

# Aggressive, Absent, and Out of Line

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Prisoner detention in the War on Terror and the constitutional failure of the executive, legislative, and judicial branches

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Abstract: After the terrorist attacks of September 11, 2001, the Bush administration launched a global War on Terror and established policies on detaining enemies captured during its course. In acting without legislative authority, President Bush unnecessarily exceeded his legal bounds. Congress proved unwilling to clash with the President or establish clear policy and as a result largely ceded its role in foreign affairs. Perhaps most alarmingly, the Supreme Court overstepped its constitutional authority of interpreting the laws, undermined its own authority, and set a dangerous precedent in the constitutionally established governing principle of separation of powers.

## **Introduction:**

The United States responded to the terrorist attacks of September 11, 2001 with a global War on Terror designed to root out those responsible and prevent future acts of terrorism. US forces started operating in Afghanistan under Operation Enduring Freedom less than a month later. One of the challenges presented to the United States was how to deal with captured al-Qaeda, Taliban, and associated forces, many of whom were captured on the battlefield in wide sweeps or handed over for bounties by tribesmen. The Bush administration decided to use the US military facility in Guantanamo Bay, Cuba to house certain prisoners and eventually instituted a system of military commissions to try those the administration selected. The saga surrounding the right of the President to detain and try enemy combatants captured in the War on Terror has involved the participation of all three branches of government. Resolving the proper role of the three branches in prisoner detention during wartime is essential not only to crafting a practical and constitutional policy but also to restoring the balance between the branches.

Unfortunately, none of the three branches has adequately filled its constitutional role. President Bush sought and received wartime powers from the Congress in the aftermath of September 11, but proceeded to exceed his statutory authority in some instances. However, the failures of the other two branches, considered here, are more serious. Congress gave the president wide-ranging and virtually unchecked authority, notably with the Authorization for Use of Military Force Against Terrorists, the Detainee Treatment Act, and the Military Commissions Act. These acts, and allowing the president to interpret them with wide latitude, represent a dereliction of Congress' duty to ensure that the executive branch does not act in a way inconsistent with the Constitution or the principles and goals of the country. When crafting the Constitution, our founders did not intend for the nation's international

actions to be determined solely by one man. Continued congressional reluctance to fight with the president over foreign affairs policy will allow the executive branch to dominate foreign policy decisions without Congress's input or oversight.

The judicial branch, although arguably well intentioned, overstepped its constitutional authority by intervening in what should have been a dispute between the political branches. The Supreme Court, with the *Hamdan* and *Boumediene* decisions, moved beyond its role of interpreting the laws and the Constitution. Rather than allowing the political branches to resolve the country's wartime policy, the Supreme Court acted to nudge policy in a manner it saw fit. In trying to compensate for the Congress and correct a short-term problem, the Supreme Court undermined its own authority and set a dangerous precedent in the constitutionally established principle of separation of powers.

Although the Constitution governs the relationship between the branches in both wartime and peace and in both domestic and international affairs, it also provides flexibility to adapt to unique and challenging circumstances. The court has two primary roles in wartime. First, it must protect the rights of Americans from the government, considered as a whole. For example, during the Civil War the Supreme Court ruled in *Ex Parte Milligan* that the military tribunals Lincoln wanted to use to try Americans were unconstitutional while the regular court system functioned. This decision protected the rights of American citizens against an expansive government while still respecting the President's authority to determine the necessity of military tribunals in warzones. Second, the court must serve as a neutral and non-partisan institution to resolve disputes between the legislative and executive branches. In the future, the Supreme Court should restrict its role in foreign affairs cases to these two roles and should leave as much of policy determination to the political branches as possible.

The founders intended the privilege of setting American foreign policy to be the responsibility of both the legislative and executive branches. The Constitution gives both the president and the Congress

some influence over the other by requiring cooperation between the two to achieve any kind of foreign policy goal. If a president wants to go to war, for example, Congress must both declare (or authorize) the war and provide continuing funding needed to prosecute the war. However, during the War on Terror, including on the issue of prisoner detainment and trial, Congress has allowed the president to dominate policy setting and implementation. Restoring a balance between the branches in foreign affairs policy ultimately relies on the will of Congress to take risks in confronting the President and using its powers to play a key role in foreign affairs policy.

