

“THE ESSENCE OF A FREE SOCIETY”: THE
EXECUTIVE POWERS LEGACY OF JUSTICE
STEVENS AND THE FUTURE OF FOREIGN
AFFAIRS DEFERENCE

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ABSTRACT—After 9/11, Justice John Paul Stevens insisted the United States maintain its foundational commitment to the rule of law—the very “essence of a free society.” Justice Stevens led the Court’s scrutiny and rejection of early Bush Administration policies regarding the detention and prosecution of suspected terrorists. Since it lost Justice Stevens’s passionate and principled voice in 2008, the Court has not addressed the scope of the President’s military detention authority. This Article considers Justice Stevens’s role in the Court’s altered stance, and also a complementary explanation: the Obama Administration’s improved interpretation and exercise of executive authority. Informed and inspired by Justice Stevens’s jurisprudence, a post-9/11 academic debate explores the deference due the Executive’s statutory and treaty interpretations on foreign affairs matters, appropriately favoring an intermediate measure of foreign affairs deference that provides a meaningful judicial check while respecting the Executive’s constitutional authority and expertise. This Article highlights the Bush Administration’s extraordinarily flawed theory and often secret claims of authority to contravene federal statutes that effectively forfeited its claim to judicial deference. Prevailing narratives that emphasize continuity—between the Bush and Obama policies as well as presidential power aggrandizements—underappreciate the unusual, arguably unique, nature of the Bush approach’s threat to the rule of law. Future judicial review of foreign affairs matters might not be as robust as some hope and others fear. Only the combination of judicial review and continued vigilance from nonjudicial sources can effectively check the Executive during times of war and crisis. The Article concludes by briefly assessing President Obama’s performance on rule-of-law issues that might never face judicial review.

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INTRODUCTION

During his extraordinary career on the U.S. Supreme Court, Justice John Paul Stevens distinguished himself on a wide range of vital issues affecting the nation. His opinions on issues of executive power may be his most enduring legacy. His very first majority opinion, the relatively unknown *Hampton v. Mow Sun Wong*,¹ reviewed the power of an Executive Branch agency to limit certain federal jobs to U.S. citizens. Justice Stevens also wrote for the majority in several landmark executive power cases. *Clinton v. Jones*² allowed a civil lawsuit to proceed against a sitting president for conduct alleged to have occurred before he took office. *Clinton v. City of New York*³ invalidated a federal statute that afforded the President what Congress termed a “line-item veto.” One of the most cited Supreme Court opinions of all time,⁴ *Chevron U.S.A. Inc. v. NRDC*,⁵ articulated standards to govern judicial review of Executive Branch statutory interpretations. For a quarter-century after *Chevron*, as the Court wrestled with its application, Justice Stevens authored influential opinions on issues that clarified *Chevron*’s reach and closely divided the Court.⁶

And then came September 11th. Justice Stevens led the Court in checking executive excesses in counterterrorism efforts following the September 11, 2001 attacks. At a time when the President strongly resisted

¹ 426 U.S. 88 (1976).

² 520 U.S. 681 (1997).

³ 524 U.S. 417 (1998).

⁴ See, e.g., Cass R. Sunstein, *Beyond Marbury: The Executive’s Power to Say What the Law Is*, 115 YALE L.J. 2580, 2580 (2006) (noting that *Chevron* has become the “most cited case in modern public law”).

⁵ 467 U.S. 837 (1984).

⁶ See *infra* notes 157–65 and accompanying text.

checks on terrorism policies from Congress and the courts—claiming broad constitutional authority to ignore such limits—the Supreme Court insisted otherwise. Justice Stevens’s post-9/11 opinions will stand as powerful, historic examples of the United States’ commitment to the rule of law and the judiciary’s role in safeguarding it.

That the Court would provide a meaningful check on unlawful terrorism policies was not preordained. In the months following the 9/11 terrorist attacks, conventional wisdom, supported by precedent, predicted that the Court would afford strong deference to President George W. Bush’s choices.⁷ Foreign affairs, national security, war powers—these all top the list of areas in which the judiciary historically has practiced the greatest restraint and deference in reviewing executive action, albeit inspiring fierce debate and occasionally leading to spectacularly bad results.⁸

Justice Stevens, more than any other Justice, is rightfully credited with building the majorities behind the Court’s willingness to scrutinize and reject early Bush Administration policies regarding the detention and prosecution of those suspected of terrorism—particularly those detained, interrogated, and prosecuted outside of the United States’ civilian system and geographic boundaries in Guantánamo Bay, Cuba. In *Rasul v. Bush*,⁹ Justice Stevens wrote for the Court, which held that the federal habeas corpus statute encompassed the Guantánamo detainees, permitting them to

⁷ See, e.g., William Glaberson, *Government Has Power to Curb Some Freedoms*, N.Y. TIMES, Sept. 19, 2001, at B7 (“[L]egal experts say the courts have effectively ceded to the government vast powers to limit many freedoms when the nation’s security was threatened in the past. . . . [M]any of the new limits may never receive rigorous court review.”). Of course, from the outset, critics argued vehemently against the legality and for judicial review of the early, contested Bush policies. See, e.g., Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259, 1277 (2002) (arguing congressional authorization was required for President Bush’s military commissions).

⁸ The Court’s now-infamous decisions upholding discrimination against Japanese Americans during World War II out of deference to the Executive’s national security judgments stand in sharp contrast to the Court’s post-9/11 rulings and as reminders of the danger of excessive judicial deference. See *Korematsu v. United States*, 323 U.S. 214 (1944) (upholding an “exclusion order” forcing Japanese Americans living in designated military zones to move from their homes to detention camps); *Hirabayashi v. United States*, 320 U.S. 81 (1943) (unanimously upholding a curfew imposed on Japanese Americans in designated military areas). Justice Stevens served as a law clerk in 1947 to Justice Wiley Rutledge, who experienced “anguish” over his role in those cases. Craig Green, *Wiley Rutledge, Executive Detention, and Judicial Conscience at War*, 84 WASH. U. L. REV. 99, 139 n.174 (2006) (citing JOHN M. FERREN, *SALT OF THE EARTH, CONSCIENCE OF THE COURT: THE STORY OF JUSTICE WILEY RUTLEDGE* 245 (2004)). Several commentators have described the extraordinary influences that clerkship experience apparently had on Justice Stevens’s post-9/11 opinions. See, e.g., Green, *supra*, at 114–15 (discussing, among other opinions, the role of Justice Rutledge’s dissent in *In re Yamashita*, 327 U.S. 1, 41 (1946) (Rutledge, J., dissenting)); 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, 507–13 (2006) (discussing the influence of Justice Rutledge’s dissent in *Ahrens v. Clark*, 335 U.S. 188, 193 (1948) (Rutledge, J., dissenting), on which Justice Stevens worked as Justice Rutledge’s law clerk).

⁹ 542 U.S. 466 (2004).

challenge the legality of their detention in federal court. The Court's finding that the rule of law—at least the law of habeas—governed these military detentions thwarted the Bush Administration's efforts to create a detention center beyond the reach of the federal courts and the protections of U.S. law. In Justice Stevens's majority opinion in *Hamdan v. Rumsfeld*,¹⁰ the Court declared unlawful the Bush Administration's system of military commissions. The Court's reasoning also made evident the illegality of the Administration's use of torture and other extreme interrogation policies. In *Hamdi v. Rumsfeld*,¹¹ the Court held that the government could not preventively detain U.S. citizens as "enemy combatants" without providing certain due process protections, including the right to challenge the detention and to have the advice of counsel. Justice Stevens would have gone further in protecting liberty and joined a dissent by Justice Antonin Scalia that found this uncharged, preventive detention of a U.S. citizen unlawful absent a congressional suspension of the writ of habeas corpus.¹²

Justice Stevens insisted on maintaining the United States' foundational commitment to being a nation ruled by law—a government of laws and not of men. His vigorous dissent in *Rumsfeld v. Padilla* objected to the Court's dismissal of the case on jurisdictional grounds and declared that Jose Padilla's lengthy detention without charge threatened the very "essence of a free society": "Even more important than the method of selecting the people's rulers and their successors is the character of the constraints imposed on the Executive by the rule of law."¹³ Among his colleagues, Justice Stevens maintained an extraordinary faith in the ability of the courts—of judges—to exercise the principled judgment necessary to uphold the rule of law and to check the political branches when they stray.

After deciding five military detention cases in five years, the Supreme Court has not since 2008 decided the merits of another case that involves the rights of Guantánamo detainees or otherwise defines the scope of the President's military detention authority.¹⁴ This lack of Court activity was

¹⁰ 548 U.S. 557 (2006).

¹¹ 542 U.S. 507 (2004).

¹² See *id.* at 554 (Scalia, J., dissenting).

¹³ 542 U.S. 426, 455, 465 (2004) (Stevens, J., dissenting).

¹⁴ The Court held in 2008 that Congress had acted in violation of the Constitution's Suspension Clause by depriving Guantánamo detainees of habeas review without providing an adequate alternative. See *Boumediene v. Bush*, 553 U.S. 723 (2008). The Court granted certiorari in two detainee cases after *Boumediene*, but did not address the scope of military detention authority in either. In *al-Marri v. Spagone*, 555 U.S. 1220 (2009) (mem.), the Court granted certiorari to vacate as moot the Fourth Circuit's en banc decision upholding the military detention of a noncitizen arrested within the United States after the government transferred the detainee to civilian custody for prosecution by criminal indictment. And in *Kiyemba v. Obama*, 130 S. Ct. 1235 (2010) (per curiam), the Court originally granted certiorari to answer the question "whether a federal court exercising habeas jurisdiction has the power to order the release of prisoners held at Guantánamo Bay 'where the Executive detention is indefinite and without authorization in law, and release into the continental United States is the only possible effective remedy.'" *Id.* at 1235 (quoting Petition for Writ of Certiorari at i, *Kiyemba*, 130 S. Ct. 1235 (No. 08-

particularly remarkable during the year following Justice Stevens’s 2010 retirement, when the Court denied certiorari in six Guantánamo cases from the D.C. Circuit.¹⁵ Also striking is the D.C. Circuit’s treatment of detainees in these and other cases: not a single detainee has won a clear victory before the D.C. Circuit and not one has attained a ruling for his release.¹⁶ Critics have attacked the court’s reasoning in some of these cases (and even more, the reasoning in some of the separate concurrences and dissents) as not faithful to the Supreme Court’s detainee rulings.¹⁷

In her June 2011 end-of-Term “Scorecard,” longtime *New York Times* Supreme Court reporter Linda Greenhouse described the Court’s “voice on Guantánamo” as “missing in action”;¹⁸ elsewhere she concluded that the Court might be “finally finished with Guantánamo,”¹⁹ possibly due to

1234), 2009 WL 934097). The Court ultimately declined to reach the merits, however, because by the time the case reached the Court “each of the detainees . . . ha[d] received at least one offer of resettlement in another country,” and the Court found that this “change in the underlying facts” mooted the question presented. *Id.* The Supreme Court therefore vacated and remanded to the D.C. Circuit, *id.*, which effectively reinstated its original ruling—a decision that some legal scholars have criticized as not faithful to the Supreme Court’s due process analysis in *Boumediene*. See Stephen I. Vladeck, *The D.C. Circuit After Boumediene*, 41 SETON HALL L. REV. 1451, 1477–78 (2011) (“*Kiyemba I* reached its due process holding by effectively ignoring *Boumediene* . . .”). When a second petition for certiorari in the case reached the Court, Justice Elena Kagan recused herself and the Court denied certiorari. See *Kiyemba v. Obama*, 131 S. Ct. 1631 (2011). Four of the Justices—Stephen Breyer, Anthony Kennedy, Ruth Bader Ginsburg, and Sonia Sotomayor—filed an opinion respecting the denial of certiorari that gives rise to the question of whether the Court would have granted certiorari the second time had Justice Stevens not retired.

¹⁵ See *Al-Adahi v. Obama*, 613 F.3d 1102 (D.C. Cir. 2010), *cert. denied*, 131 S. Ct. 1001 (2011); *Al Odah v. United States*, 611 F.3d 8 (D.C. Cir. 2010), *cert. denied*, 131 S. Ct. 1812 (2011); *Awad v. Obama*, 608 F.3d 1 (D.C. Cir. 2010), *cert. denied*, 131 S. Ct. 1814 (2011); *Kiyemba v. Obama*, 605 F.3d 1046 (D.C. Cir. 2010), *cert. denied*, 131 S. Ct. 1631 (2011); *Ameziane v. Obama*, 620 F.3d 1 (D.C. Cir. 2010), *cert. denied*, 131 S. Ct. 1673 (2011); *Al-Bihani v. Obama*, 590 F.3d 866 (D.C. Cir. 2010), *cert. denied*, 131 S. Ct. 1814 (2011).

¹⁶ See, e.g., Peter Finn & Del Quentin Wilber, *On Appeals, Detainees Have Never Won*, WASH. POST, July 6, 2011, at A1. Notably, in four of the five cases in which the Court reached the merits and rejected the Bush Administration’s policies, the Court reversed the courts of appeals, which were more inclined toward the Executive. See *infra* Part II.

¹⁷ The *New York Times*, for example, editorialized against the D.C. Circuit’s handling of detainees’ claims and in favor of Supreme Court review in 2011: “The appellate court has all but nullified that view of judicial power and responsibility backed by Justice Kennedy and the court majority [in *Boumediene*]. The Supreme Court should remind the appellate court which one leads the federal judicial system and which has a solemn duty to follow.” Editorial, *A Right Without a Remedy*, N.Y. TIMES, Mar. 1, 2011, at A26. In the year following, the D.C. Circuit’s criticism, and arguable defiance, has intensified. See *infra* note 23 and Part III.C. For a thoughtful and thorough review of the D.C. Circuit’s post-*Boumediene* decisions, see Vladeck, *supra* note 14.

¹⁸ Linda Greenhouse, *A Supreme Court Scorecard*, N.Y. TIMES OPINIONATOR (July 13, 2011, 9:30 PM), <http://opinionator.blogs.nytimes.com/2011/07/13/a-supreme-court-scorecard>.

¹⁹ Linda Greenhouse, *Gitmo Fatigue at the Supreme Court*, N.Y. TIMES OPINIONATOR (Apr. 6, 2011, 8:45 PM), <http://opinionator.blogs.nytimes.com/2011/04/06/gitmo-fatigue-at-the-supreme-court>.

