

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 detention of alleged enemy combatants outside the ordinary criminal justice system. Nor is it a balance about which the Supreme Court has made many definitive statements. Indeed, as the Supreme Court observed at the end of its recent opinion in *Boumediene v. Bush*, "[b]ecause our Nation's past military conflicts have been of limited duration, it has been possible to leave the outer boundaries of war powers undefined."¹ The *Boumediene* Court went on to warn that it "might not have this luxury" if the "war on terror" and its attendant dangers persist for years to come.² If the political branches insist on pushing the constitutional limits of their authority in times of crisis, the Court might become obliged to issue conclusive pronouncements, one way or the other, about the nature and location of those limits. Still, there is reason to believe that the Court may succeed in avoiding many such pronouncements, especially as regards the detention of enemy combatants. The aim of this short essay is to show how it may do so, and to suggest why it should.

It is now commonplace to observe that in times of national security crisis, the Court tends to privilege the joint actions of the political branches. That is, rather than upholding unilateral assertions of executive power or categorically invalidating such assertions on civil libertarian grounds, the Court has often looked to whether the

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1. 128 S. Ct. 2229, 2277 (2008).

2. *Id.*

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 a posture that the courts take in the course of exercising their own ongoing role in the process, not as a way to abdicate that role altogether. Thus, courts are least likely to defer to the legislative and executive branches—and, I will argue, the core of the argument for such deference is least applicable on its own terms—when the political branches attempt to remove or substantially restrict the jurisdiction of the courts themselves. As Justice O'Connor stressed on behalf of a plurality of the Court in *Hamdi v. Rumsfeld*, even “in times of conflict,” the Constitution “most assuredly envisions a role for all three branches when individual liberties are at stake.”⁴

My second claim goes to how the Court has treated—and, I suggest, is likely to treat in the future—questions about the extent of the government's power to detain enemy combatants without judicial trial. In this context, privileging the joint action of the political branches means being more prepared to uphold the executive's assertion of detention authority when the executive can point to legislative authorization for its actions. Such deference does not come into play, however, until the Court concludes that Congress has in fact conferred the authority the executive claims. And that process can involve the imposition of important limits. By relying on a range of techniques of statutory interpretation—including the canon of constitutional avoidance and a presumption of consistency with the law of war—the courts can merge substantial deference to the political branches with some provisional constraints on those branches, while continuing to “leave the outer boundaries of war powers undefined.”⁵ The judicial function at work here is one of deference cabined by provisional, defeasible limits.

3. For further discussion of this “institutional process” approach, see *infra* Part I.

4. 542 U.S. 507, 536 (2004) (plurality opinion) (citing *Mistretta v. United States*, 488 U.S. 361, 380 (1989) and *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 426 (1934)).

5. *Boumediene*, 128 S. Ct. at 2277.

This essay has three main parts. In Part I, I describe the “middle approach” to assertions of extraordinary government power in times of national security crisis—namely, the tendency of the Court to encourage the political branches to work together and to defer to their collective judgment. I also show that this account well describes a number of the Court’s recent enemy combatant decisions, including *Hamdi*⁶ and *Hamdan v. Rumsfeld*.⁷ In Part II, I place those cases alongside *Boumediene* to develop my first claim—that the Court is least likely to defer to the joint action of the political branches when they attempt to eliminate or substantially circumvent the judicial role. In other words, even as it defers to the political branches, the Court tends to resist departures from what it deems the core characteristics of our three-branch constitutional structure. Finally in Part III, I use *Hamdi* and *Hamdan* to advance my second claim—that the Court can and has employed substantive tools of statutory construction to impose whatever limits it thinks are appropriate on the joint action of the political branches. Especially on issues as to which the constitutional answers are so uncertain, this approach enables the Court to rely on the political branches for the basic contours of the balance between liberty and security while also resisting their attempts to push the constitutional envelope.

