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Decisions Detained: The Courts' Embrace of Complexity in Guantánamo-Related Litigation

By
Joshua Alexander Geltzer*

INTRODUCTION

In confronting the litigation arising from post-9/11 detentions at Guantánamo Bay, American courts have struggled to determine which actions of the executive branch, often supported by Congress, qualify as part of what the executive originally called the “Global War on Terror,” and which actions fall beyond the scope of that war. This question poses a necessary threshold determination in evaluating the political branches’ behavior: courts first must ask whether a given action qualifies as a *war* action, as the executive often has claimed, and then, if answering in the affirmative, must ask whether the given action qualifies as a *lawful* war action.¹

In grappling with cases from *Rasul v. Bush*² in 2004 to *Basardh v. Obama*³ in 2009, the courts have labored to evaluate that threshold question in the context of an unusual, and perhaps even unprecedented, type of American war. In so doing, they have charted a deliberately difficult course: the factors of *time*

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1. Cf. *Sterling v. Constantin*, 287 U.S. 378, 401 (1932) (finding insufficient military necessity to justify a governor’s order to restrict production of oil and explaining that “the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions”).

2. 542 U.S. 466 (2004).

3. 612 F. Supp. 2d 30 (D.D.C. 2009).

and *space* are clearly much stricter and, once determined, much easier for courts to apply, yet the courts steadfastly have avoided using them as limiting factors in evaluating where the political branches' war on terrorism begins and ends. Instead, the courts have chosen to focus on the amorphous factor of *means*, with all its accompanying difficulty and complexity. Such courts have chosen the most difficult and complex factor precisely *because* of its difficulty and complexity: by focusing on the one factor that defies hard and fast delineations, the courts have been able to push back against the political branches in case-specific ways without appearing to assume the questionable role of defining where today's war begins and ends. In other words, sticking to the most difficult factor has actually made the courts' job easier by allowing them to issue narrow rulings while never foreclosing the possibility of reinterpreting the contested material should they deem it prudent to move in a different direction in future cases. One consequence, however, has been persistent judicial uncertainty, in which virtually every ruling of a higher court leaves more questions unanswered for lower courts and virtually every ruling of a lower court is appealed to test the interpretation of a higher court. Another potentially more enduring consequence has been the possible marginalization of the judiciary during war-time.

This article explores the judicial embrace of complexity in the context of Guantánamo-related litigation. First, the article sets out a conception of war as defined by time, space, and means, and the conceptual challenge to each of those limiting factors that today's war against terrorism has posed. Next, the article examines a number of key judicial decisions implicating post-9/11 detention at Guantánamo to reveal how courts have shied away from delving too deeply into the factors of time and space while concentrating on the factor of means. Subsequently, the article suggests institutional reasons for that emphasis: in particular, the avoidance of issues potentially considered political questions, and the evasion of clear and potentially unwinnable conflict with other branches. Afterwards, the article explores the benefits of that choice to a handful of detainees by demonstrating how it has allowed the courts to intervene in case-specific ways and, in so doing, to secure the release of a limited number of detainees. The article then reveals the costs of that choice by showing how uncertainty has repeatedly traveled up and down the judicial hierarchy, delaying resolution of central issues that remain unsettled today, all the while potentially endangering the judiciary's institutional standing in war-time. Finally, the article concludes by framing Guantánamo-related litigation as an experiment in war-time democracy that underscores the requirements for a true democratic dialogue to emerge and reveals distinct advantages on the part of the executive branch in setting policies in certain controversial areas.

Throughout, the article argues that courts have refused to define time or space as limiting factors in the war against terrorism, instead focusing on the means employed. Emphasizing that distinctly difficult defining factor has made the courts' task easier, enabling them to issue narrow rulings through reinterpretable opinions. Institutional reasons explain this judicial approach: in

particular, the courts have sought to avoid clear intrusion into the sphere of political questions as well as to evade clear and potentially unenforceable conflict with the political branches. While the benefits of this approach have included particularized judicial intervention, the costs have loomed large, including persistent uncertainty and potential institutional diminution for the judiciary during war-time.

I.

A THREE-PART ASSAULT: HOW TERRORISM COMPLICATES WAR'S LIMITING FACTORS

Our conception of a particular war usually characterizes that war based on three factors: time, space, and means. Time captures when the war's violence begins and ends; space captures where the war's violence occurs; and means capture the very fact that organized political violence, war's hallmark, is employed in ways that qualify as war-making. The great military theorist Carl von Clausewitz set out the following definition on his treatise's opening page: "*War is thus an act of force to compel our enemy to do our will. . . . Force—that is, physical force[—]is thus the means of war. . . .*"⁴ Hence, violent force of a particular kind and toward a particular end constitutes war itself,⁵ while time and space define the parameters of a particular war.⁶

4. CARL VON CLAUSEWITZ, ON WAR 75 (Michael Howard & Peter Paret, eds. & trans., Princeton Univ. Press 1984) (1832). While Clausewitz's conception of warfare remains a towering authority in the field, see Michael Howard, *The Influence of Clausewitz*, in *id.* at 3, 44 ("It remains the measure of [Clausewitz's] genius that, although the age for which he wrote is long since past, he can still provide so many insights relevant to a generation, the nature of whose problems he could not possibly have foreseen."), other scholars also refer regularly to differing uses of force as delineating the limits of what constitutes warfare. For example, in the context of analyzing international humanitarian law as placing limits on the permissible bounds of war-making, Craig Forrest refers to constraints on the use of force as a "limitation to the means of waging war." Craig J.S. Forrest, *The Doctrine of Military Necessity and the Protection of Cultural Property During Armed Conflicts*, 37 CAL. W. INT'L L.J. 177, 183 (2007); cf. PAUL SEABURY & ANGELO CODEVILLA, WAR: ENDS & MEANS 160 (1989) ("Arms are the tools of war. . . .").

5. See SEABURY & CODEVILLA, *supra* note 4, at 12; RUPERT SMITH, THE UTILITY OF FORCE: THE ART OF WAR IN THE MODERN WORLD 6 (2006).

6. Other limiting factors could, of course, be suggested, perhaps most notably *participants*. To be sure, who takes part in a war does seem central to defining that war: thus, for the Vietnam War, it is undeniably significant that South Vietnam, the United States, and various allies fought against North Vietnam, the Viet Cong, and various allies. However, even the very example of Vietnam reveals that a war's participants are not constitutive of the war in the same way as time, space, and means: some participants fought for just part of the war, others participated in the war effort but not actually in war-making, and yet the broad phenomenon known as the Vietnam War remains a relatively distinct one. Participation is unquestionably a defining factor on the level of individuals, but at the level of a war itself, the fact that violence is being employed for a certain amount of time in a certain geographical space sets out boundaries for the war in a way that particular participants do not. Moreover, much of the Guantánamo litigation has concerned precisely the question of who qualifies as participants in the conflict between the United States and al-Qaeda, the Taliban, and others, and for how long—meaning that courts clearly could not use the limiting

Today's war against terrorism⁷ complicates all three factors.⁸ In terms of time, the beginnings and ends of traditional wars fought by the United States were, in general, relatively clear: often they began with a declaration of war and ended with a surrender; or, in other cases, the beginning was marked by the insertion of American troops onto foreign soil and the end was defined by the removal of those troops, or their transition from active war-fighting to mere stationing.⁹ In contrast, it remains unclear precisely when America's war against terrorism began and when it will end.¹⁰ Perhaps it began with the issuance of al-Qaeda's "Ladenese Epistle" in August 1996,¹¹ or with the declaration of the "World Islamic Front" in February 1998.¹² The war even may have begun with al-Qaeda's attacks on American embassies in East Africa in August 1998, or with the attacks of September 11, 2001. Alternatively, the war may have commenced a week later with Congress' Authorization for Use of Military Force (AUMF),¹³ or the following month with the actual introduction of American forces into Afghanistan. Even less clear is when the conflict will end: given the unlikelihood of a formal surrender by al-Qaeda (or America),¹⁴ will the war end when every known al-Qaeda leader has been killed or captured, or

factor of participants to answer the very question facing them of who qualifies as participants. Participation is a limiting factor at the level of individuals; time, space, and means are limiting factors at the level of wars themselves.

7. While courts (and others) have, at times, distinguished between the United States' war against al-Qaeda and its war against the Taliban, *see, e.g.*, *Hamdan v. Rumsfeld*, 548 U.S. 557, 628 (2006); JOSHUA ALEXANDER GELTZER, *US COUNTER-TERRORISM STRATEGY AND AL-QAEDA: SIGNALLING AND THE TERRORIST WORLD-VIEW* 122-24 (2010), this article does not do so, given its emphasis on litigation concerning all types of detainees at Guantánamo and, moreover, given the executive branch's frequent insistence on the intertwined nature of its conflicts with al-Qaeda, the Taliban, and affiliates of each.

8. *See* Rosa Ehrenreich Brooks, *War Everywhere: Rights, National Security Law, and the Law of Armed Conflict*, 153 U. PA. L. REV. 675, 677 (2004) ("Shifts in the nature of security threats have broken down once clear distinctions . . . between spatial zones in which conflict is occurring and zones in which conflict is not occurring; [and] between temporal moments in which there is no conflict and temporal moments in which there is conflict . . ."); *id.* at 725 ("The laws of armed conflict traditionally conceptualize conflict as bounded temporally as well as spatially. Spatially, there were zones of war, in which the laws of armed conflict applied, and zones of peace, in which ordinary domestic law and international law applied. Temporally, the laws of armed conflict drew a sharp distinction between armed conflict on the one hand, and the 'cessation of hostilities'—peace—on the other hand.")

9. *See id.* at 725-26 ("[I]n the traditional paradigm, war is clearly defined, marked by the formal surrender of the defeated parties or by an armistice or other peace agreement.")

10. *See id.* at 726 ("[T]he 'war on terrorism' renders the traditional temporal distinctions between war and peace less salient.")

11. *MESSAGES TO THE WORLD: THE STATEMENTS OF OSAMA BIN LADEN* 23-30 (Bruce Lawrence ed., 2005).

12. *Id.* at 58-62.

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

14. *See* MOHAMMAD-MAHMOUD OULD MOHAMEDOU, *UNDERSTANDING AL QAEDA: THE TRANSFORMATION OF WAR* 80-94 (2007); MICHAEL SCHEUER, *THROUGH OUR ENEMIES' EYES: OSAMA BIN LADEN, RADICAL ISLAM, AND THE FUTURE OF AMERICA* 283-85 (2006).

when anyone acting in the group's name has failed to take any action for a long enough period of time, or when public opinion worldwide turns sufficiently against the group—or at some other point?¹⁵

Similarly, terrorism complicates the spatial limitations associated with a traditional conception of war. To be sure, the World Wars of the twentieth century spanned vast geographic expanses. Yet, at any given moment during each of those wars, belligerents and observers alike could specify with relative precision where the war was being fought and, perhaps even more significantly, where it was not being fought.¹⁶ Not so with today's war against terrorism¹⁷: al-Qaeda and its affiliates operate from and in many countries, sometimes appearing unexpectedly in previously uninvolved areas;¹⁸ and the United States takes action worldwide, sometimes suddenly striking in countries in which few, if any, American forces are actually on the ground.¹⁹ Geographical limits and boundaries simply fail to contain the war against terrorism within the type of geographical space that delineated the scope of traditional wars.²⁰

Finally, today's war against terrorism challenges the means typically

15. See HOWARD BALL, *BUSH, THE DETAINEES, AND THE CONSTITUTION* 7, 32 (2007); JOSEPH MARGULIES, *GUANTÁNAMO AND THE ABUSE OF PRESIDENTIAL POWER* 12 (2007) (“A conflict so nebulous is unlikely to end with either a single, recognizable event or within a foreseeable period.”); BENJAMIN WITTES, *LAW AND THE LONG WAR: THE FUTURE OF JUSTICE IN THE AGE OF TERROR* 13, 49 (2008) (referring to “the indefinite nature of the long war on terror” and asserting that “[w]e have no idea even what the end of hostilities might look like”); Audrey Kurth Cronin, *How al-Qaida Ends: The Decline and Demise of Terrorist Groups*, *INT’L SECURITY*, Summer 2006, at 7; Matthew C. Waxman, *Administrative Detention of Terrorists: Why Detain, and Detain Whom?*, 3 *J. NAT’L SECURITY L. & POL’Y* 1, 11 (2009) (“Terrorism . . . is unlikely to end soon or at all or with any certainty.”). See generally Mary L. Dudziak, *Law, War, and the History of Time*, 97 *CAL. L. REV.* (forthcoming 2010) (manuscript at 5, 6) (on file with author) (exploring “the role of wartime in legal thought” and “the way the tension between war’s seamlessness and our conception of temporally distinct wartimes surfaces in contemporary cases relating to Guantánamo detainees”).

16. See Brooks, *supra* note 8, at 720 (“The traditional paradigm of armed conflict assumes that at any given time, it will be readily apparent where the armed conflict is taking place and where it is not. To put it another way, the traditional paradigm assumes clear spatial boundaries between zones of war and zones of peace.”).

17. See *id.* at 721 (“The distinction between zones of war and zones of peace—between spatial areas in which the law of armed conflict governs and spatial areas in which ‘ordinary’ domestic law and international agreements govern—is another once clear-cut distinction that no longer seems tenable in light of recent events.”).

18. See PHILIP BOBBITT, *TERROR AND CONSENT: THE WARS FOR THE TWENTY-FIRST CENTURY* 14-15 (2008); Philippe Migaux, *Al Qaeda*, in *THE HISTORY OF TERRORISM: FROM ANTIQUITY TO AL QAEDA* 314, 334-36 (Gérard Chaliand & Arnaud Blin eds., 2007).