“Gitmo [f]atigue.”²⁰ Among other theories, veteran Court observer Lyle Denniston suggested that “the Court no longer has as strong a champion of detainees’ legal claims now that Justice John Paul Stevens has retired.”²¹

Undoubtedly, Justice Stevens championed detainees’ rights and the rule of law while on the Court, and the loss of his passionate and principled voice inevitably altered internal Court dynamics on detainee issues. This Article will review his vital role and also consider another, complementary explanation for the Court’s altered stance: in light of changes in the government’s detainee policies since President Barack Obama took office, the Court may have perceived less of a need to provide a check on executive power and therefore reverted to a stance more typical of judicial review on matters of foreign affairs. This explanation runs counter to a prevailing narrative, from the ideological right and left, that emphasizes continuity between the Bush and Obama Administrations’ counterterrorism policies, as well as general presidential aggrandizement of power. Notwithstanding understandable disappointment from some quarters with the degree of change, executive policy in fact has changed markedly under President Obama, particularly when evaluated in respects relevant to judicial review and executive legal compliance. The various influences behind the Supreme Court’s decisions not to review the merits of additional detainee cases since 2008 almost certainly include substantial improvements in the Executive’s interpretation and exercise of its legal authorities—changes prompted in part by the Court’s earlier detainee decisions.²² If the Court decides to reengage, the reason might stem less from any perceived ongoing executive abuse and more from the D.C. Circuit’s sharp criticism of the Supreme Court’s rulings recognizing detainees’ rights.²³

²⁰ *Id.* After noting that the Court’s decisions all “required the expenditure of substantial amounts of institutional capital,” Greenhouse concluded: “My sense is that the well, at least for now, has run dry. The court was there when we needed it, for which, as a citizen, I am grateful. If it now has nothing constructive to say, it has earned its rest.” *Id.*

²¹ Lyle Denniston, *D.C. Circuit in Control on Detainees*, SCOTUSBLOG (Apr. 4, 2011, 9:36 AM), <http://www.scotusblog.com/2011/04/dc-circuit-in-control-on-detainees>.

²² Citation of detainees’ zero-win record in the D.C. Circuit without more may be misleading. It does not account for either detainee victories in the district court that the government did not appeal, or government decisions to release and transfer detainees voluntarily. For a summary of the status of the Guantánamo habeas cases and a discussion of the complications of compiling a win-loss record, see Benjamin Wittes, Robert M. Chesney & Larkin Reynolds, *The Emerging Law of Detention 2.0: The Guantánamo Habeas Cases as Lawmaking*, BROOKINGS INSTITUTION 7–11 (Apr. 2011), http://www.brookings.edu/~media/Files/rc/reports/2011/05_guantanamo_wittes/05_guantanamo_wittes.pdf. This valuable report, for example, cites seventeen cases in which detention was deemed or conceded unlawful and fourteen cases in which detainees prevailed where either the government did not appeal or the initial appeal was later dismissed. *Id.* at 10.

²³ Shortly before this Article went to press, the Supreme Court denied certiorari in seven Guantánamo cases, including one in which a panel of the D.C. Circuit, in the course of holding against a detainee, had criticized the Supreme Court in exceptionally harsh and provocative terms:

Part I of this Article examines the Court’s rulings, and the Bush Administration’s arguments to the Court, in each of the 9/11 detainee cases. One useful lens for evaluation focuses on the appropriate role of the courts vis-à-vis the Executive on matters of “foreign affairs”—a phrase this Article uses to encompass war powers and national security. The review therefore highlights the Administration’s arguments for judicial restraint and deference, which the Court overwhelmingly rejected. Immediately apparent are vital roles played by two Justices: Justice Stevens, as the chief proponent of vigorous judicial review, and Justice Anthony Kennedy, the more hesitant Justice in the middle of the Court, who ultimately cast the deciding vote to play that strong judicial role.

In striking down various counterterrorism policies, the Court rejected the Bush Administration’s legal interpretations of statutes and treaties and, less directly, its interpretations of its own constitutional war powers. This ignited a vibrant debate among legal academics and other commentators over the degree of deference due the Executive’s legal interpretations on foreign affairs matters, which is the subject of Part II. Justice Stevens’s refusal to defer to the Executive’s views in the detainee cases features prominently, as does his approach to deference on domestic issues in *Chevron* and its progeny. Informed and inspired by Justice Stevens’s jurisprudence, the post-9/11 literature makes great strides toward developing an appropriately balanced approach to foreign affairs deference—one that checks executive abuses while respecting the Executive’s constitutional authorities and expertise on foreign affairs matters.

Part III seeks to supplement the otherwise-rich deference debate by highlighting one relatively unexamined aspect: the extraordinarily flawed nature of the theory of executive authority and other legal interpretations that informed the Bush Administration’s early counterterrorism policies. The reasons for the Court’s aggressive review undoubtedly are multiple and include a recognition of the judiciary’s special role in protecting individual liberty—as painfully underscored by *Korematsu*’s lesson in the risks of

As the dissenters warned and as the amount of ink spilled in this single case attests, *Boumediene*’s airy suppositions have caused great difficulty for the Executive and the courts. Luckily, this is a shrinking category of cases. The ranks of Guantanamo detainees will not be replenished. *Boumediene* fundamentally altered the calculus of war, guaranteeing that the benefit of intelligence that might be gained—even from high-value detainees—is outweighed by the systemic cost of defending detention decisions. While the court in *Boumediene* expressed sensitivity to such concerns, it did not find them “dispositive.” *Boumediene*’s logic is compelling: take no prisoners. Point taken.

Latif v. Obama, 666 F.3d 746, 764 (D.C. Cir. 2011) (citations omitted), *reissued*, 677 F.3d 1175 (D.C. Cir. 2012), *cert. denied*, 80 U.S.L.W. 3510, 80 U.S.L.W. 3676 (U.S. June 11, 2012) (No. 11-1027). *The New York Times* editorialized against the Court’s denials of certiorari: “[I]t is devastatingly clear that the Roberts court has no interest in ensuring meaningful habeas review for foreign prisoners.” Editorial, *The Court Retreats on Habeas*, N.Y. TIMES, June 14, 2012, at A34.

excessive judicial deference to the Executive.²⁴ Beyond the protection of detainees' rights, one likely principal influence behind the Court's refusal to defer was what the Court knew to be the extreme and deficient nature of some of the Bush Administration's secret legal interpretations: most notorious, that waterboarding was not torture and thus not a crime under the federal criminal anti-torture statute—and that, in any event, the President could disregard federal laws that he believed constrained his war powers.

The popular understanding of the Bush Administration's counterterrorism policies underappreciates the unusual, arguably unique, nature of the threat they posed to the rule of law and constitutional structure. Other presidents have taken legally dubious actions based on excessive views of their substantive war powers. Wartime Presidents Abraham Lincoln and Franklin D. Roosevelt come to mind; indeed, some of President Bush's advocates have compared him favorably to Presidents Lincoln and Roosevelt. Their actions, however, are fundamentally distinguishable: Presidents Lincoln and Roosevelt acted openly, engaged in public debate about the legality of their actions, and, most critically, acknowledged Congress's ultimate authority to resolve the particular matters in dispute. President Bush relied on deeply flawed and often secret legal interpretations to make erroneous claims of preclusive constitutional war powers—that is, authority to act in direct violation of statutes enacted by Congress or similar laws Congress might enact in the future.²⁵ In the two most significant examples, detainee interrogations and domestic surveillance, the Bush Administration acted in secret for more than a year (until the programs leaked), in effect depriving Congress of the ability even to consider executive oversight or amendment of the relevant statute. President Bush and others in his Administration bore awesome responsibilities and undoubtedly were motivated by the desire to protect the nation from terrorism. Their choice of methods, however, at times reflected an explicit ideological preference to act unilaterally in order to expand presidential war powers relative to Congress, and create a more powerful presidency for future Administrations. Part III reviews what was publicly known when the Court issued its 9/11 detainee rulings about the Bush Administration's deviations from longstanding executive practices, and posits that—through failures of legal interpretation and execution of a constitutional dimension—the Bush Administration effectively forfeited its claim to judicial deference.

²⁴ See *Korematsu v. United States*, 323 U.S. 214 (1944); see also *supra* note 8.

²⁵ See David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689 (2008) [hereinafter Barron & Lederman, *Commander in Chief—Framing the Problem*]; David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, 121 HARV. L. REV. 941 (2008) [hereinafter Barron & Lederman, *Commander in Chief—History*] (providing a remarkable survey of presidents' claims of preclusive war powers, from George Washington to George W. Bush, and establishing the exceptional nature of George W. Bush's claims).

Judicial review, although vital, cannot singlehandedly ensure the legality of executive action. Essential nonjudicial constraints may be undermined by overconfidence in the Court’s willingness to scrutinize executive action and an overly cynical view of presidents’ willingness to violate legal constraints on war powers. A proper appreciation of the atypical nature of the Bush Administration’s claims of preclusive authority suggests that future judicial review of foreign affairs matters might not be as robust as some hope and others fear. Only the combined effects of judicial review and continued vigilance from nonjudicial sources—Congress, the press, the American public, the international community, and even sources within the Executive Branch—can effectively keep the Executive in check during times of war and national crisis. In that spirit, Part III concludes by moving beyond the courts and foreign affairs deference to a brief assessment of President Obama’s performance on rule-of-law issues that might never be the subject of plenary judicial review.

I. THE SUPREME COURT’S 9/11 DETAINEE CASES

In adjudicating challenges to detainee policies, the federal courts repeatedly confront a difficult question that is as old as the Constitution: What role should the judiciary play in reviewing executive action in the realm of foreign affairs? Faced with challenges to its claims of power to detain, interrogate, and try before military tribunals those it suspected of terrorism, the Bush Administration invoked the full range of available doctrines and practices the Court long has relied upon to constrain judicial review: political question, mootness, ripeness, and abstention doctrines; state secrets and other privileges; discretionary Supreme Court review; and deferential standards of review for the Executive’s legal interpretations, factual determinations, and actions. Although distinct in many respects, these various doctrines reflect similar considerations regarding constitutional structure and the three branches’ authorities and relative competencies—considerations that often lead courts to afford the Executive some measure of deference. One common approach across the doctrines and practices weighs judicial protection of individual liberties and the rule of law against respect for the Executive’s superior political accountability and functional abilities on matters of foreign affairs.²⁶

In the decades before September 11, 2001, the Supreme Court emphasized that on foreign affairs matters the balance specially tips against vigorous judicial review.²⁷ The Court sometimes described the deference due the Executive in very strong or even absolute terms, along the lines of often quoted dicta from the 1936 case *United States v. Curtiss-Wright*

²⁶ See *infra* Part II.

²⁷ See, e.g., Curtis A. Bradley, *Chevron Deference and Foreign Affairs*, 86 VA. L. REV. 649, 663 (2000) (“At least when added together, the various categories of deference amount to a very deferential approach by United States courts in the foreign affairs area.”).

Export Corp., describing “the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations.”²⁸ Writing just a year before 9/11, Professor Curtis Bradley usefully characterized the state of debate on judicial deference due the Executive on issues of foreign affairs.²⁹ Bradley described the works of academics who aligned themselves at the other end of the deference spectrum, far from *Curtiss-Wright*, where they opposed the prevailing notions of foreign affairs deference, including on the ground that it subverted the rule of law by largely immunizing foreign affairs from judicial review.³⁰ Prominent among critics at that time, Professor Harold Koh noted that the “lavish description” of executive authority in *Curtiss-Wright* led to its excessive citation by government attorneys, who knew it as the “*Curtiss-Wright*, so I’m right” cite.³¹

Given this state of affairs, it is not surprising that the Bush Administration generally took a strong *Curtiss-Wright*-like approach in defending its detainee policies, resisting judicial review and arguing for strong deference. In each of the Court’s five detainee cases, the Department of Justice (DOJ) first urged the Court not to reach the merits of the detainees’ claims and then argued in the alternative that, to defeat those claims, the Court should defer to the Executive’s views of its constitutional authorities and its interpretation and application of statutory and international law. DOJ went even further and defied practice, especially in its early years, by typically centering its defense of Administration policies on a sweeping view of the President’s constitutional authorities, and only secondarily addressing relevant statutes that conferred broad executive powers.³²

Also surprising was the Supreme Court’s response, in particular its rejection of the Bush Administration’s claims with little deference or restraint—or even express consideration of whether deference was due the Executive.³³ To the extent the Court recognized executive power, it looked

²⁸ 299 U.S. 304, 320 (1936).

²⁹ Bradley described five categories of deference: political question deference, executive branch lawmaking deference, international facts deference, persuasiveness deference, and *Chevron* deference. Regarding this last category, Bradley noted that courts generally did not use the label “*Chevron* deference” for foreign affairs and the principal focus of his article was to encourage its more deliberate application. Bradley, *supra* note 27, at 659–63.

³⁰ *See id.* at 650–51, 665–67.

³¹ HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION* 94 (1990).

³² Far more than in its briefs, the legal analysis in opinions of the Bush Administration’s Office of Legal Counsel (OLC), particularly in the Administration’s first few years, emphasized the President’s unilateral and preclusive war powers to initiate war and subject suspected terrorists to military detention and trial, warrantless surveillance, and extreme interrogations (even to the point of torture), unconstrained by applicable federal statutes. *See infra* Part III.A.

³³ Justice Stevens dissented from the one ruling in favor of the DOJ’s request to dismiss the case on jurisdictional grounds. *See Rumsfeld v. Padilla*, 542 U.S. 426, 455 (2004) (Stevens, J., dissenting).

to statutory sources and avoided grounding authority in the President’s constitutional war powers, thereby rejecting the Administration’s preferred analysis. The Court looked especially to the September 18, 2001 Authorization for Use of Military Force (AUMF) and its meaning in light of other acts of Congress.³⁴ A brief review of each of the Court’s five cases, with a focus on the Bush Administration’s arguments for deference and against judicial review, also reveals special roles played by two Justices: Justice Stevens’s leadership driving the Court’s willingness to take a hard look and invalidate the challenged policies, and Justice Kennedy’s critical and familiar role as the Justice in the middle of the Court.

A. Hamdi v. Rumsfeld

The Court issued opinions in the first three cases on a single day: June 28, 2004. In *Hamdi v. Rumsfeld*,³⁵ the Court rejected the Bush Administration’s claims of constitutional and statutory authority to detain a U.S. citizen indefinitely as an “enemy combatant” without affording him access to counsel or an opportunity to challenge his detention.³⁶ Six Justices wrote opinions, and none commanded a majority; shifting majorities resolved various issues. Most central, five Justices agreed that the AUMF conferred some military detention authority,³⁷ but eight Justices (all but Justice Clarence Thomas) found that the Bush Administration’s policy of unilateral, unreviewable detention without counsel violated constitutional or statutory protections.³⁸

The Bush Administration’s DOJ urged the Court to follow the Court of Appeals for the Fourth Circuit in “[a]pplying an appropriately deferential standard of review”³⁹ that reflected “[r]espect for separation of powers and the limited institutional capabilities of courts in matters of military

³⁴ With the AUMF, Congress authorized the President to “use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks . . . in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.” Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001).

³⁵ 542 U.S. 507 (2004).

³⁶ *Id.* at 527, 533 (O’Connor, J., plurality opinion).

³⁷ *Id.* at 516–17; *id.* at 587 (Thomas, J., dissenting).

³⁸ *See id.* at 532–34, 535–39 (O’Connor, J., plurality opinion); *id.* at 553–54 (Souter, J., concurring in the judgment); *id.* at 573 (Scalia, J., dissenting).