### **Setting the Stage:**

The most direct cause of the detainee issue was, of course, the terrorist attacks of September 11, 2001 and the war in Afghanistan that followed. Less than a week after the tragedy, Congress passed the Authorization for Use of Military Force Against Terrorists (AUMF-AT) which provided:

That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, 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. (US Congress, Authorization for Use of Military Force Against Terrorists)

Operation Enduring Freedom, in Afghanistan, began on October 7, 2001 and rapidly proceeded with the toppling of the Taliban regime. Shortly after, on November 13, President Bush issued a recently released Executive Order entitled “Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism.” President Bush used his position as president and Commander in Chief in the AUMF to claim the authority to detain those non-citizens he determines to have been a member of al-Qaeda, engaged in or supported international terrorism, or supported an individual engaging in terrorism. The Executive Order also gave the president the authority to have any detainee under the order “be tried by military commission” where “the Secretary of Defense shall issue such orders and regulations.” (Bush) In other

words, under the Executive Order the executive branch would have full discretion to determine who should be held, under what conditions they would be held, if they would be tried, how they would be tried, and how extensively they would be punished.

The *Hamdan* case revolves around Salim Hamdan, who was captured during Operation Enduring Freedom in Afghanistan on November 24, 2001. Hamdan admitted to being Osama bin Laden's driver and one of his personal bodyguards, and was eventually transferred to Guantanamo Bay prison. In July 2004, the Department of Defense tried Hamdan with conspiracy under a military commission based on President Bush's Executive Order of November 13, 2001. In November 2004, District Court in Washington, DC halted the military commission because no competent tribunal had determined Hamdan's POW status, and therefore under the Geneva Conventions the trial could not legally proceed. To satisfy this requirement, the Department of Defense instituted Combatant Status Review Tribunals to determine whether each detainee could be classified as an 'enemy combatant.' The Bush administration argued that members of al-Qaeda and the Taliban were unlawful combatants, and therefore would not receive the protections of the Geneva Conventions. In July 2005, the Court of Appeals overturned Hamdan's appeal, arguing that the Geneva Conventions were not applicable and permitting the military commissions to continue. The Supreme Court agreed to hear the case in November, and in June 2006 issued its *Hamdan* ruling.

One central issue in the *Hamdan* case is the degree of applicability of the Geneva Conventions, which if applicable require a minimum level of treatment for prisoners. Yet the primary text of the Geneva Convention was designed to apply only to uniformed soldiers of signatory nations to the convention and then only when they followed the rules of war as prescribed. The Geneva Convention, for example, specifically bans targeting civilians, using civilians as human shields, and blending in with civilian populations by not wearing an identifiable uniform. It also requires that both sides treat their

prisoners in accordance with the standards of the treaty. The Taliban, al-Qaeda, and related forces, however, do not come close to fitting this standard—they are not parties to the treaty, do not treat American prisoners humanely, deliberately target civilians, and do not wear a uniform. The relevant article, and the one cited by the American Civil Liberties Union and others, is Geneva Article 3. The article reads that it covers “members of armed forces who have laid down their arms,” but captured al-Qaeda and Taliban forces do not necessarily meet this criterion because they were not members of recognized nation state armed forces. (Geneva Convention)

Even if Article 3 of the Geneva Convention is applicable, its protections are much less far-reaching than those of the general conventions. Prisoners of War (POWs) under the General Convention cannot be interrogated or tried for normal war operations and must be released at the conclusion of hostilities. Common Article 3 only prevents the following:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) taking of hostages;
- (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
- (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

The first three sections are not directly applicable to the regular detainment of prisoners in the War on Terror (not considering any instances of torture). The majority in the *Hamdan* decision cited the need for a ‘regularly constituted court,’ from the final section. Since the United States ratified the Geneva Convention, they represent a binding commitment and attain the status of law. Yet ‘a regularly constituted court’ is not further defined in the convention and it is unclear what it would constitute. It is also interesting to note that, historically, the court has left up to the executive branch the task of interpreting the precise meaning of the United States’ international obligations.