19. See DANIEL BYMAN, *THE FIVE FRONT WAR: THE BETTER WAY TO FIGHT GLOBAL JIHAD* 116-24 (2008).

20. See MARGULIES, *supra* note 15, at 12 (“Unlike prior conflicts, the [Bush] Administration argues, this one is not confined to a particular theater of operations.”); George W. Bush, *The President’s Radio Address* (Sept. 29, 2001), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=24999&st=&st1=> (last visited Sept. 30, 2010) (“[O]ur war on terror will be much broader than the battlefields and beachheads of the past. This war will be fought wherever terrorists hide or run or plan.”).

employed by belligerents in violent conflicts.²¹ Terrorists employ violence against civilians in dramatic ways for the sake of provoking a violent response by governments, and often attack only sporadically to allow that response and its consequences to develop²²—all of which is very different from the customary use of force on the battlefield. More importantly for issues confronting American courts, countering terrorism involves means such as detentions, interrogations, and targeted strikes, which also can occur sporadically and, often, in secret.²³ In sum, terrorism wages a three-front assault on the factors that normally define and limit the scope of a particular war: time, space, and means are all complicated by the unconventional strategy of terrorism and the unconventional governmental response that it demands.

II.

EMBRACING COMPLEXITY: COURTS' FOCUS ON MEANS RATHER THAN TIME OR SPACE

In handling the litigation that has emerged from post-9/11 detentions, American courts have consistently declined to mark out any sorts of limits whatsoever for the time and space of America's war against terrorism—even though such factors, once defined, would be quite clear and would enable judicial ease and predictability in handling future cases. Instead, courts have focused exclusively on the means of America's current war, thus electing to engage solely with the most complex limiting factor. The consequences of this approach have been narrow rulings, reinterpretable opinions, and potential doctrinal inconsistency as circumstances change.

A. Courts' Avoidance of Time

The courts have consistently refrained from using time as a limiting factor in considering the boundaries of permissible executive actions in today's war against terrorism. In one of its initial decisions concerning post-9/11 detention, *Hamdi v. Rumsfeld*, the Supreme Court, in a plurality opinion by Justice O'Connor, set out the executive's position that temporal limits simply cannot and do not apply to a conflict with terrorists: "As the Government concedes, 'given its unconventional nature, the current conflict is unlikely to end with a formal ceasefire agreement.'"²⁴ The Court recognized the possibility that "the

21. See WITTES, *supra* note 15, at 13 ("[A]s the war on terror progressed, it became clear that a lot of its major operations were not, in fact, military in nature.")

22. See Andrew H. Kydd & Barbara F. Walter, *The Strategies of Terrorism*, INT'L SECURITY, Summer 2006, at 49; Peter Neumann & M. L. R. Smith, *Strategic Terrorism: The Framework and Its Fallacies*, 28 J. STRATEGIC STUD. 571 (2005).

23. See BYMAN, *supra* note 19; BRIAN MICHAEL JENKINS, UNCONQUERABLE NATION: KNOWING OUR ENEMY, STRENGTHENING OURSELVES (2006).

24. 542 U.S. 507, 520 (2004) (plurality opinion) (quoting the government's brief); *cf. In re*

Government [might] not consider this unconventional war won for two generations,” and then acknowledged the corresponding concern raised by the “clearly established principle of the law of war that detention may last no longer than active hostilities.”²⁵ The Court homed in quickly on precisely the temporal challenge posed by a war against terrorism, and appeared poised to establish some sort of limit: “Certainly, we agree that indefinite detention for the purpose of interrogation is not authorized.”²⁶

Then, just as quickly, the Court backed away: while asserting that Congress had authorized detention only “for the duration of the relevant conflict,” the Court refused to set any sort of temporal parameters to that conflict. Instead, the plurality avowed that it did not need to confront the problem, or the challenge to traditional temporal understandings of war that today’s conflict against terrorism poses:

If the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding may unravel. But that is not the situation we face as of this date. Active combat operations against Taliban fighters apparently are ongoing in Afghanistan.²⁷

Because the conflict still seemed to resemble a traditional war, the Court could pretend that it was. Hence, Justice O’Connor declared for the Court:

The United States may detain, for the duration of these hostilities, individuals legitimately determined to be Taliban combatants who “engaged in an armed conflict against the United States.” If the record establishes that United States troops are still involved in active combat in Afghanistan, those detentions are part of the exercise of “necessary and appropriate force,” and therefore are authorized²⁸

At first glance, this approach seems sensible: the Court could be sure that detention was authorized for as long as hostilities resembled those of traditional wars, and if the Court had to confront detentions thereafter, it could settle the broader issue of temporal limitations then. Yet, closer inspection reveals the tautological nature of this holding: what qualifies as “the duration of these

Guantanamo Detainee Cases, 355 F. Supp. 2d 443, 465 (D.D.C. 2005) (“Indeed, the government cannot even articulate at this moment how it will determine when the war on terrorism has ended.”).

25. *Hamdi*, 542 U.S. at 520 (plurality opinion); cf. *Boumediene v. Bush*, 553 U.S. 723, 785 (2008) (referring to “the duration of hostilities that may last a generation or more”); *Khalid v. Bush*, 355 F. Supp. 2d 311, 319 & n.10 (D.D.C. 2005) (invoking *Hamdi* for the principle that “detention may last for the duration of active hostilities” while noting that “[i]f the current conflict continues for an unacceptable duration, inadequacies in the law of ‘traditional’ warfare may be exposed, . . . requiring a reevaluation of the laws by the *political branches*, not the judiciary”).

26. *Hamdi*, 542 U.S. at 521 (plurality opinion).

27. *Id.*

28. *Id.* (quoting the government’s brief and the Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001)); see Dudziak, *supra* note 15 (manuscript at 42) (“The Court did not have to face the prospect of endless detention, however, at least not yet. O’Connor found that the war on terror, at that moment, fit within conventional understandings of military conflict, with temporal limits, for there were ‘active combat operations’ against the Taliban in Afghanistan.”).

hostilities” is precisely one of the core questions that detainees like Yaser Hamdi, who initially had been held at Guantánamo, have wanted the courts to resolve. Temporal limits, however, would not be forthcoming from the nation’s highest Court—as lower courts clearly recognized.²⁹ Indeed, Justice Souter had said as much at oral argument: “. . . I can also imagine that the concern about Afghanistan will go on as long as there is concern about Al Qaeda, and there is no endpoint that we can see at this point to that.”³⁰

Perhaps, in 2004, such judicial reluctance even to speculate on temporal constraints seemed natural, even though Hamdi himself—an American citizen—already had been held by his own government for over two and a half years without being charged with any crime. Yet, a full two years later, the Supreme Court again recognized that it had been asked to articulate a temporal limit on the political branches’ war against terrorism—and again flatly refused. In *Hamdan v. Rumsfeld*,³¹ the Court was confronted with a Guantánamo detainee’s challenge to the military commission before which he was to be tried. Writing for the Court, Justice Stevens rejected the design for military commissions adopted by the executive, but refused to touch the temporal issue. Relatively early in his lengthy opinion, he set out the requirement that “the offense charged ‘must have been committed within the period of the war,’”³² and emphasized that “the offense alleged must have been committed both in a theater of war and *during*, not before, the relevant conflict”³³—a potential complication in Hamdan’s case, in that the bulk of his involvement with Osama bin Laden appeared to have preceded the actual attacks on 9/11 and the passage of the AUMF.³⁴ Yet, despite Justice Stevens’ acknowledgement that this temporal element “alone cast[s] doubt on the legality of . . . the commission,”³⁵ that temporal focus completely dropped out of the majority’s analysis—until, at the very end of its opinion, the majority made clear that, once again, it had chosen to

29. See, e.g., *Gherebi v. Obama*, 609 F. Supp. 2d 43, 50-51 (D.D.C. 2009) (quoting and discussing *Hamdi*).

30. Transcript of Oral Argument at 52, *Hamdi*, 542 U.S. 507 (No. 03-6696); see Richard H. Fallon, Jr. & Daniel Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 HARV. L. REV. 2029, 2073 (2007) (“We have no ready solution to this vexing problem—vexing because wartime detention has not traditionally been indefinite, because terrorists dangerous today may remain dangerous indefinitely, and because absent a clear termination to the war on terror, there is no obvious point at which to conclude that any lawful basis for detention no longer exists.”).

31. 548 U.S. 557 (2006).

32. *Id.* at 597 (quoting WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 837 (2d ed. 1920)).

33. *Id.* at 600.

34. See *id.* at 598-99 (“The charge against Hamdan . . . alleges a conspiracy extending over a number of years, from 1996 to November 2001. All but two months of that more than 5-year-long period preceded the attacks of September 11, 2001, and the enactment of the AUMF—the Act of Congress on which the Government relies for exercise of its war powers and thus for its authority to convene military commissions.” (citation omitted)).

35. *Id.*

avoid delineating any temporal limit to the war against terrorism: "It bears emphasizing that Hamdan does not challenge, and we do not today address, the Government's power to detain him for the duration of active hostilities" ³⁶ While the Court may have been right that the particular question had not been posed in a way that required the Court to address it in this case, such a reaffirmation, at the end of a lengthy rejection of the political branches' design for military commissions, raised the specter of a strange incentive. By the Court's logic, it would be far easier for the executive simply to jettison the troublesome commissions altogether and indefinitely hold a detainee like Hamdan, never trying him at all. Based on the Court's ruling in *Hamdi*, it would have little to say about such detention, at least "for the duration of active hostilities," which it has refused to define.

Moreover, writing in dissent, Justice Thomas seized on the Court's even implicit suggestion of temporal limitations to the war, avowing that Hamdan's conflict certainly fell within the span of time that would justify use of a military commission. Justice Thomas asserted that America's war began long before Congress recognized its existence:

The starting point of the present conflict (or indeed any conflict) is not determined by congressional enactment, but rather by the initiation of hostilities. . . . Thus, Congress' enactment of the AUMF did not mark the beginning of this Nation's conflict with al Qaeda, but instead authorized the President to use force in the midst of an ongoing conflict. ³⁷

America's war, Justice Thomas argued, was not limited by congressional declaration, and extended at least as far back as 1996: "the President's determination that the present conflict dates at least to 1996 is supported by overwhelming evidence." ³⁸ Moreover, that retrospectively open-ended start date "is beyond judicial reproach." ³⁹ Hence, going even further than Justice Stevens' opinion for the Court, Justice Thomas' *Hamdan* dissent exemplified courts' repeated insistence that the judiciary should not and would not use time as a limiting factor in assessing the scope of the political branches' authority in connection with the war against terrorism.

B. Courts' Avoidance of Space

Much as the courts have insistently avoided limiting the temporal dimension of the political branches' war against terrorism, they also have consistently refrained from delineating the spatial boundaries of that war. In *Rasul v. Bush*, ⁴⁰ the Supreme Court shied away from even considering geographic boundaries to the war against terrorism much as it refrained from

36. *Id.* at 635.

37. *Id.* at 685 (Thomas, J., dissenting).

38. *Id.* at 687.

39. *Id.* at 688.

40. 542 U.S. 466 (2006).

addressing temporal boundaries to that war in *Hamdi*, handed down the same day. Indeed, the Court assiduously avoided any specification of the war's geography even though *Rasul* concerned an entirely geographic question: whether the habeas jurisdiction of American courts extended to Guantánamo.⁴¹

Given *Rasul*'s focus, it was entirely natural that, at oral argument, the two questions of geography—one concerning the scope of the war, the other the scope of federal courts' habeas jurisdiction—became, for just a moment, merged. Justice Kennedy asked whether jurisdiction over a habeas petition might extend to an actual battlefield: "What do you do if you have a lawful combatant in a declared war, and the combatant, an enemy of the United States[,] is captured and detained[:] habeas?"⁴² Shafiq Rasul's lawyer, sensing dangerous territory, replied, "Habeas, you mean on the battlefield? Absolutely not."⁴³ Here Justice Scalia jumped in, and tried to test whether any spatial limits could be set on what qualified functionally as "the battlefield": "We'll take it from the battlefield, and a week later, 10 miles away, then six months later, a thousand miles away."⁴⁴ Again sensing danger, Rasul's attorney refused to consider the possibility of limits to the war-zone: "In the zone of active military operations or in an occupied area under martial law, habeas corpus jurisdiction has never extended."⁴⁵ Then Justice Kennedy asked the crucial question: "Suppose it's Guantanamo."⁴⁶ After hesitating for a moment, the lawyer found a way out: "an application for a writ of habeas corpus in those circumstances would, under [Federal Rule of Civil Procedure] 12(b)(6), be summarily dismissed" for failure to state a claim upon which relief can be granted; in other words, were active fighting actually to occur on Guantánamo, trial judges could erect bars other than jurisdiction to dismiss any improvidently hasty habeas petitions.⁴⁷ And then the conversation moved on: the Court had tempted the advocate with the notion that his argument might require a delineation of geographic boundaries; he had refused to specify any; but he had escaped.

Indeed, even as Rasul prevailed in establishing federal court jurisdiction over Guantánamo, Justice Stevens' opinion for the Court made no mention of geographic limits to the war itself. Clearly, however, the exchange during oral argument remained in Justice Kennedy's mind, and in his short concurrence he sought to distinguish the hypothetical battlefield that he had conjured from the situation at Guantánamo. He explained that Guantánamo is "far removed from

41. See *id.* at 470 ("These two cases present the narrow but important question whether United States courts lack jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at the Guantanamo Bay Naval Base, Cuba.").

42. Transcript of Oral Argument at 14, *Rasul*, 542 U.S. at 466 (No. 03-334).

43. *Id.*

44. *Id.* at 15.