³⁹ Brief for the Respondents at 10, *Hamdi*, 542 U.S. 507 (No. 03-6696), 2004 WL 724020, at *10. The Fourth Circuit reversed the district court because, as the plurality described, it found that “separation of powers principles prohibited a federal court from ‘delv[ing] further into Hamdi’s status and capture.’” *Hamdi*, 542 U.S. at 515 (alteration in original) (quoting *Hamdi v. Rumsfeld*, 316 F.3d 450, 473 (4th Cir. 2003)); *see also id.* at 514–15 (“Article III contains nothing analogous to the specific powers of war so carefully enumerated in Articles I and II.” (quoting *Hamdi*, 316 F.3d at 463) (internal quotation marks omitted)).

decisionmaking in connection with ongoing conflict.”⁴⁰ As it generally would in future detainee cases before the Court, DOJ cited for support, first, the President’s constitutional war powers and precedent calling for strong deference to the Executive Branch in light of those authorities,⁴¹ and second, authority under the AUMF and other statutes, which it argued must be interpreted in light of the President’s broad constitutional authorities.⁴² It argued for deference also to the Executive’s interpretation of international law.⁴³ Finally, on an issue developed further in *Rumsfeld v. Padilla*,⁴⁴ DOJ defended the policy of denying counsel to detainees until “the military has determined that such access would not interfere with ongoing intelligence-gathering,” but argued that the Court need not reach that issue because the military by that time had afforded Hamdi counsel.⁴⁵ Only Justice Thomas, citing the President’s Article II powers and superior expertise, endorsed the call for absolute deference to the President’s determination that the petitioner was subject to military detention.⁴⁶

In the controlling plurality opinion (which Chief Justice William Rehnquist and Justices Anthony Kennedy and Stephen Breyer joined), Justice Sandra Day O’Connor found the detention violated the Fifth Amendment’s guarantee of due process.⁴⁷ Relying on the international law of war to interpret the AUMF, the plurality found the AUMF gave the government limited military detention authority, so the Court did not reach

⁴⁰ *Hamdi*, 542 U.S. at 527 (alteration in original) (quoting Brief for the Respondents, *supra* note 39, at 26) (internal quotation marks omitted).

⁴¹ See, e.g., Brief for the Respondents, *supra* note 39, at 13–18, 25–27; see also *id.* at 25 (“As this Court has observed, ‘courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs.’” (quoting *Dep’t of the Navy v. Egan*, 484 U.S. 518, 530 (1988)); *id.* (“Matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention.” (quoting *Haig v. Agee*, 453 U.S. 280, 292 (1981)) (internal quotation marks omitted); *id.* at 34 (warning against “second-guessing in a federal courtroom far removed from the battlefield”).

⁴² *Id.* at 19–22; see also *id.* at 22 (“The canon of constitutional avoidance counsels against interpreting Section 4001(a) [of the Non-Detention Act] in a manner that would interfere with the well-established authority of the Commander in Chief to detain enemy combatants in wartime.”).

⁴³ *Id.* at 24 n.9 (“The determination whether captured enemy combatants are entitled to POW [prisoner of war] privileges under the GPW [Geneva Convention on Prisoners of War] is a quintessential matter that the Constitution (not to mention the GPW) leaves to the political branches and, in particular, the President.”).

⁴⁴ 542 U.S. 426 (2004) (plurality opinion).

⁴⁵ Brief for the Respondents, *supra* note 39, at 43–45.

⁴⁶ *Hamdi v. Rumsfeld*, 542 U.S. 507, 588 (2004) (Thomas, J., dissenting) (“[T]he President’s action here is ‘supported by the strongest of presumptions and the widest latitude of judicial interpretation.’” (quoting *Dames & Moore v. Regan*, 453 U.S. 654, 668 (1981))); see Brief for the Respondents, *supra* note 39, at 25 (calling for the “utmost deference” to the President).

⁴⁷ *Hamdi*, 542 U.S. at 532–33 (plurality opinion).

the President’s claim of constitutional authority.⁴⁸ Although the process due could reflect military exigencies, the government had afforded Hamdi no process at all, and the plurality found that some process was constitutionally required (including access to counsel).⁴⁹ Precedent supported not only the general respect owed the President on military matters,⁵⁰ but also the competing commitment to individual liberty and the reality that during times of crisis and emergency the Executive Branch faces its “greatest temptation to dispense with fundamental constitutional guarantees.”⁵¹ The plurality flatly rejected DOJ’s argument that separation of powers principles required extreme deference; instead, it declared that the Constitution “envisions a role for all three branches when individual liberties are at stake” and—most memorably—that “a state of war is not a blank check for the President.”⁵²

Justice Stevens joined a dissent by Justice Scalia that would have rejected the Bush Administration’s claims even more completely on a ground that left no room for deference.⁵³ They instead would have held Hamdi’s detention unconstitutional on the ground that Congress had not suspended the writ of habeas corpus, which they found a necessary prerequisite to the Executive’s ability to hold an American indefinitely without charge: “The very core of liberty secured by our Anglo-Saxon system of separated powers has been freedom from indefinite imprisonment at the will of the Executive.”⁵⁴ Justice Scalia’s dissent emphasized its very limited scope, noting only two detainees at that time were U.S. citizens detained in the United States.⁵⁵ This unusual pairing of Justices was not repeated in any other detainee case; in the remaining four, including the other two issued that very day, Justices Stevens and Scalia fell on opposite sides.

⁴⁸ *Id.* at 516–17. The plurality also found the AUMF satisfied the requirement of section 4001(a) of the Non-Detention Act, which prohibited detention of a U.S. citizen “except pursuant to an Act of Congress.” *Id.* at 517 (quoting 18 U.S.C. § 4001(a) (2000)) (internal quotation mark omitted).

⁴⁹ *Id.* at 533–35, 539.

⁵⁰ *Id.* at 531 (noting that *Department of the Navy v. Egan*, 484 U.S. 518, 530 (1988), recognized “the reluctance of the courts ‘to intrude upon the authority of the Executive in military and national security affairs’”).

⁵¹ *Id.* at 532 (quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 165 (1963)); *see also id.* at 530 (“[H]istory and common sense teach us that an unchecked system of detention carries the potential to become a means for oppression and abuse of others who do not present that sort of threat.”).

⁵² *Id.* at 536.

⁵³ *Id.* at 577–78 (Scalia, J., dissenting). Justice Souter, joined by Justice Ginsburg, would have found Hamdi’s detention forbidden by § 4001(a) of the Non-Detention Act, but largely agreed with the plurality on the due process question, concerning the process that would be due if the detention were authorized. *Id.* at 553–54 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment).

⁵⁴ *Id.* at 554–55 (Scalia, J., dissenting).

⁵⁵ *Id.* at 577.

B. *Rasul v. Bush*

In *Rasul v. Bush*,⁵⁶ Justice Stevens wrote for five Justices, and Justice Scalia dissented for three.⁵⁷ Justice Kennedy concurred in the judgment.⁵⁸ Hamdi was a U.S. citizen held in Virginia, but Rasul and his fellow petitioners were noncitizens held at Guantánamo Bay—brought there, in fact, for the purpose of preventing their access to federal courts.⁵⁹

DOJ argued, and Justice Scalia in dissent agreed, that the federal courts lacked jurisdiction over habeas claims by Guantánamo detainees.⁶⁰ It bolstered this interpretation of the federal habeas statute with references to the grave constitutional concerns and military harm that would arise if the Court were to allow the detainees access to judicial protection.⁶¹ DOJ's brief filed in *Rumsfeld v. Padilla* suggested that such harm included interference with the interrogation of detainees, which would follow from access to courts and lawyers.⁶² Although DOJ argued that Congress was better situated than the Court to consider the issue,⁶³ it also suggested that Congress might be constitutionally barred from extending habeas jurisdiction to Guantánamo detainees.⁶⁴ DOJ also asserted that the President had “conclusively determined” that Guantánamo detainees were not entitled to prisoner-of-war (POW) status under the Geneva Conventions.⁶⁵ In the alternative, it suggested that the Court should decline to exercise jurisdiction based on the political question doctrine⁶⁶ and sought to reassure the Court that its review was unnecessary: the Executive Branch voluntarily provided protections, and “diplomatic and political scrutiny” provided external checks.⁶⁷ Counsel for Rasul agreed that some judicial deference to the Executive was appropriate, but noted that the Administration sought not

⁵⁶ 542 U.S. 466 (2004).

⁵⁷ *Id.* at 488 (Scalia, J., dissenting).

⁵⁸ *Id.* at 485 (Kennedy, J., concurring in the judgment).

⁵⁹ *Id.* at 470–71 (majority opinion); see Memorandum from Patrick F. Philbin & John C. Yoo, Deputy Assistant Attorneys Gen., Office of Legal Counsel, to William J. Haynes, II, Gen. Counsel, Dep't of Def. (Dec. 28, 2001), in *THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB* 29, 29 (Karen J. Greenberg & Joshua L. Dratel eds., 2005) [hereinafter *THE TORTURE PAPERS*].

⁶⁰ Brief for the Respondents at 10–11, *Rasul*, 542 U.S. 466 (Nos. 03-334, 03-343), 2004 WL 425739, at *10–11.

⁶¹ See *id.* at 41–43; *id.* at 42 (arguing that if the Court were to exercise jurisdiction it would “directly interfere with the Executive’s conduct of the military campaign against al Qaeda and its supporters”).

⁶² Brief for the Petitioner at 29, *Rumsfeld v. Padilla*, 542 U.S. 426 (2004) (No. 03-1027), 2004 WL 542777, at *29.

⁶³ Brief for the Respondents, *supra* note 60, at 45–46.

⁶⁴ *Id.* at 45 (“To be sure, the Constitution would limit the ability of Congress to extend federal court jurisdiction into areas that interfered with the core executive responsibilities.”).

⁶⁵ *Id.* at 36.

⁶⁶ *Id.* at 37 & n.19.

⁶⁷ *Id.* at 47–50.

merely deference but absolute and exclusive executive control over the detainees.⁶⁸

Justice Stevens’s dense and technical majority opinion in *Rasul* lacked the kind of discussion found in *Hamdi*’s various opinions of the Judiciary’s role in safeguarding liberty and how best to weigh competing constitutional values. Focusing instead on dissecting complicated Court precedent—about which he had particular knowledge from his time as Justice Wiley Rutledge’s law clerk⁶⁹—Justice Stevens held that the habeas statute afforded federal courts jurisdiction over the detainees in part because of the United States’ exclusive jurisdiction and control over the U.S. military base at Guantánamo Bay.⁷⁰ The Court implicitly rejected, but did not expressly address, DOJ’s argument that the Court should accept the Department’s interpretation in order to avoid “directly interfer[ing] with the Executive’s conduct of the military campaign against al Qaeda and its supporters.”⁷¹ In a concurring opinion, Justice Kennedy expressed greater concern than the majority with the deference due the Executive, but agreed that on balance—and in light of Guantánamo’s special status—the competing values of respect for the President’s military authority and the Court’s role in protecting against unlawful detention weighed in favor of habeas review.⁷²

C. *Rumsfeld v. Padilla*

The Bush Administration’s only victory among the Court’s five detainee cases came in convincing the Court not to reach the merits in *Rumsfeld v. Padilla*,⁷³ the third ruling issued on June 28, 2004. The government had seized Jose Padilla, a U.S. citizen, in Chicago on suspicion of conspiring to detonate a dirty bomb. After holding him for a month in New York, where he was allowed access to counsel, President Bush declared Padilla an “enemy combatant” and transferred him to military custody—specifically, a military brig in South Carolina where he was held for three and a half years, during most of which he was held in solitary

⁶⁸ Brief for Petitioners at 11, *Rasul v. Bush*, 542 U.S. 466 (2004) (Nos. 03-334, 03-343), 2004 WL 96764, at *11 (“The courts should certainly pay considerable deference to the executive in times of crisis, and they have the wisdom and the experience to do so. But the government here is not asking for deference. It contends that the courts do not even have the authority to defer; that they lack jurisdiction The courts’ role may be limited in times of crisis, but they must have a role to play.”).

⁶⁹ See *Thai*, *supra* note 8 (describing the import of a dissent issued by Justice Rutledge while Justice Stevens served as his law clerk).

⁷⁰ *Rasul*, 542 U.S. at 580–84.

⁷¹ Brief for the Respondents, *supra* note 60, at 42. The Court also signaled its view that the detainees would prevail on the merits of their claims if their allegations were true. See *Rasul*, 542 U.S. at 483 n.15.

⁷² *Rasul*, 542 U.S. at 487–88 (Kennedy, J., concurring).

⁷³ 542 U.S. 426 (2004).

confinement, interrogated, and denied access to counsel.⁷⁴ Chief Justice Rehnquist, writing for the five-Justice majority (including Justice Kennedy), agreed with DOJ that Padilla erred by filing his habeas petition in the Southern District of New York rather than the District of South Carolina, and dismissed the suit.⁷⁵

In its alternative argument on the merits, which the Court did not address, DOJ again relied on the President's detention authority that flowed from his constitutional authority as Commander in Chief and his statutory authority under the AUMF.⁷⁶ It argued that the Court could review the President's judgments "only in exceptionally narrow situations, if at all"⁷⁷ and emphasized that the President's judgments resulted from "a careful, thorough, and deliberative process consisting of several layers of review."⁷⁸ Counsel for the detainees responded that any argument for deference due the Executive with regard to "enemy combatants" detained on the battlefield was absent because Padilla was arrested in the United States.⁷⁹

Relevant to *Hamdi* and *Rasul*, as well as *Padilla*, the Administration expounded upon why it believed its policy of military detention without access to counsel was essential to effective military operations and national security. It defended military detention not only for the traditional purpose of preventing a return to the battlefield, which the Court recognized as legitimate in *Hamdi*,⁸⁰ but also for the far more controversial purpose of facilitating interrogation by creating a sense of hopelessness and dependency on the interrogators. To explain its perceived need to deny counsel to Padilla, the government submitted a sworn declaration of Vice Admiral Lowell E. Jacoby, Director of the Defense Intelligence Agency, which stated:

Only after such time as Padilla has perceived that help is not on the way can the United States reasonably expect to obtain all possible intelligence information from Padilla. . . . Providing him access to counsel now . . . would break—probably irreparably—the sense of dependency and trust that the

⁷⁴ See Abby Goodnough & Scott Shane, *Padilla Is Guilty on All Charges in Terror Trial*, N.Y. TIMES, Aug. 17, 2007, at A1 (noting Padilla's three-and-a-half-year detention at a military brig); Deborah Sontag, *A Videotape Offers a Window into a Terror Suspect's Isolation*, N.Y. TIMES, Dec. 4, 2006, at A1 (noting Padilla was denied counsel for twenty-one of those months). Former Attorney General Michael Mukasey, then the chief judge of the District Court for the Southern District of New York, ultimately rebuffed DOJ and granted Padilla access to counsel. Philip Shenon & Benjamin Weiser, *Washington Outsider with Many Sides*, N.Y. TIMES, Sept. 18, 2007, at A1.

