criminal behavior. Formalistic adherence to the crime/war dichotomy ignores the contextual complexities of terrorism as both criminal activity and an unconventional method of armed conflict. Consequently, a formalistic approach ignores functional mixing of deliberative processes involved in an unlawful combatant detention decision: processes that require the executive to

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[698] See *United States* v. *Lindh*, Plea Agreement (15 July 2002), online at: FindLaw <http://news.findlaw.com/hdocs/docs/lindh/uslindh71502pleaag.pdf> and *United States* v. *Moussaoui*, 382 F.3d 453 (4th Cir. 2004), cert. denied 125 S. Ct. 1670 (2005); Another citizen, Lyman Faris, was also criminally prosecuted for terrorism offenses. *United States* v. *Faris*, Plea Agreement (June 2003), online at: FindLaw <http://news.findlaw.com/hdocs/faris/usfaris603plea.pdf>.

[699] "If the war on terrorism is not to be conceived of as an international armed conflict, it is one of startling breadth, innumerable 'combatants,' and indefinite duration." Fitzpatrick, "Jurisdiction of Military Commissions," *supra* note 531 at 347, and 346-48.

adhere to adjudicative standards of decision-making and so permit judicial review under the separation of powers doctrine.

Terrorism, therefore, is not just a criminal phenomenon, but is a "highly irregular technique of armed conflict" often organized and waged within and against a civilian population at large, thus distinguishing it from regular crimes.[700] These tactics are in pursuit of political goals by attempting to affect government behavior, seen for example in the influence of the March 11, 2004 Madrid train bombing upon the subsequent Spanish general election. In this way, terrorists' political goals resemble those traditionally pursued by nation-states through international diplomacy or armed conflict. As demonstrated by al-Qaeda's orchestration of the September eleventh attacks, terrorists might also possess capabilities to operate on an international level and cause catastrophic loss of life. Al-Qaeda's, or other groups', capacity to cause harm and wage violent campaign for political ends challenge the nation-state monopoly on large-scale violence. Terrorism might at times resemble in purposes, execution, and scale those hostile acts previously attributable only to nation-states or well-organized internal resistance movements. Indeed, some terrorist resources might even be greater than those possessed by weak or "failed" states, typified by the strong connection between al-Qaeda and the Taliban regime in Afghanistan. Thus, the question as to whether criminal acts of terrorism can also constitute acts of war intersects with the legal status of non-state entities, such as al-Qaeda, in international law and their capacity to wage war for the purposes of triggering the President's detention authority under his war powers.[701]

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[700] W. Michael Reisman, "International Legal Responses to Terrorism" (1999) 22 Hous. J. Int'l L. 3 at 11-12; Philip B. Heymann, *Terrorism and America: A Commonsense Strategy for a Democratic Society* (Cambridge, Mass.: MIT Press, 1998) at 8-9.

[701] Curtis A. Bradley and Jack L. Goldsmith, "Congressional Authorization and the War on Terrorism" (2005) 118 Harv. L. Rev. 2047 at 2066-71 [hereinafter "Congressional Authorization"], however, argue that the "war against terrorism" does strongly exhibit characteristics of a more traditional war. "Where, as here, both political branches have treated a conflict as a 'war', and that characterization is plausible, there is no basis for the courts to second-guess that determination based on some metaphysical conception of the true meaning of war." Even accepting that courts should not engage in such second-guessing, the character of the conflict and its participants nevertheless becomes relevant to determining such legal questions as the applicability of the *Third Geneva Convention*, the criteria for lawful

The Bush Administration's association of al-Qaeda with the Taliban, and the consequent refusal to apply the *Third Geneva Convention* to belligerents captured fighting for either group, resulted from just such an ambiguity about the nature of terrorism. The international status of the Taliban as the government of Afghanistan and its relationship with al-Qaeda was far from clear. Only three states, Pakistan, Saudi Arabia, and the United Arab Emirates had recognized the Taliban as the legitimate government of Afghanistan as of August 2001.[702] The peculiar isolation of the Taliban in the world community and the highly unstable, nearly anarchic, political situation in Afghanistan prior to September 11, 2001 raised the question as to whether that country might not be a "failed" state, against which certain rules, such as those of the *Third Geneva Convention*, might not fully apply. As a failed state, the Taliban might have been under international law no more than a tenuous alliance of warlords and religious leaders, *de facto* controlling most of Afghanistan only by virtue of force. Without a legitimate claim to sovereign authority, nearly no international recognition, little administrative or bureaucratic apparatus, or even a uniformed, organized military force distinct from independent factional or tribal militias, the Taliban might have arguably constituted only a sub-state entity acting as the *de facto* government of Afghanistan.

The close relationship between the Taliban and al-Qaeda complicated the difficulty in making legal distinctions between sub-state, criminal enterprise and state war-making. Individual loyalties to the Taliban and al-Qaeda often over-lapped and interplayed with conflicts between tribal warlords, while al-Qaeda exerted considerable political influence over the Taliban.[703] The two

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combatancy, and the scope of presidential authority to detain unlawful combatants pursuant to congressional authorization.

[702] "Afghanistan's Taliban Rules" CNN (9 August 2001), online at: CNN <http://archives.cnn.com/2001/WORLD/asiapcf/central/08/09/taliban.profile/>.

[703] As Bradley and Goldsmith, "Congressional Authorization," *supra* note 701 at 2049, mention, loyalties to the Taliban and al-Qaeda, or other terrorist causes, transcend national identification. Not only have citizens of the United States, Canada, Australia, the United Kingdom, and other Western nations fought on the ground in Afghanistan on behalf of the Taliban or al-Qaeda, but citizens have conspired from within their own countries to commit terrorist acts against them. "The traditional concept of 'enemy alien' is inapplicable in this

entities were in many respects intertwined, confusing the international legal status of both. Under dichotomous crime/war paradigms, a determination that the Taliban was a sub-state entity might indeed exempt its fighters from *Geneva Convention* protections from criminal prosecution. The implications of the Taliban's *Geneva* exception, however, are uncertain in terms of the President's constitutional authority to deal with them. The non-state character of Taliban fighters could mean that the President's full war powers would not apply in the event of their capture, requiring punishment through some sort of civilian prosecution. Alternatively, like the Bush Administration claimed, the non-state status of the Taliban and its association with al-Qaeda might mean that that the President could treat them as unlawful combatants under his war powers. The opposing position would be that the *Third Geneva Convention* applied to the Taliban's fighters due to its status as the *de facto* government of Afghanistan. Consequently, international law would require POW treatment of its belligerents captured in conventional battle, including possibly those members of al-Qaeda fighting on its behalf. The uncertainty of the international status of the Taliban and al-Qaeda therefore raised doubts about whether the President, under the Constitution and the laws of war, could detain their fighters as unlawful combatants, must hold them as POWs under the *Third Geneva Convention*, or might prosecute them before civilian courts.[704]

The difficulties in characterizing the Taliban and al-Qaeda under international law led the Fourth Circuit and the New York District Court to defer to the President's decisions regarding the legal status of those entities. Nevertheless, while such foreign affairs decisions might fall outside of the normal competency of the courts, judicial deference to the executive in such matters has implications for the constitutional separation of powers and the rule of law, which the courts have a Lockean fiduciary obligation to maintain. In allowing the President to treat Taliban or al-Qaeda fighters as unlawful combatants, with unchecked discretion and outside of his deliberative

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conflict; instead of being affiliated with particular states at war with the United States, terrorist enemies are predominantly citizens and residents of friendly states or even the United States."

[704] See Aldrich, George H., "The Taliban, Al Qaeda, and the Determination of Illegal Combatants" (2002) 96 Amer. J. Int'l. L. 891 at 893-96.

competency, the courts enable him to determine the applicability and scope of his own war powers to the possible detriment of the public good. The Supreme Court confronted this problem in *Hamdi* when considering the personal status of individuals subject to detention as unlawful combatants.[705] Not only does the "war against terrorism" offer the prospect of an open-ended, ill-defined conflict, but executive discretion to determine combatant status threatens to dissolve any legal certainties about just who is the enemy. Such discretion allows the President to infringe upon the rights of individuals who might not actually qualify as unlawful combatants under the laws of war. It further enables the President to direct the war powers domestically inward to circumvent civilian courts in dealing with individuals alleged to present an unconventional security threat, through their association with organizations such as the Taliban or al-Qaeda. Such unbounded executive discretion to deal with individuals under the war powers and by-pass federal courts was the very issue in *Milligan*, as well as the World War II case of *Duncan* v. *Kahanamoku*.[706] Decided shortly after *Quirin*, the Supreme Court found in *Duncan* that judicial consideration of the actual state of hostilities was necessary to determine whether the executive branch had lawfully imposed martial law in Hawaii. Accordingly, while courts should normally defer to the executive's foreign affairs and military judgments, the absence of any judicial consideration of the nature and intensity of a conflict, and the international status of its belligerents, allows the President potentially to abuse his war powers and violate the separation of powers. He could do so by improperly detaining alleged unlawful combatants, using his war powers under circumstances that might not constitutionally trigger them, and acting in a functionally judicial manner without deliberating according to adjudicative standards.[707]

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[705] See 248, below.

[706] 327 U.S. 304 (1946).

[707] As the Supreme Court stated in *Hamdi*: "Moreover, as critical as the Government's interest may be in detaining those who actually pose an immediate threat to the national security of the United States during ongoing international conflict, history and common sense teach us that an unchecked system of detention carries the potential to become a means for oppression and abuse of others who do not present that sort of threat." 124 S. Ct. at 2647.

Moreover, President Bush's Military Order[708] subjecting all members of al-Qaeda to military trial as unlawful combatants, along with his denial that the Taliban's fighters were entitled to protection under the *Third Geneva Convention*, assigned group culpability based upon his own evaluations of those entities' international status. The *Geneva Convention* allows for no such collective determination, but expressly requires cases of its applicability to be resolved individually in regard to its four criteria for lawful belligerency.[709] Under the laws of war, it is doubtful that an individual can qualify as an unlawful belligerent based merely upon association, rather than his actual commission of unprivileged belligerent acts. While one might argue that "[v]irtually no Taliban, al Qaeda, or other terrorist satisfies the very precise *Geneva Convention* requirements for prisoner of war status,"[710] such determination must nevertheless depend upon the individual's personal engagement in or preparation for belligerent acts, and not be predicated upon a blanket executive judgment about the characteristics of the belligerent entities and their actions. Otherwise, the President could claim authority under the war powers to deal with individuals sympathetic to a particular group, such as al-Qaeda, even though such individuals might never have actively participated in violent acts of belligerency.[711] As with an unfettered discretion to

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[708] Military Order, *supra* note 443.

[709] See 183, 188, above; Jennifer Elsea, *Treatment of 'Battlefield Detainees' in the War on Terrorism* (New York: Novinka, 2003) at 39-41; But see Draper, "The Status of Combatants," *supra* note 510 at 197, who writes that "[w]here, however, the majority of the members of the group, for any reason whatever, fail to meet the conditions [of *Geneva III*], or any of them, at any time, then the members of the group, all of them, fail to obtain combatant status. An individual belonging to a group of that kind will, upon capture, be denied a prisoner or combatant status, whatever his individual behaviour may have been. All the members of such a group are then exposed to the legal consequences of illegal combatancy." However, no courts hearing the cases of Hamdi or Padilla sufficiently considered this question.

[710] Solis, *supra* note 529 at 198.

[711] The Government has admitted the potentially limitless scope of an executive power to determine individual combatant status or group culpability free from judicial review: "[C]ounsel for the respondents argued that the Executive has the authority to detain the following individuals until the conclusion of the war on terrorism: '[a] little old lady in Switzerland who writes checks to what she thinks is a charity that helps orphans in Afghanistan, but [what] really is a front to finance al-Qaeda activities,' . . . a person who teaches English to the son of an al Qaeda member, . . . and a journalist who knows the location of Osama bin Laden but refuses to disclose it to protect her source. . . ." *In re Guantanamo*

determine individual combatant status, executive assignment of group culpability threatens the separation of powers. If courts overly defer to such executive decisions, the President rather than the courts would then determine the extent and applicability of his own war powers, resolve pertinent questions of international law, and adjudicate individual rights without judicial review. In the case of citizens or individuals present on U.S. territory, it would also bridge the divide between the President's foreign exercise of the war powers, and the domestic execution and adjudication of the laws. All of these issues fall within the judiciary's deliberative competence, justifying careful judicial review of them notwithstanding appropriately measured deference to the executive branch's expertise in foreign affairs and war.