I. THE MIDDLE APPROACH

As a number of scholars have recently observed, there are at least three possible judicial approaches to the tension between civil liberties and national security in times of national crisis.⁸ At one end of the spectrum, “executive unilateralists” argue that because the executive is the branch best suited to acting with “speed, secrecy, flexibility, and efficiency,” courts should defer to executive decisions about how to deal with heightened threats to national security.⁹ At the other end of the spectrum, “civil libertarian idealists” either “deny. . . that shifts in the institutional frameworks and substantive rules of

6. 542 U.S. 507 (2004).

7. 548 U.S. 557 (2006).

8. See Samuel Issacharoff & Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime*, 5 THEORETICAL INQUIRIES L. 1, 1–2 (2004), available at <http://www.bepress.com/til/default/vol5/iss1/art1>; Cass R. Sunstein, *Minimalism at War*, 2004 SUP. CT. REV. 47, 48–55; see also Trevor W. Morrison, *Hamdi’s Habeas Puzzle: Suspension as Authorization?* 91 CORNELL L. REV. 411, 412–14 (2006) (discussing and applying the Issacharoff and Pildes framework).

9. Issacharoff & Pildes, *supra* note 8, at 4 (internal quotations omitted).

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

Historically and still today, U.S. courts have generally favored neither of these polar positions, preferring instead what Professors Issacharoff and Pildes have called a “process-based, institutionally-oriented (as opposed to rights-oriented) framework” for evaluating government action in times of heightened national security risks.¹¹ This is what I call the “middle approach.” At its core, this approach privileges the “bilateral institutional endorsement of both political branches of new legal structures for addressing exigent security contexts,” thus “shift[ing] the responsibility [for] these difficult decisions away from themselves and toward the joint action of the most democratic branches of the government.”¹² Put another way, the middle approach eschews conclusive constitutional judgments in either direction. It neither categorically forbids certain government actions as violative of the Constitution’s individual rights provisions nor upholds such actions on theories of unilateral, preclusive executive power derived directly from the Constitution. Instead, this approach encourages the legislative and executive branches to work together to decide how best to balance liberty and security in times of national crisis, and substantially defers to them when they do.

The most famous judicial articulation of the middle approach is undoubtedly Justice Jackson’s concurring opinion in *Youngstown Sheet and Tube Co. v. Sawyer*.¹³ His “canonical”¹⁴ three-tiered framework for analyzing the scope of executive power depends heavily on the action of Congress. “Presidential powers,” he explained, “are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress.”¹⁵ He then proceeded to place that fluctuation in three broad categories. First,

10. *Id.*

11. *Id.* at 5.

12. *Id.*

13. 343 U.S. 579 (1952) (Jackson, J., concurring).

14. Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259, 1274 (2002); see Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2050 (2005) (describing the framework as “widely accepted”); *Dames & Moore v. Regan*, 453 U.S. 654 (1981) (calling “Justice Jackson’s classification of executive actions into three general categories analytically useful,” and employing his basic approach in that case).

15. *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring).

“[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 directly under Article II of the Constitution,²¹ no one on the Court embraced that position. Instead, five Justices (a plurality opinion written by Justice O’Connor and joined by the Chief Justice and Justices Kennedy and Breyer,²² and a separate opinion written by Justice Thomas²³) avoided the Article II argument by concluding that Congress had authorized the detention in question. The focus here was on the Authorization for Use of Military Force (AUMF), passed by Congress on September 18, 2001.²⁴ The AUMF empowers the President to “use all necessary and appropriate force against those

16. *Id.*

17. *Id.* at 637.

18. *Id.*

19. *Id.* at 637–38.

20. 542 U.S. 507, 539 (2004) (plurality opinion).

21. *See id.* at 516.

22. *See id.* at 516–17.

23. *See id.* at 587 (Thomas, J., dissenting).

24. Pub. L. No. 107-40, 115 Stat. 224 (2001).

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 considering, for the duration of the particular conflict in which they were captured, is so fundamental and accepted an incident to war as to be an exercise of the ‘necessary and appropriate’ force Congress has authorized the President to use.²⁸

Thus, Justice O’Connor concluded that the AUMF authorized the detention of individuals like Hamdi because she read the AUMF against the backdrop of the historical practice of war. This was the middle approach at work. Although it upheld the government’s asserted authority, the plurality avoided resolving constitutional questions about the extent of the President’s inherent Article II powers.²⁹ Instead, it relied on the authority conferred upon by Congress, which it construed to be consistent with traditional wartime practices uncontested by Congress.