International terrorism presents a difficult problem for the United States in applying either international POW convention or domestic criminal statute. The Geneva Convention was designed to be used in cases of traditional warfare, where the enemy was easily defined and both sides accepted POW treatment standards. At the conclusion of war, each side would return the others' prisoners, who would not be punished unless they committed a particularly grave war crime. There is almost no burden of proof required to hold a prisoner as a POW until the end of hostilities, including under US domestic law, because the conflict would take place on a foreign battlefield. When the United States captures a member of al-Qaeda not only does he not meet the standards required to be considered a POW, but the United States has different goals in mind for detaining him. A country detains a POW in order to prevent them from returning to the battlefield in the war. A terrorist, on the other hand, can never be released because the War on Terror will not end like a conventional war; even if al-Qaeda is completely eliminated, that terrorist will still seek to kill Americans. In many instances, the United States also seeks to try those terrorists who have committed acts of barbarism. Treating a terrorist under US criminal law does not meet the practical requirements necessary when dealing with capturing a terrorist on the battlefield. Considerations such as maintaining the chain of evidence, proving guilt beyond a reasonable doubt, and extracting important information preclude applying the criminal justice process.

The procedures, then, that President Bush decided to use for the military commissions were based on the Uniform Code of Military Justice (UCMJ), initially passed by Congress in 1950. Although the UCMJ serves primarily as the law for armed service members, President Bush used it as a basis for the military commissions. Article 36 allows the president to prescribe rules and procedures for pretrial, trial and post trial that "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." (Uniform Code of Military Justice, Article 36) The Supreme Court felt that the president did not sufficiently justify

the impracticality of the criminal courts and thus struck down the military commissions in the *Hamdan* decision partly because they did not meet Article 36 of the UCMJ.

### **Literature Review:**

The *Hamdan* case is widely recognized by scholars to be one of the most significant court cases relating to the conduct of the War on Terror. The Supreme Court's decision prompted Congress to pass the Military Commissions Act in 2006, which eventually resulted in the *Boumediene* case, another hugely consequential decision. Scholarly conflict over the case begins with whether the Supreme Court should have heard the *Hamdan* case at all or dismissed it as the government argued it should have done. Some, including John Yoo, argue that the Supreme Court should have rejected the case based on both legal and practical grounds. On the other side, those concerned about the growth of the executive branch argued that the Supreme Court has the power to and should force the President to allow a greater role for Congress. The *Hamdan* case also acted as a focal point to examine the health of the relationship between, and the performance of, the three branches during the War on Terror. Scholarly opinions range from those of John Yoo, who argues that the President has appropriately used his wide-ranging authority to pursue a congressionally authorized war, to those that argue that the Congress has removed itself from difficult foreign affairs decisions and allowed the President to dominate.

According to the government's brief, the "Detainee Treatment Act in plain terms removes the Court's jurisdiction to hear" the case under Section 1005(e) of the act (Clement, 3). Therefore, the government argued that the court should at a minimum wait until the military commission rendered a decision following the procedures established by Congress in the act. Justices Scalia, Thomas, and Alito agreed with the government's position but formed the minority of the court (Chief Justice Roberts recused himself from the decision, but likely would have sided with the minority). Dissenting, Justice Scalia wrote that the Detainee Treatment Act "unambiguously provides that, as of [December 30, 2005],

'no court, justice, or judge' shall have jurisdiction to consider the habeas application of a Guantanamo Bay detainee." (Scalia, *Hamdan v. Rumsfeld*, 1) The government and these justices argued that since Congress had made clear it did not want the Supreme Court to review the military commissions, the Supreme Court should let the political branches take the lead in wartime matters. Hamdan's attorneys argued that the relevant section of the Detainee Treatment Act takes effect on the date of the enactment of the legislation and since the case was on the docket before the enactment of the legislation, the act did not preclude the Supreme Court from hearing the case (Katyal, 1-3). Justice Stevens, in his opinion for the Court, argued that Congress did not include sufficiently clear language in the Detainee Treatment Act that might have precluded the jurisdiction of the Supreme Court (Supreme Court of the United States, *Hamdan v. Rumsfeld*, 2-3). As a result, Stevens denied the government's motion to dismiss, allowing the Supreme Court to hear the case and make a decision on the merits.

Outside of those directly involved with the *Hamdan* case, most of those who supported the court's decision argued that the court should have heard the case based on democratic, not legal, grounds. This position implies that the end of reforming an unjust policy or an imbalanced relationship between the branches justified the legally ambiguous standing that the Supreme Court had in hearing the case. Jonathan Mahler argues that by taking the case, "the system worked: the president broke the rules, and the justices, acting equally as the nation's conscience and the defender of its traditions, stopped him. In so doing, they restored to America a measure of dignity that had been badly eroded by Abu Ghraib, the torture memos, the secret CIA prisoners, and numerous other post-9/11 antiterrorism policies." (Mahler, 293) Mahler does not address whether the Supreme Court had the legal standing to decide the case on its merits, but rather argues that the executive overstep in the War on Terror had to be reversed. Other scholars argue that the court's decision acted as a 'democracy forcing event' by rejecting the president's argument that he did not need to have explicit Congressional authorization on the detainment of enemy prisoner combatants. By forcing the president to seek legislation if he thought

military commissions necessary, the court would restore Congress's input in foreign affairs policy. Yet the court could only force the president to go to Congress for authorization; it could not force Congress to oppose the president's request or to assert a policy of its own.