⁷⁵ *Padilla*, 542 U.S. at 442–47.

⁷⁶ Brief for the Petitioner, *supra* note 62, at 43–44.

⁷⁷ *Id.* at 43.

⁷⁸ *Id.* at 6.

⁷⁹ See Brief of Respondent at 43, *Padilla*, 542 U.S. 426 (No. 03-1027), 2004 WL 812830, at *43 ("Any deference to executive judgment that might be appropriate in battlefield determinations is wholly absent here.").

⁸⁰ See *Hamdi v. Rumsfeld*, 542 U.S. 507, 519 (2004) (plurality opinion).

interrogators are attempting to create.⁸¹

The tone of Justice Stevens’s dissent for four Justices in *Padilla* differs strikingly from his majority opinion in *Rasul*. Freed of the need to achieve a majority, Justice Stevens wrote expansively and with passion about the Judiciary’s essential role in constraining the Executive in order to preserve “a free society,” even in the most challenging of circumstances.⁸² He decried detention without counsel for interrogation purposes as reminiscent of the Star Chamber and unlawful regardless of information procured.⁸³ His stirring opinion merits quotation at length:

At stake in this case is nothing less than *the essence of a free society*. Even more important than the method of selecting the people’s rulers and their successors is the character of the constraints imposed on the Executive by the rule of law. Unconstrained executive detention for the purpose of investigating and preventing subversive activity is the hallmark of the Star Chamber. Access to counsel for the purpose of protecting the citizen from official mistakes and mistreatment is the hallmark of due process.

Executive detention of subversive citizens, like detention of enemy soldiers to keep them off the battlefield, may sometimes be justified to prevent persons from launching or becoming missiles of destruction. It may not, however, be justified by the naked interest in using unlawful procedures to extract information. Incommunicado detention for months on end is such a procedure. Whether the information so procured is more or less reliable than that acquired by more extreme forms of torture is of no consequence. For if this Nation is to remain true to the ideals symbolized by its flag, it must not wield the tools of tyrants even to resist an assault by the forces of tyranny.⁸⁴

Justice Stevens also addressed the merits of Padilla’s claims, writing in a footnote that he agreed with the Second Circuit that the “Non-Detention Act prohibits—and the [AUMF] does not authorize—the protracted, incommunicado detention of American citizens arrested in the United States.”⁸⁵

After holding Padilla for three and a half years as an “enemy combatant,” the government successfully avoided further Supreme Court review of the extremely difficult issues associated with applying that status to someone detained on U.S. soil by, at the eleventh hour, transferring Padilla out of military custody and trying him in a civilian court, on charges

⁸¹ Brief of Respondent, *supra* note 79, at 3 n.3 (omissions in original) (quoting Jacoby’s declaration) (internal quotation marks omitted); *see also* Brief for the Petitioner, *supra* note 62, at 10, 29 (relying upon Jacoby’s declaration).

⁸² *Padilla*, 542 U.S. at 465 (Stevens, J., dissenting).

⁸³ *Id.*

⁸⁴ *Id.* (emphasis added) (footnote omitted).

⁸⁵ *Id.* at 464 n.8 (citations omitted). Justice Stevens thus disagreed with the *Hamdi* plurality on this point, which he did not reach in *Hamdi*. *See supra* note 48.

unrelated to the initial “dirty bomb” charge.⁸⁶ After the transfer, the Supreme Court denied review of the legality of his military detention.⁸⁷ Three Justices dissented from the denial of certiorari.⁸⁸ Justice Stevens, the natural fourth vote to grant review, instead joined an opinion by Justice Kennedy, which Chief Justice John Roberts also joined.⁸⁹ Justice Kennedy’s opinion explained that they denied review because of the transfer but emphasized that the federal district court now “will be obliged to afford him the protection, including the right to a speedy trial, guaranteed to all federal criminal defendants” and that the court should respond promptly if the government sought to transfer Padilla again to military control.⁹⁰ Commentators speculated that Justice Stevens voted against taking the case because Justice Kennedy, the presumed deciding vote, believed review of the merits was premature and therefore the Court would lack five votes to resolve the merits in the way Justice Stevens believed appropriate.⁹¹

⁸⁶ *Padilla v. Hanft*, 547 U.S. 1062, 1063 (2006) (Kennedy, J., concurring in denial of certiorari); see also Goodnough & Shane, *supra* note 74, at A21 (“After being held in isolation in a military brig in South Carolina for three and a half years, Mr. Padilla . . . was transferred to civilian custody here last year after the Supreme Court considered taking up his case.”).

⁸⁷ The Fourth Circuit, which had held that Padilla’s military detention was within the President’s authority, *Padilla v. Hanft*, 423 F.3d 386, 397 (4th Cir. 2005), denied DOJ’s requests to vacate that decision and authorize the transfer due to “at least an appearance that the government may be attempting to avoid consideration of our decision by the Supreme Court.” *Padilla v. Hanft*, 432 F.3d 582, 583 (4th Cir. 2005). The Supreme Court granted the application for transfer, *Hanft v. Padilla*, 546 U.S. 1084 (2006), and subsequently denied certiorari, *Padilla v. Hanft*, 547 U.S. 1062 (2006).

⁸⁸ *Padilla*, 547 U.S. at 1064 (Ginsburg, J., dissenting from denial of certiorari) (“This case, here for the second time, raises a question ‘of profound importance to the Nation[]’” (quoting *Padilla*, 542 U.S. at 455 (Stevens, J., dissenting))).

⁸⁹ *Id.* at 1063–64 (Kennedy, J., concurring in denial of certiorari).

⁹⁰ *Id.* at 1064. The opinion also noted that in the future Padilla could seek a writ of habeas corpus from the Court in an original action and cited the applicable Supreme Court rule. *Id.*

⁹¹ See, e.g., Marty Lederman, *Reading Padilla’s Tea Leaves*, SCOTUSBLOG (Apr. 3, 2006, 11:01 AM), <http://www.scotusblog.com/2006/04/reading-padillas-tea-leaves>. Padilla’s story continued. Padilla was convicted and sentenced to more than seventeen years. Kirk Semple, *Padilla Gets 17-Year Term for Role in Conspiracy*, N.Y. TIMES, Jan. 23, 2008, at A14. Federal district court Judge Marcia Cooke found, in part, that the conditions of Padilla’s detention and interrogation had been “harsh” and that this finding “warrant[ed] consideration in the sentencing.” *Id.* (internal quotation marks omitted). The government challenged the sentence as inadequate and on appeal a divided three-judge panel of the Eleventh Circuit vacated the sentence. See *United States v. Jayyousi*, 657 F.3d 1085, 1118–19 (11th Cir. 2011). The majority agreed that harsh conditions of pretrial detention may justify a downward departure but held that the district court had abused its discretion by “attach[ing] little weight to Padilla’s extensive criminal history, [giving] no weight to his future dangerousness, compar[ing] him to criminals who were not similarly situated, and [giving] unreasonable weight to the conditions of his pre-trial confinement.” *Id.* at 1119. Separately, a unanimous panel of the Fourth Circuit affirmed a district court’s dismissal of Padilla’s *Bivens* suit against former Secretary of Defense Donald Rumsfeld and others for alleged infringements of his constitutional rights. See *Lebron v. Rumsfeld*, 670 F.3d 540 (4th Cir. 2012), *aff’g* 764 F. Supp. 2d 787 (D.S.C. 2011), *cert. denied*, 80 U.S.L.W. 3676 (U.S. June 11, 2012) (No. 11-1277). The court found that “[s]pecial factors do counsel judicial hesitation in implying causes of action for enemy combatants held in military detention.” *Id.* at 548. *But see* Stephen I. Vladeck, *National Security and Bivens After Iqbal*, 14 LEWIS & CLARK L. REV. 255 (2010) (arguing a *Bivens* remedy is

D. Hamdan v. Rumsfeld

Two years later, on June 29, 2006, Justice Stevens wrote for a five-Justice majority in *Hamdan v. Rumsfeld*.⁹² In an unusually long and complex opinion focused on technical statutory interpretation rather than constitutional principles, the Court held unlawful the Bush Administration’s system of military commissions established outside of civilian federal courts for the trial of certain noncitizens “for violations of the laws of war and other applicable laws.”⁹³ DOJ’s brief in support urged strong deference: “Because the Military Order applies to alien enemy combatants who are captured during the ongoing war with al Qaeda, both the traditional deference this Court pays to the military justice system and the vital role played by that system are at their pinnacle.”⁹⁴ As usual, DOJ urged the Court to dismiss the case and not reach the merits. The Detainee Treatment Act of 2005 (DTA), it argued, removed the Court’s jurisdiction, and even if it did not, precedent required the Court to abstain until the final outcome of Hamdan’s military commission process.⁹⁵

On the merits, DOJ cited as authorization for the commissions the DTA, the AUMF, the Uniform Code of Military Justice (UCMJ), and the President’s inherent constitutional authority.⁹⁶ Regarding detainees’ claims under international law, it argued that the President’s determination that the Geneva Conventions did not apply to the conflict with al Qaeda (and therefore did not protect Salim Hamdan) was “binding on the courts”—or, if not binding, the standard of review at a minimum “would surely be extraordinarily deferential to the President.”⁹⁷

Three Justices joined two dissenting opinions that would have upheld the commissions. Chief Justice Roberts presumably would have provided a fourth dissenting vote. He recused himself because as a judge on the D.C. Circuit just days before President Bush nominated him to the Supreme

appropriate and that special factors of the kind the *Lebron* court considered are better addressed by qualified immunity and state secrets doctrines).

⁹² 548 U.S. 557 (2006).

⁹³ Military Order of Nov. 13, 2001: Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism, 3 C.F.R. § 918 (2002).

⁹⁴ See Brief for Respondents at 13, *Hamdan*, 548 U.S. 557 (No. 05-184), 2006 WL 460875, at *13.

⁹⁵ See *id.* at 7, 15–16.

⁹⁶ *Id.* at 15–23. To Hamdan’s argument that the military commissions were not “necessary” and thus not authorized under the AUMF, the Administration responded: “This Court has recognized that courts are not competent to second-guess judgments of the political branches regarding the extent of force necessary to prosecute a war.” *Id.* at 19.

⁹⁷ *Id.* at 38. President Bush issued a memorandum stating, “I also accept the legal conclusion of the Department of Justice and determine that common Article 3 of Geneva does not apply to either al Qaeda or Taliban detainees, because, among other reasons, the relevant conflicts are international in scope and common Article 3 applies only to ‘armed conflict not of an international character.’” Memorandum from President George W. Bush for the Vice President et al., Humane Treatment of al Qaeda and Taliban Detainees (Feb. 7, 2002), in *THE TORTURE PAPERS*, *supra* note 59, at 134, 134–35.

Court, he joined the very opinion upholding military commissions that the Court reversed in *Hamdan*.⁹⁸ The D.C. Circuit had deferred to the President's view of Common Article 3, concluding that "the President's reasonable view of the provision must . . . prevail" in resolving ambiguity in its meaning.⁹⁹ Justice Thomas, joined by Justice Scalia, essentially agreed with the D.C. Circuit. He wrote that the majority "without acknowledging its duty to defer to the President, adopts its own, admittedly plausible, reading of Common Article 3,"¹⁰⁰ and "its opinion openly flouts our well-established duty to respect the Executive's judgment in matters of military operations and foreign affairs."¹⁰¹ Justice Scalia authored a second dissent, joined by Justices Thomas and Alito, which found that the DTA denied the Court jurisdiction and in any event the Court should have abstained.¹⁰²

On both the question of jurisdiction and the merits, Justice Stevens's opinion for the Court is striking for its refusal to abstain or give significant consideration to the issue of deference. The Court held that the DTA did not deprive the Court of jurisdiction and found DOJ "has identified no other 'important countervailing interest'" to justify abstention.¹⁰³ On the merits, the Court found no need to reach the question of the President's constitutional authority to convene military commissions in the absence of congressional authorization: the UCMJ allowed for the establishment of military commissions but required compliance with certain specified procedures as well as with the laws of war¹⁰⁴—which the Bush system failed to do. Specifically, the Court found that the UCMJ required the same procedures used in courts martial "insofar as practicable" as well as the procedures required under Common Article 3, including a "regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples."¹⁰⁵

Two aspects of the Court's ruling merit special note for their effects beyond military commissions. First, the Court's only consideration of deference was as applied to President Bush's determination that it was impracticable to apply to Hamdan's military commission the rules and principles of law governing criminal trials in federal courts.¹⁰⁶ The Court

⁹⁸ Linda Greenhouse, *Detainee Case Will Pose Delicate Question for Court*, N.Y. TIMES, Mar. 27, 2006, at A12.

⁹⁹ *Hamdan v. Rumsfeld*, 415 F.3d 33, 42 (D.C. Cir. 2005), *rev'd* 548 U.S. 557; *see also id.* at 44 (Williams, J., concurring) (concluding that Common Article 3 does apply to al Qaeda members captured in Afghanistan but that the Geneva Convention is "not enforceable in courts of the United States").

¹⁰⁰ *Hamdan*, 548 U.S. at 719 (Thomas, J., dissenting).

¹⁰¹ *Id.* at 678.

¹⁰² *Id.* at 655 (Scalia, J., dissenting).

¹⁰³ *Id.* at 589 (majority opinion) (quoting *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996)).

¹⁰⁴ *Id.* at 592–94.

¹⁰⁵ *Id.* at 620, 630 (internal quotation mark omitted).

¹⁰⁶ *See id.* at 623.

declined to defer to the President’s decision not to use the rules for courts martial, holding that the President had failed to make the required determination that it was impracticable to do so and citing to Justice Kennedy’s discussion of the difference in wording of the two requirements.¹⁰⁷ Even more striking, the Court without comment declined to defer to (let alone accept as binding) the President’s interpretation of Common Article 3. The Court instead found to the contrary that Common Article 3 applied to the conflict with al Qaeda, with implications devastating not only for President Bush’s military commissions, but also for his “enhanced interrogation” policies that clearly did not comply with Common Article 3.¹⁰⁸

Second, the Court pointedly noted (citing *Youngstown Sheet & Tube Co. v. Sawyer*) that the President “may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers,” and that “[t]he Government does not argue otherwise.”¹⁰⁹ The Court, of course, knew that the Bush Administration in fact had argued otherwise in other contexts, in support of claims of presidential authority to disregard (or reinterpret) several other statutory limits on its counterterrorism and war policies.¹¹⁰ While Justice Stevens limited the comment to a footnote, Justice Kennedy’s concurrence quoted approvingly the entirety of Justice Robert Jackson’s famous three-part scheme in his *Youngstown* concurrence, highlighting that to the extent President Bush’s military commissions did not comply with the UCMJ, they fell in zone three where “his power is at its lowest ebb.”¹¹¹ Justice Kennedy expounded on the harms of presidential unilateralism and the “stability in time of crisis” provided by statutes enacted as “the result of a deliberative and reflective process engaging both of the political branches.”¹¹²

Justice Stevens lost Justice Kennedy and thus the majority on one major issue: Justice Kennedy found it unnecessary to reach whether the specific charge of conspiracy against Hamdan was an offense against the laws of war cognizable by military commission.¹¹³ Also, although Justice Kennedy agreed that Common Article 3 applied to the commissions, he would not have gone as far as the plurality in finding specific procedural

¹⁰⁷ *Id.* at 622–24. Even assuming that President Bush’s determination “would be entitled to a measure of deference,” “the only reason offered . . . is the danger posed by international terrorism” but the record provided no specific reason for thinking standard court-martial procedures would not work. *Id.* at 623 & n.51.

