THE MIDDLE GROUND IN JUDICIAL REVIEW OF ENEMY COMBATANT DETENTIONS

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In periods of heightened national security concern, it is perhaps inevitable that the judiciary will be called upon to balance the government's asserted need for extraordinary powers against the rights of the individual. This is not an easy balance to strike, especially when the national security concern rises to the level of an actual military conflict and when the issue at hand is as difficult as the

executive has involved the legislature in the equation, and to whether the executive has remained within the bounds of the power granted it by the legislature.[3] That basic observation is the starting point for my arguments here. My first claim is that the Court's willingness to defer to the joint actions of the political branches is limited by an insistence on maintaining the basic structure of our three-branch constitutional system. Deferring to executive action carrying Congress's blessing is

liberty/security tradeoffs do, indeed, regularly take place during times of serious security threats," or they "recognize the historical patterns of these shifts but refuse to accept any induction from experience that would legitimate such changes."[10]

"[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum."[16] Second, "[w]hen the President acts in absence of either a congressional grant or denial of authority," he operates in a "zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain."[17] Third, "[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb."[18] Courts can uphold assertions of presidential power in this third category "only by disabling the Congress from acting upon the subject," and "[p]residential claim[s] 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."[19] This framework is equally applicable in times of national emergency as in ordinary times. In both, a presidential assertion of power is on strongest ground when premised on congressional authorization, and on weakest ground when contrary to a congressional prohibition. The key to the analysis, in other words, is legislative action.

A number of the Court's recent enemy combatant decisions continue in this same vein. Consider *Hamdi v. Rumsfeld*,[20] in which the Court concluded that the government had the authority to detain, without trial, a U.S. citizen as an enemy combatant. Although the government had argued that the President possessed that authority

nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks . . . , or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations, or persons."[25]

Although AUMF does not speak explicitly of detention, Justice O'Connor concluded that it comprehends the power to detain a limited category of individuals.[26] This conclusion involved two steps. First, for purposes of that case, Justice O'Connor defined "enemy combatant" narrowly as "an individual who, [the government] alleges, was part of or supporting forces hostile to the United States or coalition partners in Afghanistan and who engaged in an armed conflict against the United States there."[27] Second, focusing only on individuals meeting that narrow definition, she reasoned that

> detention of individuals falling into the limited category we are

inherent constitutional authority to establish them and, alternatively, that Congress had granted the President such authority through a combination of the Uniform Code of Military Justice (UCMJ), the AUMF, and a more recent law called the Detainee Treatment Act of 2005 (DTA).[32] The Court avoided addressing the constitutional argument by treating the three statutes collectively as not only authorizing the use of military commissions in some circumstances but also imposing legitimate limits on those uses. "Together," the

legality of the broader 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."[41] The key point here is that, at least in areas where the political branches are prone to infringe individual liberty in the pursuit of security, constitutional checks and balances are best achieved by preserving a role for the third branch. As Justice O'Connor put it, "[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."[42]

To be sure, defending the judiciary's role was somewhat easier in *Hamdi* than in later cases, as Congress had not passed any legislation purporting to limit the role. In *Hamdi*, the argument for judicial noninterference with enemy combatant designations was pressed by the executive branch alone. But on the same day that it decided *Hamdi*, the Court also held in *Rasul v. Bush*[43] that the federal courts possessed statutorily-based jurisdiction to entertain habeas corpus challenges to enemy combatant detentions not just of U.S. citizens within the United States (as in *Hamdi*), but also of noncitizens held at Guantanamo Bay, Cuba.[44] Congress responded to that decision by passing the DTA, discussed above.[45]

had originated in the federal courts as a habeas action.[48] The government argued that the DTA had divested the Court of jurisdiction, as indeed its plain text arguably appeared to do.[49] On a simplistic application of the middle approach described in Part I, this might have seemed a winning argument. The executive and legislative branches had collectively determined that habeas-based review of the detentions at Guantanamo Bay was inappropriate, and so Congress had divested the courts of that jurisdiction. One might have expected the Court to accede to that decision as a permissible balance of the liberty and security considerations at work.