Those who argued that the executive had gained too much power after September 11 "invited the courts to play a 'democracy forcing' role to prompt greater congressional participation, through, in particular, the application of 'clear statement' requirements." (Bradley, Farer and Martin, 322) These scholars celebrate the court's decision on the grounds that it resulted in an increased role for Congress, as the founders envisioned. Yet ironically, these same scholars ignore the restrictions that the founders placed on the judicial system in the Constitution to prevent it from interfering in political matters. One commentator supporting the Supreme Court's intervention argued that the *Hamdan* case seemed to display "a special form of judicial role" where the court "used statutory construction to give a strong nudge in a direction favorable to human rights." (Martin, 344) This new judicial role, however, compromises the court's intended position as a non-partisan, non-ideological institution removed from the political struggle present in the legislative and executive branches.

Of those who opposed the Supreme Court's decision in the *Hamdan* case, most offered legal and practical arguments why the Court should have elected not to hear the case. Douglas Kmiec argues that the Supreme Court should have followed the precedent established by Justice Sutherland of giving the President discretion in international affairs and continued its "historical circumspection in war matters." (Kmiec, 575-576) From this perspective, an active judicial role in foreign affairs during wartime is unnecessary meddling that does not recognize the dynamic situation and the need for strategic flexibility. For this reason, the Supreme Court in the past sought reasons not to decide wartime policy. Peter Spiro noted that the justices had, but ignored, "multiple jurisdictional grounds for evading the merits," ranging from technicalities to the Detainee Treatment Act to traditional deference to the

executive, and set precedent by taking the case (Spiro, 892). John Yoo, widely considered to have one of the most expansive views of executive power in wartime, argues that “*Hamdan* was an unprecedented attempt by the court to rewrite the law of war and intrude into war policy.” (Yoo, *Sending A Message*) Implicit in the statement is the idea that war policy falls entirely under the domain of the legislature and executive branches, where, according to Yoo, the President takes the initiative.

According to Yoo, the conduct of war is a decision primarily made by the executive with an important but limited role for Congress. The Supreme Court’s role in the process “smacks of judicial micromanagement” of a war unlike any that the United States has fought before (Yoo, *The High Court’s Hamdan Power Grab*). Yoo and his colleague Julian Ku argue that the court has institutional differences, such as limited access to information and an inability to “take into account the broader factual context underlying the application of laws in [foreign affairs]” that impose a practical limitation on its ability to make effective wartime policy (Yoo and Ku, 121). This line of reasoning was supported by Justice Thomas when he argued in his dissent that, “The Court’s evident belief that *it* is qualified to pass on the ‘military necessity’... of the Commander in Chief’s decision to employ a particular form of force against our enemies is so antithetical to our constitutional structure that it simply cannot go unanswered.” (Supreme Court of the United States, 2823) Justice Thomas also noted that the court was not siding with Congress to resolve a conflict with the President, but rather opposed the Commander in Chief’s wartime decision while the Congress either tacitly supported the President or, at a minimum, acquiesced to it. Yoo, Ku, and the dissenting justices in *Hamdan* argued that the Supreme Court’s ability to guide policy is severely restricted in war and that therefore it should defer to Congress and the president.

While scholars disagree about whether the Supreme Court was right to hear the case in the first place, they almost all uniformly recognized that the decision, in and of itself, would not mandate a lasting impact on detainee policy. Although the Supreme Court decided against President Bush’s

assertion of power, it decided based on statutory, not constitutional grounds. Therefore, Congress had the power to reinstate the military commissions by passing a statute that explicitly approves of them. In fact, the Justices in the majority noted multiple times that nothing prevents the President from returning to Congress to seek the authority he believes necessary” (Supreme Court, Justice Breyer, 82). In the Supreme Court’s ruling, the majority decided that that the President’s policy violated prior legislation, the Uniform Code of Military Justice, and therefore the President was on his lowest ‘ebb’ of power as he was violating a Congressional statute (Supreme Court, 49-72).