The ambiguous character of the Taliban and al-Qaeda, along with their violent deeds, prompted the Bush Administration to designate and detain citizens as unlawful combatants as part of the "war against terrorism," a conflict very much unlike the declared, conventional, total war that was the backdrop for *Quirin*. No courts in the *Hamdi* or *Padilla* cases, when following *Quirin*, questioned either the unconventional nature of the conflict or the status of the Taliban or al-Qaeda under the international laws of war. Nevertheless, the Supreme Court's *Hamdi* decision left open the possibility that, in a petition for a writ of habeas corpus, a detainee could raise such questions as issues of fact, upon which the President's detention authority would be legally predicated. Additionally, the nature of the conflict and the status of the actors could be substantive considerations in balancing individual versus Government interests under the *Mathews* test, thus determining the procedural requirements that the executive must follow when functionally adjudicating an individual's combatant status.

Locus of Capture and Personal Status

Detainee Cases, 255 F. Supp. 2d 443 at 475 (D. D.C. 2005) [citations omitted]. See 275, below.

In his habeas petition, Hamdi did not challenge the fact of his capture in a zone of combat, but did dispute allegations of his belligerency. While the District Court for the Eastern District of Virginia focused upon whether Hamdi was actually armed and what his actions had been, the Fourth Circuit Court of Appeals only considered his capture in a combat zone. The Fourth Circuit decided only the issue of law[712] as to whether the President could exercise the detention power in such an area, without independently inquiring as to whether Hamdi's actual conduct supported his status as an unlawful combatant. Thus, according to the Fourth Circuit, the President's lawful authority to detain unlawful combatants was effectively predicated upon the individual's locus of capture; detention of an individual, captured in a combat zone, would depend upon the President's own factual assertions. The Fourth Circuit thus overruled the District Court, which had insisted upon an independent judicial inquiry as to whether Hamdi had actually violated the laws of war. The Court of Appeals had earlier directed the District Court that "if Hamdi is indeed an 'enemy combatant' . . . , the government's detention of him is a lawful one,"[713] only later to base the status determination upon the executive's unquestionable factual findings. Executive jurisdiction to detain unlawful combatants essentially depended not upon the personal status of the individual, then, but upon the location of the individual's locus of capture. Foreign captures, according to the view of the Fourth Circuit, deserved *Curtiss-Wright* deference as "federative" matters, appropriately resolved through executive deliberative processes.

The Fourth Circuit was also unwilling to scrutinize the executive's criteria for determining unlawful combatancy. The court's omission on this point meant that the President could not only establish the predicate facts for his detention power, but could change the legal criteria defining its scope, as well. The Fourth Circuit accordingly deferred to the "determination by the executive that the citizen was allied with enemy forces,"[714] without further

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[712] "[W]e conclude that Hamdi's petition fails as a matter of law." 316 F.3d at 469.

[713] *Hamdi*, 296 F.3d at 279.

[714] 316 F.3d at 465.

analysis as to whether such individual behavior, even if true, amounted to a violation of the laws of war. Although Hamdi allegedly bore arms openly in the field, and did not surreptitiously cross American or allied lines in order to commit hostile acts, the Government nevertheless designated him as an unlawful combatant based simply upon his alleged affiliation with the Taliban. Hamdi's designation as an unlawful combatant did not rest upon specific allegations of individual offenses under the laws of war, based upon the *Third Geneva Convention's* criteria, as had been the case with the petitioners in *Quirin*. Instead, Hamdi's designation rested upon the Bush Administration's categorical determination that all individuals associated with the Taliban were unlawful combatants without protection under the *Convention*. Because of the locus of Hamdi's capture, the Fourth Circuit left his unlawful combatant status solely to executive discretion. According to the Appeals Court, courts should look only at whether the Government's factual assertions, accepted as true on their face, would support the executive's detention decision according to its own established criteria.[715] This was a more formalistic view of the separation of powers, despite habeas review, as it heavily circumscribed judicial oversight of executive actions under the war powers and discounted overlapping branch authority over a detention decision. The Court of Appeals refused to recognize its institutional competency to determine facts and consistently to interpret the legal criteria of unlawful combatant status, while ignoring the functionally judicial aspects of such an executive detention decision.

The Fourth Circuit formalistically interpreted *Quirin* as support for a broad executive authority to detain unlawful combatants, subject only to very deferential review for legality upon a petition for habeas corpus. Importantly, however, the court disregarded the importance of personal status and the particular facts in the prior decision. The earlier case dealt specifically with the internment and military trial of a U.S. citizen, Haupt, as well as others,

[715] "By refusing to inquire meaningfully into the facts underlying and legitimating the government's deprivation of Hamdi's constitutionally guaranteed liberty, the Fourth Circuit had effectively demoted its powerful conception of the rights at stake to the status of mere precatory language." Jonathan Masur, "A Hard Look or a Blind Eye: Administrative Law and Military Deference" (2005) 56 Hastings L.J. 441 at 468.

who were unlawful combatants because they had entered the country and shed uniform to commit sabotage. The detainees' affiliation with the enemy and their hostile intent were undisputed, but their personal status was a point that the *Quirin* majority belabored in its full opinion. In *Quirin*, as in the District Court's decision in *Hamdi*, the actual conduct of the detainees was determinative of whether they were unlawful combatants under the laws of war. Because *Quirin* was concerned with the domestic arrest and military trial of belligerents on U.S. soil, the locus of capture would have been an insufficient basis for judicial deference to the executive's factual assertions. Instead, *Quirin* required judicial inquiry into the detainees' status. Defense counsel in *Quirin* had relied upon *Milligan's* holding that the military could not try a citizen by military commission where the civil courts were open and functioning. However, the Supreme Court had distinguished the Civil War case by pointing out that the civilian, non-belligerent status of Milligan contrasted with the military affiliations of the *Quirin* petitioners, and their violations of the laws of war. Thus, while *Quirin* affirmed the domestic reach of the President's detention power, it premised his jurisdiction upon the facts supporting unlawful combatant status. Consequently, in reviewing the executive's legal authority to detain an unlawful combatant, courts would have to make an independent inquiry into the facts behind the executive's status determination. Because, under *Quirin*, jurisdictional facts coincided with those of personal status, courts could not properly refuse upon a habeas petition to review the executive's factual allegations about an individual captured in a foreign zone of combat. To do so, as the Fourth Circuit did, would abdicate the judiciary's constitutional responsibility to maintain the separation of powers by ensuring that the executive does not act unlawfully and outside of its decision-making competence.

In *Hamdi* the Fourth Circuit went beyond *Quirin,* insofar as it suggested that the President might enjoy greater discretion to detain suspected unlawful combatants if captured abroad rather than at home. The Fourth Circuit noted the difference between the case it was deciding and the type represented by *Quirin* and *Padilla*, which concerned "the designation as an enemy combatant

of an American citizen captured on American soil . . . ."[716] The Fourth Circuit refused to speculate on how its approach might impact a domestic unlawful combatant case, stating that it applied *Quirin* to "the specific context before us – that of the undisputed detention of a citizen during a combat operation undertaken in a foreign country . . . ."[717] Thus, the Fourth Circuit made a conscious effort not to address the ongoing *Padilla* case in the Southern District of New York, declaring that "[t]o compare this battlefield capture to the domestic arrest in *Padilla* v. *Bush* is to compare apples and oranges."[718] The Fourth Circuit thereby suggested that domestic captures of unlawful combatants might require less judicial deference to executive status determinations than would battlefield captures like Hamdi. The court seemingly interpreted *Quirin* in light of the *Curtiss-Wright* and *Youngstown* paradigm, giving the President a greater discretion to detain in "federative" matters while narrowing that discretion as it impacted more heavily upon domestic affairs or citizens' rights.

Unlike Hamdi, the Government captured Padilla, not on a foreign battlefield, but within the United States. The District Court for the Southern District of New York, applying *Quirin*, recognized that the President possessed constitutional and statutory authority to detain citizens as unlawful combatants, even if captured on American soil. The District Court found, similarly to the Fourth Circuit in *Hamdi*, that the executive determination of Padilla's status deserved a high degree of judicial deference. The District Court, however, cautioned that, because the *Quirin* petitioners stipulated the facts, it "offers no guidance regarding the standard to be applied in making the threshold determination that a habeas corpus petitioner is an unlawful combatant."[719] In trying to balance its duty to review executive detention decisions with appropriate deference the President's military judgment, the

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[716] *Ibid.* at 465.

[717] *Ibid.*

[718] *Hamdi* v. *Rumsfeld*, 337 F.3d 335, 344 (4th Cir. 2003), *per* Wilkinson, J., denying rehearing *en banc* of 316 F.3d 450 (4th Cir. 2003).

[719] 233 F. Supp. 2d at 607.

court held that it would determine only whether there was "some evidence" in support of the Government's unlawful combatant designation.[720] This standard was a highly deferential one that would accept the Government's factual assertions about Padilla to be true, but unlike the Fourth Circuit's approach would give petitioner a limited opportunity to introduce additional facts. Because it interpreted Congress' *Military Force Authorization* to permit detentions of citizens anywhere, the court found that the domestic locus of capture was not a consideration in reviewing the President's legal authority to detain an unlawful combatant.[721] The District Court complied with *Quirin* in so far as it recognized the importance of individual status over the locus of capture. The court also noticed that the Government had accorded the *Quirin* petitioners a hearing on their unlawful combatant status before a military commission, a procedural benefit not enjoyed by Padilla. However, its "some evidence" standard of review remained highly deferential to the executive's assessment of the factual predicates supporting its own established criteria for unlawful combatancy, raising the same separation of powers problems as did the Fourth Circuit's decision in *Hamdi*.

Despite its attention to personal status, the District Court still failed to address the important dissimilarities between the status of Padilla and the *Quirin* petitioners. Padilla's alleged plot to detonate a "dirty bomb" would violate the laws of war, but for the fact that he had no affiliation with enemy armed forces that would seem to qualify him as an unlawful combatant under the laws of war. This lack of affiliation called into question his belligerent, rather than civilian, status, and so did not clearly subject him to treatment under the President's military authority as opposed to regular criminal process. The Supreme Court in *Quirin*, in contrast, had distinguished *Milligan* from the case before it, because of the military associations of Haupt and the others.[722] Although the District Court stated that "Padilla, like the [*Quirin*] saboteurs, is alleged to be in active association with an enemy whom the United States is at

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[720] *Ibid.* at 608.

[721] *Ibid.* at 606-07.

[722] See 317 U.S. at 45.

war,"[723] Padilla disputed the truth of this allegation. The "some evidence" standard set by the District Court, however, would have restricted the petitioner from effectively contraverting the Government's factual assertions. The court left unanswered just what kind of enemy contacts *Quirin* required in order to avoid *Milligan's* holding. Like the Fourth Circuit in *Hamdi*, the District Court in *Padilla* accordingly refrained from making a closer examination of the "war against terrorism," the legal status of al-Qaeda and its sympathizers, and the actual circumstances of Padilla's alleged belligerency. The Fourth Circuit's decision in *Hamdi* and the New York District Court's decision in *Padilla* together stood for a broad executive power to designate, detain, and try individuals as unlawful combatants without any meaningful judicial review into whether they had actually violated the laws of war.[724]

The Second Circuit Court of Appeals, in reversing the District Court, did not reach the issues of Padilla's locus of capture and personal status. Rather, by interpreting Congress' *Military Force Authorization* as insufficient to abrogate the explicit requirement in 18 U.S.C. § 4001(a) that the executive not detain a citizen "except pursuant to an Act of Congress," the Second Circuit found an absolute statutory bar to the military detention of citizens. Because the President possessed no inherent constitutional authority to detain unlawful combatants under the war powers, the detention of Padilla or other citizens was unlawful. The Court of Appeals accordingly ordered the District Court to issue a writ of habeas corpus, freeing Padilla from military custody.

The Supreme Court did not reach the merits of Padilla's petition due to a finding that the New York District Court lacked jurisdiction over his detention in South Carolina. However, it addressed them indirectly in its *Hamdi* decision. In *Hamdi*, the Court's plurality interpreted the *Military Force Authorization*, permitting the President's use of "necessary and appropriate

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[723] 233 F. Supp. 2d at 594.

[724] For analysis of the deferential approaches that the Fourth Circuit and New York District Court took towards executive unlawful combatant designations, see for example Jordan J. Paust, "Judicial Power to Determine the Status and Rights of Persons Detained Without Trial" (2003) 44 Harv. Int'l L.J. 503 at 525 *et seq.* and Steven R. Swanson, "Enemy Combatants and the Writ of Habeas Corpus" (2003) 35 Ariz. St. L.J. 939 at 982 *et seq.*

force," to allow detentions of unlawful combatants as a power necessarily incidental to the conduct of war. The Force Authorization therefore satisfied 18 U.S.C. § 4001(a). Citing *Quirin*, it agreed that there was no constitutional bar to such detention of a citizen.[725] However, the Court recognized that, as to the designation of "enemy combatant", "[there] is some debate as to the proper scope of this term, and the Government has never provided any court with the full criteria that it uses in classifying individuals as such."[726] The Court made clear that detention was authorized only for "individuals falling into the limited category we are considering."[727] That restricted category, according to the Court, was that proposed by the Government under the circumstances, being an individual "'part of or supporting forces hostile to the United States or coalition partners' in Afghanistan and who 'engaged in armed conflict against the United States.'"[728] The Court, however, did not need directly to address the question of the applicability of the *Geneva III* criteria, as it did not rule on the merits of the case.