Another example of the middle approach at work, and yielding the opposite conclusion, is *Hamdan v. Rumsfeld*.³⁰ There, the Supreme Court struck down the system of military commissions for trying unlawful enemy combatants that the Bush administration had established by executive order.³¹ The government defended the commissions on two grounds: that the President possessed the

25. *Id.* at § 2(a).

26. *Hamdi v. Rumsfeld*, 542 U.S. 507, 518–19 (2004) (plurality opinion).

27. *Id.* at 516 (internal quotations omitted).

28. *Id.* at 518.

29. *Id.* at 516–17.

30. 548 U.S. 557 (2006).

31. *Id.* at 567, 635.

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 Court reasoned, “the UCMJ, the AUMF, and the DTA at most acknowledge a general Presidential authority to convene military commissions in circumstances where justified under the ‘Constitution and laws,’ including the law of war.”³³ And the Court read the UCMJ to require that military commissions comply with “the rules and precepts of the law of nations,”³⁴ including Common Article 3 of the Geneva Conventions.³⁵ All those limitations amounted to a requirement that military commissions meet the standards Congress had established in the UCMJ for the operation of courts-martial, which the military commissions failed to do. For that reason, the Court struck down the commissions as unlawful.

Importantly, *Hamdan* did not conclude that the military commissions ran afoul of some individual right under the Constitution. A holding of that sort would have ruled out the commissions categorically. Instead, *Hamdan* held that the commissions established by the President were contrary to statutory constraints on such tribunals (Article 3 of the Geneva Conventions being applicable here because incorporated by the UCMJ), and that the President was legitimately subject to those constraints.³⁶ In *Youngstown* terms, the case fell into Justice Jackson’s third category, where the President’s power was at its “lowest ebb.”³⁷ Going forward, however, the decision left open the possibility of seeking express congressional authorization for the commissions. As Justice Breyer noted in a concurring opinion in the case, “Nothing prevents

32. Pub. L. No. 109-148, Title X, 119 Stat. 2680, 2739 (2005).

33. *Hamdan*, 548 U.S. at 594–95; *id.* at 635 (“[I]n undertaking to try Hamdan and subject him to criminal punishment, the Executive is bound to comply with the rule of law that prevails in this jurisdiction.”).

34. *Id.* at 641 (Kennedy, J., concurring in part) (quoting *Ex parte Quirin*, 317 U.S. 1, 28 (1942)).

35. *Id.* at 641–42.

36. *Id.* at 567 (plurality opinion).

37. See *supra* notes 13–18 and accompanying text.

the President from returning to Congress to seek the authority [for military commissions] he believes necessary.”³⁸ Seen in this light, *Hamdan* is entirely consistent with the middle approach described above. Indeed, “*Hamdan*’s greatest effect to date has been to force the President to work with Congress, within constitutional boundaries, to implement desired policies.”³⁹

In sum, *Hamdi* and *Hamdan* both reveal that in war-on-terror cases pitting executive power against individual liberty, the Court has looked in particular to Congress. When the executive’s actions seem to the Court to fall within the scope of authority conferred by Congress, as in *Hamdi*, the Court has been inclined to sustain the actions; when the executive acts alone, as in *Hamdan*, the Court has been less inclined to defer. There are, of course, other aspects of the *Hamdan* decision, including the Court’s conclusion that new statutory limits on the federal courts’ habeas corpus-based jurisdiction did not apply to cases already pending when the limitations were enacted. I take up that dimension of the case in the next Part.

II. LIMITS TO THE MIDDLE APPROACH: PRESERVING THE JUDICIAL ROLE

In addition to underscoring the premium the Court places on legislative authorization of executive action, the enemy combatant decisions also highlight the one circumstance in which the Court is least likely to defer to the political branches: where the Court’s own jurisdiction is in issue. *Hamdi*, *Hamdan*, and *Boumediene* all illustrate the point.