¹⁰⁸ *Id.* at 629–33; see *infra* note 223 and accompanying text.

¹⁰⁹ *Id.* at 593 n.23 (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)).

¹¹⁰ See *infra* Part III.A.

¹¹¹ *Hamdan*, 548 U.S. at 638 (Kennedy, J., concurring) (quoting *Youngstown*, 343 U.S. at 637) (internal quotation mark omitted).

¹¹² *Id.* at 637.

¹¹³ *Id.* at 655.

guarantees applicable.¹¹⁴ Justice Stevens declined to join a short concurrence by Justice Breyer for four Justices (including Justice Kennedy) that emphasized the President remained free to ask Congress to amend the statutory requirements and give him the authority he believed he needed.¹¹⁵ President Bush promptly did so and, in direct response to *Hamdan*, Congress enacted the Military Commissions Act of 2006 (MCA).

E. *Boumediene v. Bush*

In the Supreme Court's last opinion to date on the rights of the Guantánamo detainees, *Boumediene v. Bush*,¹¹⁶ the Court for the first time disagreed with both the President and Congress. Also for the first time, Justice Stevens did not write an opinion; he joined Justice Kennedy's majority opinion for five Justices, which held that in enacting the MCA, Congress unconstitutionally deprived the detainees of habeas review without providing an adequate alternative. Justice Stevens initially had voted with Justice Kennedy to deny certiorari.¹¹⁷ After the experience of losing the majority in *Padilla*, Justice Stevens apparently made the strategic decision to wait to grant certiorari until Justice Kennedy agreed that review was desirable, and then allowed him to write the opinion, in recognition of his key position at the center of the Court on 9/11 detainee issues.¹¹⁸

Chief Justice Roberts wrote a dissenting opinion for four Justices. He agreed with DOJ that the Court should abstain from reaching the merits of this "grossly premature" constitutional challenge and instead required the detainees to exhaust remedies provided under the DTA that permitted limited review of "enemy combatant" status.¹¹⁹ On the merits, the dissenters found the DTA procedures constitutionally adequate.¹²⁰ In a second dissent also for four Justices, Justice Scalia noted that DOJ's Office of Legal Counsel (OLC) had advised President Bush that the federal courts could not exercise habeas jurisdiction over the Guantánamo detainees; Justice Scalia accused the Court of a "game of bait-and-switch" with "the Nation's

¹¹⁴ *Id.* at 654.

¹¹⁵ *Id.* at 636 (Breyer, J., concurring).

¹¹⁶ 553 U.S. 723 (2008).

¹¹⁷ *Boumediene v. Bush*, 549 U.S. 1328, 1328–29 (2007) (denying certiorari).

¹¹⁸ Professor Richard Fallon succinctly explained,

Alone among his colleagues, Justice Kennedy has voted with the majority in every single habeas case stemming from the War on Terror. Justice Stevens may have signaled his recognition of Justice Kennedy's outcome-controlling influence when he declined to join three "liberal" colleagues in voting to grant certiorari in the *Boumediene* case as long as Justice Kennedy opposed a grant. Then, when Justice Kennedy changed his mind, Justice Stevens shifted his vote too, possibly in anticipation that Kennedy would ally himself with the Court's four liberals

Richard H. Fallon, Jr., *The Supreme Court, Habeas Corpus, and the War on Terror: An Essay on Law and Political Science*, 110 COLUM. L. REV. 352, 376 (2010) (footnotes omitted).

¹¹⁹ *Boumediene*, 553 U.S. at 801, 804 (Roberts, C.J., dissenting).

¹²⁰ *Id.* at 808.

Commander in Chief” that “will almost certainly cause more Americans to be killed.”¹²¹

The Court’s majority found further delay unwarranted, given the Court’s central role in upholding the Constitution against political branch violations and the fact that the detainees already had been imprisoned for years without judicial review.¹²² Unlike the statutory provision at issue in *Hamdan*, a provision of the MCA enacted in response to *Hamdan* unambiguously denied the federal courts jurisdiction to hear habeas corpus actions pending at the time of enactment.¹²³ The Court therefore reached the constitutional challenge and held that the Constitution’s Suspension Clause applied to the Guantánamo detainees and that Congress had not provided a constitutionally adequate substitute for habeas review.¹²⁴

The process by which the Court decided to review *Boumediene* exemplifies the central roles of Justices Stevens and Kennedy in the detainee cases—and the centrality as well of the flawed nature of the Bush Administration’s policies. When both Justices initially voted to deny certiorari, they issued a jointly signed statement saying that review was premature but that the Court would remain open to a renewed appeal if circumstances warranted it.¹²⁵ A few months later, Boumediene’s lawyer filed a remarkable motion for reconsideration attaching an affidavit from an army officer, Stephen Abramson, who had been a member of a military review board making individual detention determinations. Abramson reported that the process was badly flawed; commanding officers, for example, pressed officers on the boards to decide in favor of detention.¹²⁶ The Court responded with an unusual grant of certiorari just months after a denial, suggesting that Justice Kennedy changed his mind in light of the Abramson statement, and that Justice Stevens strategically waited for Justice Kennedy and later assigned him the majority opinion.¹²⁷

As is apparent from this review of the Court’s detainee cases, Justice Stevens led the Court in upholding detainees’ rights by authoring key opinions and building majorities in support of a strong judicial check on

¹²¹ *Id.* at 827–28 (Scalia, J., dissenting).

¹²² *Id.* at 765, 772–73; *see also id.* at 771 (“This Court may not impose a *de facto* suspension by abstaining from these controversies.”).

¹²³ *Id.* at 738–39.

¹²⁴ *Id.* at 787–92.

¹²⁵ *Boumediene v. Bush*, 549 U.S. 1328, 1329 (2007) (Stevens & Kennedy, JJ., respecting denial of certiorari).

¹²⁶ William Glaberson, *In Shift, Justices Agree to Review Detainees’ Case*, N.Y. TIMES, June 30, 2007, at A1.

¹²⁷ *Id.* Court reporter Linda Greenhouse wrote of Justice Stevens’s vote, “The most plausible explanation is that this canny tactician and strategist, who had managed to win Justice Kennedy’s vote for his two earlier Guantánamo opinions, knew better than to risk losing that support by pushing his colleague too far, too fast.” Linda Greenhouse, *Clues to the New Dynamic on the Supreme Court*, N.Y. TIMES, July 3, 2007, at A11.

presidential overreaching. Equally clear, Justice Stevens needed Justice Kennedy—the only Justice who has voted with the majority in every detainee case.¹²⁸ Justice Kennedy, more than Justice Stevens, was willing to avoid reaching the merits and to defer to the Executive on the merits: he joined the *Hamdi* plurality's less liberty-protective approach; wrote separately in *Rasul* to emphasize the deference due the Executive; provided a necessary fifth vote to dismiss in *Padilla* from which Justice Stevens passionately dissented; concurred in *Hamdan* to limit its holding; and initially voted against certiorari in *Boumediene*—as did Justice Stevens, until Justice Kennedy was willing to hear the case. In the end, Justice Kennedy rejected the government's arguments and ruled for the detainees in four out of five cases. After Justice Stevens's retirement, Justice Kennedy likely remains an essential vote for upholding contested rights of the Guantánamo detainees and constraining unlawful executive action amid the pressures of war and threats to national security.

II. TOWARD A BALANCED APPROACH TO FOREIGN AFFAIRS DEFERENCE

The Supreme Court's 9/11 detainee decisions inspired extensive and varied academic commentary, much of which addresses the role of the federal judiciary vis-à-vis the Executive and the appropriate level of deference due the Executive on matters of foreign affairs. Some commentators celebrate the Court's willingness to stand up to the Executive Branch and safeguard the rule of law; others express grave concern about the harmful, even horrific consequences they fear might follow the Court's overreaching. Among those who agree that the Court was right to find the challenged policies unlawful, some nonetheless question the Court's failure to address deference.

Justice Stevens is featured not only for his lead role in the detainee cases, but also for what may seem a contradictory pro-deference position for the unanimous Court in *Chevron*, the landmark 1984 ruling that established standards affording considerable judicial deference to certain executive interpretations of statutes.¹²⁹ As discussed, the detainee cases turned in part on whether the Court would defer to the Executive Branch's controversial interpretations of various statutory and treaty provisions: the 2001 Authorization to Use Military Force (AUMF), the Uniform Code of Military Justice (UCMJ), the Detainee Treatment Act (DTA), the Non-Detention Act, the federal habeas statute, and provisions of the Geneva Conventions, especially Common Article 3. A recurring subject of commentary considers *Chevron*'s relevance in the foreign affairs context: whether and under what circumstances the Court should afford *Chevron*-

¹²⁸ See *supra* note 118.

¹²⁹ *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984).

like deference to the Executive Branch’s interpretations of federal statutory and treaty provisions that involve foreign affairs.¹³⁰

The recent flurry of scholarship, rich in descriptive and normative analysis, contrasts with the Court’s longstanding inattention to the theoretical basis for foreign relations deference. As Professor Curtis Bradley observed, writing before 9/11: “In most of its deference decisions, the Supreme Court has simply assumed, or has asserted in a conclusory fashion, that foreign affairs should in fact make a difference.”¹³¹ Bradley cited the often quoted 1936 *Curtiss-Wright* decision as the rare exception.¹³² The Court’s post-9/11 opinions, although enormously consequential in their rejection of both strong deference and the President’s policies, provided remarkably little additional guidance about the nature of foreign affairs deference. Most instructive is the *Hamdi* plurality’s discussion of the judiciary’s essential role in protecting individual liberty against the power of the Executive even during wartime.¹³³

Hamdan, at the other extreme, barely acknowledged the issue. The Court purported to rely on a relatively straightforward application of legal requirements that President Bush’s commissions failed to meet.¹³⁴ Many commentators, however, have argued persuasively that the relevant statutory and treaty provisions were not so unambiguous, and that something more must have motivated the Court’s interpretation.¹³⁵ One illustration of the Court’s generally undertheorized approach to foreign affairs deference is, as Professor Robert Chesney observed, the juxtaposition of *Hamdan*’s “fail[ure] even to mention the deference doctrine” in construing the Geneva Conventions, against the Court’s invocation of treaty deference in another decision issued just one day

¹³⁰ For a thorough assessment of the related question of appropriate judicial deference to the Executive Branch’s factual judgments on national security matters, see Robert M. Chesney, *National Security Fact Deference*, 95 VA. L. REV. 1361 (2009).

¹³¹ Bradley, *supra* note 27, at 663.

¹³² *Id.* at 663–64 (“But in a few instances—most notably in its 1936 *Curtiss-Wright* decision—it has attempted an explanation.”).

¹³³ See *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) (O’Connor, J., plurality opinion). As discussed in Part I of this Article, several other opinions in the Court’s detainee cases also addressed the issue of wartime deference to the Executive when individual liberty is at stake.

¹³⁴ See *Hamdan v. Rumsfeld*, 548 U.S. 557, 575–76 (2006) (“Ordinary principles of statutory construction suffice to rebut the Government’s theory . . .”).

¹³⁵ This is true even of commentators who generally praise *Hamdan*. See, e.g., Deborah Pearlstein, *Justice Stevens and the Expert Executive*, 99 GEO. L.J. 1301, 1304–05 (2011).

earlier.¹³⁶ Chesney concluded that “the deference doctrine appears more unsettled and indeterminate than ever before.”¹³⁷

Given this vacuum, some deference proponents look to Justice Stevens’s *Chevron* opinion, which, in a wholly domestic context, addressed both the mechanics of, and justifications for, judicial deference to executive agency statutory interpretations. In the course of upholding an Environmental Protection Agency interpretation of the Clean Air Act, the *Chevron* Court articulated a two-step test for judicial review of certain executive agency interpretations of statutes they administer.¹³⁸ First, the court considers whether Congress has spoken clearly to the issue, and if so, the court (and the agency) must give effect to that intent.¹³⁹ If Congress was silent or its intent was ambiguous, step two directs the court to defer to a reasonable construction of the statute by the administering agency, even if the court would have preferred a different interpretation.¹⁴⁰

The *Chevron* Court explained the justifications for deference in terms of functionalism and democratic theory: “Judges are not experts in the field, and are not part of either political branch of the Government,”¹⁴¹ while the administering agencies possess superior expertise and political accountability by virtue of serving an elected President. *Chevron* rests further on a theory of delegation: Congress is assumed to have delegated resolution of the ambiguous question to the expert agency. As commentators have noted, this assumption is based on a fiction because Congress typically does not consider the question of who will fill gaps with regard to a particular statute.¹⁴² The assumption is that Congress would prefer the gap be filled based on the policy judgments of the administering agency, given its expertise and location within a branch of government headed by an elected president, rather than by a reviewing court.¹⁴³

¹³⁶ Robert M. Chesney, *Disaggregating Deference: The Judicial Power and Executive Treaty Interpretations*, 92 IOWA L. REV. 1723, 1732–33 (2007) (“[T]he Court had expressly invoked the deference doctrine just one day before it issued *Hamdan*, in *Sanchez-Llamas v. Oregon* By failing even to mention the deference doctrine the next day in *Hamdan*, the Court ensured that questions would arise as to the doctrine’s scope and significance.” (footnote omitted)).

¹³⁷ *Id.* at 1727; *see also id.* at 1734–35 (“[T]he details of the methodology are not entirely certain, and there is considerable room for debate regarding the extent to which courts are obliged to or consistently do follow it.”).

¹³⁸ *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 842–43 (1984).

¹³⁹ *Id.* at 842–43.

¹⁴⁰ *Id.* at 843.

¹⁴¹ *Id.* at 865.

¹⁴² *See, e.g.*, David Barron & Elena Kagan, *Chevron’s Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 203 (arguing that “some version of constructive—or perhaps more frankly said, fictional—intent must operate in judicial efforts to delineate the scope of *Chevron*” and “this construction should arise from and reflect candid policy judgments”).

¹⁴³ The Court explained in *Chevron*:

Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges’ personal policy preferences. In contrast, an agency to which Congress has delegated

Congress retains full authority to clarify the reach and meaning of the law through subsequent legislation.