In President Bush’s November 13, 2001 executive order governing enemy detainment, he cited “the authority vested in me as President and as Commander in Chief of the Armed Force of the United States by the Constitution and the laws of the United States of America, including the Authorization for Use of Military Force Joint Resolution” (Bush). The scholars who agree with the Supreme Court’s *Hamdan* decision agree with the majority that the AUMF was not specific enough to alter the UCMJ. The AUMF, written in a time of crisis, was broad and vague, and therefore did not express Congress’s support to override the UCMJ. However, others such as John Yoo believe that the president acted within his bounds as Commander in Chief under the Constitution absent any explicit Congressional authorization, though not necessarily in the face of legislative opposition (Yoo and Ku, 127-128).

In addition to an analysis of the case’s legal merits, scholars used the *Hamdan* case to frame the argument about the role of the executive, legislative, and judicial branches in wartime. Many noted that Congress seemed content to allow the president wide-ranging authority and discretion in foreign affairs with little oversight. Neal Katyal, who acted as chief counsel for Hamdan before the Supreme Court, notes that “Congress has often been content to stay at the sidelines of regulating the executive... Congress has passed open-ended legislation that fails to check the executive or has passed no legislation at all.” (Katyal, *Toward Internal Separation of Powers*, 106) Norman Ornstein and Thomas Mann point

out that Congress seems to have a declining role; “congressional oversight of the executive across a range of policies, but especially on foreign and national security policy, has virtually collapsed.” (Ornstein and Mann, 67) They note that, especially recently, Congress has tended towards decreasing real oversight over foreign affairs policy in favor of focusing on partisan issues or domestic politics. With Congress’ passive nature, Bush “bypassed Congress and issues a comprehensive military order that governed” the detention of non-citizens in the war on terror. (Lamson, 499) As a sharp contrast to the Congress, President Bush exerted an incredible degree of power in unilaterally determining huge aspects of the country’s foreign policy and conduct in the war on terror. Michael Dorf argues that Bush used his Commander in Chief powers and the non-specific AUMF to “[assert] an entitlement to hold detainees indefinitely, subject them to harsh methods of interrogation, and try them, if it chose not to simply hold them, before specially constituted military commission. Moreover, the administration eventually claimed, the civilian courts were powerless to rule on the legality of such measures.” (Dorf, 47) Dorf considers this especially dangerous because the administration claimed the authority to determine the composition and procedures of the military commissions with neither input from Congress nor oversight from the court system. Scholars from this perspective argue that President Bush’s claims of executive powers represents a dangerous level of executive overstepping that needs to be constrained.

These same scholars were pleased that the Supreme Court chose to intervene with the *Hamdan* decision but then deeply disappointed by the eventual outcome, the Military Commissions Act of 2006. Summing up what seems to be a common view, Dorf says that interactions between a “largely passive Congress, an extraordinarily assertive President, and a divided but determined Supreme Court led to the MCA.” (Dorf, 48) Jonathan Mahler, for example, calls *Hamdan* “an affirmation of the majesty of America’s constitutional government.... The framers wanted the people to govern the country through their elected representatives, but they also created a third branch of government, the independent judiciary, to ensure that these politicians remained true to the system set forth in the Constitution”

(Mahler, 293). In the epilogue, however, Mahler expresses disappointment at what he sees as the potentially unconstitutional stripping of habeas corpus contained in the Military Commissions Act (Mahler, 300-307). Dorf argues that *Hamdan* is “a victory for the principle of checks and balances, even if, as an immediately practical matter, it will have little impact in light of the MCA” (58). Other scholars are less optimistic: Lamson says that *Hamdan* and the resulting MCA, rather than restoring a balance between the branches, “concentrates too much power in the Executive Branch” (Lamson, 498).

On the other hand, those who opposed the court’s decision in *Hamdan* see the Military Commissions Act as the appropriate response to judicial overstepping. Many scholars from this perspective did not believe that the President had an outsized role in foreign affairs prior to *Hamdan*. John Yoo, for example, argues that there is a reason why the President dominates the conduct of war. Rather than forcing the executive to follow strict rules, the executive should have the leeway to execute policy based on the circumstances and the president’s determination of the best way to conduct the war (Yoo and Ku, 122). Yoo and Ku argue that when Congress leaves ambiguities in a foreign affairs statute, “it is reasonable to assume it would prefer such ambiguities to be resolved by the more politically responsive institution,” meaning by the presidency (Yoo and Ku, 124). For them, Congress maintains a significant check on the President through “its power of the purse and its control over the shape and size of the armed forces and the intelligence agencies” (Yoo and Ku, 128). That Congress generally maintains a reactive role reflects the fact that, especially in warfare, the legislature cannot anticipate rapidly changing and unique circumstances. Nonetheless the President still requires and, in the *Hamdan* case, received congressional cooperation to enable his foreign policy agenda. Similarly, Douglas Kmiec argues that the framers of the Constitution assigned broad powers to the President give his “unique role and capacities in foreign affairs” (Kmiec, 575).