45. *Id.*

46. *Id.*

47. *Id.*

any hostilities” and that detainees there had been “taken from a zone of hostilities” but no longer remained in one.⁴⁸ Particularly revealing is what Justice Kennedy did *not* say: even as he signed on to the majority’s recognition of jurisdiction over Guantánamo, thus transforming the place from a zone in which the military held complete dominion to one within the reach of the federal courts, he still would not proclaim the enclave beyond the boundaries of the war itself, which would seem the natural way of distinguishing his battlefield hypothetical from the more criminal-like detentions at Guantánamo—especially in the context of the Court’s apparent extension of potential habeas rights to those detained there.⁴⁹ Nonetheless, Justice Kennedy would recognize geographic boundaries only to the “zone of hostilities”—not to the war itself.⁵⁰

In contrast, Justice Scalia, dissenting, chastised Justice Kennedy for even this rather minimal suggestion of geographic limitation to the war, asking, “If there is a terrorist attack at Guantanamo Bay, will the area suddenly fall outside the habeas statute because it is no longer ‘far removed from any hostilities’? Justice Kennedy’s approach provides enticing law-school-exam imponderables in an area where certainty is called for.”⁵¹ Indeed, as far as Justice Scalia was concerned, whatever the Court said about Guantánamo applied *everywhere*: through its decision in *Rasul*, “the Court boldly extends the scope of the habeas statute to the four corners of the earth.”⁵² Standing the Court’s logic on its head, Justice Scalia provocatively suggested that if Guantánamo was not, in fact, within the geographic expanse of today’s war, then neither were parts of Afghanistan or Iraq, meaning that jurisdiction might extend there, too: based on the Court’s holding in *Rasul*, “part of Afghanistan and Iraq should logically be regarded as subject to our domestic laws.”⁵³ Whatever minimal geographic

48. *Rasul v. Bush*, 542 U.S. 466, 487, 488 (2004) (Kennedy, J., concurring); cf. *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 446 (D.D.C. 2005) (referring to detainees held at Guantánamo “who were captured hundreds or thousands of miles from a battle zone in the traditional sense of that term”).

49. Cf. *Boumediene v. Bush*, 553 U.S. 723, 798 (2008) (Souter, J., concurring) (“[N]o one who reads the Court’s opinion in *Rasul* could seriously doubt that the jurisdictional question must be answered the same way in purely constitutional cases, given the Court’s reliance on the historical background of habeas generally in answering the statutory question.”).

50. *Rasul*, 542 U.S. at 488 (2004) (Kennedy, J., concurring); see also *Hamdan v. Rumsfeld*, 548 U.S. 557, 597 (2006) (noting that military commissions traditionally could try only crimes committed within the “theatre of war,” but exploring no further the relevance of those traditional geographic limitations); *id.* at 688 (Thomas, J., dissenting) (urging the same deference to the executive regarding the “theatre of war” as urged regarding the timing of the war’s commencement); *Hamdi v. Rumsfeld*, 542 U.S. 507, 524 (2004) (plurality opinion) (criticizing Justice Scalia’s dissent for implying that the geographic location of Hamdi’s detention site should affect the Court’s holding).

51. *Rasul*, 542 U.S. at 495 n.4 (Scalia, J., dissenting).

52. *Id.* at 498; cf. *Boumediene v. Bush*, 553 U.S. 723, 843 (2008) (Scalia, J., dissenting) (“[T]he Court’s ultimate, unexpressed goal is to preserve the power to review the confinement of enemy prisoners held by the Executive anywhere in the world.”).

53. *Rasul*, 542 U.S. at 501 (Scalia, J. dissenting).

distinction Justice Kennedy sought to demarcate, Justice Scalia seemed determined to eliminate.

Over three years later, the Court of Appeals for the District of Columbia Circuit followed the Supreme Court's lead in declining to express any geographic limitations to the war against terrorism. The court made explicit and affirmative what Justice Kennedy's *Rasul* concurrence left uncertain (and what, due to its uncertainty, elicited such protest from Justice Scalia). The D.C. Circuit split five-to-five in *Bismullah v. Gates*⁵⁴ on whether to rehear en banc a panel's decision⁵⁵ on what materials had to be presented by the government in response to eight Guantánamo detainees' challenges to their Combatant Status Review Tribunals. Concurring in the denial of rehearing en banc, Judge Randolph wrote separately to emphasize his view that Guantánamo falls decidedly within the geographic expanse of the war against terrorism.

While effectively backing the detainees in denying an en banc rehearing of the panel's decision largely in their favor, Judge Randolph took issue with even the implicit suggestion that their transportation, at the hands of the United States military, from Afghanistan and Pakistan to Guantánamo somehow moved them from inside to outside the physical space of America's war against terrorism. He wrote: "Each of the detainees, according to their pleadings, was taken into custody by American armed forces 'in the field in time of war.' I believe they remain in custody 'in the field in time of war.' It is of no moment that they are now thousands of miles from Afghanistan."⁵⁶ To the contrary, even in Guantánamo the detainees remained, in Judge Randolph's view, unquestionably within the same geographic war-zone in which they were first detained:

Their detention is for a purpose relating to ongoing military operations and they are being held at a military base outside the sovereign territory of the United States. The historical meaning of "in the field" was not restricted to the field of battle. It applied as well to "organized camps stationed in remote places where civil courts did not exist." To allow judicial inquiry into military decisions after those captured have been moved to a "safe" location would interfere with military functions⁵⁷

Without making direct reference to it, Judge Randolph provided determined affirmation to the implicit suggestion of Justice Kennedy's *Rasul* concurrence and the explicit assertion of Justice Scalia's *Rasul* dissent: the courts should and would impose no geographic limits to the war against terrorism, even for a locus as far from the site of traditional types of battle as Guantánamo. Much like time, space was simply off-limits for the courts as a constraining factor in assessing the scope of the war against terrorism.⁵⁸

54. 514 F.3d 1291 (D.C. Cir. 2008) (denying rehearing en banc).

55. *Bismullah v. Gates*, 501 F.3d 178 (D.C. Cir. 2007).

56. *Bismullah*, 514 F.3d at 1306 (denying rehearing en banc) (Randolph, J., concurring).

57. *Id.* (citation omitted).

58. See *Khalid v. Bush*, 355 F. Supp. 2d 311, 320 (D.D.C. 2005) ("[T]he AUMF does not place geographic parameters on the President's authority to wage this war against terrorists."); cf.

C. Courts' Focus on Means

While avoiding any delineation of potential temporal or spatial boundaries of the war against terrorism, the Supreme Court and lower courts have seized on the third defining factor of wars—means—as an entry point for evaluating the extent of the political branches' authority.⁵⁹ Indeed, the courts' interventions into issues emanating from the war against terrorism—which have been repeated and, for actual war-time, unusually extensive⁶⁰—have made use of this single, complex limiting factor as the basis for judicial appraisal.

The Supreme Court's first significant intervention into the political branches' conduct of the war against terrorism came in *Hamdi*. In her decision on behalf of a plurality of the Court, Justice O'Connor effectively homed in on a single perspective on the complex issue of detention presented to the Court: did detaining citizens who qualify as enemy combatants fall within the permissible means of America's war against terrorism? Never addressing the time-frame of such detentions or their geographic location, the Court applied a narrow and explicit focus on the means employed by the executive: "The threshold question before us is whether the Executive has the authority to detain citizens who qualify as 'enemy combatants.' . . . We therefore answer only the narrow question before us: whether the detention of citizens falling within that definition is authorized."⁶¹ In other words, the sole question with which the

Respondents' Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantanamo Bay at 7, *In re Guantanamo Bay Litigation*, No. 08-442 (D.D.C. Mar. 13, 2009) ("[T]he AUMF is not limited to persons captured on the battlefields of Afghanistan.")

59. In *Boumediene v. Bush*, to be discussed below, the Supreme Court was quite explicit that its refusal to set temporal limits to the scope of the war against terrorism led the Court instead to assess and restrict the political branches' means of prosecuting that war: "Because our Nation's past military conflicts have been of limited duration, it has been possible to leave the outer boundaries of war powers undefined. If, as some fear, terrorism continues to pose dangerous threats to us for years to come, the Court might not have this luxury." *Boumediene v. Bush*, 553 U.S. 723, 798 (2008).

60. See DAVID COLE & JAMES X. DEMPSEY, *TERRORISM AND THE CONSTITUTION: SACRIFICING CIVIL LIBERTIES IN THE NAME OF NATIONAL SECURITY* 188 (2006) ("From a Supreme Court that has historically deferred to the president during wartime . . . the enemy combatant decisions of June 2004 were a resounding defeat for which the administration was totally unprepared."); JONATHAN MAHLER, *THE CHALLENGE: HAMDAN V. RUMSFELD AND THE FIGHT OVER PRESIDENTIAL POWER* 197 (2008) ("Never is the Supreme Court more reluctant to act than when faced with a challenge to the president's constitutional war powers in the midst of an ongoing conflict."); MARGULIES, *supra* note 15, at 11-12 ("It is indisputably true, . . . at least as a historical matter, that the president is given substantially more latitude by the other branches of government during wartime than during peace."); ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* 287 (1973) ("Never in American history had the Court tried in any significant way to interfere with a war in progress."); *cf.* *United States v. O'Brien*, 391 U.S. 367 (1968) (upholding, in the midst of the Vietnam War, a statute criminalizing the burning of a draft card); *Korematsu v. United States*, 323 U.S. 214 (1944) (upholding, in the midst of World War II, President Roosevelt's Civilian Exclusion Order removing from most of the western United States all persons of Japanese ancestry); *The Prize Cases*, 67 U.S. (2 Black) 635 (1863) (upholding, in the midst of the Civil War, President Lincoln's seizure of foreigners' goods in order to blockade Confederate ports, despite his acting without congressional authorization).

61. *Hamdi v. Rumsfeld*, 542 U.S. 507, 516 (2004) (plurality opinion).

Court would grapple was whether Congress had authorized the executive to employ these particular means—detention of enemy combatants—in prosecuting the war against terrorism.⁶²

Answering that question in the affirmative, the Court explicitly included such detentions within the use of force that constitutes the means of war-making while bracketing the question of temporal limitations:

We conclude 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.⁶³

Thus, within the necessary and appropriate force specified by the AUMF as the means of fighting terrorism, detention—even of American citizens—was included. The Court was explicit that its ruling hinged entirely on whether such detention could be viewed as a means of war-making, finding that it could: “Because detention to prevent a combatant’s return to the battlefield is a fundamental incident of waging war, in permitting the use of ‘necessary and appropriate force,’ Congress has clearly and unmistakably authorized detention in the narrow circumstances considered here.”⁶⁴ Put differently, Hamdi’s detention, even on American soil, fell within congressionally approved means of warfare—and so the Court accepted it, while requiring the implementation of some protections for the detainee, namely notice and an opportunity to be heard by a neutral adjudicator.⁶⁵ The Supreme Court thus became significantly involved in the political branches’ conduct of the war against terrorism based on an evaluation of that war’s means, rather than its time or space.

Similarly, the Court imposed additional procedural requirements on the executive’s conduct related to Guantánamo in *Hamdan*, doing so again on the basis of the Court’s inspection of the means employed by the political branches in prosecuting a war against terrorism. In *Hamdan*, the Court framed the central question as whether the military commissions, as designed by the executive at that time, fell within the means of prosecuting a war against terrorism. After dealing with complex issues of retroactivity and comity, Justice Stevens arrived at the core of the case and framed his discussion of military commissions as an assessment of the means of war-making: “The military commission, a tribunal neither mentioned in the Constitution nor created by statute, was born of military necessity.”⁶⁶ In turn, the real question before the Court was whether the military commissions that had been established fell within “the powers granted

62. Cf. Jonathan M. Justl, Note, *Disastrously Misunderstood: Judicial Deference in the Japanese-American Cases*, 119 YALE L.J. 270, 289 (2009) (“In *Hamdi v. Rumsfeld*, the Supreme Court exercised . . . a low degree of means deference.” (citation omitted)).

63. *Hamdi*, 542 U.S. at 518 (plurality opinion).

64. *Id.* at 519.

65. See *id.* at 533.

66. *Hamdan v. Rumsfeld*, 548 U.S. 557, 590 (2006).

jointly to the President and Congress in time of war.”⁶⁷ As with other detainees challenging the government, Hamdan’s fate hinged not on the duration or location of his then almost five-year detention or on whether that time or space fell within the war against terrorism, but entirely on whether the commission convened to try him qualified as falling within the means of prosecuting the war against terrorism.

The Court held that the commission, as proposed, did not qualify as a means of prosecuting the war, criticizing various aspects of it and pointing to “a broader inability on the Executive’s part here to satisfy the most basic precondition—at least in the absence of specific congressional authorization—for establishment of military commissions: military necessity.”⁶⁸ The executive, Justice Stevens was saying, had not convinced the Court that Hamdan’s military commission was needed as a means of prosecuting the war against terrorism. Once the executive was acting outside the scope of war-making, it no longer merited judicial deference: what Hamdan did “may well be a crime, but it is not an offense that ‘by the law of war may be tried by military commission.’”⁶⁹ The executive had strayed beyond the means of permissible war-making—and, in so doing, had provoked correction by the judiciary.

Unsurprisingly, lower courts have followed the Supreme Court’s lead in addressing means, rather than time or space, as the limiting factor of the war against terrorism suitable for judicial appraisal, and one through which the courts could have some input on the conduct of the war against terrorism. With the Supreme Court having enabled the filing of habeas petitions by Guantánamo detainees, the District Court for the District of Columbia has been flooded with about two hundred of them. In handling the petitions, district court judges have avoided addressing time or space as limiting factors, instead focusing on whether the continued detention of particular detainees falls within the means of the war against terrorism.