In his 2000 article, *Chevron Deference and Foreign Affairs*, Professor Bradley suggested insights to be gained from the application of *Chevron*'s perspective to the foreign affairs context. In his view, *Chevron* aids in developing a path between two imperfect extremes: near-absolute *Curtiss-Wright* deference, on the one hand, and the inadequate respect for the Executive's expertise and constitutional role advocated by Professor Harold Koh and other *Curtiss-Wright* critics, on the other.¹⁴⁴ Bradley's illustrative applications leaned toward relatively strong deference, but his prescriptions depended on the context. He also emphasized his limited objective: he sought not to set forth a completely developed alternative approach, but “to suggest a different way of thinking about the deference issue—one that sheds new light on the question and at least begins to point the way to a better approach.”¹⁴⁵ Bradley was writing a year before 9/11 and thus in a context devoid of issues specific to the terrorist attacks and the Bush Administration's responses.

Although some lower courts afforded strong deference to the Bush Administration's policies, the Supreme Court, in reversing those decisions and finding the policies unlawful, adopted neither traditional strong deference nor a modified *Chevron* deference to the Executive. *Hamdan*'s rejection of the Bush Administration's system of military commissions left Congress with the last say on the issue, as *Chevron* typically does (as long as Congress comports with constitutional limitations). By not deferring, however, the *Hamdan* Court in effect reversed the *Chevron* presumption by requiring the Executive to go to Congress to attain desired policies—which President Bush did after *Hamdan*—rather than allowing the Executive to act while leaving Congress the authority to undo unwanted executive policies, as in *Chevron*.¹⁴⁶

policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.

When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do.

Chevron, 467 U.S. at 865–66.

¹⁴⁴ Bradley, *supra* note 27, at 650; *see also supra* text accompanying notes 27–31.

¹⁴⁵ Bradley, *supra* note 27, at 667.

¹⁴⁶ Hamdan's lawyer, Professor Neal Katyal, described seeking to persuade the Court that the default rule should be against the government because a decision in the President's favor could not be easily overcome by Congress given the presidential veto. Neal Kumar Katyal, *Hamdan v. Rumsfeld: The Legal Academy Goes to Practice*, 120 HARV. L. REV. 65, 94–95 (2006).

Professor Cass Sunstein is prominent among post-9/11 commentators who call for *Chevron*-like foreign affairs deference; he also is renowned for his scholarship on *Chevron* in its original domestic context and for his general advocacy of judicial minimalism. Sunstein argues for a strong version of *Chevron* deference to the Executive's interpretations of ambiguities in the AUMF, except where constitutionally protected interests are at stake: "[T]he President receives the kind of super-strong deference that derives from the combination of *Chevron* with what are plausibly taken to be his constitutional responsibilities."¹⁴⁷ Sunstein proposed this standard in response to a 2005 article in the *Harvard Law Review* coauthored by Professor Bradley and Professor Jack Goldsmith, after both returned to academia following service in the Bush Administration.¹⁴⁸ Bradley and Goldsmith's ambitious article developed a framework for interpreting the AUMF and tackled some of the most difficult questions that arise in its application,¹⁴⁹ including with respect to military detention and military commissions.¹⁵⁰ On issues of deference, the authors notably did not repeat Bradley's pre-9/11 call for *Chevron* deference or any particular measure of deference to the Executive's interpretations, expressly leaving that open,¹⁵¹ while urging respect for longstanding executive practice and the law of war in interpreting the AUMF.¹⁵² Professor Sunstein laments their omission of *Chevron* and calls for greater emphasis on administrative law deference principles and less on the law of war.¹⁵³

¹⁴⁷ Cass R. Sunstein, *Administrative Law Goes to War*, 118 HARV. L. REV. 2663, 2671 (2005) [hereinafter Sunstein, *Administrative Law Goes to War*]; see Cass R. Sunstein, *Minimalism at War*, 2004 SUP. CT. REV. 47, 50 [hereinafter Sunstein, *Minimalism at War*].

¹⁴⁸ Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047 (2005). Curtis Bradley spent 2004 working in the State Department's Legal Adviser's Office. Curtis A. Bradley, DUKE L. FAC., <http://www.law.duke.edu/fac/bradleyec> (last visited May 18, 2012). Jack Goldsmith served from 2002 to 2004, first as Special Counsel to the Defense Department's General Counsel and then as the Assistant Attorney General heading the Office of Legal Counsel. JACK GOLDSMITH, <http://www.jackgoldsmith.org> (last visited May 18, 2012).

¹⁴⁹ Their approach notably tempers that taken by the Administration they both recently served. But among the key Bush Administration interpretations they support is the view that Common Article 3 of the Geneva Conventions does not apply to the conflict with al Qaeda, a position the Court later rejected in *Hamdan*. See Bradley & Goldsmith, *supra* note 148, at 2115 n.304.

¹⁵⁰ Justice Stevens's majority opinion in *Hamdan* cited the Bradley and Goldsmith article for its detailed review of the law governing military commissions. See *Hamdan v. Rumsfeld*, 548 U.S. 557, 595 (2006).

¹⁵¹ Although they set forth a framework for interpreting the AUMF, they relegated the possibility of deference to the Bush Administration to a footnote and declared it beyond the scope of the article. See Bradley & Goldsmith, *supra* note 148, at 2084 n.150, 2107.

¹⁵² See *id.* at 2085–2100.

¹⁵³ Sunstein, *Administrative Law Goes to War*, *supra* note 147, at 2664. For two additional valuable perspectives published in the same issue, see Ryan Goodman & Derek Jinks, *International Law, U.S. War Powers, and the Global War on Terrorism*, 118 HARV. L. REV. 2653 (2005); Mark Tushnet, *Controlling Executive Power in the War on Terrorism*, 118 HARV. L. REV. 2673 (2005). Bradley and Goldsmith replied to all three responses in Curtis A. Bradley & Jack L. Goldsmith, *Rejoinder: The War*

Sunstein continued in this vein in a 2007 *Yale Law Journal* debate with a provocative article coauthored with Eric Posner, *Chevronizing Foreign Relations Law*, that advocated, for foreign relations matters, expanding *Chevron* deference substantially beyond *Chevron*.¹⁵⁴ Posner and Sunstein’s call for strong deference, even to executive interpretations that conflict with international law, came at a time of growing public attention to the Bush Administration’s claims of sweeping executive powers, including the power to act contrary to domestic and international law. Salim Hamdan’s victorious counsel Neal Katyal and his coauthor Derek Jinks responded with *Disregarding Foreign Relations Law*, which detailed the undesirable “radical implications” of allowing the Executive essentially to disregard international law aimed at constraining executive action.¹⁵⁵ Writing separately elsewhere, Professor Katyal called for bureaucratic expertise to play a strong role in deference analysis and also for transferring core Office of Legal Counsel functions to a new “Director of Adjudication” insulated from political influences through removal protections.¹⁵⁶

Sharp differences clearly persist, but fundamental points of near consensus also emerge. Few commentators continue to defend absolute (or near-absolute) deference of the kind described in *Curtiss-Wright* or initially claimed by the Bush Administration. Most, including counsel for detainees, acknowledge that the Executive’s functional advantages and Article II authorities support some form of foreign affairs deference in some circumstances. Consensus also recognizes that, analogous to *Chevron*, competing imperatives include appropriate respect for executive expertise and political accountability on the one hand, and preservation of the rule of law and individual rights through judicially enforced constraints on unlawful executive action on the other.

The substantial variations within this broad, evolving middle ground is unsurprising, especially in light of similar indeterminacy and controversy around *Chevron* in its domestic context.¹⁵⁷ Justice Stevens has remarked that

on *Terrorism: International Law, Clear Statement Requirements, and Constitutional Design*, 118 HARV. L. REV. 2683 (2005).

¹⁵⁴ See Eric A. Posner & Cass R. Sunstein, *Chevronizing Foreign Relations Law*, 116 YALE L.J. 1170 (2007). Sunstein and Posner acknowledged that *Chevron* in the domestic context calls only for deference to agencies’ reasonable interpretations of certain types of statutes in some circumstances (including interpretations adopted by agencies exercising delegated authority to make rules or conduct adjudications), but they suggested dispensing with some of these limitations in the foreign affairs context. See *id.* at 1195–97, 1210–15; see also Cass R. Sunstein, *Clear Statement Principles and National Security: Hamdan and Beyond*, 2006 SUP. CT. REV. 1.

¹⁵⁵ Derek Jinks & Neal Kumar Katyal, *Disregarding Foreign Relations Law*, 116 YALE L.J. 1230, 1233–34, 1245 (2007) (quoting Posner & Sunstein, *supra* note 154, at 1177).

¹⁵⁶ See Neal Kumar Katyal, *Internal Separation of Powers: Checking Today’s Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2337 (2006); Katyal, *supra* note 146, at 115.

¹⁵⁷ See, e.g., Thomas W. Merrill, *The Story of Chevron: The Making of an Accidental Landmark*, in ADMINISTRATIVE LAW STORIES 399, 426 (Peter L. Strauss ed., 2006) (“The much-debated question whether *Chevron* has had any impact on the degree of deference judges actually give to agencies

when he wrote *Chevron*, he intended simply to restate established law.¹⁵⁸ Indeed, he wrote for a unanimous Court.¹⁵⁹ But in the decades since, as *Chevron* became a landmark decision, the Court has divided closely and acrimoniously over how best to apply it.¹⁶⁰ Justices Stevens and Scalia often fell on opposite sides of key *Chevron* domestic issues, as they did on the rights of noncitizen detainees and the deference due the Executive on foreign affairs issues. Just three years after *Chevron*, Justice Scalia declared that the Court had “eviscerated” *Chevron*, in a case in which Justice Stevens wrote for a five-Justice majority.¹⁶¹ Thus began a decades-long argument about the role of legislative history in determining the existence of statutory ambiguity.¹⁶² Since 2000, the Court has denied agencies *Chevron* deference in several high-profile domestic cases, with Justice Stevens and Justice Scalia on opposing sides. The Court has declined to defer to the

remains unresolved.”); Deborah N. Pearlstein, *After Deference: Formalizing the Judicial Power for Foreign Relations Law*, 159 U. PA. L. REV. 783, 810 (2011) (“It is perhaps more than a little ironic that *Chevron* has gained interest from foreign relations scholars at the same time that scholars of administrative law have been demonstrating with increasing persuasiveness how limited the impact of *Chevron* has been in cases reviewing agency statutory interpretations.”); *id.* at 810–817 (summarizing Court cases limiting *Chevron* and citing academic commentary). See generally William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1090 (2008) (noting that the Court gave *Chevron* deference in only 8.3% of agency statutory interpretation cases from 1984 to 2005).

¹⁵⁸ See *Negusie v. Holder*, 555 U.S. 511, 529 (2009) (Stevens, J., concurring in part and dissenting in part) (“Judicial deference to agencies’ views on statutes they administer was not born in *Chevron*”); Merrill, *supra* note 157, at 420 & n.76; see also Kathryn A. Watts, *From Chevron to Massachusetts: Justice Stevens’s Approach to Securing the Public Interest*, 43 U.C. DAVIS L. REV. 1021, 1022 (2010) (“Justice Stevens seeks to effectuate Congress’s own animating goals, paying particularly close attention to Congress’s protective and remedial purposes. . . . [H]is purposivist approach to statutory interpretation often enables him to give agencies the leeway they need to achieve Congress’s broad protective or remedial goals and conversely to check agencies when they act counter to Congress’s purposes.”).

¹⁵⁹ Although *Chevron* was unanimous, only six Justices took part. See *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 866 (1984) (noting that Justices Marshall, Rehnquist, and O’Connor did not take part).

¹⁶⁰ Professor Thomas Merrill provided an interesting analysis of how *Chevron* achieved landmark status, which he attributed to two factors: the ascendancy of its approach first on the D.C. Circuit and then “migration” to the Supreme Court, and its “aggressive promotion by the executive branch lawyers” who saw the potential in it for greater deference to administrative interpretations. Merrill, *supra* note 157, at 422–26. He concluded that *Chevron* “became great not because of the inherent importance of the issue presented, but because the opinion happened to be written in such a way that key actors in the legal system later decided to make it a great case.” *Id.* at 427.

¹⁶¹ *INS v. Cardoza-Fonseca*, 480 U.S. 421, 454 (1987) (Scalia, J., concurring in the judgment).

¹⁶² Even earlier, Justice Stevens signaled the division to come. In a 1986 dissent, he alone would have invalidated a regulation as inconsistent with a statute’s clear meaning, and he described the eight-Justice majority opinion as “reflect[ing] an absence of judgment and of judging” and “employ[ing] a reasoning so formulaic that it trivializes the art of judging.” *Young v. Cmty. Nutrition Inst.*, 476 U.S. 974, 985, 988 (1986) (Stevens, J., dissenting) (disagreeing with the Court’s finding of statutory ambiguity).

government’s attempted regulation of tobacco products,¹⁶³ refusal to regulate greenhouse gases,¹⁶⁴ and attempted prosecution of physicians who assist terminally ill patients to commit suicide.¹⁶⁵

Commentators who address the usefulness of the *Chevron* analogy in the foreign affairs context similarly span a large divide on the deference spectrum. Some disagreements mirror hot debates in the domestic context. Most fundamentally, in both contexts, the choice by a commentator to privilege one of *Chevron*’s twin virtues—accountability or expertise—often proves determinative. Other disputes include whether the AUMF and the UCMJ are comparable to the Administrative Procedure Act¹⁶⁶ and the Freedom of Information Act,¹⁶⁷ which the Court has found are not subject to *Chevron* deference because they are aimed at constraining the Executive. And are executive positions first developed in the context of litigation deserving of deference? Differences specific to foreign affairs include how one views the constitutional allocation of relevant authorities and the proper place of international law.¹⁶⁸

Impressive scholarship since the initial Harvard Law Review and Yale Law Journal debates evaluates such questions of foreign affairs deference, as well as related questions that arise in the context of claims for compensation by alleged victims of unlawful detention, surveillance, or interrogation.¹⁶⁹ Before moving in Part III to one respect in which the literature seems relatively incomplete, this Part concludes by endorsing a dominant emergent strand that takes a balanced, nonabsolutist approach to foreign affairs deference. A balanced approach that supports some measure of deference in circumstances that reflect executive expertise and accountability seems clearly correct as a normative matter and also enjoys substantial doctrinal support.¹⁷⁰

Even prior to 9/11, the Court did not consistently apply *Curtiss-Wright*-like deference. Professor David Sloss argues that the *Hamdan* Court’s posture of nondeference to the Executive’s treaty interpretation is consistent with the Court’s approach in the United States’ first half century,

¹⁶³ *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

¹⁶⁴ *Massachusetts v. EPA*, 549 U.S. 497 (2007).

¹⁶⁵ *Gonzales v. Oregon*, 546 U.S. 243 (2006).

¹⁶⁶ 5 U.S.C. § 500 (2006).

¹⁶⁷ *Id.* § 552.

¹⁶⁸ Various commentators, for example, address the import of the *Charming Betsy* doctrine, which directs courts where possible to construe statutes to avoid conflicts with international law. *See Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804).

¹⁶⁹ *See infra* note 293.