From this perspective, the judiciary was at fault in the *Hamdan* case and the Military Commissions Act was a justified response to restore the executive's ability to conduct wartime operations. Rather than President Bush assuming a blank check, the *Hamdan* case is "more a case of the judiciary being involved in executive identity theft" (Kmiec, 591). Rather than respecting the President's role in foreign affairs as it should have, the Supreme Court instead "misread a law ordering it not to decide Guantanamo Bay cases, narrowed the very same authorization to use military force that it had read broadly just two years ago, ignored centuries of practice by presidents and Congress on military commissions and intruded into the executive's traditional national security prerogatives." (Yoo, *The High Court's Hamdan Power Grab*) Therefore, when Congress passed the Military Commissions Acts it removed the judiciary from micromanagement of the wartime effort and acted as "a stinging rebuke to the Supreme Court... in response to the effort by a five-justice majority in *Hamdan v. Rumsfeld* to take control over terrorism policy" (Yoo, *Sending A Message*). For Yoo, even if a better balance between the executive and legislative branch is necessary, the judiciary should leave it up to the political branches to determine. Further, he saw the Military Commissions Act as evidence that President Bush's policies were not at odds with the Congress (Yoo, *The High Court's Hamdan Power Grab*).

The *Hamdan* case is perhaps the most significant Supreme Court case decided in foreign affairs since September 11. Although it is unlikely to reach the legal level of *Ex Parte Milligan* or *Youngstown* since the majority ruled on statutory and not constitutional grounds, it resulted in the Military Commissions Act and became the focal point of a debate around executive authority and the relationship between the branches during the War on Terror. Scholars universally acknowledge the significance the case has, both due to the potentially new role for the judiciary that it may foretell and for the reaction that it prompted from Congress.

**State of Affairs:**

Using the *Hamdan* case to examine the relationships between the branches shows a system far removed from the one the founders sought to create. Of course, the world has changed and the foreign policy challenges the country faces today are unique and demand new procedures and solutions. Yet the founders designed the Constitution to be flexible and applicable in both peace and war. If the United States is to fight a global War on Terror that may last another decade or more, we would do well to return to the Constitution to ensure that the American system of government and the liberties this country affords are protected. The War on Terror demands a new role for government that, like other wars in history, has seen government grow rapidly and assume new powers. Restoring a balance between the political branches and an appropriate role for the courts would strengthen the strategy and implementation of the War on Terror and would be an important step in safeguarding the freedoms for which the United States is fighting. Unfortunately, none of the three of the branches is currently filling its constitutional responsibilities—the executive branch has aggressively pursued an expansion in its power; the legislative branch has either been absent or acquiesced to the president; and the judicial branch has overstepped its role into a partisan position.

Of the three, the executive branch's transgressions are arguably both expected and the least blameworthy. While many scholars argued that President Bush and others in his administration acted without permission of Congress, in the majority of instances the administration's actions were either implicitly or explicitly sanctioned by Congress. President Bush sought and received Congress's approval to prosecute the War on Terror in Afghanistan. The Executive Order governing the detainment of those captures seems to be an adaption to the realization that the armed forces needed guidelines on how to deal with prisoners, rather than a deliberate attempt to circumvent Congress. President Bush issued the Executive Order on November 13, 2001, more than a month after operations in Afghanistan had commenced and well after US forces took custody of the first prisoners. The policy on prisoner detainment and trial, rather than being established in total at once, seems to have evolved gradually

over the course of the war. At first, prisoners were held at frontline prisons, then at more secure regional ones still in the theater of operations, and some eventually at the naval facility in Guantanamo Bay. In the first two cases, seeking Congress's authorization to hold them is superfluous: Congress clearly recognized that the use of military force would involve capturing prisoners, and therefore this would be authorized in the AUMF-AT.