Consider *Hamdi* first. Although a majority of the Court concluded that the AUMF granted the executive branch the authority to detain a fairly narrowly defined category of enemy combatants outside the criminal justice system, a differently-constituted majority (again led by Justice O’Connor’s plurality opinion) rejected the idea that courts should treat as conclusive the executive’s determination that a given individual is, in fact, an enemy combatant.⁴⁰ As Justice O’Connor explained, “the position that the courts must forgo any examination of the individual case and focus exclusively on the

38. *Hamdan*, 548 U.S. at 636 (Breyer, J., concurring).

39. Dawn E. Johnsen, *The Story of Hamdan v. Rumsfeld: Trying Enemy Combatants by Military Commission*, in PRESIDENTIAL POWER STORIES 447, 484 (Christopher H. Schroeder & Curtis A. Bradley eds., 2009).

40. *Hamdi v. Rumsfeld*, 542 U.S. 507, 536–37 (2004).

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 The DTA provided, in relevant part, that “no court, justice, or judge shall have jurisdiction to hear or consider . . . an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba.”⁴⁶ Instead, the DTA provided that the U.S. Court of Appeals for the D.C. Circuit had exclusive jurisdiction to hear appeals by Guantanamo detainees wishing to challenge their designations as enemy combatants, and that those appeals could raise only a limited set of issues.⁴⁷

The Supreme Court first confronted the DTA’s jurisdiction-stripping provision in *Hamdan*, before it addressed the merits of the President’s military commissions. Put simply, the threshold question was whether the Court had jurisdiction to hear Hamdan’s case, which

41. *Id.* at 535–36.

42. *Id.* at 536.

43. 542 U.S. 466 (2004).

44. *Id.* at 483–84.

45. See *supra* text accompanying note 32.

46. Pub. L. No. 109-148, Title X, § 1005(e)(1), 119 Stat. 2680, 2742 (2005).

47. *Id.* at § 1005(e)(2).

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 It did so in light of arguments pressed by Hamdan that if the provision did apply, it would “raise[] grave questions about Congress’ authority to impinge upon this Court’s appellate jurisdiction, particularly in habeas cases,” and would also amount to an unconstitutional suspension of habeas corpus.⁵¹ I will return to the role of constitutionally-based techniques of statutory construction in the next Part, but for now I want simply to stress the Court’s resistance to interpretations that would dispense with the core judicial function of habeas corpus review. On the threshold issue of jurisdiction, *Hamdan* lies beyond the scope of the middle approach discussed in Part I. Put another way, the middle approach describes a posture of judicial deference to the joint action of the political branches in cases where the judiciary’s own jurisdiction is not in question. When that jurisdiction is challenged, however, the Court is more likely to rely on a different principle—that even in times of national security concern, the Constitution “most assuredly envisions a role for all three branches.”⁵²

That principle is even more dramatically at work in *Boumediene*. In response to the Court’s decision in *Hamdan*, Congress, in the Military Commissions Act of 2006, amended the DTA’s jurisdiction-stripping provision to make it abundantly clear that it applied to cases

48. *Hamdan v. Rumsfeld*, 548 U.S. 557, 567 (2006).

49. *Id.* at 574–75.

50. *Id.* at 575–84.

51. *Id.* at 575.

52. *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004).

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 corpus⁵⁴ 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

There is much that could be said about *Boumediene*'s holding that the Constitution secures a right to habeas for noncitizens held at Guantanamo as enemy combatants, and I will not attempt to discuss all of the Court's reasoning here. Instead, the critical point for present purposes is the Court's reliance on the separation of powers.⁵⁷ The core of the government's argument in *Boumediene* was that because Cuba retained "ultimate sovereignty" over Guantanamo (subject, however, to the United States' "total control" over the territory until relinquished), detentions there should not be subject to the Constitution.⁵⁸ The Court saw this as an impermissible attempt to "contract[] away" "[o]ur basic charter."⁵⁹ Its analysis sounds in constitutional structure:

The Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, not the power to decide when and where its terms apply. . . . Abstaining from questions involving formal sovereignty and territorial governance is one thing. To hold the political branches have the power to switch the Constitution on or off at will is quite another. The former position reflects this Court's recognition that certain matters requiring political judgments are best left to the political branches. The latter would permit a striking anomaly in our tripartite system of government, leading to a regime in which Congress and the President, not this Court, say "what the law is."