¹⁷⁰ One caution: positions at the extreme may be repackaged in the guise of *Chevron*. For example, among those who have praised the invocation of *Chevron* by Posner and Sunstein for foreign affairs is John Yoo, a harsh critic of *Hamdan* and supporter of a more extreme version of Sunstein’s “super-strong” deference. *See Julian Ku & John Yoo, Hamdan v. Rumsfeld: The Functional Case for Foreign Affairs Deference to the Executive Branch*, 23 CONST. COMMENT. 179, 195–96 (2006).

which suggests constitutional text, structure, and history are not dispositive and leave room for the consideration of functional concerns.¹⁷¹ More recent precedent and practice also are less determinate than commonly believed. An influential 1994 study by Professor David Bederman had found that the Executive's treaty interpretation was the best indicator of the Court's own interpretation from the 1950s to the early 1990s.¹⁷² The Court regularly talks of giving "great weight" to the Executive's treaty interpretations, including in an opinion issued just one day before the Court all but ignored the deference issue in *Hamdan*.¹⁷³ More recent scholarship, however, persuasively questions the conventional narrative about how much deference the Court actually has given the Executive. Professor Robert Chesney in particular helpfully situates the historical development of deference to executive treaty interpretations among foreign relations deference generally, including *Curtiss-Wright*.¹⁷⁴ In seeking to isolate actual deference from other influences in Rehnquist-era treaty cases, Professor Chesney finds persuasive evidence to counter Bederman's conclusion.¹⁷⁵

Recent works by Professor Chesney and Professor Deborah Pearlstein are especially notable for contributing theoretical support and practical detail toward an optimal intermediate approach. They do not address nor agree upon all particulars, but they both move the conversation usefully in a direction closer to Professors Jinks and Katyal—and their advocacy of attention to the actual internal processes followed—than to Professors Posner and Sunstein, who tend more toward near-absolute deference with limited exceptions. After reviewing a variety of "intermediate deference" positions, Professor Chesney makes a strong case for limiting deference to treaty interpretations reached through *Chevron*-style rulemaking or a similarly formal legal opinion by a relevant department—and not, for example, positions merely adopted in litigation.¹⁷⁶ This seems appropriate for statutes as well as treaties. Interpretations adopted in the course of litigation do not reflect only the Executive's effort to bring expertise and judgment to bear on achieving the best legal interpretation of the provision; they also may reflect, for example, government litigators' judgments about what will prevail in the courts or what will maximize broader governmental interests such as a desire to maximize the government's own authority.

¹⁷¹ David Sloss, *Judicial Deference to Executive Branch Treaty Interpretations: A Historical Exception*, 62 N.Y.U. ANN. SURV. AM. L. 497 (2007).

¹⁷² David J. Bederman, *Revivalist Canons and Treaty Interpretation*, 41 UCLA L. REV. 953, 1015 (1994).

¹⁷³ Chesney, *supra* note 136, at 1727 (discussing *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006)).

¹⁷⁴ *Id.* at 1733–51.

¹⁷⁵ *Id.* at 1754–58. He does not, though, go as far as Professor Martin Flaherty who also contributes to the foreign affairs deference debate and colorfully suggests, "Much like a blimp, the doctrine appears ponderous but in reality has little weight." Martin S. Flaherty, *Judicial Foreign Relations Authority After 9/11*, 56 N.Y.L. SCH. L. REV. 119, 127 (2011).

¹⁷⁶ Chesney, *supra* note 136, at 1773.

Professor Pearlstein’s comprehensive assessment of both statutory and treaty deference in the foreign relations context also persuasively negates an absolute or “super-strong” approach. She concludes with the suggestion that the most appropriate form in the foreign affairs context may not be *Chevron* deference at all, but lesser *Skidmore* deference, under which courts defer to an executive interpretation only to the degree to which it is persuasive and after considering the actual processes by which it was reached.¹⁷⁷ *Skidmore* deference seems too far from current practice to be palatable to the Court and, similar to Katyal’s creative but ultimately misguided “Director of Adjudication,” might in fact go too far in its focus on bureaucratic expertise to the near exclusion of political accountability and presidential direction. A serious challenge in applying *Chevron*, which is heightened in the foreign affairs context, is distinguishing between desirable political accountability and undesirable politicization.¹⁷⁸ In any event, Pearlstein’s thoughtful analysis adds to the deference debate the relevance of theories of judicial power; she suggests in particular that courts should consider what is necessary to maintain constitutional equilibrium in the context not only of constitutional adjudication, but also of the deference due statutory and treaty interpretations.¹⁷⁹ Pearlstein is correct to highlight the broader separation of powers context and also to advocate some measure of judicial attention to internal processes, which encourages (in the first instance) executive interpretive processes and related policymaking that in fact do reflect executive expertise and principled deliberation.

The deference debate’s rich normative discussion thus supports and helps delineate an appropriately balanced intermediate approach to foreign affairs deference. Less complete (and the subject of the next Part) is its descriptive account of why the post-9/11 Court did not endorse even moderate deference and what that lack of deference portends. Because the Court said so little on the subject, any account is necessarily speculative, and the reasons are almost certainly multiple and complex. They undoubtedly include the Court’s recognition of its special role in safeguarding individual liberty against executive abuse—a role the *Hamdi*

¹⁷⁷ Pearlstein, *supra* note 157, at 851–52; see *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

¹⁷⁸ Pearlstein and Katyal are correct to highlight the importance of agency expertise, which Sunstein excessively discounts in favor of accountability. But agency experts themselves may develop tendencies toward institutional absolutism (including in support of executive power) that can be appropriately tempered by the judgment of officials who are more politically accountable. Recent scholarship demonstrates the complexity of issues of political accountability. See, e.g., David J. Barron, *From Takeover to Merger: Reforming Administrative Law in an Age of Agency Politicization*, 76 GEO. WASH. L. REV. 1095, 1095–1102 (2008) (discussing competing views and distinctions between agency politicization and centralization).

¹⁷⁹ Pearlstein, *supra* note 157, at 836–42 (describing “equilibrium theory”).

plurality expressly embraced¹⁸⁰—and a determination never to repeat the mistake of *Korematsu*'s excessive deference.¹⁸¹

Beyond that, commentators offer helpful speculation. Posner and Sunstein characterize the *Hamdan* Court's neglect of the analogy to *Chevron* deference as "a puzzling and important omission"¹⁸² and seem to favor the conclusion that "*Hamdan* is simply wrong" in some respects;¹⁸³ their alternative "most sympathetic reconstruction" would read *Hamdan* as resting on a special requirement for criminal trials of a clear congressional statement to "authorize a departure from standard adjudicative forms and procedures."¹⁸⁴ Other explanations draw upon Justice Stevens's position in *Chevron* to understand *Hamdan*: as Professors Katyal and Pearlstein note, the Court (and especially Justice Stevens) sometimes has been unwilling to afford *Chevron* deference in the domestic context where the facts suggest the Executive did not actually rely on the views of agency experts¹⁸⁵—which was also true of President Bush's military commissions.¹⁸⁶ Katyal predicts that the Court in future cases similarly will require "deliberative and sober bureaucratic decisionmaking."¹⁸⁷ Pearlstein describes the Court's post-9/11 approach as calling into question and rendering "increasingly

¹⁸⁰ See *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) (O'Connor, J., plurality opinion).

¹⁸¹ See *Korematsu v. United States*, 323 U.S. 214 (1944).

¹⁸² Posner & Sunstein, *supra* note 154, at 1178.

¹⁸³ *Id.* at 1225.

¹⁸⁴ *Id.* at 1225–26.

¹⁸⁵ *Massachusetts v. EPA*, 549 U.S. 497 (2007), is one clear example. Justice Stevens, writing for the Court, found that although the EPA possessed relevant expertise it could have applied to the regulation of greenhouse gases, it had not actually done so. *Id.* at 533–34. Instead, the Court cited potential harm to the President's ability to negotiate with foreign nations, which fell within the State Department's purview. *Id.* This reasoning is reminiscent of Justice Stevens's constitutional ruling in his very first majority opinion, *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976), which held that the authority of an executive branch agency depended on whether it was the agency with relevant expertise and jurisdiction—there, to limit certain federal jobs to U.S. citizens.

¹⁸⁶ Pearlstein puts it well in describing *Hamdan*: "Expertise in the Executive was not a functional advantage to be assumed; it was a virtue executives would have to demonstrate." Pearlstein, *supra* note 135, at 1310. Katyal similarly concludes that the *Hamdan* Court "consciously refused to award deference to the presidential determinations at issue because they lacked support from the bureaucracy, and in particular the Judge Advocates General and the State Department." Katyal, *supra* note 146, at 105.

¹⁸⁷ Katyal, *supra* note 146, at 105. This prediction, however, seems a bit too narrowly focused on the lack of bureaucratic support and overconfident in generalizing from *Hamdan* to predict the Court will require evidence of such support in future cases. Posner and Sunstein object that the Court has not generally required this evidence in the past in the domestic context and should not, especially on foreign affairs questions. Posner & Sunstein, *supra* note 154, at 1214. Katyal's brief analysis of the accountability factor—particularly his suggestion that *Hamdan* would have been more difficult to win in Bush's first term because voters could have held him accountable by not reelecting him—is unpersuasive, in terms of how courts are likely to approach foreign affairs deference; in any event, his useful point is to elevate the need for bureaucratic expertise. See Katyal, *supra* note 146, at 107.

untenable” the standard historical account that “the Court will defer to executive views in core matters of foreign relations.”¹⁸⁸

As this Article’s next Part elaborates, one additional factor may have played a substantial role in the post-9/11 Court’s refusal to defer and its willingness to reach the merits of detainees’ claims: the exceptional circumstances surrounding those cases, and especially the Bush Administration’s flawed approach to its own constitutional authority. Absent similar circumstances, the Court may afford significant deference to executive interpretations involving foreign affairs without, for example, invariably requiring evidence of “deliberative and sober bureaucratic decisionmaking.”¹⁸⁹ In any event, attention to those exceptional circumstances helpfully informs analysis of both judicial deference and nonjudicial checks on the legality of executive action.

III. PRESIDENTIAL ASSERTIONS OF PRECLUSIVE WAR POWERS

One aspect of the rich, post-9/11 academic debate over foreign affairs deference seems incomplete: remarkably little relates the deference issue to the extraordinary nature of the legal interpretations to which the Court refused to defer.¹⁹⁰ Books, articles, congressional hearings, ethics inquiries, and blog posts all have detailed the notoriously flawed nature of some early legal interpretations provided by the Department of Justice’s Office of Legal Counsel (OLC) to inform the terrorism policies at issue. As the Court and the world learned, initially through leaks from an excessively secretive Administration, OLC’s legal analysis on some war and terrorism issues did not adhere to traditional standards and processes aimed at achieving accurate and principled interpretations of statutes and treaties. In addition to adopting an extreme view of executive power, in the most egregious cases, OLC’s analysis and the processes it followed seemed distorted to serve desired policies, chief among them, the use of harsh and unlawful methods of interrogation, including torture.¹⁹¹

¹⁸⁸ Pearlstein, *supra* note 157, at 785–86.

¹⁸⁹ Katyal, *supra* note 146, at 105.

¹⁹⁰ Along these lines, Professors Katyal and Pearlstein discuss one important particular aspect of the context of *Hamdan*: the possible relevance of the absence of experts within the Executive Branch in the development of the military commissions. Professor Katyal also has written of his efforts in litigating *Hamdan* to take advantage of the broader context of the controversial Bush policies. See *supra* Part II. I also have written elsewhere about the relevance of *Hamdan*’s context. See Dawn E. Johnsen, *The Story of Hamdan v. Rumsfeld: Trying Enemy Combatants by Military Commission*, in *PRESIDENTIAL POWER STORIES* 447 (Christopher H. Schroeder & Curtis A. Bradley eds., 2009).

¹⁹¹ I have written elsewhere and testified before the Senate Judiciary Committee about deficiencies in the legal advice and processes followed by the Bush Administration’s OLC. See *Secret Law and the Threat to Democratic and Accountable Government: Hearing Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 110th Cong. (2008); *Confirmation Hearing on the Nomination of Michael B. Mukasey to Be Attorney General of the United States: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. (2008); Dawn E. Johnsen, *Faithfully Executing the Laws: Internal Legal*

It is a simple point. At least by the time of *Hamdan*, the Court may have felt that even to cite traditional deference standards might signal approval of what it knew to be fundamentally flawed interpretations, processes, and policies by an Administration that had failed to honor core rule-of-law values. The Bush Administration can be viewed as, in effect, having forfeited its claim to deference through its failure to fulfill responsibilities of a constitutional dimension and of direct relevance to *Chevron's* theory of delegated authority: the Executive's obligation to take care that the law is faithfully interpreted and executed, to respect the constitutional roles of Congress and the courts, and to act in the transparent manner essential to democratic accountability. The Court may have deferred so little because it believed that this unusual category of legal interpretations simply did not merit traditional deference.

A cogent assessment that reflects this context came in a blog post about *Hamdan* from former Solicitor General and OLC head Walter Dellinger:

[T]he court confronted and rejected a deep theory of the Constitution that had been developed by the incumbent administration and was invoked to justify perhaps hundreds of executive decisions . . . that at least appeared to violate valid acts of Congress. The rejection of that imperial claim is what is important about this case.

It's not about the military commissions. . . . As Marty Lederman . . . said . . . , future historians are about as likely to think of *Hamdan* as a "military commissions case" as they are to think of *Youngstown Sheet & Steel v. Sawyer* as a decision about "steel mill law." *Hamdan* is about the OLC torture memo; and it's about whether the president can refuse to comply with the McCain Amendment. It's about all those laws the president says, as he signs them, that he will not commit to obey, if in his view foreign relations or deliberative processes of the executive or other matters may be affected. And, by the way, he won't even commit to tell Congress he is not obeying the law. That is what it's about.¹⁹²

Constraints on Executive Power, 54 UCLA L. REV. 1559 (2007). In these sources, I describe the OLC's traditional functions, processes, and interpretive stance. I also discussed and appended a document I coauthored in which nineteen former OLC lawyers set forth ten longstanding, nonpartisan principles that have guided OLC's work, in response to what we saw as dangerous deviations from practice in OLC's advice on the legality of extreme interrogation techniques. The first principle states, "OLC should provide an accurate and honest appraisal of applicable law, even if that advice will constrain the administration's pursuit of desired policies." WALTER E. DELLINGER, DAWN JOHNSEN ET AL., PRINCIPLES TO GUIDE THE OFFICE OF LEGAL COUNSEL (2004), reprinted in Johnsen, *supra*, at 1603.

¹⁹² Walter Dellinger, *A Supreme Court Conversation: Still "the Most Important Decision on Presidential Power Ever,"* SLATE (June 30, 2006, 6:03 PM), <http://www.slate.com/id/2144476>. Dellinger was referencing a conversation he had with Professor Marty Lederman shortly after the Court decided *Hamdan*. (Dellinger served as the Assistant Attorney General for OLC during the Clinton Administration, and Lederman served at OLC for periods under Presidents Clinton, Bush, and Obama.)