Instead, the Court relied on "[o]rdinary principles of statutory construction" to conclude that the DTA's jurisdiction-stripping provision did not apply to cases already pending when it was enacted.[50]

pending at the time of its enactment.[53] This obliged the *Boumediene* Court to address questions it had avoided in *Hamdan*: whether noncitizens held as enemy combatants at Guantanamo Bay had a constitutional right to habeas corpus[54] and, if so, whether the non-habeas mechanism of judicial review established by the DTA was a constitutionally adequate alternative.[55] The Court answered yes and no, respectively.[56]

> the separation of powers. The test for determining the scope of this provision must not be subject to manipulation by those whose power it is designed to restrain.[60]

To be sure, *Boumediene* did not hold that all of the Constitution necessarily applies in Guantanamo. It left for another day "whether the AUMF authorizes—and the Constitution permits—the indefinite detention of 'enemy combatants' as the Department of Defense defines that term."[61] But in concluding that those held at Guantanamo Bay had a right to challenge their detentions via habeas corpus, the Court insisted on a role for the courts in determining the lawfulness of those detentions. By invoking principles of separation of powers, the Court stressed that whether and to what extent the Constitution constrains the government's actions in Guantanamo are questions that that the judiciary must be involved in answering. For that reason, it would not allow the political branches to "manipulat[e]" things so that the time-tested means of reviewing executive detention—habeas corpus—was simply dispensed with.[62]

Having defended its own place in our three-branch system of government, the Court might well defer to the political branches if called upon in future cases to assess the scope of the government's authority to detain enemy combatants. Indeed, I think the Court is likely to defer if it concludes that the executive is acting within the scope of congressional authorization. But deference does not mean abdication, and in Part III, I discuss some of the constraints the Court may impose in the course of determining whether the executive is in fact acting with congressional authorization. Here, I want simply to differentiate those sorts of questions from questions about the Court's own jurisdiction. The logic of deference in the former set of cases assumes an ongoing judicial role. It is an approach that the Court adopts in the course of exercising its jurisdiction to review the government's actions. It does not apply, therefore, in cases where the political branches seek to displace or significantly alter the judiciary's own role. The middle approach addresses the relationship between

60. *Id.* (citation omitted).

61. *Id.* at 2271–72; *see also id.* at 2277 ("[O]ur opinion does not address the content of the law that governs petitioners' detention. That is a matter yet to be determined.").

62. *Id.* at 2259. Of course, Congress replaced habeas-based review of the detentions at Guantanamo with a form of alternative review in the D.C. Circu(tthab)]TJ17(.)]T TD.efere2(m)6-5(6e5( )7(matt2259)6.4(2 -1.2D-0.00

executive power and legislative action; it does not address limitations on the judicial power. To be sure, Congress has broad power to control the jurisdiction of the federal courts, especially the lower courts. The point here is simply that when the Court is called upon to ascertain the extent of that power, the *deferential* logic of the middle approach does not apply. In cases like *Boumediene*, in other words, the Court will supply its own answer to the jurisdictional question rather than deferring to the one proffered by the political branches.

Viewed in this light, the bait-and-switch complaint that Justice Scalia raised in his *Boumediene* dissent is quite mistaken. His complaint trained on a statement in the four-Justice *Hamdan* concurrence that, although the Court there held the presidentially-established system of military commissions to be unlawful, "[n]othing prevents the President from returning to Congress to seek the authority [for trial by military commission] he believes necessary."[63] Applying that invitation to the jurisdictional question at issue in *Boumediene*, Justice Scalia shot back:

> Turns out they were just kidding. For in response, Congress, at the President's request, quickly enacted the Military Commissions Act, emphatically reasserting that it did not want these prisoners filing habeas petitions. . . . But it does not matter. The Court today decrees that no good reason to accept the judgment of the other two branches is "apparent."[64]

The problem here is that Justice Scalia is merging two different issues: executive power to establish military commissions (which we might generalize to include executive authority to detain and try enemy combatants outside the criminal justice system), and judicial review of the executive's actions. The *Hamdan* concurrence focused on the former;[65] *Boumediene* dealt with the latter. Justice Scalia's bait-and-switch accusation simply ignores the difference.

63. *Id.* at 2295 (Scalia, J., dissenting) (quoting Hamdan v. Rumsfeld, 548 U.S. 557, 636 (2006) (Breyer, J., concurring)).

64. *Id.* at 2296.

65. The sentence immediately preceding the passage quoted by Justice Scalia makes this abundantly clear: "Congress has denied the President the legislative authority to create military commissions of the kind at issue here." Hamdan v. Rumsfeld, 548 U.S. 557, 636 (2006) (Breyer, J., concurring). Having said that, the concurrence then observed that "[n]othing prevent[ed] the President from return1 Tct frsue sente62 0 D-0.0015 Tc0.005 T4w[(preve6.6(y)-C -1.)4.4(t)-nie62seekesidedeta

III. LIMITING INTERPRETATIONS AND THE MIDDLE APPROACH

Having described a set of circumstances that lie beyond the reach of the middle approach, I turn in this Part to ways the Court can impose limits on the political branches even as it implements that approach. The basic point here is simple, and hardly novel: deferring to congressionally authorized executive action requires determining the scope of the authorization, and that exercise in statutory construction can incorporate certain substantive presumptions and limits without resolving whether the limits are constitutionally mandated.