In *Basardh v. Obama*,⁷⁰ Judge Huvelle faced a habeas petition from a Yemeni national. While noting that Yasin Basardh “has been held at the U.S. Naval Base at Guantanamo Bay, Cuba for the past seven years,” Judge Huvelle made no further comment on the duration or location of Basardh’s detention, except for accepting the government’s position that “hostilities with al-Qaeda or the Taliban . . . are still ongoing . . .”⁷¹ Instead, Judge Huvelle focused on the scope of the government’s “authority to imprison individuals at Guantanamo Bay” based on “the laws of war.”⁷² The court’s inquiry, therefore, would analyze the means employed by the executive to determine whether they fell

67. *Id.* at 591.

68. *Id.* at 612.

69. *Id.* (quoting 10 U.S.C. § 821) (citation omitted).

70. 612 F. Supp. 2d 30 (D.D.C. 2009).

71. *Id.* at 30, 33-34.

72. *Id.* at 34 (quoting the government’s memorandum).

within the scope of war-making.

Noting the AUMF's emphasis on the prevention of "future acts of international terrorism,"⁷³ Judge Huvelle held that "the AUMF does not authorize the detention of individuals beyond that which is necessary to prevent those individuals from rejoining the battle, and it certainly cannot be read to authorize detention where its purpose can no longer be attained."⁷⁴ The executive, according to Judge Huvelle, had exceeded the means authorized by Congress for the prosecution of the war against terrorism. Granting Basardh's habeas petition, "the Court concludes that the government has failed to meet its burden of establishing that Basardh's continued detention is authorized under the AUMF's directive that such force be used 'in order to prevent future acts of international terrorism.'"⁷⁵ Here, the judiciary found that the executive had exceeded the means limiting the war against terrorism, and thus rebuffed the executive's assertion of a continuing right to detain. Much like the Supreme Court, this district court steadfastly avoided time or space but instead engaged with the question of means as a factor limiting the political branches' behavior in the war against terrorism.

D. Consequences

The insistence of the judiciary, from the Supreme Court down to the D.C. District Court, on refraining from passing any judgment on the temporal or geographic scope of the war against terrorism and instead assessing only the means of that war has had a number of significant consequences. Those consequences include narrow rulings, reinterpretable holdings, and potential doctrinal inconsistency as circumstances change.

The rulings that have emerged from Guantánamo-related litigation have been exceedingly narrow, as others have noted.⁷⁶ Consider, first, the major activity at the Supreme Court. Initially, in *Rasul*, the Court established federal court jurisdiction over Guantánamo, without addressing the implications that might flow from the filing of habeas petitions based on that jurisdiction. Next, in *Hamdi*, the Court upheld the detention without charge of an American citizen on American soil while demanding the implementation of some procedural protections—all the while avoiding the broader issue of war-time detentions in

73. *Id.* (quoting the Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001) (emphasis added by the court)).

74. *Id.*

75. *Id.* at 35 (quoting the Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001)).

76. See WITTES, *supra* note 15, at 106-09; Owen Fiss, *The Perils of Minimalism*, 9 THEORETICAL INQUIRIES L. 643, 647 (2008) (suggesting that the Supreme Court has resolved Guantánamo-related cases on "the narrowest ground" needed to resolve the particular disputes); cf. Linda Greenhouse, *The Mystery of Guantánamo Bay*, 27 BERKELEY J. INT'L L. 1, 20 (2009) ("How is it that the Administration has lost, and lost, and lost again, and still has not been ordered against its will to release a single detainee?").

general. Third, in *Hamdan*, the Court found no statutory bar to jurisdiction over Guantánamo, and struck down the particular procedures and charges associated with an intended military commission at Guantánamo. Fourth, when Congress responded by clearly stripping such statutory jurisdiction, the Court countered, in *Boumediene v. Bush*,⁷⁷ by finding a constitutional right to jurisdiction over habeas petitions by Guantánamo detainees while still avoiding the substantive issues associated with those petitions, such as what rights could be vindicated through habeas and what potential remedies might be available. While the Court does, in general, seek to issue narrow rulings to avoid constitutional questions,⁷⁸ and has even labored to do so specifically in the habeas context,⁷⁹ it is hard to imagine much more delicately incremental judicial answers than these. Indeed, each of these rulings could not have been much narrower, a direct consequence of the courts' focus on means rather than time or space.

Lower courts have proceeded with similarly focused rulings. Judges of the D.C. District Court considered at length the issue of defining the proper standard for determining whether particular detainees are subject to the detention authority provided by the AUMF, initially without actually resolving individual detainees' claims.⁸⁰ The D.C. Circuit decided, and then painstakingly decided not to re-decide, the narrow question of what materials had to be provided by the government to the Circuit for its review of Guantánamo's Combatant Status Review Tribunals.⁸¹ Almost nine years into detentions at Guantánamo, the truly big questions remain unanswered, even by the lower courts—let alone by the Supreme Court itself.⁸²

Not only have the courts' means-based rulings been narrow, they also have emerged from judicial opinions that are flexibly reinterpretable and even effectively revisable as new cases present themselves. A perfect and still unresolved example concerns the Uighurs, originally from China's Xinjiang Province, held at Guantánamo. One Uighur successfully challenged his status as an enemy combatant and prevailed before the D.C. Circuit in *Parhat v. Gates*.⁸³ In rejecting Huzaiifa Parhat's status as an enemy combatant, the Court of Appeals explicitly explored its assumption that, should the government prove

77. 553 U.S. 723 (2008).

78. See, e.g., *Gregory v. Ashcroft*, 501 U.S. 452 (1991); *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288 (1936); *Murray v. Schooner Charming Betsy*, 6 U.S. 64 (1804).

79. See *INS v. St. Cyr*, 533 U.S. 289 (2001); Fallon & Meltzer, *supra* note 30, at 2050 ("From one perspective, the *St. Cyr* opinion was disingenuous, resting on a tortured interpretation of statutory language.").

80. See *Hamliily v. Obama*, 616 F. Supp. 2d 63 (D.D.C. 2009); *Gherebi v. Obama*, 609 F. Supp. 2d 43 (D.D.C. 2009).

81. *Bismullah v. Gates*, 501 F.3d 178 (D.C. Cir. 2007), *reh'g en banc denied*, 514 F.3d 1291 (D.C. Cir. 2008).

82. See WITTES, *supra* note 15, at 109 ("[N]otwithstanding these . . . highly publicized cases, all of the fundamental questions remain unanswered."); *Greenhouse*, *supra* note 76, at 2-3.

83. 532 F.3d 834 (D.C. Cir. 2008).

unable to offer different evidence supporting its claim that Parhat qualified as an enemy combatant, he could file a habeas petition and the district court could order him released. The Court of Appeals concluded: “Most important, in that proceeding there is no question but that the court will have the power to order him released.”⁸⁴ Such language appeared rather unambiguous.

After *Parhat*, the government conceded that sixteen other Uighurs were situated similarly to Parhat and, thus, cleared all seventeen for release or transfer. However, the Uighurs feared persecution if returned to China, and no other country was willing to accept them. A district judge ordered them released into the United States, citing the language above from *Parhat* while acknowledging that “[t]he precise extent of this court’s authority to implement *Parhat*’s mandate remains opaque.”⁸⁵ On appeal, the D.C. Circuit reversed, rejecting any requirement that the government release the Uighurs into the United States as well as the notion that an Article III court had jurisdiction to order such a release.⁸⁶ The D.C. Circuit clarified that when *Parhat* anticipated a release, it meant a “simple release”: but “petitioners are not seeking a ‘simple release.’ Far from it—they asked for, and received, a court order compelling the Executive to release them into the United States outside the framework of the immigration laws.”⁸⁷ Rather, the D.C. Circuit was “certain that no habeas court since the time of Edward I ever ordered such an extraordinary remedy.”⁸⁸ Whatever imprecise dicta may have surrounded the narrow holding in *Parhat* proved reinterpretable—and such language did *not*, upon later interpretation, entitle the Uighurs to be released by court order onto American soil. To order the executive to take that step presumably would have intruded into an area of immigration authority beyond the courts’ reach, not to mention taking an unprecedented geographic step in judicially demanding that those held at Guantánamo—deemed in *Rasul* to be functionally part of the United States—should be admitted onto actual American soil. Having granted certiorari,⁸⁹ the Supreme Court was expected to have the final say, but ended up vacating the circuit court’s opinion,⁹⁰ then seeing it reinstated by the D.C. Circuit.⁹¹ Perhaps, on a return visit to the Supreme Court, that Court will decide the case on its merits—and, based upon past performance, one might expect the ruling to be a flexible one subject to retrospective reinterpretation.⁹²

84. *Id.* at 851.

85. *In re Guantanamo Bay Detainee Litig.*, 581 F. Supp. 2d 33, 41 (D.D.C. 2008).

86. *Kiyemba v. Obama*, 555 F.3d 1022 (D.C. Cir. 2009).

87. *Id.* at 1028 (quoting *Munaf v. Geren*, 553 U.S. 674, 693 (2008)).

88. *Id.*

89. *Kiyemba v. Obama*, 130 S. Ct. 458 (2009).

90. *Kiyemba v. Obama*, 130 S. Ct. 1235 (2010).

91. *Kiyemba v. Obama*, 605 F.3d 1046 (D.C. Cir. 2010).

92. *Cf.* Joseph T. Thai, *The Law Clerk Who Wrote Rasul v. Bush: John Paul Stevens’s Influence from World War II to the War on Terror*, 92 VA. L. REV. 501, 531-32 (2006) (anticipating ways in which the Supreme Court might reinterpret aspects of *Rasul* in grappling with subsequent

In addition to producing narrow rulings and flexible opinions, the courts' focus on means rather than time or space as limiting the war against terrorism has laid the groundwork for potential inconsistency as circumstances change. That future cases might produce new rulings moving in new directions is, of course, simply in the nature of common law jurisprudence. But the decisions discussed here have been so narrow and rested on such contingent factors that slight alteration of those factors would seem to invite potentially contrary rulings, as inconsistent as those might seem. The finding of jurisdiction in *Rasul* rested on the United States' "plenary and exclusive jurisdiction" over Guantánamo.⁹³ Yet, what if the United States were formally to relinquish jurisdiction over Guantánamo—would *Rasul*'s narrow holding still apply? The outcome in *Hamdi* relied on American troops' patent "active combat" in Afghanistan.⁹⁴ What if those troops were to become engaged only in training local forces, or in sporadic special operations—would *Hamdi*'s narrow holding survive? The questions are endless.

Perhaps most dramatically, *Hamdan* relied on what the Court deemed Congress' lack of intent to strip jurisdiction over pending habeas petitions from Guantánamo.⁹⁵ Congress soon thrust back by unmistakably stripping the courts of statutory habeas jurisdiction, thus changing the circumstances that had underpinned the previous, statutory decision. Consequently, in *Boumediene*, the Court had to find a new basis—now a constitutional one—in order for habeas jurisdiction over Guantánamo to survive.⁹⁶ Narrow holdings, based on the war-making means that happen to be employed by the political branches at the moment when such holdings are handed down, lack the broad, definitive, and enduring coherence that holdings based on the less malleable factors of time and space would possess. Thus, a result of courts' focus on the most complex factor limiting the scope of the war against terrorism is potential doctrinal inconsistency in light of changed circumstances.

III.

INSTITUTIONAL REASONS FOR EMBRACING COMPLEXITY: WHY COURTS HAVE FOCUSED ON MEANS RATHER THAN TIME OR SPACE

Why have American courts, in assessing the limits of the political branches' war against terrorism, consistently focused on the means of that war, rather than on its time or space? Two institutional considerations reveal why tackling the war's most difficult and complex limiting factor actually has made the courts' job easier. By embracing complexity—in the form of the

cases).

93. *Rasul v. Bush*, 542 U.S. 466, 475 (2004).

94. *Hamdi v. Rumsfeld*, 542 U.S. 507, 521 (2004) (plurality opinion).

95. *See Hamdan v. Rumsfeld*, 548 U.S. 557, 584 (2006).

96. *See Boumediene v. Bush*, 553 U.S. 723 (2008).

multifarious, nebulous limiting factor of the means of prosecuting a war against terrorism—the judiciary has avoided clear intrusion into the space of political questions, while also eluding clear and potentially unwinnable conflict with the political branches.

A. Avoiding Political Questions

As previously mentioned, American courts have shown a willingness to scrutinize and even alter the political branches' conduct of the war against terrorism that is unusual for the judiciary during war-time. Becoming involved to such an extent treads contested ground. In few arenas has the notion of non-justiciable political questions been pressed as vigorously as in the national security arena, in which a vision of "*unchecked executive discretion* has claimed virtually the entire field of foreign affairs as falling under the president's inherent authority."⁹⁷ While acceptance of this vision has waxed and waned throughout American history, it emerges most strongly during war-time, and is often attributed to the Supreme Court's 1936 decision in *United States v. Curtiss-Wright Export Corp.*⁹⁸

The dissenting opinions in the major cases bearing on post-9/11 detention consistently have complained that the Court has overstepped its bounds by venturing into political questions.⁹⁹ In *Rasul*, Justice Scalia's dissent charged that the Court's decision would force "the courts to oversee one aspect of the Executive's conduct of a foreign war" and would bring "the cumbersome machinery of our domestic courts into military affairs."¹⁰⁰ In *Hamdi*, Justice Thomas' dissent insisted that "[t]his Court has long . . . held that the President has *constitutional* authority to protect the national security and that this authority carries with it broad discretion," adding that "*judicial* interference in these domains destroys the purpose of vesting primary responsibility in a unitary Executive" and avowing that "we lack the information and expertise to question whether Hamdi is actually an enemy combatant, a question the resolution of

97. HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR 72 (1990) [hereinafter KOH, THE NATIONAL SECURITY CONSTITUTION]; see Harold Hongju Koh, *Judicial Constraints: The Courts and War Powers*, in THE U.S. CONSTITUTION AND THE POWER TO GO TO WAR: HISTORICAL AND CURRENT PERSPECTIVES 121 (Gary M. Stern & Morton H. Halperin eds., 1993); Barry N. Sweet, *Legal Challenges to Presidential Policies on the Use of Military Force*, 24 POL'Y STUD. J. 27 (1996).