To a majority of justices, the individual's personal status as a belligerent, and not his locus of capture, was nevertheless the crucial issue in determining the executive's lawful authority to detain. The Court overruled the Fourth Circuit's decision that Hamdi's capture in a foreign combat zone required broad deference to the executive's status determination, without any independent judicial review of the facts. The Court explained, *per* Justice O'Connor, that *Quirin* "postdated and clarifies" the decision in *Milligan*,[729] making it clear that the President could detain a citizen who aided the enemy only if the individual met certain criteria under the laws of war. In a footnote, the Supreme Court cautioned that an individual's affiliation with an enemy, or

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[725] 124 S. Ct. at 2640-41, *per* O'Connor J.; It was on this point of statutory interpretation that Justices Souter and Ginsburg disagreed in their concurring opinion, finding that the *Military Force Authorization* did not override the prohibition on detention found in 18 U.S.C. § 4001(a), the same position taken by the Second Circuit in *Padilla*. *Ibid.* at 2653-54.

[726] *Ibid.*

[727] *Ibid.* at 2640.

[728] *Ibid.* at 2639.

[729] *Ibid.* at 2642-43.

capture upon a battlefield, was not necessarily sufficient to allow his detention as an unlawful combatant. Accordingly, "[t]he legal category of 'enemy combatant,'" the Government's euphemism for an unlawful combatant, "has not been elaborated upon in great detail. The permissible bounds of the category will be defined by the lower courts as subsequent cases are presented to them."[730] By this statement, the Court suggested that the judicial branch, not the executive, had to determine the legal criteria of unlawful combatancy, against which the executive's factual determinations would be reviewed. While remaining sensitive to the executive's military judgment, Justice O'Connor explained, courts could still scrutinize the factual allegations supporting an unlawful combatant detention:

> [A]rguments that military officers ought not to have to wage war under the threat of litigation lose much of their steam when factual disputes at enemy-combatant hearings are limited to the alleged combatant's acts. This focus meddles little, if at all, in the strategy or conduct of war, inquiring only into the appropriateness of continuing to detain an individual claimed to have taken up arms against the United States. 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.[731]

Thus, while the contours of judicial review of unlawful combatant detentions might be different from those in civilian criminal cases, "the threats to military operations posed by a basic system of independent review are not so weighty as to trump a citizen's core rights to challenge meaningfully the Government's case and to be heard by an impartial adjudicator."[732] A court's factual inquiry into an individual's belligerent conduct therefore coincided with the jurisdictional question of whether the President had constitutional authority to detain unlawful combatants under the war powers, an authority subject to

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[730] *Ibid.* at 2642, n. 1.

[731] *Ibid.* at 2649-50.

[732] *Ibid.* at 2650.

judicial review under the separation of powers doctrine because it implicated mixed executive and judicial deliberative processes.

Because the legal authority of the President to detain depended upon the personal status of the individual, the Supreme Court found it inappropriate to defer to executive fact-finding under the "some evidence" standard suggested by the Government in *Hamdi* and accepted by the Second Circuit in *Padilla*. The Court noted that the "some evidence" standard was for the review of an administrative record developed after adversarial hearing, and was not itself a standard of factual proof.[733] Where a citizen detainee disputed the executive's factual allegations about his belligerency, due process required procedural mechanisms for the status determination. The due process consequently required was, pursuant to the *Mathews* test, a balance between individual liberty interests and the Government's interest in protecting national security.[734] Fifth Amendment due process therefore mandated that the executive must give notification and fair hearing, including access to counsel, to a citizen detainee regarding the factual basis for his detention.[735] An individual, pursuant to a petition for a writ of habeas corpus, must consequently have an opportunity for meaningful judicial review of the executive's detention decision.[736] Due process under the *Mathews* test thus

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[733] *Ibid.* at 2651.

[734] *Ibid.* at 2644-46, citing *Mathews*, 424 U.S. 319; But see Masur, *supra* note 715 at 472, criticizing the Supreme Court's decision in *Hamdi*, and its allowance of a rebuttable factual presumption in favor of the Govement, as leading to a position "nearly identical" to the one established by the "some evidence" standard of the New York District Court in *Padilla*. However, the Supreme Court's specific reliance upon the Fifth Amendment due process clause in fashioning procedures for status determinations, and its clear statement that any factul presumption is indeed rebuttable, is an inherently more robust standard for executive decision-making. Not only must the Government, upon rebuttal, proffer supporting evidence for its factual claims, but the Fifth Amendment opens up a window for judicial scrutiny into the executive's actual decision-making processes. Indeed, Masur himself goes on to suggest that administrative law provides better controlling principles in reviewing unlawful combatant detentions. However, the *Hamdi* Court's invocation of the *Mathews* balancing test, a cornerstone of administrative law, invites just such an administrative-based review of justiciable exercises of the war powers. See 265, below.

[735] *Ibid.* at 2648; Justices Souter and Ginsburg concurred with the plurality's opinion, though admitting it to be unnecessary given their view that 18 U.S.C. § 4001(a) barred detentions of citizens as unlawful combatants, notwithstanding Congress' *Authorization for Military Force*. *Ibid.* at 2660.

[736] *Ibid.* at 2650.

depended upon judicial evaluation of fact-specific, contextual considerations, and required the executive to adhere to adjudicative standards when functionally adjudicating individual rights.[737] Where the executive failed to accord sufficient due process before a neutral decision-maker, the Court added, a court upon habeas review must compensate for the procedural deficiencies by independently scrutinizing the factual predicates to the President's detention decision.[738]

In applying *Quirin*, the *Hamdi* Court supported an executive authority to detain unlawful combatants, pursuant to congressional authorization. However, it required judicially reviewable, procedural protections to prevent the executive from determining the extent of its own detention authority under the war powers. In so far as it also found congressional authorization for detentions, the Court recognized a combined role for the legislative, executive, and judicial branches in lawfully detaining citizens as unlawful combatants. Each brought to bear its own deliberative virtues in the decision to detain an unlawful combatant. As the Court stated, "[w]hatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake."[739] The Supreme Court condemned the Government's claims to a broad discretion to detain in no uncertain terms:

> Indeed, the position that the courts must forego any examination of the individual case and focus exclusively on the legality of the broader

[737] "At the same time, the exigencies of the circumstances may demand that, aside from these core elements, enemy combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict. Hearsay, for example, may need to be accepted as the most reliable available evidence from the Government in such a proceeding. Likewise, the Constitution would not be offended by a presumption in favor of the Government's evidence, so long as that presumption remained a rebuttable one and fair opportunity for rebuttal were provided. Thus, once the Government puts forth credible evidence that the habeas petitioner meets the enemy-combatant criteria, the onus could shift to the petitioner to rebut that evidence with more persuasive evidence that he falls outside the criteria." *Ibid.* at 2649.

[738] *Ibid.* at 2651.

[739] *Ibid.* at 2650.

> detention scheme cannot be mandated by any reasonable view of separation of powers, as this approach serves only to *condense* power into a single branch of government. We have long 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 [citing *Youngstown*]. . . . Thus, while we do not question that our due process assessment must pay keen attention to the particular burdens faced by the Executive in the context of military action, it would turn our system of checks and balances on its head to suggest that a citizen could not make his way to court with a challenge to the factual basis for his detention by his government, simply because the Executive opposes making available such a challenge.[740]

As this passage shows, the *Hamdi* Court was keenly sensitive to the contextual aspects of *Quirin* and the mixed deliberative processes that underlay its approach to the separation of powers issues involved in unlawful combatant detentions.[741] The Court's exercise of review and imposition of the *Mathews* test sought to reconcile the complementary executive and judicial competencies in unlawful combatant cases. It did so by permitting the executive to detain, pursuant to congressional authorization, but subject to judicial review and the deliberative standards of adjudication.

Treatment of Detainees

Not only did their unlawful combatant status bridge a divide between criminal and martial conduct, but the detention conditions of Hamdi and Padilla, like those of al-Marri and the Guantanamo detainees, smacked of criminal punishment. This punitive aspect highlighted the functionally judicial nature of unlawful combatant detentions, and emphasized the need for procedural protections and judicial oversight to prevent executive abuses of

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[740] *Ibid.*

[741] The reasoning of the majority, however, contrasted with the dissenting opinions of Justices Scalia and Thomas. See *supra* note 695. Because Justice Scalia found that the President had no constitutional power to detain citizens as unlawful combatants, there were no factual predicates for the courts to review. Justice Thomas took the opposite approach, suggesting that courts had no authority to review the President's detention decisions, to determine whether an individual is, in fact, an unlawful combatant. The President's factual findings are conclusive if made in good faith, Justice Thomas submitted, "*even if he is mistaken.*" *Ibid.* at 2681 [emphasis original].

the war powers. The conditions of confinement for the detainees neither met the standards for POWs under the *Third Geneva Convention*, nor administratively served the sole purpose of preventing their rejoinder with an enemy. That the President, under the war powers, can detain a citizen to prevent his return to an enemy is clear. In the World War II case of *In re Territo*, the Court of Appeals for the Ninth Circuit ruled that the President, under the war powers, may constitutionally detain a citizen as a prisoner of war, when captured while serving in the enemy military.[742] Territo, an American citizen taken by U.S. forces while he served with the Italian army, was interned in a prisoner of war camp along with his fellow, captured soldiers. The Appeals Court held that, although a citizen may file a petition for writ of habeas corpus to test the legality of such detention, federal courts will not look beyond the alleged facts of battlefield capture.[743] The court in *Territo* further explained that internment of POWs is necessary to the executive's prosecution of war in order to prevent captives from rejoining the enemy.[744] As a result, the detention of a citizen as a POW is for militarily administrative rather than punitive purposes, is not a badge of criminality, and is limited to the duration of hostilities, at the end of which the capturing power must repatriate its prisoners. POW detention, therefore, does not meet the two primary objectives of criminal punishment, those being retribution for and deterrence of unlawful activities.[745] Under *Territo*, the President can administratively hold citizens at his discretion to prevent their return to battle while hostilities last, but such internment cannot be of a punitive nature. Accordingly, the procedural protections due to a POW are possibly lower than those owed to an alleged unlawful combatant. Should the President seek to

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[742] *In re Territo*, 156 F.2d 142 (9th Cir. 1946); "The option to detain those captured in a zone of armed combat for the duration of hostilities belongs indisputably to the Commander in Chief." *Hamdi*, 337 F.3d at 341, *per* Wilkinson J., denying rehearing *en banc* 316 F.3d 450.

[743] 156 F.2d at 145-46.

[744] *Ibid.* at 145.

[745] See *Padilla*, 233 F. Supp. 2d at 591, citing *Kansas* v. *Hendricks*, 521 U.S. 346, 361-62 (1997); "In this respect, 'captivity is neither a punishment nor an act of vengeance,' but rather 'a simple war measure.'" *Hamdi*, 316 F.3d at 465, quoting Winthrop, *supra* note 552 at 788.

punish a citizen captured while fighting for the enemy, he must first comply with due process in functionally adjudicating the individual's guilt.

Neither the Fourth Circuit Court of Appeals in *Hamdi* nor the New York District Court in *Padilla* considered the actual punitive conditions that the prisoners endured during their detention. Both courts also emphasized the belligerent rather than criminal aspects of unlawful combatant status, ignoring its uneasy place between the dichotomous paradigms of crime and war. The courts took the absence of formal criminal charges to mean that petitioners were subjected only to administrative internment. Both courts intentionally overlooked the true facts of detention and naively trusted that the executive branch would not impose punitive conditions upon detainees who had not been formally prosecuted and convicted. The Fourth Circuit, for example, found that "Hamdi has not been charged with any crime. He is being held as an enemy combatant pursuant to the well-established laws and customs of war."[746] The court overlooked the criminal nature of unlawful combatant status, while suggesting that a criminal prosecution would be highly inconvenient to the Government while conducting war.[747] The New York District Court in *Padilla* noted the difference between lawful and unlawful combatants,[748] while nevertheless stating that "[n]o criminal charges have been filed against Padilla."[749] The District Court stated that "[a]lthough unlawful combatants, unlike prisoners of war, may be tried and punished by military tribunals, there is no basis to impose a requirement that they be punished. Rather, their detention for the duration of hostilities is supportable . . . on that same ground that the detention of prisoners of war is supportable: to prevent them from rejoining the enemy."[750] The Southern District Court of New York,

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[746] 316 F.3d at 475.

[747] *Ibid.* at 465-66. The Court of Appeals did not consider the possibility that the Government might avoid such inconveniences by simply holding captives under administrative conditions similar to those of POWs.