While the Bush administration ideally *should* have sought the explicit legislative authority to try the prisoners in the War on Terror, the fault mostly lies elsewhere, namely with Congress. As described above, the procedures for dealing with prisoners were fluid over the initial course of operations. Although the president would have probably received the explicit authorization to conduct the military commissions had he sought the legislative authority, to President Bush's credit it is not clear whether or not he had the authority to conduct the military commissions in its absence. Guantanamo Bay is an overseas US military base, the detainees were neither American citizens nor legal combatants in another nation's military, and many of them had committed grave crimes violating the laws of war that historically have been punished in military court. This is not to argue that the president had the authority to try them on his own, but rather simply to point out that he had justification for acting as if he did. With Congress's legislative permission, many assumed that the United States could legally use military commissions. Given Congress's reluctance to take up the issue, essentially implying Congress's indifference, the president could justify taking the initiative on a wartime measure such as that one.

Congress, on the other hand, bears virtually all responsibility for allowing its role in the War on Terror to virtually dissipate. The initial AUMF-AT was exceptionally broad, transferring all decision making authority from the Congress to the President. The AUMF did not mention al-Qaeda or Afghanistan even once, but authorized war against any nation, group, or individual that President Bush determined. Even if one views the AUMF-AT as a legislative act that took place in the immediate

aftermath of September 11, it does not justify later congressional silence on important wartime issues, such as American policy on detaining and trying captured terrorists. Even if Congress wanted to largely defer to the President, as John Yoo argues it should in times of war, Congress could and should have still used the power of oversight over the military commissions. As Yoo notes, even if one accepts the President's unitary authority to run the military commissions, had Congress disapproved it could have stopped them overnight by removing the funding necessary to continue them. Yet by removing itself from any meaningful role, whether through oversight, authorization of a set of procedures, or even a resolution expressing its view, the Congress turned what should have been a decision for the political branches into a decision solely for the president.

On the two occasions where Congress did pass legislation regarding prisoners, in the Detainee Treatment Act and the Military Commissions Act, it largely acceded to the president's wishes. The Detainee Treatment Act, for example, initially was due to set standards for the treatment of all detainees under the jurisdiction or control of any US government agency or employee. Yet after objections from the Bush administration, the legislation was limited to only the Department of Defense, allowing agencies such as the Central Intelligence Agency to decide appropriate interrogation techniques for themselves. Also, the act limits the DoD to those methods authorized in the Army's field manual on interrogation, but the manual changes overtime and is under the exclusive control of the executive branch. Therefore not only did the legislation not change the ability of the administration to conduct interrogations it sees fit with agencies outside the DoD, but also allowed the administration to alter the manual in the future, which it did, to authorize the military to use any interrogation technique it wants. Finally, the Detainee Treatment Act also attempted to strip the Supreme Court of any jurisdiction to hear habeas corpus petitions originating from prisoners held at Guantanamo Bay. While that would be an appropriate means of restricting wartime decisions to the political branch, Congress should not have taken that step unless it was ready to proactively determine war policy itself.

Unfortunately, the judicial branch has perhaps made the most severe constitutional errors of all three branches. This is especially alarming because the court is supposed to play a non-partisan and non-ideological role in resolving disputes and interpreting the laws. Yet in the *Hamdan* case the court neither protected individual American liberties nor resolved a dispute between the branches, which should be its twin goals during wartime. Instead, the court's majority sought either to reassert Congress's role for Congress or to nudge American foreign policy in wartime. Either way, the Supreme Court was acting well beyond its constitutional responsibilities and, in the end, the decision has had negative repercussions for both the court and the balance between the political branches. Assuming the former, the court clearly failed: Congress went even further in acceding to the president with the Military Commissions Act, which provided every single provision the president asked without any congressional oversight to compensate for the stripping of the court's jurisdiction. The act forbids detainees from using the Geneva Conventions to challenge their trials or detention or from petitioning for habeas corpus, and considers the Combatant Status Review Tribunal to be a competent tribunal for determining lawful or unlawful combatant status. If the court's goal truly is to encourage greater participation from the Congress, clearly thrusting unto Congress a role it does not want is not an effective remedy.