98. 299 U.S. 304 (1936); see KOH, THE NATIONAL SECURITY CONSTITUTION, *supra* note 97, at 95.

99. Other critics of the decisions have lodged similar critiques. See, e.g., JOHN YOO, WAR BY OTHER MEANS: AN INSIDER'S ACCOUNT OF THE WAR ON TERROR 160-61 (2006) ("[*Rasul*] was a wrongheaded decision that posed the threat of judicial micromanagement of military operations as never before."); *id.* at 237 ("The *Hamdan* Court displayed a lack of judicial restraint that would have shocked its predecessors. This signals a dangerous judicial intention to intervene in wartime policy.").

100. *Rasul v. Bush*, 542 U.S. 466, 499, 506 (2004) (Scalia, J., dissenting).

which is committed to other branches.”¹⁰¹ In like vein, Justice Thomas’ dissent in *Hamdan* complained that the Court’s opinion “openly flouts our well-established duty to respect the Executive’s judgment in matters of military operations and foreign affairs,” arguing 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.”¹⁰²

Already, the Court was straying far enough into the contested borderland between the judiciary and the political branches to make its decisions deeply divided, at times forcing a plurality to speak for the Court. However, the complexity of the war’s limiting factor being questioned by the Court—the war’s means—masked the extent to which the judiciary really was contesting the political branches’ war-making authority. In asserting jurisdiction, as in *Rasul*, or in demanding procedural protections for American citizens detained on American soil, as in *Hamdi*, or in rejecting the proposed procedures and charges for a military commission, as in *Hamdan*, the Court plausibly could claim merely to be delineating the scope of the law, rather than circumscribing the scope of the war. After all, it is the judiciary’s job to uphold the law, while it is the political branches’ responsibility to wage war.¹⁰³ In turn, the Court was able to portray itself as modestly ensuring that the law played some role in situations where judges and justices seemed to belong: the extent to which that role enmeshed the judiciary in the prosecution of the war against terrorism was at least partially obscured amidst the complexity that defines the means of war-making, a complexity that is heightened when those means involve detentions and military commissions on or near American soil.

In contrast, consider the patent intrusion into the area of war-making that the judiciary would have made had the Court instead seized upon time or space as a factor limiting the scope of the political branches’ war against terrorism. Imagine if the Court had set a temporal limit to the war against terrorism,¹⁰⁴ or

101. *Hamdi v. Rumsfeld*, 542 U.S. 507, 581, 582, 585-86 (2005) (Thomas, J., dissenting). Note that Justice Thomas specifically cites *Curtiss-Wright*. See *id.* at 582.

102. *Hamdan v. Rumsfeld*, 548 U.S. 557, 678 (2006) (Thomas, J., dissenting) (citation omitted). Note that, once again, Justice Thomas specifically cites *Curtiss-Wright*. See *id.* at 719, 723; cf. *Boumediene v. Bush*, 553 U.S. 723, 796 (2008) (asserting that “proper deference must be accorded to the political branches” and citing *Curtiss-Wright*).

103. See *Maqaleh v. Gates*, 604 F. Supp. 2d 205, 217 (D.D.C. 2009) (“As *Boumediene* has already made clear, reaching back to the admonition in *Marbury v. Madison*, 5 U.S. 137, 1 Cranch 137, 177, 2 L. Ed. 60 (1803), that it is the Court that says ‘what the law is,’ the *Judiciary*—not the Executive—must decide when and where the Suspension Clause applies”); cf. MARGULIES, *supra* note 15, at 9 (“This is the spirit that has animated the litigation in *Rasul*. The question is not whether the United States has the power to imprison people seized in connection with the war on terror; without doubt the government has such power. The question is, and has always been, whether the exercise of this power would be restrained by the rule of law.”).

104. By way of contrast, Owen Fiss appears willing to assert that “[i]n [a] sense, the war in Afghanistan ended more than five years ago.” Fiss, *supra* note 76, at 644.

more modestly to the authority conferred upon the executive by the AUMF,¹⁰⁵ or—more modestly still—to the length of time any detainee could be held without some form of process, whether a Combatant Status Review Tribunal, a military commission, or a trial in federal court. Such an approach would not be entirely unprecedented in the Court’s history. In the immigration context, and without any clear basis for doing so, the Court held in *Zadvydas v. Davis* that six months constituted a “presumptively reasonable period of detention” for determining whether a deportable alien’s “removal is no longer reasonably foreseeable.”¹⁰⁶ Had the Court set a similarly arbitrary limit on detention in the context of the war against terrorism, the response would have been outrage at the judiciary’s intrusion into the political branches’ prerogative to interrogate detainees and gather intelligence. Of course, had the Court gone further still and judicially imposed a sunset provision on the AUMF or a limit on the war as a whole, the response surely would have been bolder still, as such a move would have directly implicated military strategy. In any event, not even a plurality on the Court could be found to recognize a geographic limit on the war against terrorism. The intrusion into the space of political questions simply would have been too obvious to maintain.

Alternatively, imagine if the Court had declared everywhere beyond Afghanistan (and perhaps Pakistan) outside of the war’s scope—and, thus, outside of the political branches’ exclusive war-making authority. For the judiciary to set such unmistakable limits on where the United States was and was not to wage war would have constituted utterly unprecedented judicial involvement in the conduct of war, and would have been most unlikely to command even a plurality of votes on the Court. Indeed, the Supreme Court rejected precisely such a challenge in *Holtzman v. Schlesinger*,¹⁰⁷ in which a member of Congress and three members of the Armed Services challenged the expansion to Cambodia of America’s involvement in the Vietnam War. Eight members of the Court appeared to deem the matter off-limits for the judiciary. The geographic expanse of a war seems utterly within the sway of the political

105. It is worth noting here the consistently broad interpretations of the AUMF espoused by courts in Guantánamo-related litigation, a trend particularly unusual in the context of yielding jurisdiction. Generally, the judiciary demands an “unmistakably clear statement” from Congress before yielding jurisdiction. *Hamdan*, 548 U.S. at 575. In contrast, the courts—both in the jurisdictional context and otherwise—have consistently erred on the side of assuming that the AUMF *does* authorize the executive branch’s activity being challenged. See, e.g., *Hamdi*, 542 U.S. at 519 (plurality opinion) (“[I]t is of no moment that the AUMF does not use specific language of detention. . . . Congress has clearly and unmistakably authorized detention in the narrow circumstances considered here.”).

106. 533 U.S. 678, 701, 699 (2001); see also *Clark v. Martinez*, 543 U.S. 371 (2005) (finding that *Zadvydas* applied to inadmissible aliens, as well). Interestingly, the *Zadvydas* Court acknowledged that its analysis might have differed had the statute at issue been targeted at suspected terrorists. See *Zadvydas*, 533 U.S. at 691; Waxman, *supra* note 15, at 19 (“In *Zadvydas v. Davis*, . . . the Court also noted that a statutory scheme directed at suspected terrorists, in particular, might change its analysis.”).

107. 414 U.S. 1323 (1973).

branches' war-making discretion, making space an extraordinarily difficult limiting factor for courts to employ in assessing the scope of the war against terrorism.

B. Avoiding Conflict with the Political Branches

Focusing on the means of today's war against terrorism rather than on the war's time or space not only spared the judiciary from intruding into political questions; doing so also avoided the courts' clear and potentially unwinnable conflict with the political branches. To be sure, the courts' decisions in cases like *Hamdi*, *Hamdan*, *Basardh*, and *Parhat* dealt direct defeats to the government and forced the political branches, usually the executive, to take steps that previously it had claimed a right not to take.¹⁰⁸ Put in perspective, however, the effects of the judiciary's rulings were rather minimal.¹⁰⁹ While *Hamdi* may have demanded notice and an opportunity to be heard by a neutral adjudicator and *Hamdan* may have required alterations to Guantánamo's military commissions, as this article approached publication—almost nine years into the post-9/11 detentions—only a handful of detainees had been released from Guantánamo by court order, the ultimate outcome for which most detainees have been pressing.¹¹⁰ Hence, by nibbling at the margins of the political branches' conduct of the war against terrorism, the courts have

108. See Dawn E. Johnsen, *The Story of Hamdan v. Rumsfeld: Trying Enemy Combatants by Military Commission*, in *PRESIDENTIAL POWER STORIES* 447, 448 (Christopher H. Schroeder & Curtis A. Bradley eds., 2009) ("The Bush administration . . . suffered substantial setbacks, both with regard to the particular policy under review and in its broader effort to expand presidential power.").

109. See WITTES, *supra* note 15, at 15 ("[T]he Court's specific pronouncements have been far less consequential than many commentators imagine. . . . In both decisions [in *Rasul* and *Hamdan*], the administration suffered dramatic setbacks that amounted in practical terms merely to a requirement to seek congressional permission for what it wanted to do—congressional permission that proved, in both cases, relatively easy to obtain.").

110. See, e.g., *Bacha v. Obama*, No. 05-2385, slip op. (D.D.C. July 30, 2009) (ordering the release of Mohammed Jawad); *Ahmed v. Obama*, 613 F. Supp. 2d 51 (D.D.C. 2009) (ordering the release of Alla Ali bin Ali Ahmed); see also CENTER FOR CONSTITUTIONAL RIGHTS, GUANTANAMO HABEAS SCORECARD, <http://www.ccrjustice.org/files/2010-09-27%20Habeas%20SCORECARD%20Website%20Version.pdf> (last visited September 30, 2010); cf. Johnsen, *supra* note 108, at 482 ("Viewed narrowly from the personal perspective of Hamdan and other detainees who faced possible trials before military commissions, the Court's ruling [in *Hamdan*] changed little. . . . Hamdan's victory, of course, did not result in his—or any detainee's—release. The United States continued to hold him as an unlawful combatant while developing its response."). Many detainees have been released at the discretion of the executive branch; others have prevailed in court but await the outcome of the government's appeal; but relatively few have been ordered released by a court and then, in fact, been released by the executive branch in response. See Aziz Z. Huq, *What Good Is Habeas?*, 26 CONST. COMMENT. 385, 429 (forthcoming 2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1596963 ("Only two [district court decisions], Judge Huvelle's order concerning the juvenile detainee Muhammed Jawad and Judge Kessler's concerning Alla Ali bin Ali Ahmed, directly order release."); *id.* at 410 ("After *Boumediene*, releases in the absence of a final judgment from a habeas corpus continue to dominate over releases in the wake of a district court remedial order.").

managed to alter some of the means employed in that war without provoking open conflict with the political branches on major issues—conflict that the judiciary might well lose.

The defeats dealt to the government by the courts, while significant, have been ones that the government could afford to lose without altering the basic course of its prosecution of the war against terrorism.¹¹¹ In *Hamdi*, the Supreme Court demanded that an American citizen held on American soil be provided with notice and an opportunity to be heard by a neutral adjudicator, rather than being detained indefinitely.¹¹² In response, the executive branch released Hamdi to Saudi Arabia in return for his relinquishing American citizenship and accepting travel restrictions.¹¹³ It hardly could be said that the major contours of the war against terrorism had been shaken.¹¹⁴ *Rasul*, handed down the same day, recognized federal court jurisdiction over Guantánamo. That decision laid the groundwork for the Court, first in *Hamdan* and then in *Boumediene*, to enable habeas petitions from Guantánamo to be heard. Such petitions may have shaken the courts by flooding the dockets of the D.C. District and Circuit Courts with hundreds of habeas petitions, and in turn consumed the time of dozens of executive branch lawyers—but, again, such activity hardly demanded a fundamentally different approach to the war against terrorism, as only a handful of detainees actually have been released by court order and Guantánamo itself remains in use as a detention facility.

Indeed, rather than imposing its will on the political branches, the judiciary appeared to see itself as opening a dialogue with those branches in the hope of collectively forging a path ahead. As recently as in *Boumediene*, the Supreme Court looked back on its own narrow ruling in *Hamdan* as intended to encourage a cooperative response from Congress: “This interpretive rule facilitates a dialogue between Congress and the Court.”¹¹⁵ Not only did the Supreme Court seek dialogue rather than collision with Congress, it even portrayed its narrow rulings as facilitating dialogue between the *other* two branches, leaving the judiciary as simply an umpire or even bystander. Justice Breyer struck this tone in his *Hamdan* concurrence. After ruling against the executive branch, he then stated: “Nothing prevents the President from returning to Congress to seek the authority he believes necessary.”¹¹⁶ Mediation, not conflict, would be the judiciary’s preferred role in relation to the political

111. See JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* 135 (2009) (“And yet while the government’s losses in the Supreme Court made front-page news, the decisions were really little more than slaps on the wrist.”).

112. *Hamdi v. Rumsfeld*, 542 U.S. 509, 533 (2004) (plurality opinion).

113. See *Hamdi Voices Innocence, Joy About Reunion*, CNN.COM, Oct. 14, 2004, <http://www.cnn.com/2004/WORLD/meast/10/14/hamdi/>.

114. See Fallon & Meltzer, *supra* note 30, at 2073 (“The practical significance of *Hamdi* is probably slight.”).

115. *Boumediene v. Bush*, 553 U.S. 732, 738 (2008).

116. *Hamdan v. Rumsfeld*, 548 U.S. 557, 636 (2006) (Breyer, J., concurring).

branches—and narrow rulings would make that role possible.