These concerns have particular bearing upon the Suspension Clause question in these cases now before us, for the writ of habeas corpus is itself an indispensable mechanism for monitoring

53. *Boumediene v. Bush*, 128 S. Ct. 2229, 2241–42 (2008).

54. *Id.* at 2244.

55. *Id.* at 2262.

56. *Id.* at 2262, 2274.

57. *See, e.g., id.* at 2246 ("[T]he Framers deemed the writ to be an essential mechanism in the separation-of-powers scheme."); *id.* at 2258 (describing the government's argument as "rais[ing] troubling separation-of-powers concerns").

58. *See id.* at 2258.

59. *Id.* at 2259.

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. Circuit, but the Court deemed it a constitutionally insufficient alternative to habeas. I agree with that conclusion, but a full consideration of the Court’s reasoning, and of the counterarguments presented by Chief Justice Roberts in dissent, is well beyond the scope of this essay.

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 returning to Congress to seek the authority he believes necessary.” *Id.* The *Boumediene* majority recognized that this is what the concurrence was talking about. See *Boumediene*, 128 S. Ct. at 2242 (“The authority to which the concurring opinion referred was the authority to “create military commissions of the kind at issue” in the case.” (quoting *Hamdan*, 548 U.S. at 636 (Breyer, J., concurring))).

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 scope of the authority granted by the AUMF. Some very likely are;⁶⁸ others probably are not.⁶⁹ But in any event, it is not my aim here to reach any definitive conclusion about the precise limits of the AUMF under Justice O'Connor's reasoning. Rather, my point is simply to observe that the shape of her reasoning is consistent with imposing at least some limits that do not appear on the face of the AUMF itself.

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

67. *Id.* at 516–22.

68. On the purpose of detention, Justice O'Connor was explicit: "Certainly, we agree that indefinite detention for the purpose of interrogation is not authorized." *Id.* at 521.

69. It would be surprising, for example, if the Court ever construed the AUMF to authorize the detention of individuals apprehended in Afghanistan only, and nowhere else.

Although Justice O'Connor's opinion is deferential to legislative authorization, it also reminds us that deference requires interpretation, and that interpretation can entail limitation.

This point is even more vividly on display in Justice Souter's separate opinion in *Hamdi*. In a partial concurrence joined by Justice Ginsburg, he concluded that the AUMF did not authorize the detention of U.S. citizens like Hamdi.⁷⁰ In reaching that conclusion, he placed special emphasis on a federal statute known as the Non-Detention Act, which provides that “[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.”⁷¹ As Justice Souter recounted, Congress passed the Non-Detention Act “to preclude reliance on vague congressional [enactments] . . . as authority for detention or imprisonment at the discretion of the Executive.”⁷² Accordingly, he reasoned, the Act's bar on detaining citizens except “pursuant to an act of Congress” should be construed “to require a congressional enactment that clearly authorize[s] detention or imprisonment.”⁷³ Finding no such clear statement in the AUMF, Justice Souter concluded that it did not authorize Hamdi's detention.⁷⁴ This was not a conclusion that Congress *could not* authorize the detention, but simply that it *had not*.

Justice Souter's analysis both fits within the middle approach described in Part I and underscores the judiciary's capacity to impose limits within that approach. The key to his opinion is the clear statement rule he fashioned to implement the Non-Detention Act.

70. *Hamdi*, 542 U.S. at 541 (Souter, J., concurring in part).

71. *Id.* at 542 (quoting 18 U.S.C. § 4001(a) (2000)).

72. *Id.* at 543–44. In particular, Congress sought “to preclude another episode like the one described in *Korematsu v. United States*,” where U.S. citizens of Japanese ancestry were interned pursuant to an executive order. *Id.* at 542. As Justice Souter explained,

Although an Act of Congress ratified and confirmed an Executive order authorizing the military to exclude individuals from defined areas and to accommodate those it might remove, the statute said nothing whatever about the detention of those who might be removed; internment camps were creatures of the Executive, and confinement in them rested on assertion of Executive authority.