[748] 233 F. Supp. 2d at 592-93.

[749] *Ibid.* at 572.

[750] 316 F. Supp. 2d at 593.

like the Court of Appeals for the Fourth Circuit, established a theoretical distinction without a difference between POW and unlawful combatant status. Both were subject to detention at the President's discretion, and the administrative nature of their internment dispensed with any due process requirements. In addition, the two courts refused to look at the actual treatment of Hamdi and Padilla, to assess whether their detentions were in fact administrative or punitive in nature.

The Court of Appeals in *Hamdi* and the District Court in *Padilla* thereby allowed the executive branch to hold an individual as an unlawful combatant with the same scope of discretion as a POW, but possibly under punitive conditions without criminal prosecution. Both courts arrived at their conclusions based upon an interpretation of a passage in *Quirin*, stating that "[u]lawful combatants are likewise subject to capture and detention (like lawful combatants as prisoners of war), *but in addition* they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful."[751] The Court of Appeals for the Tenth Circuit had repeated this language in *Colepaugh* v. *Looney*,[752] the other World War II unlawful combatant case. The courts in *Hamdi* and *Padilla* took this phrase to mean that the Government had a choice simply to detain or alternatively prosecute unlawful combatants, at its discretion. The facts of both *Quirin* and *Colepaugh*, however, do not suggest an interpretation of this passage that would permit the Government to detain unlawful combatants under punitive conditions, without first prosecuting them. In both cases, the Government promptly prosecuted, before military commissions, the individuals involved upon their arrest and designation as unlawful combatants.[753] Neither case presented a scenario in which the Government claimed authority to hold unlawful combatants under punitive conditions without first affording them some due process. Instead, the facts at issue in *Quirin* and *Colepaugh*, along

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[751] 317 U.S. at 31 [emphasis added], quoted in *Hamdi*, 316 F.3d at 469 and *Padilla*, 233 F. Supp. 2d at 595.

[752] 235 F.2d at 432.

[753] Fisher, *Presidential War Power*, *supra* note 18 at 205.

with *Territo's* distinction between administrative and punitive internment, suggest the correct interpretation of the above passage from *Quirin*. That is, the Government can capture and detain unlawful combatants for the administrative purpose of prevent their rejoining an enemy, as it does with POWs. However, the Government must prosecute unlawful combatants if its purpose is to punish them in any way for their unlawful belligerent acts. The Fourth Circuit and New York District Court in *Hamdi* and *Padilla* incorrectly applied *Quirin* in this regard, overlooking the actual conditions and purposes of detention. They refused to recognize that the actual detention conditions of the petitioners in those cases (as opposed to the executive branch's formal characterization of the conditions), did not resemble administrative internment, but instead served the Government's punitive purposes of retribution for and deterrence of terrorism. Such detention purposes were the hallmarks of criminal punishment, as the District Court remarked in *Padilla*,[754] over which courts could exercise review to ensure that the executive had accorded the individual in question due process of law.

The detention conditions that Hamdi and Padilla, as well as al-Marri and the Guantanamo detainees, endured indicated more than a Government administrative interest in preventing their rejoining enemies of the United States. Al-Marri, for example, was already in custody and scheduled for trial in a federal district court shortly after the date on which the President designated him an unlawful combatant and placed him under military arrest.[755] Padilla, too, was under arrest on a material witness warrant and facing criminal investigation when the President declared him to be an unlawful combatant, authorizing his immediate transfer to military custody.[756] The civilian arrests of al-Marri and Padilla significantly lessened the necessity of their military confinement in order to prevent consorting with an enemy, and suggested that the Government had ulterior purposes for their detention as unlawful combatants. Locked in solitary confinement in military prisons rather than

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[754] 233 F. Supp. 2d at 591; See *supra* note 745 and accompanying text.

[755] See 167, above.

[756] See 169, above.

administrative internment facilities,[757] Hamdi, Padilla, and al-Marri had no outside contact, while subject to intense interrogation for whatever information they might possesses regarding terrorist activities. Government sources publicized the justifications for the military detention of al-Marri, suggesting that the detention of all three citizens was in fact punitive rather than administrative in purpose. An unnamed senior F.B.I. official commented to the *New York Times* that the decision to declare al-Marri an unlawful combatant and remove him from civil court jurisdiction "held clear implications for other terrorism suspects. 'If I were in their shoes, I'd take a message from this,' the official said."[758] Deputy Assistant Attorney General Alice Fisher similarly suggested that al-Marri's transfer to military custody as an unlawful combatant was the best way to deter future terrorist attacks.[759] Notwithstanding the absence of formal criminal charges, the actual conditions of confinement and such Government sources indicated that the executive detained al-Marri and the other detainees for the punitive purposes of deterrence and retribution.

Before the Supreme Court's *Hamdi* decision, only the Eastern Virginia District Court and the Second Circuit Court of Appeals gave any consideration to Hamdi and Padilla's detention conditions. In finding the allegations in the Mobbs Declaration as insufficient to justify Hamdi's detention, the Virginia District Court noted that the Declaration neither mentioned the unlawful nature of Hamdi's belligerency (which the Government subsequently did in the

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[757] *Geneva III*, *supra* note 442, arts. 22, 97, which forbid holding POWs in penitentiaries, still might give guidance as to acceptable conditions of purely administrative detention of unlawful combatants.

[758] "Enemy Combatant Decision Marks Change, Officials Say" *New York Times* (25 June 2003) A14; The *New York Times*, *ibid.*, also reported Government officials as indicating that "[b]y declaring Mr. Marri an enemy combatant, the administration also sends a message to other terrorist suspects now in the criminal system – some charged secretly – about what could happen if they do not cooperate with investigators. . . ."

[759] "Enemy of the State: Bush Administration Designates Qatar Man Enemy Combatant" (A.P.) (23 June 2003), online: A.B.C. News <http://abcnews.go.com/sections/us/world/enemy_combatant030623.html>.

hearing) nor justified detention for purposes of intelligence gathering (as the Government also later argued).[760] Furthermore, the District Court observed:

> There is nothing to indicate why he is treated differently than all the other captured Taliban. There is no reason given for Hamdi to be in solitary confinement, incommunicado for over four months and being held for some eight-to-ten months without any charges of any kind. This is clearly an unreasonable length of time to be held in order to bring criminal charges [footnote omitted]. So obviously criminal charges are not contemplated.[761]

The District Court's comments drew attention to the punitive conditions of Hamdi's detention, and noticed the absence of any criminal process. The Second Circuit in *Padilla*, moreover, held that 18 U.S.C. § 4001(a) barred the President's detention of citizens as unlawful combatants,[762] regardless of the administrative or punitive nature of the internment. Although finding, in contrast, that Congress' *Authorization for Use of Military Force* was explicit authorization for Hamdi's detention, the Supreme Court did not discuss his detention conditions. Instead, the Court took a broader view that all of the executive's decisions to designate, detain, or possibly try individuals as unlawful combatants must comply with due process under the *Mathews* test.[763] Such executive decisions remained subject to vigorous judicial review. The *Mathews* balancing test, however, left open the possibility that administrative versus punitive conditions of detention would be determinative factors in weighing individual liberty interests against Government interests in national security.

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[760] 243 F. Supp. 2d at 533.

[761] *Ibid.* at 533.

[762] See 169, above.

[763] "[C]ommitment for *any* purpose constitutes a significant deprivation of liberty that requires due process protection." 124 S. Ct. at 2646-47 [emphasis original], quoting *Jones* v. *United States*, 463 U.S. 354, 361 (1983).

Unlawful combatants, by their very character, commit both criminal and martial acts,[764] invoking executive and judicial decision-making competencies. Accordingly, a presidential designation of an individual as an unlawful combatant under the laws of war, both in its substantive status determination and the punitive aspects possibly attendant upon detention, is in essence a criminal allegation as much as it is a wartime measure. Unlawful combatant detentions involve executive adjudication of an individual right to personal liberty as well as executive judgment of military necessity, representing mixed deliberative processes over which the courts can exercise review to ensure that the executive complies with due process. However, the ambivalence of the Fourth Circuit and New York District Court about whether to treat unlawful combatants under a crime or war paradigm benefited the Government by effectively allowing the executive branch to determine the extent of its own authority to detain.[765] Such executive discretion would unbalance the separation of powers and permit the President to use the war powers functionally to adjudicate individual liberties and impact domestic affairs, without procedural protections and adequate judicial check.[766]

The above contextual analysis of the legal status of the "war against terrorism" and non-state belligerents, the locus of capture and personal status of alleged unlawful combatants, and the conditions of their detention leads to

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[764] Feldman, *supra* note 533 at 458-61, identifies four general elements in distinguishing between the commission of a crime and the waging of war. These comprise the identity of the actor, the jurisdictional provenance of the act, the intentions of the actor, and the scale of the act. As with terrorism, unlawful belligerency, and treason, "[t]he hard cases on the border of the crime/war distinction show the importance of all four criteria. . . ." *Ibid.* at 461.

[765] As Fletcher, *supra* note 560 at 639, somewhat cynically but accurately comments, "[w]hen it suits its purposes, the administration justifies its actions as the pursuit of justice; if the justice argument fails, the move is to think in the language of war and collective self-defense."

[766] Katyal and Tribe, *supra* note 561 at 1265-66, emphasize the danger attendant upon a presidential claim unilaterally to qualify and punish terrorism as unlawful belligerency. "[T]he [Military] Order installs the executive branch as lawgiver as well as law-enforcer, law-interpreter, and law applier, asserting for the executive branch the prerogative to revise the jurisdictional design of the system of criminal justice and leaving to the executive the specification, by substantive rules promulgated as it goes along, of what might constitute 'terrorism' or a 'terrorist group' and a host of other specifics left largely to the imagination. This 'blending of executive, legislative, and judicial powers in one person or even in one branch of the government is ordinarily regarded as the very acme of absolutism'" (quoting *Reid* v. *Covert*, 354 U.S. 1, 11 (1957) (civilian wives of military personnel could not be tried by courts martial)).

two conclusions about the judicial review of unlawful combatant detentions. First, the jurisdictional facts predicate to triggering the President's authority to detain unlawful combatants under the war powers are also the same ones at issue in an individual's status determination. Because the executive power to detain is contextually dependent upon the circumstances, the courts' separation of powers analysis requires inquiry into the substantive merits of a particular case. Second, an unlawful combatant detention decision involves mixed executive and judicial deliberative processes. Upon a petition for a writ of habeas corpus, therefore, courts have an independent constitutional authority, under the separation of powers doctrine, not only to scrutinize the facts justifying detention, but to ensure that the executive complies with adjudicative standards of decision-making. Consequently, whenever the President exercises the war powers in a justiciable way to infringe individual rights or impact domestic matters, the standards of legality, procedural fairness, and substantive reasonableness must guide the courts in resolving the separation of powers issues involved. The *Mathews* test, adopted by the Supreme Court in *Hamdi*, incorporates these standards in marking the judicially reviewable constitutional boundaries to the President's exercise of the war powers.

Chapter XII: Post *Hamdi*: Towards Substantive Review of the War Powers

The Mathews *Test, Due Process, and Unlawful Combatant Status Determinations*

In *Hamdi*, the Supreme Court applied *Quirin* in a way that made executive authority to detain unlawful combatants, under the war powers, dependent upon contextual considerations. Thus, the Court made it clear that judicial review of the legality of an executive detention decision required attention to the particular facts of the case and the adjudicative nature of that decision. Whatever institutional expertise the executive branch might have in matters of war, it did not preclude the courts from examining either executive fact-findings or decision-making processes for purposes of determining the lawfulness of an unlawful combatant detention. Pursuant to habeas corpus review, courts had an independent constitutional responsibility to ensure that the executive did not abuse its power, and so violate the separation of powers, by acting beyond its deliberative competency and arbitrarily infringing individual rights. As the *Hamdi* plurality noticed, "[e]ven in cases in which the detention of enemy combatants is legally authorized, there remains the question of what process is constitutionally due to a citizen who disputes his enemy-combatant status."[767] The executive's jurisdiction to detain accordingly had a procedural element to it, which courts must consider upon habeas review. *Hamdi's* imposition of the *Mathews* test meant that a court would also have to consider substantive issues involved, in determining constitutionally required standards of due process and whether the executive had complied with them.

[767] 124 S. Ct. at 2643.