Nonetheless, despite this relatively modest judicial intrusion into the political branches' conduct of the war against terrorism and despite the courts' posture of favoring dialogue and mediation, the political branches have resisted the courts at every step—in ways that, at times, have tested the limits of constitutionally acceptable inter-branch jostling.¹¹⁷ After *Hamdan* held that the 2005 Detainee Treatment Act¹¹⁸ did not strip the courts of jurisdiction over already pending habeas petitions, Congress responded by unambiguously stripping that jurisdiction in the 2006 Military Commissions Act¹¹⁹—a move that the Supreme Court, in *Boumediene*, declared unconstitutional. Perhaps even more strikingly, the Bush administration, apparently eager to vindicate a broad conception of executive power,¹²⁰ responded to the Court's finding, in *Rasul*, of jurisdiction over Guantánamo by picking up exactly where the executive had left off before the decision: "Immediately renewing its motions to dismiss the [habeas] petitions, the government proceeded as if *Rasul* had not been decided—or as if that decision had been a victory rather than a repudiation of the very basis for transferring the prisoners to Guantánamo in the first place."¹²¹ In other words, when confronted with relatively minor defeats in court, the political branches responded either by ignoring the courts altogether or by acting in a manner soon deemed unconstitutional.¹²²

117. See Greenhouse, *supra* note 76, at 8 ("If the Court envisioned . . . an inter-branch dialogue, as I believe it did, the dialogue would prove to be all one way, with the Court consistently offering flexibility and accommodation, and the Administration demanding nothing less than total deference.").

118. Detainee Treatment Act of 2005, Pub. L. No. 109-163, 119 Stat. 3474 (2005).

119. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006); see BALL, *supra* note 15, at 178-86.

120. See GOLDSMITH, *supra* note 111, at 123-26 (discussing the Bush administration's "unquestioned commitment to a peculiar conception of executive power"); *id.* at 135 ("The June 2004 decisions gave the administration the perfect opportunity to go to a Congress controlled by Republicans to get the entire terrorism program on a stronger and more explicit legal footing not driven by backward-looking legalisms. . . . Refusing to read the Court's tea leaves, and taking advantage of the fact that the Court had not in fact technically required the executive to do very much, [Counsel to the Vice President David] Addington successfully argued once again that the administration should continue push-push-pushing until a stronger force required otherwise, something the Supreme Court had not done yet.").

121. Greenhouse, *supra* note 76, at 10; see BALL, *supra* note 15, at 125, 126 (noting "the Bush administration's almost instantaneous *minimally compliant* responses to the June 2004 decisions of the Court" in *Rasul* and *Hamdi* as well as "the Bush administration's refusal to comply with the Court's 2004 opinions"); MARGULIES, *supra* note 15, at 158-59 ("[T]he administration unveiled its response to *Rasul* . . . Having lost that argument, the Administration now repackaged it to say that while the prisoners could *seek* relief, none could be provided. This argument, however, ignores the determination by the Supreme Court in *Rasul* . . . The government's position suggests that *Rasul* was nothing more than a fire drill, a meaningless exercise.").

122. Indeed, Senator Arlen Specter warned Congress that the Military Commissions Act would, in his view, be unconstitutional, yet Congress approved it nonetheless—with Senator Specter himself voting in favor of the Act. See MARGULIES, *supra* note 15, at 260; Jonathan Mahler, *After the Imperial Presidency*, N.Y. TIMES MAG., Nov. 9, 2008, at 42.

Imagine, then, the potential for the judiciary's direct conflict with its coordinate branches that would have emerged had the courts more boldly applied time and space as limiting factors constraining the political branches' war against terrorism. Ever since *Marbury v. Madison*,¹²³ the Supreme Court has been alert to the possibility that its decisions will be ignored by the political branches, a threat encapsulated in President Andrew Jackson's famous, if apocryphal, retort to the Marshall Court's holding in *Worcester v. Georgia*¹²⁴: "John Marshall has made his decision; now let him enforce it!"¹²⁵ Had the judiciary boldly declared a temporal limit to the war against terrorism, setting a period of acceptable detention or reading in a sunset provision to the AUMF, would the political branches have complied? Or, had the courts announced a geographic constraint to the war against terrorism that rendered detentions at Guantánamo impermissible, would the political branches have acquiesced? Especially given the post-9/11 state of public opinion regarding national security in general, it is hard to imagine the political branches (or the public) simply acquiescing—particularly in light of the political branches' pattern of either ignoring or responding unconstitutionally to far more minor setbacks in court.

Perhaps this disobedience to clear judicial orders seems farfetched, but recent history demonstrates how plausible it is. Before the Supreme Court as a whole took the aforementioned action in *Holtzman*, in which the Court refused to support an injunction prohibiting American military operations in Cambodia, Justice Douglas, acting individually, granted a vacatur lifting the Second Circuit's stay of the injunction, thus reinstating the trial court's order that the military operations come to a halt.¹²⁶ Justice Douglas' vacatur restored the injunction for just a few hours before the Court reversed him—but even in that fleeting moment, the Pentagon adamantly announced that it would defy America's highest Court.¹²⁷ If the executive branch was so eager to disobey the Supreme Court in 1973, for the sake of prosecuting a new expansion of an already unpopular war, then how might the executive branch have responded three decades later if brought into direct conflict with the Court regarding existing policies in a war against terrorism that remained generally popular?¹²⁸

123. 5 U.S. (1 Cranch) 137 (1803).

124. 31 U.S. (6 Pet.) 515 (1832).

125. JOHN F. BOLLER, JR. & JOHN GEORGE, THEY NEVER SAID IT: A BOOK OF FALSE QUOTES, MISQUOTES, & MISLEADING ATTRIBUTIONS 53 (1990); see BALL, *supra* note 15, at 126 ("In the case of a Supreme Court order going against the government, the question becomes *how* or *whether* the executive will implement the ruling of the Court. The Court has no mechanisms for enforcing its orders; no formal sanctions attach to a president's noncompliance.").

126. *Holtzman v. Schlesinger*, 414 U.S. 1316 (1973); see JOHN HART ELY, WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH 34 (1993); Sweet, *supra* note 97.

127. See Philippa Strum, *The Supreme Court and the Vietnamese War*, in 4 THE VIETNAM WAR AND INTERNATIONAL LAW 535, 566-67 (Richard Falk ed., 1976).

128. Cf. BALL, *supra* note 15, at 127 ("At no time did the Bush administration lawyers and political managers acknowledge that their legal views of presidential power had been rejected by the

The judiciary never tempted fate by exploring that question, avoiding direct and potentially unwinnable conflict with the political branches by steering clear of time and space as limiting factors in the war against terrorism and instead more subtly focusing on the war's means.

IV.

BENEFITS OF EMBRACING COMPLEXITY: PARTICULARIZED JUDICIAL INTERVENTION IN THE WAR AGAINST TERRORISM

The judiciary's embrace of complexity in defining the limits of the war against terrorism has avoided political questions and potentially unwinnable conflict with the political branches while yielding certain benefits, at least from the perspective of a number of detainees, in the form of particularized judicial intervention. While limited, these benefits nonetheless have had a profound impact on the lives of individual detainees.

The Supreme Court's decision in *Hamdi* rejected the government's claimed right to detain indefinitely an American citizen on American soil, instead demanding that the detainee be provided with notice and an opportunity to be heard by a neutral decision-maker, among other procedural guarantees. In response, the government—presumably concluding either that it could not substantiate its case against Hamdi through such processes¹²⁹ or that doing so required more effort than it was worth¹³⁰—released Hamdi to Saudi Arabia as mentioned above.¹³¹ Though unhappy that his release took so long, Hamdi nonetheless made clear that it was the judiciary's intervention that set in motion the process that freed him: “[I] was hoping that it [my case] would reach the Supreme Court . . . faster and they will look at my case because I believe that I was innocent and I was locked down for the wrong reason.”¹³² While *Hamdi* may have eschewed clearer statements limiting the time or space of the war against terrorism in favor of more modest tailoring of the war's means, the decision nonetheless resulted in a person long detained being set free.

Similarly, the string of decisions in *Rasul*, *Hamdan*, and *Boumediene* that permitted habeas petitions from Guantánamo to proceed led to the freedom of Mohammed Jawad. Jawad may have been as young as 12 when taken into custody in 2002, and he was held at Guantánamo for almost seven years.¹³³ After protracted judicial proceedings, and despite the continuing opposition of

Court majorities.”).

129. See LOUIS FISHER, *THE CONSTITUTION AND 9/11: RECURRING THREATS TO AMERICA'S FREEDOMS* 196 (2008).

130. See BALL, *supra* note 15, at 125, 131-32; DAVID COLE & JULES LOBEL, *LESS SAFE, LESS FREE: WHY AMERICA IS LOSING THE WAR ON TERROR* 51 (2007).

131. See BALL, *supra* note 15, at 132; *Hamdi Voices Innocence*, *supra* note 113.

132. *Hamdi Voices Innocence*, *supra* note 113 (quoting Yaser Hamdi).

133. William Glaberson, *Obama Facing Big Court Test over Detainee*, N.Y. TIMES, July 29, 2009, at A1.

the executive branch, the D.C. District Court granted his habeas petition in 2009, ordering that the government “promptly release petitioner Jawad from detention at the U.S. Naval Station at Guantanamo Bay”¹³⁴ Within a month, he was back home in Afghanistan.¹³⁵ The decisions leading up to and enabling Jawad’s release by court order may have been tentative and gradual, as they avoided the clear limiting factors of time and space and focused exclusively on means; but, in the end, Jawad did leave Guantánamo and return home, making him the first detainee released from Guantánamo by court order.

A month later, Alla Ali Bin Ali Ahmed became the second detainee to be released by court order.¹³⁶ While acknowledging massive questions still left unanswered by the Supreme Court’s most recent Guantánamo-related decision in *Boumediene*,¹³⁷ the district court held that “[t]he Government has failed to prove . . . by a preponderance of the evidence, that Alla Ali Bin Ali Ahmed was ‘part of, or substantially supported, Taliban or al-Qaida forces or associated forces that are engaged in hostilities against the United States or its coalition partners.’”¹³⁸ After five months of further delay by the executive branch, Ahmed finally returned to his native country of Yemen.¹³⁹ As it had been for Jawad, the wait had been long for Ahmed; but the courts’ limitation of the scope of the political branches’ war against terrorism ultimately led to his release. Then again, Jawad and Ahmed, as well as the subsequently freed Fouad al-Rabiah,¹⁴⁰ were just three detainees out of hundreds.¹⁴¹

V.

COSTS OF EMBRACING COMPLEXITY: PERSISTENT JUDICIAL UNCERTAINTY AND POTENTIAL INSTITUTIONAL DIMINUTION

While Hamdi and Jawad may have benefited from particularized judicial intervention in the war against terrorism, hundreds of detainees have not experienced such concrete benefits—even when they have ostensibly prevailed

134. *Bacha v. Obama*, No. 05-2385, slip op. at 1 (D.D.C. July 30, 2009).

135. *Guantánamo Detainee Released*, N.Y. TIMES, Aug. 25, 2009, at A8.

136. Huq, *supra* note 110, at 429; Scott Shane, *Detainee’s Case Illustrates Bind of Prison’s Fate*, N.Y. TIMES, Oct. 4, 2009, at A1.

137. *See Ahmed v. Obama*, 613 F. Supp. 2d 51, 52 (D.D.C. 2009).

138. *Id.* at 66 (quoting the government’s memorandum).

139. Shane, *supra* note 136.

140. *Judge Frees Kuwaiti Detainee*, N.Y. TIMES, Dec. 10, 2009, at A30 (“A Kuwaiti detainee held in the military prison at Guantanamo Bay, Cuba, for almost eight years was sent home after a federal judge ordered him freed, the Justice Department said.”).

141. *See WITTES, supra* note 15, at 124 (“[I]t is important to identify what all of this litigation has not accomplished: For the person erroneously or unnecessarily detained at Guantánamo, access to federal courts has not meant freedom.”). Of course, hundreds of detainees have been released over the years by the executive branch, rather than by judicial intervention; but such releases were based on executive discretion rather than on court order. *See supra* note 110.

in court.¹⁴² As Owen Fiss has explained, despite all the judicial activity, the Guantánamo detainees still do not really know the scope of their rights and how to vindicate them: “For over six years, they have been unable to obtain a satisfactory response to their constitutional claims.”¹⁴³ With courts eschewing rulings based on the bright-line factors of time and space, detainees still find themselves with fundamental questions left unanswered as to their rights and remedies, such as what standard of review should be applied to their habeas petitions,¹⁴⁴ what voice they might possess in determining the location of their own resettlement after release from Guantanamo,¹⁴⁵ whether they are entitled to any protections under the Fifth Amendment’s Due Process Clause,¹⁴⁶ and to what extent their detention is governed by the laws of war.¹⁴⁷ Indeed, two distinct costs of the courts’ embrace of complexity have emerged: persistent judicial uncertainty and potential institutional diminution.

A. Persistent Judicial Uncertainty

Tackling the most complex limiting factor of the war against terrorism, its means, has led the courts into treacherous terrain. The lack of bright lines in judicial decisions has meant that virtually every lower court ruling has been

142. See Christopher Flavelle, *Why Many Guantanamo Detainees Ordered Released Are Still Stuck There*, PROPUBLICA, Oct. 12, 2009, <http://www.propublica.org/feature/gitmo-guantanamo-detainees-ordered-released-are-still-stuck-there-1012>.

143. Fiss, *supra* note 76, at 647; see Samuel Estreicher & Diarmuid O’Scannlain, *The Limits of Hamdan v. Rumsfeld*, 9 GREEN BAG 353, 356 (2006) (“*Hamdan* says nothing about the President’s authority to detain the Guantanamo detainees or other alleged unlawful combatants for the duration of hostilities, even without bringing formal charges against them.”).