Consider *Hamdi*. In concluding that the AUMF authorized the detention of enemy combatants as narrowly defined for purposes of that case, Justice O'Connor did not focus only on the plain text of the statute, nor on some understanding of the dictionary meaning of "necessary and appropriate force." Instead, she relied on extratextual considerations—specifically, her understanding of what counts as a "fundamental and accepted . . . incident to war"—to give otherwise open-ended statutory language some texture and potential limits.[66] Specifically, her opinion strongly suggests that it mattered that Hamdi was apprehended in an active field of battle while fighting against the U.S. or its allies; that the place of his apprehension (Afghanistan) remained an active field of battle at the time of the Court's decision; that Hamdi was being held to prevent his return to the battlefield and not solely for intelligence-gathering purposes; and that he had not yet been held for a length of time that led the Court to deem the detention effectively "perpetual."[67]

To be clear, Justice O'Connor did not say that all of the above factors are necessary conditions for a detention to fall within the

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Clear statement rules of this sort can be an effective means actually of implementing the institutional process values underlying the middle approach. As Cass Sunstein has explained, requiring clear congressional authorization helps "provid[e] a check on unjustified intrusions on liberty" without stopping Congress from providing such authorization "when there is a good argument for it."[75] Clear statement rules thus tend to "promote liberty without compromising legitimate security interests."[76]

Hamdan provides a final illustration of the ways in which statutory interpretation can cabin the effect of the legislation being interpreted. Recall that in that case, the Court concluded that the jurisdiction-stripping provisions of the DTA did not apply to cases that were already pending when the law was enacted.[77] Although the Court purported to rely only on "[o]rdinary principles of statutory construction" to reach that conclusion,[78] it also faced arguments from Hamdan that the law should be construed not to apply to pending cases in order to avoid "grave" constitutional questions about Congress's authority to limit the Court's appellate jurisdiction in that fashion, and also about whether the law amounted to a suspension of habeas corpus outside the circumstances described in the Suspension

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here.[82] Instead, I want to suggest that, whatever its other faults, the avoidance canon is one of a set of tools that may enable the Court, going forward, to pursue the middle approach in enemy combatant cases while also "leav[ing] the outer [constitutional] boundaries of war powers undefined," as *Boumediene* hoped.[83] One of the main advantages of leaving those outer boundaries undefined is the sheer difficulty of identifying them. Precisely because two centuries of constitutional doctrine and practice have not yielded many precedents fixing the outer limits of national power in times of national security crises, and because the constitutional text is itself too spare and open-ended to yield many clear answers in this area, there is precious little for the Court to rely on when determining the outer reaches of the government's power in this area.[84] And precisely because

fashioned by Justice Souter in *Hamdi*, and Justice O'Connor's reliance in the same case on "fundamental and accepted . . . incident[s] to war"[85]—provide ways for the Court to act on concerns about the breadth of the asserted authority without conclusively determining its constitutionality.

The underlying point here is the one suggested by the Court in *Boumediene*: that there is a value in not resolving the outer constitutional boundaries of the government's war powers, including the outer boundaries of its authority to detain people extrajudicially.[86] As *Boumediene* suggested, the political branches can serve that interest by, "consistent with their independent obligations to interpret and uphold the Constitution, . . . engag[ing] in a genuine debate about how best to preserve constitutional values while protecting the Nation from terrorism."[87] The balance the Court has in mind here seems to be one that does not push the constitutional envelope, but instead seeks ways to safeguard the nation that remain within our constitutional traditions. If, however, the political branches do not take that course, the Court can use substantive interpretive techniques like the avoidance canon to resist having to answer the ultimate constitutional questions.[88]

To be clear, judicial reliance on the avoidance canon and other substantive rules of statutory interpretation goes well beyond the judicial policing of mere institutional process. It entails more than simply encouraging a process of cooperation between the political branches, and then deferring to the outcomes of that process, whatever its substance. This is one reason why I now prefer the term "middle approach" over the "process-based, institutionally-oriented" phrase favored by Professors Issacharoff and Pildes.[89] The middle approach as I have described it, and as cases like *Hamdi* and *Hamdan* have modeled it, very definitely entails substantive judicial decisionmaking. The key, though, is that those decisions are statutory and not constitutional, hence relatively more provisional than entrenched. In short, there is room within the middle approach for

85. Hamdi v. Rumsfeld, 542 U.S. 507, 518 (2004) (plurality opinion).

86. 128 S. Ct. at 2277.

87. *Id.*

88. *Cf.* Ernest A. Young, *Constitutional Avoidance, Resistant Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549 (2000) (conceptualizing the avoidance canon as a means of implementing certain normative values by resisting statutory interpretations that implicate—whether or not they actually violate—constitutional norms).

89. Issacharoff & Pildes, *supra* note 8, at 5.

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