The *Hamdi* Court recognized that unlawful combatant detentions implicated the highest of concerns on behalf of both parties: the personal liberty of the citizen and the Government's responsibility for national security. A court's due process analysis, pursuant to its habeas review, depended upon a preliminary balancing of these interests. Rejecting the Fourth Circuit's deferential posture to the executive's security claims, the Supreme Court asserted the courts' institutional responsibility and competency to scrutinize the relative weight of the Government's risk assessments *vis-à-vis* the individual's interest in freedom from arbitrary detention. Notwithstanding that *Hamdi* was a war powers case, the Court invoked a basic test of administrative law, used for evaluating the due process required whenever an executive agency adjudicated the legal rights of individuals:

> Both of these positions [national security versus personal liberty] highlight legitimate concerns. And both emphasize the tension that often exists between the autonomy that the Government asserts is necessary in order to pursue effectively a particular goal and the process that a citizen contends he is due before he is deprived of a constitutional right. The ordinary mechanism that we use for balancing such serious competing interests, and for determining the procedures that are necessary to ensure that a citizen is not "deprived of life, liberty, or property, without due process of law," is the test that we articulated in *Mathews* v. *Eldridge*. . .[768]

This balancing test meant that courts ought not always require the strict procedures of criminal law or exercise *de novo* review, but neither should they too broadly defer to executive exercises of discretion. A court should rather weigh the competing claims of the individual and Government, in the context of factual circumstances and with sensitivity to the functional deliberations involved. *Hamdi's* implication was clear: where the executive sought to deprive an individual of his personal liberty under the war powers, a court's habeas review of the lawfulness of detention would extend to the constitutional sufficiency of the decision-making process, taking into account substantive considerations about the facts and interests of the parties.[769]

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[768] *Ibid.* at 2646 [citations omitted].

[769] See *Zadvydas* v. *United States*, 533 U.S. 678 (2001) (Due process clause recommended an interpretation of federal law that prevented the indefinite detention of a non-removable alien).

Hamdi therefore rejected a formalistic separation doctrine that would, as Justices Scalia and Thomas argued oppositely in dissent, grant to the President either no or absolute discretion to detain unlawful combatants under the war powers. Instead, the Court showed sensitivity to the mixed deliberative processes involved in such detention decisions. Potentially, any justiciable exercise of the war powers was now subject to judicial review under the same principles as any other exercise of executive discretion, and the executive would be constitutionally required to adhere to adjudicate ideals when deliberating in a functionally judicial way. The Court's invocation of *Mathews* demonstrated its willingness to subject justiciable exercises of the war powers to broader principles of judicial review. Tellingly, the *Mathews* case itself resides at the core of modern administrative jurisprudence. In *Mathews*, decided in 1976, the Court considered whether the due process clause of the Fifth Amendment required that a recipient of Social Security disability benefits receive an evidentiary hearing before their termination. The Court ruled that it did not. Nevertheless, the Government did not possess an absolute discretion in administering federal benefits schemes. Prior to *Mathews*, the Court had ruled in *Goldberg* v. *Kelly*[770] that the Government must indeed afford an evidentiary hearing, approximating a judicial trial, before terminating an individual's welfare benefits, which amounted to a constitutional property interest. *Mathews*, however, distinguished *Goldberg* on the facts. Determination of an individual's statutory entitlement to welfare depended upon an evaluation of personal circumstances more subjective than the medical questions at issue in physical disability cases. Thus, a prior evidentiary hearing was not necessary for the administrative evaluation of disability, where the individual had ample opportunity to contribute to the medical record. Subsequent to termination of disability benefits, an individual could then seek an evidentiary hearing before an administrative law judge. Furthermore, the *Mathews* Court argued, termination of disability benefits did not disqualify an individual from other need-based programs, such as welfare,

[770] 397 U.S. 254 (1970).

and so would not subject him to the same hardship threatened in the *Goldberg* case.

In arriving at its decision in *Mathews*, the Supreme Court considered the case in a broad context, and avoided any strict due process requirements that would uniformly apply in all cases of administrative decision-making. The Court affirmed that the Constitution guaranteed, as a "'principle basic to our society,'" a "'right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction. . . .' The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'"[771] Nevertheless, the contours of that right were not rigid or judicially determinable in the abstract. Rather, "'[d]ue process,' 'unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.'"[772] Instead, "'[d]ue process is flexible and calls for such procedural protections as the particular situation demands.'"[773] The *Mathews* Court then set out the constitutional test for determining just what process would be due under any particular set of circumstances. The test itself was laden with substantive determinations of the interests involved and the factual context surrounding them:

> More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[774]

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[771] 424 U.S. at 333, quoting *Joint Anti-Fascist Comm.* v. *McGrath*, 341 U.S. 123, 168 (1951) (Frankurter J., concurring) and *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965).

[772] *Ibid.* at 334, quoting *Cafeteria Workers* v. *McElroy*, 367 U.S. 886, 895 (1961).

[773] *Ibid.*, quoting *Morrissey* v. *Brewer*, 408 U.S. 471, 481 (1972).

[774] *Ibid.* at 334-35, citing *Goldberg*, 397 U.S. at 263-71.

The strict due process required in *Goldberg* therefore did not foreclose the less stringent process afforded the individual in *Mathews*. The compatibility of the cases was not because of the respective procedures used, but because they derived from a common analytical framework for applying Fifth Amendment due process.

The *Mathews* test is accordingly a cornerstone of administrative law, allowing courts to control facially lawful executive decisions otherwise made without constitutionally sufficient due process. Under the *Administrative Procedure Act*,[775] for example, which puts the judicial review of administrative actions upon a statutory footing, due process review under *Mathews* coexists with substantive heads of review. Under section 706 of that *Act*, executive administrative actions are unlawful if they are arbitrary, capricious, or an abuse of agency discretion.[776] Executive actions are also unlawful if they contravene constitutional rights, do not observe proper procedures, or are unsupported by substantial evidence.[777] Nevertheless, the *A.P.A.* is limited in its applicability. It specifically does not include courts, military commissions, or wartime military authority in the field as "agencies" within the ambit of the *Act*,[778] and its procedural requirements for agency adjudications do not apply to "the conduct of military or foreign affairs functions."[779] Notwithstanding such limitations, administrative review under the *A.P.A.* reflects an interrelationship between procedural due process and reasonable decision-making, under the Lockean constitutional paradigm, that is constitutionally intrinsic.[780] Judicial review for procedural fairness is

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[775] *A.P.A.*, 5 U.S.C. § 551 *et seq.*

[776] *Ibid.*, § 706(2)(A).

[777] *Ibid.*, § 706(2)(B), (D)-(E).

[778] *Ibid.*, § 701(b)(1)(F)-(G).

[779] *Ibid.*, § 554(a)(4).

[780] Masur, *supra* note 715 at 482, notes that judicial review of agency decisions and executive military activities raise similar questions about how to adjudicate issues within the specialist knowledge of experts, how to treat broad congressional delegations of authority, and how to keep the executive within legal boundaries. Thus, review of unlawful combatant detentions, like administrative law, requires judicial scrutiny into executive fact-findings, a distinction between notions of general executive authority to act and specific constraints upon it, and

necessary to prevent agencies either from acting *ultra vires* or impermissibly infringing individual rights based on unreasonable decisions about the relative weight of interests and the factual circumstances. Also, somewhat tautologically, judicial review of substantive matters in turn ensures that procedural rights are meaningful. Without judicial inquiry into competing substantive interests of the individual concerned and the Government, the Government could essentially determine on its own the process to be given to an alleged unlawful combatant. Likewise, without judicial inquiry into the executive's decisions, the executive could take unreasonable or arbitrary actions either without or otherwise wholly divorced from those very procedures constitutionally required to prevent them. Acting in a functionally judicial way, without adhering to adjudicative ideals and free from check by the courts, the executive could therefore avoid Lockean structural protections for the public good. It could instead act unreasonably and in violation of its fiduciary obligation.

In invoking its *Mathews* test, the *Hamdi* Court opened the door to substantive judicial inquiry into the President's unlawful combatant detention decisions, combining questions of jurisdiction, procedure, and reasonableness under its separation of powers analysis. Habeas corpus review of the lawfulness of an unlawful combatant detention requires judicial scrutiny of the executive's findings of predicate jurisdictional facts, as well as of the sufficiency of the due process afforded to the individual, determined through the balancing of the substantive interests at stake. Because the predicate facts also coincide with the unlawful belligerent acts that the individual had

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recognition that rationality review derives from "more fundamental requisites of liberal legality." In commenting upon the importance of "substantial evidence" review to administrative law, by which courts assess the weight and import of evidence justifying agency adjudicative decisions, Masur, *ibid.* at 493, touches upon the constitutional basis for such review. "In congruence with hard look review, the 'substantial evidence' standard stems from a court's duty to ensure that adjudicating agencies abide by the ground rules of their own proceedings, thus vindicating and enforcing the rule of law. . . . By consequence, Congressional repeal of the Administrative Procedure Act could not eliminate substantial evidence scrutiny as a judicial dictate any more than it could terminate hard look review. The principles underlying substantial evidence are thus general to all expert executive branch bodies: absent some ulterior motivation, they should be applied with equal force to ostensibly 'military' cases as they are to administrative ones." See also Cass R. Sunstein, "Administrative Law Goes to War" (2005) 118 Harv. L. Rev. 2663.

allegedly committed, a court's review of the executive's jurisdiction to detain will also go to the merits of any particular case. In scrutinizing the executive's decision-making under the *Mathews* test, a court can therefore assess the reasonableness of the executive's factual findings and determination as to the balance between the needs of national security ad individual rights. While reasonableness is therefore analytically distinguishable from legality and procedural fairness as a standard of judicial review, all three standards are intrinsically related, constituent parts of the executive's power to detain unlawful combatants under the separation of powers doctrine.

In balancing the competing individual and Government interests in *Hamdi*, the Supreme Court faced polar extremes. While a citizen had a fundamental right to be free from involuntary confinement, the Constitution also reposed the "core strategic matters of warmaking . . . in the hands of those who are best positioned and most politically accountable for making them."[781] Executive detention of unlawful combatants implicated both of these interests. A detention decision also involved functionally mixed deliberative processes, as the executive branch adjudicated the right to personal liberty under guise of the war powers. The Court emphasized, however, that the "starting point for the *Mathews* v *Eldridge* analysis is unaltered by the allegations surrounding the particular detainee or the organizations with which he is alleged to have associated."[782] The citizen retained a fundamental right to be free from government confinement, notwithstanding the martial nature of the allegations. Accordingly, the "some evidence" standard argued by the Government ran an unacceptably high risk of erroneous deprivation of that right, where a detainee had been previously afforded no meaningful process.[783] Still, the Court did not discount the importance of the Government's position, and so rejected the probing, essentially *de novo* review of the District Court as too burdensome on the Government. Instead, the Supreme Court applied the *Mathews* test in an

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[781] 124 S. Ct. at 2647.

[782] *Ibid.*

[783] *Ibid.* at 2651.

attempt to reach an even balance between the competing interests at stake in an unlawful combatant case.

The Court used *Mathews* to fashion for alleged unlawful combatants a basic right to a hearing, but one far removed from a regular criminal trial and still lacking in many details. The Court found that "a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker."[784] Hamdi, as a detainee, also "unquestionably" had a right to counsel.[785] "At the same time," the plurality continued, "the exigencies of the circumstances may demand that, aside from these core elements, enemy combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict."[786] Thus, the admission of hearsay evidence might be constitutionally permissible, while a "burden-shifting scheme" could permit the Government's factual assertions a favorable presumption so long as the detainee had fair opportunity to rebut.[787] In applying *Mathews*, the Supreme Court thus rejected Government suggestions that the courts had a "heavily circumscribed role" and that they "must forego any examination of the individual case and focus exclusively on the legality of the broader detention scheme. . . ."[788] Instead, the Court came to its own conclusions that the Government's substantive concerns were not so weighty as to override the individual's liberty interests. In fashioning its due process requirements, it also independently determined that those procedures would not have "the dire impact on the central functions of warmaking that the Government forecasts."[789] Rather, "[t]his focus meddles little, if at all, in the

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[784] *Ibid.* at 2648.

[785] *Ibid.* at 2652.

[786] *Ibid.* at 2649.

[787] *Ibid.*

[788] *Ibid.* at 2650.

[789] *Ibid.* at 2649.

strategy or conduct of war . . . ," indicating that courts would not be straying beyond their deliberative competency.[790] Indeed, only Congress' suspension of the writ of habeas corpus could constitutionally override an alleged unlawful combatant's entitlement to due process,[791] and so, by extension, effectively preclude the courts from making substantive inquiries into the President's unlawful combatant detention decisions.

Nevertheless, while the Supreme Court balanced the parties' substantive interests in its due process analysis, it did not resolve Hamdi's habeas petition on the merits. It instead remanded the case for further proceedings consistent with its mandated procedures. Since Hamdi afterwards struck a deal with the Government, whereby he surrendered his citizenship in return for release and return to Saudi Arabia,[792] it fell to the lower courts to flesh out *Hamdi's* reasoning in the other unlawful combatant cases that would come before them. In the months following the *Hamdi* decision, Padilla's case once again came up before a federal District Court, which granted the petition. Pursuant to the Supreme Court's *Rasul* decision, Guantanamo Bay detainees filed habeas petitions challenging the lawfulness of their detentions and the constitutional sufficiency of the Government's newly instituted Combatant Status Review Tribunals. Conflicting decisions in these cases demonstrated considerable disagreement about just how deeply courts should delve into substantive matters, in light of *Hamdi* and the *Mathews* balancing test, when reviewing the lawfulness of unlawful combatant detentions. As of August 2005 – the time of writing – it seemed certain that these cases would eventually come before the Supreme Court for clarification of the procedural and substantive issues left unanswered by *Hamdi*.