144. See *Al-Adahi v. Obama*, 613 F.3d 1102 (D.C. Cir. 2010) (declining to decide whether the Suspension Clause requires use of a preponderance of the evidence standard in reviewing habeas petitions); Petition for Writ of Certiorari at i, *Al-Odah v. United States*, No. 10-439 (Sept. 28, 2010), available at <http://sblog.s3.amazonaws.com/wp-content/uploads/2010/09/Al-Odah-cert-petition-9-28-10.pdf> (petitioning the Supreme Court to decide “[w]hether a preponderance of the evidence standard, rather than a clear and convincing evidence standard, is sufficient under the Due Process Clause of the Constitution and 28 U.S.C. § 2241 to support a ruling in favor of indefinite imprisonment, potentially for life,” at Guantanamo).

145. See *Kiyemba v. Obama*, 561 F.3d 509, 516 (D.C. Cir. 2009).

146. Compare *Kiyemba v. Obama*, 555 F.3d 1022, 1026, 1032 (D.C. Cir. 2009) (explaining that “the due process clause does not apply to aliens without property or presence in the sovereign territory of the United States” and that “*Boumediene* therefore specifically limited its holding to the Suspension Clause”) with *Al-Qurashi v. Obama*, No. 05-2385, 2010 U.S. Dist. LEXIS 85520, at *31 n.14 (D.D.C. Aug. 3, 2010) (“[I]t remains uncertain to what extent the Due Process Clause applies to the detainees at Guantanamo Bay.”), and *Basardh v. Obama*, 612 F. Supp. 2d 30, 33 (D.D.C. 2009) (“[T]he Court is spared from having to wade into the debate over whether the due process principles recognized by the Supreme Court in *Hamdi v. Rumsfeld* also apply to a non-U.S. citizen held at Guantanamo.”).

147. Compare *Al-Bihani v. Obama*, No. 09-5051, 2010 U.S. App. LEXIS 18169, at *2 (D.C. Cir. Aug. 31, 2010) (Sentelle, J., concurring in denial of rehearing en banc and characterizing as dicta the panel’s holding finding inapplicable international law of war principles), with *id.* at *26 (Kavanaugh, J., concurring in denial of rehearing en banc and offering further support for the panel’s holding finding inapplicable international law of war principles).

appealed, yet every higher court decision has left many questions unanswered—which, when answered by lower courts, have been appealed yet again. It might be said that the trajectories of the cases assume the shape of a double or even triple helix.

Various such treks up and down the judicial hierarchy can be tracked.¹⁴⁸ *Rasul*, for example, began with a district court opinion grappling, in significant part, with whether detentions at Guantánamo fell within the non-justiciable war-making means of the political branches' war against terrorism.¹⁴⁹ Given the complexity of such an evaluation, the district court's opinion in favor of the government was appealed, producing another discursive examination of the subject, this time by the D.C. Circuit.¹⁵⁰ Both lower courts then were reversed by the Supreme Court.¹⁵¹ This pronouncement by the nation's highest Court hardly resolved the matter: as previously mentioned, on remand to the district court, the government simply renewed its motion to dismiss by asserting executive authority over foreign affairs,¹⁵² thus calling into question whether the Supreme Court's dramatic decision actually had altered anything and poignantly underscoring just how much uncertainty continued to face the lower courts and plague the case law.¹⁵³ Indeed, two district court judges, tasked with responding to *Rasul*, reached diametrically opposite conclusions.¹⁵⁴ One of the judges specifically noted that "the Court would have welcomed a clearer declaration in the *Rasul* opinion regarding the specific constitutional and other substantive rights of the petitioners."¹⁵⁵ Embracing complexity thus made the application of higher courts' rulings an extremely difficult task¹⁵⁶ and one

148. See WITTES, *supra* note 15, at 70 (describing "separate rounds of this back-and-forth" of litigation).

149. *Rasul v. Bush*, 215 F. Supp. 2d 55 (D.D.C. 2002).

150. *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003).

151. *Rasul v. Bush*, 542 U.S. 466 (2004).

152. See *Greenhouse*, *supra* note 76, at 10.

153. See *Rasul*, 542 U.S. at 485 ("Whether and what further proceedings may become necessary after respondents make their response to the merits of petitioners' claims are matters that we need not address now."); BALL, *supra* note 15, at 127 ("[T]he *Rasul* majority opinion did not provide any clear guidelines regarding the next steps in the legal processes for foreign nationals detained at Guantánamo."); Thai, *supra* note 92, at 525 n.137 ("In holding that petitioners had a procedural right to challenge the legality of their detention under federal law, the Court did not express an opinion on the merits of petitioners' underlying claims.")

154. Compare *Khalid v. Bush*, 355 F. Supp. 2d 311 (D.D.C. 2005) (granting the government's motion to dismiss), with *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443 (D.D.C. 2005) (denying in part the government's motion to dismiss). Both cases later were consolidated by the D.C. Circuit, *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007), and found their way to the Supreme Court, *Boumediene v. Bush*, 553 U.S. 723 (2008).

155. *In re Guantanamo Detainee Cases*, 355 F. Supp. at 454.

156. See *Boumediene*, 553 U.S. at 817 (Roberts, C.J., dissenting) ("[T]he majority fobs that vexing question off on district courts to answer down the road."); *Anam v. Obama*, No. CA 04-1194, slip op. at 6-7 (D.D.C. Dec. 14, 2009) ("We have . . . in this court now a difference in substantive law that will be applied among the District Court judges. . . . We have different rules and procedures being used by the judges. Different rules of evidence being used by the judges . . ."); see also

inevitably challenged by further appeals.

A similarly tangled trail from lower to higher courts and back again emerged in the case of the Uighurs. After *Hamdan* and then *Boumediene* traveled up and down—and then back up and back down—the judicial hierarchy, it seemed resolved that Guantánamo detainees could file habeas petitions. What relief was available, however, remained unclear. Following the D.C. Circuit's rejection of enemy combatant status in *Parhat*¹⁵⁷ and its suggestive language regarding a court's authority to order release in response to a habeas petition,¹⁵⁸ the district court responded to precisely such a set of petitions by ordering the Uighurs released into the U.S.¹⁵⁹ The government, however, questioned whether that was *really* what the Court of Appeals had envisioned in *Parhat*, and appealed—winning a reversal, as the D.C. Circuit made clear that release on American soil was not, in fact, what *Parhat* had in mind.¹⁶⁰ As this article goes to press, the uncertainty persists and the judicial journey continues, with the Supreme Court having vacated the D.C. Circuit's decision and remanded the case,¹⁶¹ only to have the D.C. Circuit reinstate its previous opinion.¹⁶²

Hence, virtually the entire string of major Guantánamo-related cases has traveled from the D.C. District Court to the D.C. Circuit to the Supreme Court, only to return to the district court with unanswered questions whose resolution by district court judges is inevitably challenged first before the D.C. Circuit and again before the Supreme Court.¹⁶³ The narrow rulings and reinterpretable

BENJAMIN WITTES, ROBERT CHESNEY, & RABEA BENHALIM, BROOKINGS INST., *THE EMERGING LAW OF DETENTION: THE GUANTÁNAMO HABEAS CASES AS LAWMAKING 1* (2010), available at http://www.brookings.edu/~media/Files/rc/papers/2010/0122_guantanamo_wittes_chesney/0122_guantanamo_wittes_chesney.pdf (“While the justices [in *Boumediene*] insisted on a role for the courts, they expressly refused to define the contours of either the government’s detention authority or the procedures associated with the challenges it authorized. All of these questions they left to the lower courts to address in the first instance.”); *id.* at 6 (“[D]etainees freed by certain district judges would likely have had the lawfulness of their detentions affirmed had other judges who have articulated different standards heard their cases. And the reverse is also true.”); Stephen I. Vladeck, *Common-Law Habeas and the Separation of Powers*, 95 IOWA L. REV. BULL. 39, 53 (2010) (“Kennedy thereby anticipated exactly what has followed in the D.C. District Court: a process of common-law judicial decision making in which the courts have articulated the rules that they have then enforced.”). See generally Baher Azmy, *Executive Detention, Boumediene, and the New Common Law of Habeas*, 95 IOWA L. REV. 445 (2010).

157. *Parhat v. Gates*, 532 F.3d 834 (D.C. Cir. 2008).

158. *Id.* at 851.

159. *In re Guantanamo Bay Detainee Litig.*, 581 F. Supp. 2d 33, 41 (D.D.C. 2008).

160. *Kiyemba v. Obama*, 555 F.3d 1022 (D.C. Cir. 2009).

161. *Kiyemba v. Obama*, 130 S. Ct. 1235 (2010).

162. *Kiyemba v. Obama*, 605 F.3d 1046 (D.C. Cir. 2010).

163. See *Ahmed v. Obama*, 613 F. Supp. 2d 51, 52 (D.D.C. 2009) (noting that “[a]fter more than six years of litigation,” the Supreme Court decided *Boumediene*, yet even there “[t]he Court did not define what conduct the Government would have to prove, by a preponderance of the evidence, in order to justifiably detain individuals—that question was left to the District Courts. Nor did the Supreme Court lay down specific procedures for the district courts to follow in these cases.” (citation

opinions produced by the courts' avoidance of time and space as limiting factors constraining the war against terrorism have generated persistent judicial uncertainty, as court after court must assess the complex factor of the war's means. This cost burdens not only the detainees, who must await answers from their cells in Guantánamo, but also the courts themselves, which find their dockets flooded with endless litigation on the subject. In addition, the country as a whole seems to suffer from the unrelenting uncertainty surrounding such a major issue and the political energy and space that it therefore consumes.

B. Potential Institutional Diminution

A potentially more enduring cost to the judiciary is the threat of its institutional diminution. The courts' embrace of complexity—in the form of engagement with a complex limiting factor of war, rather than more bright-line factors—seems to have banished the judiciary to the margins of the three branches' interactions regarding the scope of the war against terrorism. Indeed, the narrowness of the Supreme Court's and lower courts' rulings and the virtual invitation to reinterpret those decisions already have ceded much ground to the political branches, which consistently have taken the lead in setting and, when necessary, re-setting detention policies.

The political branches have dominated definition of the parameters of post-9/11 detention policies, despite the apparent judicial implications of an unprecedented manner of detention. The AUMF¹⁶⁴ and the President's "Military Order of November 13, 2001—Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism"¹⁶⁵ laid the foundations for detention policies. Even when the courts intervened, the political branches reclaimed the lead with the Detainee Treatment Act¹⁶⁶ and Military Commissions Acts.¹⁶⁷ At each stage, the political branches not only rebuffed the

omitted)); *Maqaleh v. Gates*, 604 F. Supp. 2d 205, 218-19 (D.D.C. 2009) ("This Court, then, has little guidance as to what the citizenship factor means after *Boumediene*. . . . *Boumediene* also provides little guidance on how to analyze the 'statute of the detainee' factor."); see also COLE & DEMPSEY, *supra* note 60, at 188 (noting that in *Hamdi*, "[t]he Court left many questions unanswered Lower courts are beginning to answer those questions, but their ultimate resolution will probably require a return trip to the Supreme Court."); MAHLER, *supra* note 60 (describing at length *Hamdan's* painstakingly protracted path up the judicial hierarchy); WITTES, *supra* note 15, at 123-24 ("Since the first detainees came to Guantánamo in the wake of the American intervention in Afghanistan, habeas litigation has proceeded continuously up and down all levels of the federal court system."); Matthew C. Waxman, *Guantánamo, Habeas Corpus, and Standards of Proof: Viewing the Law Through Multiple Lenses*, 42 CASE W. RES. J. INT'L L. 245, 245 (2009) (noting that in *Boumediene* "the Court left to district courts in the first instance responsibility for working through the main procedural and substantive issues that would govern resulting habeas proceedings").

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

165. Military Order, 66 Fed. Reg. 57,833 (Nov. 16, 2001).

166. Pub. L. No. 109-163, 119 Stat. 3474 (2006).

167. Military Commissions Act of 2009, Pub. L. No. 111-84, 123 Stat. 2574 (2009); Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006).

courts' past actions but also took charge over the future. And they did so by attacking the courts' very foundations: their jurisdiction.

Even while the judiciary reasserted itself and its jurisdiction first on statutory and then on constitutional grounds, the political branches capitalized on the courts' narrow rulings and reinterpretable opinions to evade their reach, even with respect to American citizens held on American soil. The executive's shifting treatment of Ali al-Marri provides a useful example. The government arrested al-Marri, a Qatari citizen, on American soil and held him for sixteen months with criminal proceedings pending against him.¹⁶⁸ Then, less than a month before his trial was set to begin, the government designated him an enemy combatant, rendering his criminal prosecution moot and entitling the government to move him to a navy brig in South Carolina where he was held in solitary confinement for almost six years.¹⁶⁹ As al-Marri's challenge to his detention gradually wound its way through the courts, and even after Supreme Court argument had been scheduled, the government changed tactics yet again and re-indicted him, thus returning him to the federal court system in which he eventually pled guilty.¹⁷⁰ Simply put, the executive remained a step ahead of the courts at every stage in al-Marri's saga—and the courts essentially tolerated it.¹⁷¹

Similarly, the executive made use of the distinct lack of clarity regarding the scope of the war against terrorism to evade the reach of the courts in the detention of José Padilla, an American citizen arrested in Chicago. He was first held under a material witness warrant, then transferred to New York City and held in a federal facility, and next labeled an enemy combatant and moved to a navy brig.¹⁷² Eventually, Padilla was returned to federal court just in time to avoid the possibility that the Supreme Court might consider his petition contesting his confinement in the brig.¹⁷³ A jury convicted Padilla and he was sentenced to more than seventeen years in prison.¹⁷⁴ Once again, the executive

168. BALL, *supra* note 15, at 27-28.

169. *Id.* at 28; FISHER, *supra* note 129, at 209; John Schwartz, *Plea Deal Reached with Agent for Al Qaeda*, N.Y. TIMES, May 1, 2009, at A16.