Id. at 543 (citations omitted).

73. *Id.* at 544.

74. *Id.* at 551–52. Justice Souter further rejected the government's assertion that the President could detain Hamdi pursuant to his “inherent, extrastatutory authority under a combination of Article II of the Constitution and the usages of war.” *Id.* at 552. In doing so, he cited Justice Jackson's three-tiered framework and, in particular, his statement that the President's authority is “at its lowest ebb” when he acts contrary to Congress's will. *Id.* (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637–38 (1952) (Jackson, J., concurring)).

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 Clause.⁷⁹ Arguments of that sort rely on the familiar canon of constitutional avoidance, which dictates that “where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such a construction is plainly contrary to the intent of Congress.”⁸⁰ This “‘cardinal principle’ of [judicial] statutory interpretation”⁸¹ is perhaps the most powerful tool available to courts operating within the middle approach described in Part I.

The avoidance canon, as it is colloquially known, has been the target of copious academic criticism. I do not propose to survey it all

75. Sunstein, *supra* note 8, at 54.

76. *Id.*

77. *Hamdan v. Rumsfeld*, 548 U.S. 557, 575–584 (2006).

78. *Id.* at 575–76.

79. *Id.* at 575.

80. *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

81. *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001) (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)). For a survey of cases employing the avoidance canon over the last 20 years, see Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189, 1193 n.10 (2006).

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 constitutional answers are so difficult to revise, the Court may be worried that any answer it provides might be not only wrong but immediately entrenched. With profound stakes on both sides, the Court (and the country) might find it best to avoid decisive constitutional judgments.

Of course, if the Court in a given case sees neither a potential constitutional problem nor even any novelty in the full sweep of executive authority conferred by the plain text of a legislative enactment, it will have little reason to turn to the avoidance canon or any other narrowing interpretive device. But in many enemy combatant detention cases pending in the lower courts today, virtually everyone agrees that the detention authority being asserted by the government is novel in the sense that historical analogues are highly imperfect, and also that neither the AUMF nor any other legislative enactment resolves the issues by its plain terms. Many also contend, moreover, that the broadest of the theories the government has advanced over the last several years at least raise constitutional questions even though the relatively undeveloped nature of doctrine makes it hard to know how those questions should be resolved. In such cases, the avoidance canon and other “substantive” methods of statutory interpretation—including clear statement rules of the sort

82. I have discussed the main themes of criticism in other work. See Morrison, *Constitutional Avoidance in the Executive Branch*, *supra* note 81, at 1208–11.

83. *Boumediene v. Bush*, 128 S. Ct. 2229, 2277 (2008).

84. *Cf. Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952) (Jackson, J., concurring) (“A judge, like an executive adviser, may be surprised at the poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves.”).

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.

courts to impose some limits on the assertion of governmental power while still leaving the ultimate constitutional questions undecided.⁹⁰

CONCLUSION

In times of heightened national security concern, the Supreme Court has and will likely continue to privilege the collective judgment of the political branches. This deference is not absolute; the Court retains the prerogative to invalidate those arrangements that go beyond the constitutional pale. In part to preserve that power, the Court appears least likely to defer to the political branches when they attempt to strip the judiciary of jurisdiction to hear cases in this area—at least cases involving individual detention that therefore implicate the Suspension Clause. But even on other issues, the Court possesses a variety of interpretive tools enabling it to combine substantial deference to the political branches with at least some provisional, modest limits on executive power. If its war-on-terror decisions to date are any guide, we should expect the Court to favor those tools going forward. And to the extent we doubt the Court's ability to fix the outer boundaries of war (and related) powers in any durably satisfactory way, that is the course we should want it to take.

90. As should be clear, my claim here is influenced by Cass Sunstein's work on judicial minimalism. See, e.g., Cass R. Sunstein, *The Supreme Court, 1995 Term—Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4 (1996) (developing and defending a general approach to judicial minimalism).