While the law therefore remains unsettled, these later cases reaffirmed the basic premise behind the *Hamdi* decision, despite the differences in their reasoning and conclusions. That is, the judicial power to review unlawful

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[790] *Ibid.*

[791] *Ibid.* at 2650-51.

[792] See *supra* note 495.

combatant detentions results from a separation of powers doctrine based upon deliberative processes. The Supreme Court's application of the *Mathews* test recognized the functionally judicial aspect of unlawful combatant detentions, requiring judicial review along with the need for some judicial deference to the executive's particular expertise in matters of national security. Certainly, subsequent cases disagreed not just on the details of *Hamdi's* mandated procedures, but on the constitutional rights, if any, possessed by non-citizen detainees in Guantanamo Bay. Disagreements notwithstanding, the post-*Hamdi* cases differed not in their analytical frameworks, as much as in how they reconciled the overlapping institutional competencies of the executive and judicial branches in determining unlawful combatant status. *Hamdi* and its conflicting progeny thus maintained a conceptual unity between the basic principles of legality, procedural fairness, and reasonable decision-making. As suggested by their resolution through habeas corpus proceedings, these three standards combine in determining the executive's power, under the separation of powers doctrine, to detain unlawful combatants.[793] The post-*Hamdi* cases indicate how courts might now review unlawful combatant detentions, or indeed any justiciable exercises of the war powers, based upon interrelated principles of legality, procedural fairness, and reasonableness.

Legality of Unlawful Combatant Detentions: Substantive Considerations

The Supreme Court in *Hamdi* interpreted Congress' *Authorization for Use of Military Force* as authorizing the President's detention of unlawful combatants. Subsequent cases in the lower courts necessarily followed the Supreme Court's finding, but nevertheless differed in how broadly that authorization extended. For example, in hearing Padilla's habeas petition, the District of South Carolina imputed considerable limitations upon the Congress' *Authorization for Use of Military Force*, very narrowly interpreting

[793] A doctrinal exploration of administrative law principles as applied to the habeas corpus review of unlawful combatant detentions is beyond the scope of this work, which remains concerned with the larger separation of powers issues involved. For an excellent discussion of how administrative law principles might apply to the judicial review of unlawful combatant detentions, see Masur, *supra* note 715 .

its authorization of citizen detentions. In regard to non-citizens detained at Guantanamo Bay, however, judges of the D.C. District Court split radically as to the scope of the President's lawful authority to detain, basing their decisions upon whether those detainees possessed any constitutional rights. In applying *Hamdi* to the cases before them, all cases nevertheless proceeded along a similar line of analysis that respected the *Curtiss-Wright* and *Youngstown* paradigm thus depending upon whether the President exercised his war powers in a way having primary domestic or foreign impact.

Padilla, whose original habeas petition the Supreme Court had found to be filed in the wrong venue,[794] re-filed in the District Court for the District of South Carolina, where the Government held him in a Charleston naval brig. Judge Floyd, at the very beginning of his opinion, made it clear that the "sole question" was whether the President was authorized to detain a citizen as an unlawful combatant "under the unique circumstances presented here."[795] This opening statement indicated that a court should not look only at the broader question of whether the President was congressionally authorized to detain unlawful combatants, but must examine the facts and substantive issues of any particular case to determine if detention was lawful. The South Carolina District Court therefore proceeded on the assumption that habeas review for the legality of a detention required judicial scrutiny of predicate facts and independent assessment of substantive matters.

In *Hamdi*, the Supreme Court found that the *Authorization for Use of Military Force* satisfied 18 U.S.C. § 4001(a), requiring clear congressional authorization for the detention of a citizen, so as to allow the detention of citizens as unlawful combatants, *per Quirin*. However, upon Padilla's habeas petition, Judge Floyd interpreted such authorization as narrowly as possible. Pointing to the factual difference between the *Quirin* petitioners and Padilla, and noting *Milligan's* distinction between combatants and civilians, the District Court judge found that Padilla's detention was not legally authorized

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[794] 542 U.S. 426.

[795] *Padilla* v. *Hanft*, 389 F. Supp. 2d 678, 679 (D. S.C. 2005).

under the *Military Force Authorization*. Quoting *Ex parte Endo*,[796] a World War II Japanese detention case, Judge Floyd assumed, "'when asked to find implied powers in a grant of legislative or executive authority, that the law makers intended to place no greater restraint on the citizen than was clearly and unmistakably indicated by the language used.'"[797] The Judge read the *Military Force Authorization*, which authorized the President to use only "necessary and appropriate" force, in conjunction with the factual context of the case and 18 U.S.C. § 4001(a). Consequently, the detention of Padilla was unlawful, as it was not necessary and appropriate within the provisions of the *Military Force Authorization*. Citing to *Quirin*, Judge Floyd pointed to several factual differences between the earlier case and that of Padilla. Notably, Judge Floyd recognized that Padilla had not been tried by a military commission, nevertheless suffered detention that was meant to be preventative but was not so in fact, and faced potentially indefinite detention.[798] Furthermore, upon his designation as an unlawful combatant, Padilla was no longer a threat due to his prior arrest in Chicago's O'Hare airport upon a material witness warrant. Judge Floyd thus found that:

> To be more specific, whereas it may be a necessary and appropriate use of force to detain a United State citizen who is captured on the battlefield, this Court cannot find, in narrow circumstances presented in

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[796] 323 U.S. 283, 300 (1944) (Continued detention of an admittedly loyal citizen was unlawful pursuant to regulations intended to prevent espionage and sabotage). Compare with *Korematsu*, 323 U.S. 214 (upholding executive internment of Japanese-Americans as a security measure during World War Two). See *supra* note 611; Judge Floyd's quotation of *Endo*, a decision made in light of the Supreme Court's decision in *Korematsu*, seems to validate an observation of Burt Neuborne, "The Role of Courts in Time of War" (2005) 29 N.Y.U. Rev. L. and Soc. Change 555 at 568: "[C]onfronted with a massive national crisis, the Court declined to interfere with a constitutionally doubtful military program (military Reconstruction in McCardle; Japanese-American internment in Korematsu; indefinite military detention of suspected terrorists in Rasul and Hamdi). Once the military program was in place, however, the Court in all three eras acted quickly and decisively to place significant limits on the military program in order to defend core constitutional values." Such an apparently consistent approach by the Supreme Court reflects a long-standing sensitivity to deliberative processes, recognizing the competencies of Congress and the President to make decisions regarding war-making, while asserting their own power to adjudicate the right of individuals and restrain executive power in specific cases.

[797] 389 F. Supp. 2d at 689, quoting *Endo*, 323 U.S. at 300.

[798] *Ibid.* at 687, n. 10.

> this case, that the same is true when a United States citizen is arrested in a civilian setting such as an United States airport.[799]

The facts of Padilla's detention therefore differed considerably from both the *Quirin* petitioners and Hamdi,[800] meaning that Congress' *Military Force Authorization*, narrowly construed in light of Padilla's situation, did not authorize his detention under the circumstances.

Judge Floyd's decision respected *Hamdi*, but his interpretation of the *Military Force Authorization* meant that he could find Padilla's detention unlawful without applying the *Mathews* test.[801] Nevertheless, Judge Floyd's

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[799] *Ibid.* at 689.

[800] Judge Floyd specifically drew attention to the fact that "Justice O'Connor noted at least nine times that the Court's holding that Mr. Hamdi's detention as an enemy combatant was constitutionally permissible was limited to the facts of that case." *Ibid.* at 685, n. 8, citing *Hamdi*, 124 S. Ct. at 2635, 2639-42, 2642, n.1, and 2643.

[801] In relying upon the phrase "necessary and appropriate," Judge Floyd also was able to avoid the question as to whether Congress' *Military Force Authorization* limited, as well as empowered, the President to detain unlawful combatants under international laws of war. Bradley and Goldsmith, in contrast, suggest that the *Military Force Authorization* acted only as an instrument to enable but not restrict executive war powers. They write, "Congressional Authorization," *supra* note 701 at 2097, that "[a]lthough the laws of war inform the boundaries of what the [Force Authorization] authorizes, that simply means that as a general matter the [Force Authorization] authorizes no more than what the laws of war permit, not that it incorporates law-of-war prohibitions." However, such an approach is puzzling, as in determining what the laws of war permit necessarily requires a delineation of their boundaries, beyond which the President could not act without violating international law. If the *Military Force Authorization* authorizes the President to act as far as the laws of war permit, it would by necessary implication establish limits to his authority. This question becomes especially relevant in terms of unlawful combatant detentions. Should the *Military Force Authorization* permit unlawful combatant detentions pursuant to the laws of war, then the executive detention power extends to and is limited by the relevant international law. While a declaration of war or other form of congressional authorization for hostilities are usually broad authorizations for the President to use military force as he sees fit, his detention of unlawful combatants is by contrast dependent upon the legal criteria for such status, set out in the laws if war. *Quirin* itself made this clear in relying upon the *Hague Convention* (later incorporated by the *Third Geneva Convention*) for establishing the definition of unlawful combatancy. For a response to Bradley and Goldsmith, see Ryan Goodman and Derek Jinks, "International Law, U.S. War Powers, and the Global War on Terrorism" (2005) 118 Harv. L. Rev. 2653. In any case, Judge Floyd did not answer these questions, instead applying interpretational canons that narrowed the applicability of the *Military Force Authorization* so as flatly to prohibit the detention of a citizen in Padilla's circumstances, as not "necessary and appropriate." This is, ultimately, the approach also sanctioned by Bradley and Goldsmith, *ibid.* at 2106, when they suggest that "in construing the [Force Authorization], a clear statement requirement is appropriate when the President acts against non-combatants in the United States, but not when he engages in traditional military functions against combatants." Without a clear statement for such executive action, courts must then determine who qualifies as a combatant under the congressional authorization, whether such authorization permits domestic exercise of the detention power, what the time limits for detention are, and which procedural protections are appropriate in making a detention decision. Courts can draw upon the laws of war for

decision on the legality of Padilla's detention proceeded from his scrutiny of the factual context of the case and a substantive assessment about what was "necessary and appropriate." Because Padilla was a citizen with a tenuous belligerent status, was captured far from a battlefield, and was already in federal custody as a material witness, the President was exercising the war powers in a way that unnecessarily and inappropriately impacted upon individual rights and interfered with the operation of the domestic legal system. Thus, Judge Floyd ostensibly interpreted the *Military Force Authorization* so as to render Padilla's detention illegal, and preclude any direct analysis of the process due. Nevertheless, even the Judge's finding of illegality indirectly raised considerations behind the *Mathews* balancing test, as the Government's substantive interests were found not to outweigh Padilla's right to personal liberty. Indeed, in interpreting the *Military Force Authorization*, Judge Floyd implied what decision-making procedures the Constitution required for the Government to detain Padilla on account of his allegedly unlawful conduct. Those procedures were strictly criminal ones, as Padilla's case was "a law enforcement matter, not a military matter."[802] The executive branch therefore had no jurisdiction to hold Padilla as an unlawful combatant under the war powers, regardless of the process it afforded him, and the case was more appropriately dealt with by adjudication in the courts. Such narrow statutory interpretation of the *Force Authorization* followed in the line of *Youngstown*, meaning that the court's habeas review also reflected a deliberative separation of powers analysis, where executive authority to infringe individual rights or impact upon domestic affairs waned as the President redirected the war powers inward.

Substantive issues similar to those in *Padilla*, above, arose in cases arising from the habeas petitions of non-citizen Guantanamo detainees. The preliminary issue in these cases was whether non-citizens had any substantive

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principled even if non-binding guidance, delegation principles, the right to habeas corpus, and due process considerations, among other things, when interpreting congressional force authorizations for purposes of unlawful combatant detentions. See generally *ibid.* at 2103-24, and "Rejoinder," *supra* note 523 at 2685-93.

[802] 389 F. Supp. 2d at 691.

constitutional rights cognizable in federal courts.[803] Although the Supreme Court held in *Rasul* that federal district courts had jurisdiction over habeas petitions brought by the Guantanamo detainees, the Court did not decide whether the right to habeas corpus carried with it concomitant and substantive constitutional rights to be considered in the *Mathews* analysis. *Rasul* extended federal court jurisdiction over Guantanamo because it was under the exclusive control of the United States, despite being *de jure* sovereign territory of Cuba. The peculiar status of Guantanamo Bay for purposes of habeas review, as decided in *Rasul*, therefore brought into doubt the conventional assumption that non-citizens abroad possessed no constitutional rights upon which a habeas petition could rest. Judges for the D.C. District Court disagreed as to whether the special status of Guantanamo entitled detainees there to substantive constitutional rights, in addition to a right to petition for habeas. Courts therefore had to determine on what side of the *Curtiss-Wright/Youngstown* line petitioners fell, due to the territorial status of Cuba. This determination would not only affect judicial interpretation of congressional authorization for detentions, but would affect the substantive balancing between the rights of detainees, if any, against those of the Government in determining the constitutional sufficiency of the due process afforded them.