170. Schwartz, *supra* note 169.

171. Then again, one might argue that, while opportunities for formal intervention eluded the courts, the judiciary nonetheless exerted influence just through the pressure of looming judicial decision-making. How much credit one should ascribe to the courts for exerting political, rather than strictly legal, pressure regarding Guantánamo is a complicated issue worthy of further study.

172. BALL, *supra* note 15, at 27, 106; FISHER, *supra* note 129, at 197; MARGULIES, *supra* note 15, at 144-45. GOLDSMITH, *supra* note 111, at 101, clarifies that Padilla was held at a different navy brig from the one in which al-Marri was held.

173. BALL, *supra* note 15, at 31-32, 134-35 (quoting Eugene Fidell as calling Padilla's transfer "a remarkable game of musical courtrooms"); see COLE & LOBEL, *supra* note 130, at 51; MARGULIES, *supra* note 15, at 243-44; Johnsen, *supra* note 108, at 455-56; Linda Greenhouse, *Justices Let U.S. Transfer Padilla to Civilian Custody*, N.Y. TIMES, Jan. 5, 2006, at A22.

174. Kirk Semple, *Padilla Gets 17 Years in Conspiracy Case*, N.Y. TIMES, Jan. 23, 2008, at A14.

deftly, if dubiously, handled Padilla in a manner that not only kept him away from conclusive assessment by the judiciary but also avoided effective judicial review of key issues concerning the executive's war-time authority.¹⁷⁵ The lack of judicially recognized bright lines surrounding the scope of the war against terrorism effectively enabled the executive to hold the courts at bay, even for matters arising on American soil.

Even when the courts found an opportunity to rule on key issues that went beyond just their own jurisdiction, the political branches repudiated the judiciary's determinations. In *Hamdan*, a plurality of four justices held that the charge of conspiracy, not widely recognized outside the Anglo-American judicial tradition, "is not triable by law-of-war military commission."¹⁷⁶ That holding, the potential significance of which surprised even Hamdan's lawyer,¹⁷⁷ would bar the charge of conspiracy from use before a military commission. The political branches, in defiance of the Supreme Court's understanding of the law of war, responded by specifically empowering Guantánamo's military commissions to try detainees on the charge of conspiracy.¹⁷⁸ The executive branch then proceeded to include conspiracy charges in Hamdan's new military proceedings; ultimately, he was acquitted on the conspiracy charges and convicted of other charges.¹⁷⁹

All of these demonstrations of the political branches' will and capacity to evade judicial accountability amidst the war against terrorism underscore the costs of the courts' embrace of complexity in limiting the scope of that war. As this article approaches publication, some have begun to wonder whether courts are having an impact through the habeas cases enabled by *Boumediene*,¹⁸⁰ and

175. See BALL, *supra* note 15, at 123 ("... Padilla made its way back to the Court in December 2005—but with totally different legal questions raised."); see also *Rumsfeld v. Padilla*, 542 U.S. 426, 430 (2004) ("We confront two questions: First, did Padilla properly file his habeas petition in the Southern District of New York; and second, did the President possess authority to detain Padilla militarily. We answer the threshold question in the negative and thus do not reach the second question presented.")

176. *Hamdan v. Rumsfeld*, 548 U.S. 557, 600 (2006).

177. See MAHLER, *supra* note 60, at 284-85.

178. Military Commissions Act of 2006, Pub. L. No. 109-366, § 950v(b)(28), 120 Stat. 2600, 2630 (2006) ("CONSPIRACY.—Any person subject to this chapter who conspires to commit one or more substantive offenses triable by military commission under this chapter, and who knowingly does any overt act to effect the object of the conspiracy, shall be punished, if death results to one or more of the victims, by death or such other punishment as a military commission under this chapter may direct, and, if death does not result to any of the victims, by such punishment, other than death, as a military commission under this chapter may direct."); see Fiss, *supra* note 76, at 656.

179. Johnsen, *supra* note 108, at 484-85; William Glaberson, *A Conviction, but a System Still on Trial*, N.Y. TIMES, Aug. 10, 2008, at A27.

180. See HUMAN RIGHTS FIRST, HABEAS WORKS: FEDERAL COURTS' PROVEN CAPACITY TO HANDLE GUANTÁNAMO CASES I (2010), available at <http://www.humanrightsfirst.org/pdf/Habeas-Works-final-web.pdf> ("Habeas is working. The judges of the U.S. District Court for the District of Columbia have ably responded to the Supreme Court's call to review the detention of individuals at Guantánamo Bay, Cuba."); Huq, *supra* note 110, at 423 ("[I]ncreases in the rate of releases might correspond to judicial action raising the probability of intrusive judicial supervision."); *id.* at 427

perhaps the judiciary has indeed found firmer foundations. Then again, almost nine years after the first detainees arrived at Guantánamo, dozens of detainees remain there, and the basic contours of detention policy remain set by the political branches. On the whole, by avoiding limiting factors that, once recognized, would have provided hard and fast constraints and instead focusing on the means of the war, the courts both generated persistent judicial uncertainty and potentially lessened the judiciary's institutional standing during war-time.¹⁸¹ Narrow rulings, reinterpretable opinions, and benefits that were limited to scarce particularized interventions had the effect of ceding ground to the political branches in the conduct of the nation's wars that the judiciary may have to struggle to recover.

VI.

CONCLUSION: WAR-TIME DEMOCRACY IN ACTION

American courts have expended countless courtroom hours and spilled much ink in assessing the scope of the political branches' war against terrorism, a necessary threshold determination in analyzing whether particular actions of the political branches constitute lawful actions in service of that war. From early detention-related decisions of the Supreme Court in *Rasul* and *Hamdi* to more recent decisions of lower courts in *Basardh* and *Ahmed*, the judiciary has consistently shied away from analyzing either time or space as a limiting factor, instead focusing exclusively on the means of war-making as a limiting factor permitting judicial scrutiny of the war against terrorism. Eschewing the clearer factors and embracing the most difficult factor actually has made the courts' job easier, at least for the moment: doing so has enabled narrow rulings and opinions that appear reinterpretable in subsequent cases. At the same time, such an approach risks potential doctrinal inconsistency as circumstances change.

Institutional reasons explain this focus on the part of the courts. Embracing complexity has allowed the courts to avoid clear intrusion into the contested space of political questions as well as to avoid direct and potentially unwinnable conflict with the political branches. The strategy has yielded some benefits to a handful of detainees who have been released pursuant to particularized judicial intervention, but has also generated significant costs, first in the form of persistent judicial uncertainty, as ultimate decision-making is detained, and

("[T]he bulk of releases (from 2004-08) have taken place against the 'shadow' of habeas jurisdiction."). *But see* WITTES, CHESNEY, & BENHALIM, *supra* note 156, at 3 ("So fundamentally do the judges disagree on the basic design elements of American detention law that their differences are almost certainly affecting the bottom-line outcomes in at least some instances."); Huq, *supra* note 110, at 421 ("It is striking that at the most, *less than four percent of releases* from the Cuban base have followed a judicial order of release—and even in these cases it is not wholly clear that release would not have happened sooner or later.").

181. *But see* WITTES, *supra* note 15, at 109-13 (arguing that "the Court's deepest impact to date has not lain in the substance of anything it has done but in its insistence on its own predominant role—the insistence that it has the final say.").

second in the form of potential long-term marginalization of the judiciary during war-time, as courts are sidelined while the political branches take the lead.

In the end, the courts' embrace of complexity has been an experiment in war-time democracy in action. Consider Jack Balkin's assessment of the Supreme Court's decision in *Hamdan*:

What the Court has done is not so much countermajoritarian as *democracy forcing*. It has limited the President by forcing him to go back to Congress to ask for more authority than he already has, and if Congress gives it to him, then the Court will not stand in his way. . . . By forcing the President to ask for authorization, the Court does two things. First, it insists that both branches be on board with what the President wants to do. Second, it requires the President to ask for authority when passions have cooled somewhat, as opposed to right after 9/11, when Congress would likely have given him almost anything. . . . What the Court has done. . . is use the democratic process as a lever to discipline and constrain the President's possible overreaching.¹⁸²

Balkin seems right, both in analyzing *Hamdan* and more broadly. The courts' restraint in embracing complexity and engaging solely with the complicated means of the war against terrorism has produced narrow rulings and reinterpretable opinions that, in the end, empower the political branches—which is to say that they empower popular democracy. It follows that what Congress and the President have done in response to such judicial behavior is a more direct reflection of the will of today's American people than sweeping, bright-line intervention by the courts would have been. Balkin seems to suggest that this outcome is praiseworthy; others find it worrisome.¹⁸³ Ultimately, the real conclusion may be that, for better or for worse, the American people have ended up with the Guantánamo that they really wanted.

This experiment in war-time democracy offers two lessons for the future. First, a democratic dialogue emerges only if the relevant interlocutors in fact heed the call to conversation. Here, the executive branch appeared distinctly uninterested in discussion, and instead treated each judicial conversation-starter as a challenge to be fended off with a counter-thrust.¹⁸⁴ Moreover, a majority in

182. Posting of Jack Balkin to Balkinization, <http://balkin.blogspot.com/2006/06/hamdan-as-democracy-forcing-decision.html> (June 29, 2006, 13:07 EST); see BALL, *supra* note 15, at 177 (“*Hamdan* suggested that the Bush surrogates deal substantively with the other coordinate branch of the national government: the dormant and thoroughly bullied U.S. Congress.”); WITTES, *supra* note 15, at 14 (“*Hamdan* forced the administration once again to go to Congress”); Fallon & Meltzer, *supra* note 30, at 2093 (“[*Hamdan*’s] principal effect was to invite Congress to determine whether to authorize military trials that depart significantly from procedural norms that the Court understood to have been incorporated into statutes governing military commissions.”); Johnson, *supra* note 108, at 484 (“*Hamdan*’s greatest effect to date has been to force the President to work with Congress, within constitutional boundaries, to implement desired policies.”).

183. See Fiss, *supra* note 76, at 657, 658 (criticizing the view that “[j]udicial insistence that the President turn to Congress and gain its assent would further the democratic purposes of the Constitution” and that “the democratic values of the Constitution are furthered by simply enhancing the power of political institutions”; and arguing instead that “a robust use of the judicial power . . . enhances the deliberative character of the majority’s decision”).

184. See GOLDSMITH, *supra* note 111, at 123-35.

Congress proved keen to support the executive in both that perspective and that response, and thus provided legislative backing for an adversarial rather than conversational reply to the courts.¹⁸⁵ Ultimately, the judiciary can initiate a productive, democracy-developing dialogue only if its potential interlocutors in the political branches actually prefer discussion to defiance.

Second, this recent experience with Guantánamo-related litigation reveals a particular advantage of the executive branch over its coordinate branches in setting policy in certain controversial areas such as detention. While others have noted the general tendency for the executive branch to prevail on national security matters,¹⁸⁶ the particular advantage manifested in the detention context is the executive's unitary nature. Congress is designed to clash internally, pitting senator against senator, representative against representative, and even House against Senate. The Supreme Court is structured to clash internally as well, with nine justices sitting atop the judicial pyramid with the recognition that five of them often will disagree with the four others. In contrast, the executive is decidedly unitary: the president is empowered to ensure that those below him in the executive hierarchy implement rather than interfere with his policies.¹⁸⁷ Hence, when the branches end up eschewing dialogue and instead clash with one another over a controversial policy, the executive branch is likely to prevail if it pursues its course fiercely enough, as the executive enters the fray singularly united while facing two branches designed to be internally divided. In turn, judicial behavior intended to be democracy-forcing may turn out to be executive-empowering when the other two branches are divided—an outcome that, depending on the particular executive, can be a very different result, indeed.

As the war against terrorism drags on, perhaps courts will come to question its temporal limits.¹⁸⁸ As the geographic scope of that war swells, perhaps courts will come to assess its spatial boundaries.¹⁸⁹ Thus far, however, courts

185. See Greenhouse, *supra* note 76, at 2 (noting “congressional servility”).

186. See generally KOH, THE NATIONAL SECURITY CONSTITUTION, *supra* note 97.

187. See generally Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314 (2006).

188. Cf. Brief of Petitioners at 59, *Kiyemba v. Obama*, No. 08-1234 (2009) (“[T]he question is presented by seven years in the Guantánamo prison.”). Because the D.C. Circuit’s decision in *Kiyemba* was vacated by the Supreme Court, *Kiyemba v. Obama*, 130 S. Ct. 1235 (2010), then reinstated by the D.C. Circuit, *Kiyemba v. Obama*, 605 F.3d 1046 (D.C. Cir. 2010), this question concerning temporal limits still lacks a definitive answer.

189. Cf. Joint Brief for Petitioners-Appellees at 1-2, *Maqaleh v. Gates*, 605 F.3d 84 (D.C. Cir. 2010) (No. 09-5265) (“Though none of the Petitioners has any connection to Afghanistan, they were unlawfully rendered from third countries to U.S. military custody in Afghanistan.”). In *Maqaleh*, the D.C. Circuit explicitly sought, and failed to identify, a limiting principle that would have been, at least in significant part, geographic. See *Maqaleh v. Gates*, 605 F.3d 84, 95 (D.C. Cir. 2010) (“[T]he court engaged in an extend dialog [sic] with counsel for the petitioners in which we repeatedly sought some limiting principle that would distinguish Bagram from any other military installation. Counsel was able to produce no such distinction.”). As this article went to press, it remained unclear whether the *Maqaleh* petitioners would petition for certiorari from the Supreme Court, leaving the

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have avoided both time and space, instead assessing the permissible scope of today's war based solely on its means. Whether the enduring beneficiary of such judicial minimalism proves to be war-time democracy or the war-time executive remains to be seen.

geographic question without a definitive answer from the nation's highest Court.