On the other hand, if the court's majority was trying to shift war policy, as it appears it was, the court has moved even further from its constitutional role. In the *Hamdan* decision, the majority noted that if the government wanted to proceed with the military commissions, all it would have to do was seek Congress's statutory approval. Yet after Congress passed the Military Commissions Act, which explicitly supported the president's view of the detainee trials, the majority of the court ruled in the *Boumediene* decision that the Combatant Status Review Tribunal, part of the Military Commissions Act, was unconstitutional. Justice Kennedy, writing for the majority, argued that permitting the Combatant Status Review Tribunals would be equivalent to letting the "political branches... switch the Constitution

on or off at will [which] would lead to a regime in which they, not this court, 'say what the law is'."

(Supreme Court, *Boumediene*, 5) The majority of the court tried to frame the issue as about protecting American rights, yet even a broad interpretation of the Military Commissions Act allows the government to designate only "alien unlawful enemy combatants": an active non-American combatant captured in the War on Terror, not an American citizen breaking a domestic law (US Congress, Military Commissions Act). As Justice Scalia noted in his dissent, unlike in the *Hamdan* case, Congress and the president now agreed and made their agreement explicit in legislation yet the court still disagreed:

What competence does the Court have to second-guess the judgment of Congress and the President on such a point? None whatever. But the Court blunders in nonetheless. Henceforth, as today's opinion makes unnervingly clear, how to handle enemy prisoners in this war will ultimately lie with the branch that knows least about the national security concerns that the subject entails. (Supreme Court, *Boumediene*, 115)

The court intervened in a matter where its jurisdiction is minimal (foreign affairs), when both the political branches agreed, and where the individual liberties of Americans were under virtually no threat. While some argue that the court restored America's image abroad or stopped unjust proceedings, the court ultimately undermined its own standing by intervening in an arena where it has no expertise and little authority. The court cannot afford to involve itself in partisan battles or substitute its own judgment for that of elected representatives in the political branches because when it does that it risks its essential ability to act as an independent arbiter of the law.

### **Looking Forward:**

Unfortunately, it will take more than the election of a new president to fix the systemic imbalances that exist in the making of American foreign affairs policy. While there are some reasons to be optimistic—especially in the new rhetoric coming from President Obama—there are also many reasons to believe that the new administration may contribute to the complacency while not addressing the underlying issues. For example, Obama has announced the goal of closing the prison at Guantanamo

Bay, stated that the United States will not torture, and recently dropped the usage of ‘enemy combatant’ (Perez and Bavin). Yet in a Department of Justice brief filed in the DC District Court, the administration asserts that the president retains the authority to detain those who he determines supported the attacks of September 11 and “also has the authority under the AUMF to detain in this armed conflict those persons whose relationship to al-Qaida or the Taliban would, in appropriately analogous circumstances in a traditional international armed conflict, render them detainable.” (Hertz, 1) There is also the risk that the anger at President Bush’s perceived human rights or constitutional abuses will dissipate, and with it so will the pressure for greater and more meaningful congressional participation in foreign affairs policy.

Fundamentally, the primary impetus for change must be through Congress, not the court system or the presidency. The United States cannot rely on a president continually going to Congress when Congress does not demonstrate a willingness to stake out a clear policy. When Congress abstains from the process, the responsibility for the success or failure of a foreign affairs policy will fall on the president, who then will seek to maximize his control of the policy. Further, as demonstrated with the *Hamdan* decision, when the court tries to play a ‘democracy forcing’ role its actions can often backfire. The issue is not that Congress has insufficient institutional power to have a meaningful role in foreign affairs—presidents need Congress to authorize the use of force, fund the military, and set rules for the armed services to follow. Getting Congress to accept responsibility for an area with political risk but unclear political payoff will likely be difficult. Perhaps the political solution lies with convincing voters that congressional oversight and input in foreign affairs policy can result in a more efficient use of taxpayer resources, a better foreign affairs policy, and possibly even fewer American casualties.

Once the Congress restores its constitutional role, the executive will once again have a political branch to compete with for control over foreign affairs policy. The nature of our Constitution guarantees

that when the system is functioning properly, there will always be a struggle. Rather than inefficient gridlock, the system has proven itself over more than 200 years to be the best structural way of restraining dangerous and wasteful government growth and of protecting individual liberties. Restoring the Congress to its rightful place would also allow the judicial branch to return to an apolitical entity, insofar as that is possible, rather than attempting to overwrite the decisions of elected representatives. Our Constitution has proven itself to be suited to an array of circumstances and historical periods, allowing the government the flexibility to meet challenges as they arise while providing continuing protection to the American people in both war and peace. The War on Terror may be a new and daunting challenge to the balance between the branches, but it also makes maintaining our democratic system more important than ever. Let the Constitution lead the way.

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