In *In re Guantanamo Detainee Cases*,[804] D.C. District Court Judge Green issued a memorandum opinion on eleven coordinated habeas cases, dispensing with the common issues of law without ruling on their individual merits. In her opinion, Judge Green found that non-citizens held in Guantanamo had Fifth Amendment rights, entitling them under *Hamdi* to the same due process as either a citizen, or non-citizen in sovereign United States territory, alleged to be an unlawful combatant. The District Court noticed that the detainees were subject to the "same fate as those convicted of war crimes," that being

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[803] See *United States* v. *Verdugo-Urquidez*, 494 U.S. 259 (1990) (The Fourth Amendment does not apply to search and seizure by United States agents of property owned by a non-resident alien and located in a foreign country) and *Eisentrager*, 339 U.S. 763 (Constitution does not confer a right of personal security or an immunity from military trial and punishment upon an alien engaged in the hostile service of a government at war with the United States).

[804] 355 F. Supp. 2d 443 (D. D.C. 2005).

indefinite, potentially life imprisonment but without significant procedural rights.[805] She thus took notice of the actual rather than formal detention conditions and purposes, and found that non-citizens held in Guantanamo were, under the logic of *Youngstown*, domestic targets of the war powers. Their cases were therefore within the adjudicative competency of the courts, just like the cases of citizens. Extrapolating from *Rasul's* jurisdictional holding, Judge Green found that "fundamental constitutional rights cannot be denied in territories under the control of the American government, even where the United States technically is not considered 'sovereign. . . .'"[806] The Government's *de facto* control of Guantanamo Bay therefore placed the detainees there in the same legal situation as al-Marri, for example, or any other non-citizen held within the United States.

In applying *Rasul* as she did, Judge Green substantively weighed the Government's interest against that of the petitioners, in finding that they had a basic right to due process. The Judge remarked, that "[r]ecognizing the existence of that right [to due process] at the Naval Base would not cause the United States government any more hardship than would recognizing the existence of constitutional rights of the detainees had they been held within the continental United States."[807] Though not explicitly saying so, Judge Green's finding that substantive rights attached to Guantanamo habeas petitions also questioned the reasonableness of the Government's argument that non-citizens there had no substantive rights that could withstand the Government's national security interests. She noticed that non-citizens detained in Guantanamo were in no different position from that of a citizen who might be held there, while they potentially faced a worse situation than other non-citizens there who might be imprisoned for a fixed sentence following trial by a military commission. Unlawful combatants also faced the possibility of such a trial at all times, at the executive's discretion, even though they might dispute their status. As such, there was no rationally justifiable reason for why the

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[805] *Ibid.*

[806] *Ibid.* at 457, and 461, 464.

[807] *Ibid.* at 463.

Government should deny to certain non-citizens the same procedural rights that similarly situated citizens, or military commission defendants, might enjoy in Guantanamo Bay. Because the executive functionally adjudicated the rights of both non-citizen and citizen detainees in Guantanamo, courts were institutionally competent equally to review the executive's decisions over either group of individuals. Detention of non-citizens was congressionally authorized, but the *de facto* domestic status of Guantanamo Bay meant that *Hamdi* and the *Mathews* test applied for determining just what due process was constitutionally required for lawful detention.

Judge Green's decision contrasted sharply with that of Judge Leon in *Khalid* v. *Bush*,[808] another Guantanamo habeas case to come before the D.C. District Court. Judge Leon drew attention to *Youngstown*, but found that the President's authorization to detain unlawful combatants must have expansive interpretation.[809] He thereby rejected a narrow application of the Supreme Court's decision in *Hamdi*, the particular facts of which might limit an unlawful combatant detention to battlefield captures, and so foreclosed a restrictive interpretation of the *Authorization for Use of Military Force* like that given to it by the South Carolina District Court in *Padilla*.[810] While willing to find broad congressional authorization for detention, Judge Leon also found that non-citizens in Guantanamo Bay had no constitutional rights upon which to base their habeas claims. As such, the District Court refused to extend *Rasul's* ruling on the courts' habeas jurisdiction to grant to non-citizens there other substantive rights. According to Judge Leon, "the Supreme Court [in *Rasul*] chose to only answer the question of jurisdiction, and not the question of whether these same individuals possess any substantive rights on the merits of their claims."[811] The peculiar status of Guantanamo therefore meant that non-citizens detained there had a procedural right to file a habeas

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[808] 355 F. Supp. 2d 311 (D. D.C. 2005).

[809] *Ibid.* at 318.

[810] *Ibid.* at 320.

[811] *Ibid.* at 323.

petition, but one that did not affect the generally applicable rule that non-citizens held abroad had no judicially cognizable constitutional rights.[812]

Judge Leon's decision meant that, while the Guantanamo petitioners could challenge the lawfulness of their detention in the courts, habeas review would be limited only to the questions of whether Congress had generally authorized such detentions, or the Constitution directly conferred inherent detention powers on the President. Such review did not permit judicial inquiry in the substantive merits of petitioners' claims, as "[i]n the final analysis, the Court's role in reviewing the military's decision to capture and detain a non-resident alien is, and must be, highly circumscribed."[813] This thin concept of legality would mean, for example, that a court should not only refuse to examine the merits of a non-citizen detainee's claim, but that it also could not grant the writ where habeas petitioners could prove that "the *conditions* of their custody might violate existing United States law. . . ."[814] Under this approach to habeas review, the legality of the decision to detain was a different issue from the legality of the conditions of that detention. Pursuant to *Rasul*, courts could only look to see if the custody decision alone was either congressionally authorized or supported by inherent executive power directly conferred by the Constitution. Any substantive judicial inquiry into the facts of capture or conditions of detention "during a time of armed conflict, would, of course, require that Court to inject itself into sensitive matters of foreign affairs, military policy, and other national security areas."[815] Judge Leon's

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[812] But see Yin, *supra* note 452 at 1067-69, suggesting that due process rights are, alternatively, limitations upon executive power that exist even in the absence of anyone have a right to seek enforcement. Thus, while non-citizens detained abroad might not have any substantive rights, due process would be an inherent limitation upon executive power, enforceable independently by the courts whenever they had habeas jurisdiction. Due process "rights," strictly speaking, would therefore not run with the writ, but due process "limitations" upon executive power would. Yin's position is interesting, as it implies a close relationship between due process and the separation of powers – a relationship, in light of *Mathews*, fixed upon the fluctuating and overlapping deliberative competencies of the branches.

[813] 355 F. Supp. 2d at 329.

[814] *Ibid.* at 324 [emphasis original], and 329.

[815] *Ibid.* at 326; "Moreover, the absence of federal court review of the conditions of the detention of a non-resident alien is also consistent with the text of the Constitution and other Supreme Court precedent. The Founders allocated the war powers among Congress and the

approach to habeas review and the separation of powers had a strong flavor of formalism. Contrasted with *In re Guantanamo Detainee Cases*, *Khalid* placed petitioners in an intermediate territorial status under the *Curtiss-Wright* and *Youngstown* paradigm. Individuals could petition for habeas review under *Rasul*, but were still subject to a greater executive discretion to detain by virtue of their lack of citizenship and their presence in *de jure* foreign territory. Regarding the executive's use of the war powers to detain foreigners abroad, Judge Leon's decision gave to the President an almost absolute discretion, even while preserving a weak habeas review. *Khalid* therefore seemed to take the Fourth Circuit's approach to habeas review in *Hamdi*, since overruled by the Supreme Court in regard to citizen detentions, and apply it in the different context of the Guantanamo cases.

Despite their different holdings on whether non-citizens held in Guantanamo had substantive rights, *Guantanamo Detainee* and *Khalid* rested on the same analytical framework established by *Hamdi* and *Rasul*. That is, they addressed the question of just where to draw a line between domestically and foreign oriented exercises of the war powers, according to the *Curtiss-Wright/Youngstown* paradigm. It just happened that Guantanamo Bay, because of its peculiar territorial status, fell right along that line. Depending upon how the D.C. District judges resolved the preliminary issue of Guantanamo's status, the executive's lawful authority to detain non-citizens there would be either nearly absolute or considerably limited by due process requirements, subject to judicial review inquiring into substantive issues behind the detention decision. Thus, while Judge Leon in *Khalid* cast this foreign and domestic divide in a formalistic light, his decision nevertheless fit with that of Judge Green into a deliberative separation of powers analysis, in which the executive and judicial branches' relative decision-making competencies overlapped and rested upon contextual factors. For Judge Green, the *de facto* status of Guantanamo as United States territory meant that detentions there had a domestic impact, which courts were institutionally

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Executive, not the Judiciary. As a general rule, therefore, the judiciary should not insinuate itself into foreign affairs and national security issues." *Ibid.* at 329.

competent to review to the same extent as the Supreme Court set out in *Hamdi*. To Judge Leon, on the other hand, the foreign status of Guantanamo engaged the broad discretion of the executive branch under what might be considered a Lockean "federative" power. In accordance with this narrow interpretation of *Rasul*, therefore, judicial competence did not go beyond a general inquiry as to whether congressional authorization for the detention power existed.

The separation of powers analysis behind the decisions in *Guantanamo Detainee* and *Khalid*, as well as with the South Carolina District Court decision in *Padilla*, reconciled with one another in light of *Hamdi* and *Rasul*. That is, the President's discretion to detain non-citizens abroad remained exceptionally wide due to the executive branch's competence in Lockean "federative" affairs, matters which were resistant to adjudication in the courts. When the President redirected his war powers inward to detain citizens or non-citizens within the United States as unlawful combatants, however, the justifications for judicial review increased. These executive unlawful combatant detentions were functionally judicial in nature, and so subject to resolution by adjudication in the courts. Moreover, judicial review over domestic exercises of the war powers was necessary to check potential abuses of executive authority, thereby preserving the separation of powers' structural protections for individual rights. Habeas review for legality of a detention would therefore depend upon separation of powers concerns in interpreting congressional authorization and applying the *Mathews* due process analysis mandated by *Hamdi*. Both *Guantanamo Detainee* and *Khalid* differed only as to their findings about the peculiar territorial status of Guantanamo Bay, and did not otherwise challenge the applicability of the Supreme Court's decision in *Hamdi* to the case of a citizen or non-citizen located on sovereign U.S. territory.

Procedural Fairness and Reasonableness as Grounds for Habeas Review

Notwithstanding its formalistic approach, *Khalid* still showed that contextual considerations shaped the courts' analysis of both executive and judicial authority under the separation of powers. "Having concluded that Congress, through the [Military Force Authorization], has conferred authority on the President to detain the petitioners," Judge Leon believed that "it would be impermissible . . . under our constitutional system of separation of powers for the judiciary to engage in a substantive evaluation of the conditions of their detention."[816] However, this is exactly what Judge Green did in *Guantanamo Detainee* in applying *Hamdi* and using the *Mathews* balancing test to determine the process due to non-citizens held at Guantanamo Bay. Accordingly, as of August 2005, *Guantanamo Detainee* was one of only two federal court decisions exploring the scope of habeas review under the due process requirements of *Hamdi*. The other decision from the D.C. Circuit Court of Appeals, *Hamdan* v. *Rumsfeld*,[817] decided in summer 2005, explored the connection between constitutionally mandated procedures for unlawful combatant status determinations and the jurisdiction of military commissions trying them for their alleged violations of the laws of war. Both of these decisions, along with *Padilla*, *Khalid*, and other habeas cases to come, would doubtlessly work their way up to the Supreme Court for clarification of its ruling in *Hamdi*. However, a brief explanation of Judge Green's due process analysis in *Guantanamo Detainee* and the D.C. Circuit opinion in *Hamdan* sheds some light on the interrelationship between legality, procedural fairness and the reasonableness of a detention decision.

Judge Green, finding that non-citizens held in Guantanamo possessed substantive constitutional rights, proceeded to review the procedures used in designating individuals to be unlawful combatants. Shortly after the Supreme Court's decision in *Hamdi*, Deputy Secretary of Defense Paul Wolfowitz ordered that a Combatant Status Review Tribunal, comprised of three military officers, review the combatant status of each Guantanamo detainee.[818] The

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[816] *Ibid.* at 328.

[817] 415 F.3d 33 (D.C. Cir. 2005).

[818] Order Establishing Combatant Status Review Tribunal, *supra* note 518.

Review Tribunal was to determine whether detainees were "enemy combatants," defined as "an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who had committed a belligerent act or had directly supported hostilities in aid of enemy armed forces."[819] This definition reflected the criteria which the President's Military Order set forth for subjecting individuals to trial by military commissions,[820] and was considerably broader than the definition of unlawful combatants in the *Third Geneva Convention* and used by the Supreme Court in *Quirin*. As summarized by Judge Green,[821] the Tribunal procedures allowed detainees to hear the factual basis for their detentions, excepting that information which the Government deemed classified. Detainees could testify before the Tribunal, and submit exculpatory evidence where the Tribunal found it relevant and "reasonably available," although the Government's initial status determination was entitled to a presumption. Detainees had a right to a have a military officer as a "Personal Representative," but not access to legal counsel.

Judge Green found that the Review Tribunal was constitutionally defective, pursuant to the decision in *Hamdi*, for two main reasons. First, the tribunals suffered from basic procedural defects. The Tribunals denied petitioners due process by disallowing their access to material evidence supporting their status determination, which the Government had deemed classified. Accordingly, in light of the petitioners' lack of access to material evidence, the unavailability of legal counsel to assist petitioners in their Tribunal hearing was impermissible. The Government had denied to each petitioner "sufficient notice of the factual basis for which he is being detained and a fair opportunity to rebut the government's evidence supporting the determination that he is an 'enemy combatant.'"[822] As such, the Tribunal

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[819] *Ibid.*

[820] See 194, above.

[821] 355 F. Supp. 2d at 450.

[822] *Ibid.* at 468.

procedures violated the due process guaranteed by *Hamdi*. However, Judge Green recognized the flexibility of procedures in how she linked the availability of material evidence to petitioners with their access to legal counsel. Therefore, due process would allow the withholding of material evidence from direct release to the petitioners, as long as legal counsel could review it on petitioners' behalf so as to "investigate and ensure the accuracy, reliability and relevance of that evidence. Thus, the governmental and private interests have been fairly balanced in a manner that satisfied constitutional due process requirements."[823] In so determining the precise contours of *Hamdi's* procedural requirements, under the *Mathews* test, Judge Green balanced the competing substantive interests of the parties.

Second, Judge Green found that the Tribunal had denied petitioners their due process in making its decisions on the merits. In responding to petitioners' claims that the Government had obtained incriminating statements and evidence through involuntary means possibly amounting to torture, she found that the Tribunal had not sufficiently considered such evidence as due process violations. Finding that due process prohibited the use of evidence obtained through coercion, she stated that due process therefore required "a thorough inquiry into the accuracy and reliability of statements alleged to have been obtained through torture."[824] Without ruling on the merits of the petitioners' claims of torture, Judge Green nevertheless made it clear that courts would review how the Tribunal had weighed and considered the evidence before it. Not only did the use of coerced evidence violate due process, but potentially any detention decision not reasonably supported by the evidence would also be unlawful. As for the Government's definition of "enemy combatant," relied upon by the Tribunal, it was vague, overly broad, and went beyond that used in *Hamdi*. Judge Green noted that the Government's definition could support the indefinite detention of individuals

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[823] *Ibid.* at 471; For criticism of the Combatant Status Review Tribunal procedures, and a generally favorable view of Judge Green's decision, see Kent Roach and Gary Trotter, "Miscarriages of Justice in the War Against Terror" (2005) 109 Penn. St. L. Rev. 967 at 1015-31.

[824] 355 F. Supp. 2d at 472-73.

who had never actually committed a belligerent act or directly supported hostilities against the United States.[825] Finding that the *Third Geneva Convention* applied, its Article four criteria for lawful combatancy controlled and required an individualized assessment of conduct, thereby prohibiting the Government's detention of individuals based upon associations with broad group categories, such as the Taliban.[826] Thus, not only did the executive's jurisdiction to detain unlawful combatants depend upon a narrow definition of such status, but due process permitted courts to review how the Tribunal would assess the evidence in making its decisions. Judge Green's decision suggested, then, that courts could review whether the Tribunal's decisions as to facts and the competing interests of the parties were reasonable in light of the evidence.[827]

Decided some months after *Guantanamo Detainee*, in the summer 2005, *Hamdan* v. *Rumsfeld*[828] was the first Appeals Court case to look at the jurisdiction of military commissions over Guantanamo Bay detainees. Salim Ahmned Hamdan, alleged to be *inter alia* a driver and bodyguard to Osama bin Laden, filed his petition alleging that his detention at Guantanamo Bay was unlawful. Hamdan's petition arose before the *Hamdi* decision and the creation of the Combatant Status Review Tribunal, although the Tribunal subsequently affirmed his status as an "enemy combatant" under the Government's own definition. Upon hearing Hamdan's petition, Judge Robertson of the D.C. District Court[829] found that the *Third Geneva*

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[825] *Ibid.* at 475.

[826] *Ibid.* at 478-80; Yin, *supra* note 452 at 1084-85.

[827] Judge Hens Green's decision reflects what Cass Sunstein has characterized as a minimalist approach to conflicts between civil liberties and national security interests, that strives for a middle ground between opposite extremes of, as he terms it, liberty maximalism and national security maximalism. Minimalism, by contrast, represents "due process writ large." Sunstein, "Minimalism at War" (2004) Sup. Ct. Rev. 47 at 109, describes it so: "First, Congress should be required to provide clear authorization for executive intrusions on interests that have a strong claim to constitutional protection. Second, some kind of hearing should be required before the executive deprives people of their freedom. Third, courts should discipline themselves through narrow, incompletely theorized rulings."

[828] 415 F.3d 33.

[829] *Hamdan* v. *Rumsfeld*, 344 F. Supp. 2d 152 (D. D.C. 2004), overruled by 415 F.3d 33 (D.C. Cir. 2005).

Convention was a self-executing treaty. Therefore, Article five required that Hamdan receive a hearing before a competent tribunal to determine whether he was entitled to POW status, before he could be tried before a military commission. Absent such a hearing, the District Court had decided, Hamdan was to receive POW protection, prohibiting his trial before a military commission and allowing only a court martial under the *U.C.M.J.* In any case, Judge Robertson found that the rules of procedure for military commissions, allowing exclusion of an accused from a hearing and reliance upon secret evidence, violated controlling provisions of the *U.C.M.J.*[830] For these reasons, Judge Robertson concluded, Hamdan's trial by military commission was unlawful.

The D.C. Circuit Court of Appeals had little trouble reversing Judge Roberston's ruling, first finding that the *Third Geneva Convention* was not self-executing. Particularly, the Circuit Court noted that *Rasul's* extension of district court habeas jurisdiction over non-citizens in Guantanamo did nothing to "render the Geneva Convention judicially enforceable."[831] The court's decision on this point echoed that of Judge Leon in *Khalid*, finding that *Rasul* was a jurisdictional decision that did not confer substantive constitutional rights on the non-citizens held in Guantanamo. However, the D.C. Circuit did not go this far, limiting its analysis to treaty rights only. Nevertheless, the court went on to find that even if the *Third Geneva Convention* was judicially enforceable, it did not apply in Hamdan's case for other reasons.[832] As to any

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[830] *U.C.M.J.*, art. 36, at 10 U.S.C. § 836(a), provides: "Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals. . . may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rule of evidence generally recognizable in the trial of criminal cases in the United States district courts, but which may not be contrary to or consistent with this chapter." Judge Robertson relied on Article 36, to find that *U.C.M.J.*, art. 39(b), at 10 U.S.C. § 839(b) applied to military commissions: "When the members of a court-martial deliberate or vote, only the members may be present. All other proceedings, including any other consultation of the members of the court with counsel or the military judge, shall be made part of the record and shall be in the presence of the accused, the defense counsel, the trial counsel, and, in cases in which a military judge has been detailed to the court, the military judge."

[831] 415 F.3d at 40.

[832] The Circuit Court opined that the *Third Geneva Convention* did not apply because Hamdan did not meet its Article four criteria for POWs. Additionally, the Court found that al-Qaeda was not a High Contracting Party whose members were entitled to *Convention* protection,

ambiguities about the application of the *Convention's* provisions, "the President's reasonable view of the provision must therefore prevail."[833] As for the applicability of the *U.C.M.J.*, the Court found that it "imposes only minimal restrictions upon the form and function of military commissions. . . ."[834] Nothing in its provisions or any other military regulations required a special status hearing before an individual stood trial as an alleged unlawful combatant before a military commission.[835] The D.C. Circuit's decision on the applicability of the *Convention* thus only went to the issue of enforceable treaty rights, and the Court did not go further and consider whether Hamdan was constitutionally entitled to due process. Similarly, the court's refusal to apply the *U.C.M.J.* was an act of statutory interpretation, and not a ruling on the whether other rights existed. Like the District Court below, the Court of Appeals did not review the sufficiency of military commission procedures under an independent due process analysis, preferring instead to rely upon claims under the *Geneva Convention* and the *U.C.M.J.*

It is therefore unclear as to whether the D.C. Circuit considered the military commission procedures to be sufficient as a matter of legally-required due process, or simply expressions of executive grace established at the President's discretion under his war powers. The court offered only one hint to this important question, stating that "[t]he issue thus raised is not *whether* the commission may try [Hamdan], but rather *how* the commission may try him. That is by no stretch a jurisdictional argument." The court therefore deferred to the ongoing military proceedings, while reserving the possibility that the petitioner could later "contest his conviction in federal court after he exhausted his military remedies."[836] The Circuit Court thus seemed to limit its habeas review to a bare examination of whether legal authorization existed for

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while the international character of the "war against terrorism" meant that the *Convention* did not apply to the action in Afghanistan as an internal armed conflict. 415 F.3d at 40-42.

[833] *Ibid.* at 42.

[834] *Ibid.* at 43.

[835] *Ibid.*

[836] *Ibid.* at 42.

the executive detention of unlawful combatants. That is, upon a habeas petition, it would only look to see whether Congress or the Constitutional directly had generally authorized the trial of unlawful combatants by military commission, while leaving procedural questions for later appeal. *Hamdan* might accordingly proceed upon the same reasoning as *Khalid*, that non-citizens abroad had no substantive due process rights on which to base a habeas claim. If so, *Hamdan* would seem, like *Khalid*, to rest upon an assumption about the territorial status of Guantanamo, in terms of the *Curtiss-Wright/Youngstown* paradigm. Yet, the Circuit Court did not go this far, instead limiting its inquiry into substantive rights to the question of whether the *Third Geneva Convention* was self-executing and its protections therefore available to an alleged unlawful combatant. If taking a position like that in *Khalid*, then the Circuit Court's suggestion that petitioners might later appeal a military commission decision upon procedural grounds became meaningless, as they would have no rights upon which to ground their claims. Alternatively, if the case is understood to presume that non-citizens in Guantanamo did indeed possess substantive rights, then *Hamdan* complemented *Hamdi* and *Guantanamo Detainee* by sketching out the military commission procedures constitutionally due to an alleged unlawful combatant who is a citizen or non-citizen with comparable rights. Under the latter interpretation, however, the court's division between the jurisdictional and procedural issues becomes even more puzzling. Severance of legality from procedural fairness and reasonableness cut against *Hamdi's* thrust that due process itself circumscribed the executive's jurisdiction to detain, allowing courts to balance the parties' interests and review executive decisions. Because it speculated upon the procedures of a military commission trial that had not yet taken place, however, the D.C. Circuit Court could not delve into the substantive rights or reasonableness of the commission's decisions.

As the above cases show, *Hamdi* has opened up the prospect that courts can scrutinize unlawful combatant detentions based upon substantive considerations, in reviewing them for legality, procedural fairness, and reasonableness. Although courts might still extend deference to executive fact-findings or national security judgments, especially when acting abroad

against non-citizens, such deference is neither absolute nor automatic. Gone is a formalistic sphere of war powers, in which the actions categorized within it are immune from judicial review. While the President might continue to possess exceptional discretion when exercising his war powers abroad, the courts will exercise increasingly vigorous judicial review as he redirects those war powers inward to infringe liberties of the citizen or impact domestic affairs. Just how intensely courts will wish to inquire into the substantive issues behind an unlawful combatant detention, or other inherently justiciable exercise of the war powers, might vary depending upon factual circumstances, themselves determinative of the relative deliberative competencies of the executive and judicial branches. Still, the prospect of review itself should serve to caution the executive branch from abusing its war powers, as it might do when designating, detaining, and trying individuals as unlawful combatants. After *Hamdi*, judicial consideration of the deliberative processes involved in an unlawful combatant determination puts review of the war powers on a common principled footing, where the lawful exercise of executive power depends upon legality, procedural fairness, and reasonableness. This principled footing, and the judicial review of the war powers, rests upon the same foundations as those upon which the Constitution always has rested. These foundations are Lockean ones, demanding that government institutions exercise power in trust – checking and balancing one another – to preserve liberty and promote the public good.

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