The Court of course did not say any of this in *Hamdan*. Nor did it use more traditional language of deference and find the Bush Administration’s views unreasonable. Those who support a vibrant judiciary, strongly protective of individual rights against unlawful governmental action, understandably may prefer to interpret the Court’s silence as a marked shift away from foreign affairs deference. Litigants challenging governmental action surely will seek to generalize from the lack of deference. Taken together, the rulings certainly constitute a definitive rejection of the near-absolute foreign affairs deference reflected in the *Curtiss-Wright* dicta and propounded by the Bush Administration. They reinforce the central lesson of the Court’s abject failure in *Korematsu*, cautioning against excessive deference in cases involving individual liberties.¹⁹³ They also invite legal scholars to develop (as they have) thoughtful intermediate approaches, the desirability of which are further encouraged by the apparent absence, at least so far, of the harmful consequences for national security that the dissenting Justices and Bush Administration officials predicted would result from the Court’s intervention.¹⁹⁴ No genuine dispute remains that the legal advice was badly defective. Officials from both political parties, and even from within the Bush Administration, condemned it,¹⁹⁵ though that consensus is sometimes lost—occasionally intentionally obfuscated—in partisan disputes about counterterrorism policies.¹⁹⁶

¹⁹³ See *Korematsu v. United States*, 323 U.S. 214 (1944).

¹⁹⁴ Justice Scalia’s dissent in *Boumediene* charged that the majority’s approach “will almost certainly cause more Americans to be killed.” *Boumediene v. Bush*, 553 U.S. 723, 827–28 (Scalia, J., dissenting); see *supra* text accompanying note 121.

¹⁹⁵ See, e.g., JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* (2007) (quoted *infra* notes 231–32 and accompanying text); *id.* at 161 (“No one except [Vice President Dick Cheney’s Counsel David] Addington disputed that the opinions I had withdrawn and redone (or started to redo) were deeply flawed.”); Press Release, Sen. Lindsey Graham, Senate Armed Services Committee Hearing: Opening Statement for Detainee & Interrogation Hearing (June 17, 2008) (“I have long made clear I believe the [Bush] Administration’s lawyers used bizarre legal theories to justify harsh interrogation techniques. . . . I could go on and on about the legal analysis that any first year law student could poke holes in.”); see also Editorial, *The Torturers’ Manifesto*, N.Y. TIMES, Apr. 18, 2009, at WK9 (“These memos are not an honest attempt to set the legal limits on interrogations, which was the authors’ statutory obligation. They were written to provide legal immunity for acts that are clearly illegal, immoral and a violation of this country’s most basic values.”).

¹⁹⁶ This fact also is clouded by the confusing conclusion of the Office of Professional Responsibility’s (OPR) exhaustive investigation into a difficult question that goes beyond the deficiencies in OLC’s legal advice: whether the advice was so egregiously flawed that it merited sanctions against the top lawyers responsible. In its 261-page report, OPR detailed the numerous legal errors and concluded that Assistant Attorney General Jay Bybee, who headed OLC, and his deputy, John Yoo, had committed professional misconduct that merited referral to their respective state bar disciplinary authorities. OFFICE OF PROF’L RESPONSIBILITY, U.S. DEP’T OF JUSTICE, REPORT: INVESTIGATION INTO THE OFFICE OF LEGAL COUNSEL’S MEMORANDA CONCERNING ISSUES RELATING TO THE CENTRAL INTELLIGENCE AGENCY’S USE OF “ENHANCED INTERROGATION TECHNIQUES” ON SUSPECTED TERRORISTS 260 (2009). The OPR report quotes, for example, former Attorney General Michael Mukasey calling one of the OLC memos a “slovenly mistake.” *Id.* at 9. A subsequent acting head of OLC under President Bush, Daniel Levin, described his own reaction as “this is insane, who

As a purely predictive matter, however, the Court's 9/11 detainee opinions probably do not signal as wholesale a rejection of foreign affairs deference as some commentators hope and others fear.¹⁹⁷ Under those decisions, the Court might afford substantial deference to a future Administration's legal interpretations on similar foreign affairs matters. Appreciation of this possibility is important regardless of one's views and hopes. Unrealistic expectations about what the decisions portend could distract from the essential truth that protecting against unlawful executive action always has and always will require more than the possibility of judicial review. It requires close attention to the legality of executive action, and the quality of executive legal interpretation, from other forces with the potential to provide meaningful checks: Congress, the press, the public, nongovernmental organizations, and individuals and entities within the Executive Branch. Also important to future meaningful checks is a shared public understanding of what precisely was wrong with the legal interpretations that underlay the early Bush Administration policies.

The brief review that follows establishes at least two vital facts. First, as section A below describes, when the Supreme Court issued each of its 9/11 detainee rulings, much was publicly available and widely known about the flawed nature of the Executive's extreme claims of authority. In litigating before the Court, the Bush Administration emphasized narrower justifications for its policies than those upon which it initially relied and downplayed inflammatory claims of presidential authority to violate statutes and treaties. The Administration also went to exceptional lengths to keep details of its actions and supportive OLC memos or other legal justifications secret from the public and Congress. But by the time the 9/11

wrote this?" *Id.* at 124. Whether those egregious errors constitute professional misconduct that warrants referral, as OPR concluded, is a much more difficult question. Indeed, on review, Associate Deputy Attorney General David Margolis decided to "not adopt" OPR's conclusion because in his judgment, the attorneys had not "violate[d] a clear obligation or standard." Memorandum from David Margolis, Assoc. Deputy Attorney Gen., to the Attorney Gen. & Deputy Attorney Gen. 2, 68 (Jan. 5, 2010) [hereinafter Margolis Memo], available at <http://judiciary.house.gov/hearings/pdf/DAGMargolisMemo100105.pdf>. Some Republican Senators and John Yoo himself have falsely described Margolis's determination as a vindication of OLC's advice. See *The Office of Professional Responsibility Investigation into the Office of Legal Counsel Memoranda: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. (2010) (statements of various Senators throughout); cf. John Yoo, *My Gift to President Obama*, WALL ST. J., Feb. 24, 2010, at A17 (arguing President Obama should be grateful to him for "winning a drawn-out fight to protect his powers as commander in chief to wage war and keep Americans safe"). In fact, Margolis agreed that Bybee and Yoo's legal advice contained "significant flaws" and reflected "poor judgment," and he concluded, "John Yoo's loyalty to his own ideology and convictions clouded his view of his obligation to his client." Margolis Memo, *supra*, at 67-68.

¹⁹⁷ Professor Sunstein has found that courts of appeals upheld national security policies at a very high rate during President Bush's administration, and that the rate did not change after the Supreme Court's decisions upholding detainees' claims, suggesting a continued very high degree of judicial deference. Cass R. Sunstein, *Judging National Security Post-9/11: An Empirical Investigation*, 2008 SUP. CT. REV. 269, 271 ("The government loses only 15% of the litigated cases—a lower figure than in almost all other domains of federal law.").

detainee cases reached the Court, efforts at excessive secrecy had significantly broken down, and the Justices were well aware of the deficiencies in the Bush Administration’s legal interpretations, the grave need for external checks, and the broader implications of their rulings.¹⁹⁸

Second, the Bush policies were deeply flawed in ways that are anomalous. A narrative of policy continuity has emerged during the Obama Administration that obscures critical differences and promotes inaccurate understandings of the extent to which presidents make sweeping claims of preclusive war powers. Another narrative of ever-expanding presidential war powers in modern times similarly obscures the exceptional nature of President Bush’s claims. President Obama, like all presidents, of course is vulnerable to criticism for his foreign affairs policies. But the differences between President Bush’s initial counterterrorism policies and those of other presidents, including President Obama, are profound in respects relevant to the rule of law and judicial review. As sections B and C below describe, President Bush stands alone in his pattern of often secret claims of broad constitutional authority to act in direct contradiction of statutes—or, similarly, to “interpret” statutes in light of his expansive views of his own constitutional powers in order to “avoid” constitutional conflict. President Bush and his advisors undoubtedly were motivated in their actions by a sincere desire to protect the nation’s security against terrible threats. In their choice of methods, however, they intentionally sought to expand presidential war powers and to diminish checks on the exercise of those powers from Congress, the courts, and the public, all while they weakened traditional checks internal to the Executive Branch.

A. *President George W. Bush’s Administration*

On June 28, 2004, the Court issued its first rulings rejecting the policy of indefinitely detaining suspected terrorists while denying access to lawyers and the courts.¹⁹⁹ As the Bush Administration had informed the

¹⁹⁸ Part III.A expands on this point, but, to take one example, within minutes of the Court’s handing down of *Hamdan*, Professor Lederman wrote:

Even more importantly for present purposes, the Court held that Common Article 3 of Geneva applies as a matter of treaty obligation to the conflict against Al Qaeda. That is the HUGE part of today’s ruling. The commissions are the least of it. This basically resolves the debate about interrogation techniques, because Common Article 3 provides that detained persons “shall in all circumstances be treated humanely,” and that “[t]o this end,” certain specified acts “are and shall remain prohibited at any time and in any place whatsoever”—including “cruel treatment and torture,” and “outrages upon personal dignity, in particular humiliating and degrading treatment.” . . .

This almost certainly means that the CIA’s interrogation regime is unlawful, and indeed, that many techniques the Administration has been using, such as waterboarding and hypothermia (and others) violate the War Crimes Act (because violations of Common Article 3 are deemed war crimes).

Marty Lederman, *Hamdan Summary—And HUGE News*, SCOTUSBLOG (June 29, 2006, 10:37 AM), <http://www.scotusblog.com/2006/06/hamdan-summary-and-huge-news> (emphases omitted).

¹⁹⁹ *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Rasul v. Bush*, 542 U.S. 466 (2004).

Court in its briefs and the accompanying Jacoby Declaration, its denial of counsel and court access in part aimed at inducing in 9/11 detainees feelings of helplessness, dependency, and trust that the Administration believed would improve the effectiveness of its harsh interrogation techniques.²⁰⁰ During the two months before the Court's three rulings, the issue of the United States' possible complicity in unlawful interrogations and even torture dominated the news. The Abu Ghraib scandal, with its horrific photographs of U.S. soldiers abusing Iraqi prisoners, broke on April 28, 2004,²⁰¹ the very day of the *Padilla* oral argument.²⁰² In that scandal's wake, someone leaked a shocking legal memorandum ("the Torture Memo") issued almost two years earlier in which OLC secretly advised that a federal statute banning the use of torture could not constrain the President's choice of interrogation methods in combating terrorism.²⁰³ President Bush already had announced, on February 7, 2002, his determination that Common Article 3 of the Geneva Conventions—which prohibited not only "cruel treatment and torture" but also "outrages upon personal dignity, in particular humiliating and degrading treatment"—did not apply to the conflict with al Qaeda.²⁰⁴

The Torture Memo began with a flawed statutory analysis inconsistent with the clear import of the federal anti-torture statute, followed with an extreme theory of the President's authority as Commander in Chief as allowing outright noncompliance with the statute, and concluded with

²⁰⁰ See *supra* note 81.

²⁰¹ James Risen, *G.I.'s Are Accused of Abusing Iraqi Captives*, N.Y. TIMES, Apr. 29, 2004, at A15 (discussing the *60 Minutes II* story that aired on CBS the previous night); see also Seymour M. Hersh, *Torture at Abu Ghraib*, NEW YORKER, May 10, 2004, at 42; *Slide Show: The Abu Ghraib Pictures*, *New Yorker* (May 3, 2004) http://www.newyorker.com/archive/2004/05/03/slideshow_040503.

²⁰² The story broke after the oral argument, during which the Justices asked what was to constrain the government from torturing detainees for information. The Solicitor General replied that the courts remained open as a check but urged the Justices to defer to the President: "[Y]ou have to trust the executive to make the kind of quintessential military judgments that are involved . . ." Transcript of Oral Argument, *Padilla v. Rumsfeld*, 542 U.S. 426 (2004) (No. 03-1027), 2004 WL 1066129, at *19; see also *id.* ("[T]hat executive discretion in a war situation can be abused is not a good and sufficient reason for judicial micromanagement and overseeing of that authority."). Linda Greenhouse wrote in the *New York Times* that the discussion of torture in the oral argument took on a "different, even chilling, tone" in light of the release hours later of the Abu Ghraib photographs. Linda Greenhouse, *Word for Word/Rumsfeld v. Padilla; The Supreme Court Asks: Who Will Guard the Guardians*, N.Y. TIMES MAG., May 9, 2004, at WK7.

²⁰³ Memorandum from Jay S. Bybee, Assistant Attorney Gen., Office of Legal Counsel, U.S. Dep't of Justice, to Alberto R. Gonzales, Counsel to the President, Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340–2340A (Aug. 1, 2002), in THE TORTURE PAPERS, *supra* note 59, at 172, 172 [hereinafter OLC Torture Memo]; see Jane Mayer, *The Memo: How an Internal Effort to Ban the Abuse and Torture of Detainees Was Thwarted*, NEW YORKER, Feb. 27, 2006, at 32; Dana Priest & R. Jeffrey Smith, *Memo Offered Justification for Use of Torture*, WASH. POST, June 8, 2004, A1.

²⁰⁴ Memorandum from President George W. Bush to Vice President Dick Cheney et al., Humane Treatment of al Qaeda and Taliban Detainees (Feb. 7, 2002), in THE TORTURE PAPERS, *supra* note 59, at 134, 134.

faulty applications of the defense doctrines of necessity and self-defense. The Commander-in-Chief analysis was of broadest implication and failed even to acknowledge Congress’s countervailing constitutional war powers or the then-leading Supreme Court precedent of relevance, *Youngstown Sheet & Tube Co. v. Sawyer*.²⁰⁵ OLC’s interpretations in the Torture Memo, once leaked to the public, provoked widespread condemnation, prompting President Bush immediately to seek to distance himself from it and the Abu Ghraib abuses by declaring (just days before the Court released its initial detainee rulings) that “America stands against and will not tolerate torture.”²⁰⁶

In December 2004—several months after the Court’s first 9/11 decisions and long before *Hamdan*—the Bush Administration released another long-secret OLC opinion that explained its view of the Executive’s authority to act contrary to statutes.²⁰⁷ That memorandum, written just two weeks after 9/11, essentially interpreted the President’s constitutional authority as Commander in Chief as exceedingly broad and Congress’s war powers as exceedingly narrow: Congress may not “place any limits on the President’s determinations as to any terrorist threat, the amount of military force to be used in response, or the method, timing, and nature of the response.”²⁰⁸ Thus, the scope of the AUMF did not limit President Bush’s conduct of the “War on Terror.”²⁰⁹ Applying the same reasoning to criminal penalties Congress had imposed for torture, the Torture Memo put it this way:

Congress can no more interfere with the President’s conduct of the interrogation of enemy combatants than it can dictate strategic or tactical decisions on the battlefield. Just as statutes that order the President to conduct warfare in a certain manner or for specific goals would be unconstitutional, so too are laws that seek to prevent the President from gaining the intelligence he believes necessary to prevent attacks upon the United States.²¹⁰

These radical arguments were widely known and criticized in the spring of 2006, as the Court considered the Bush Administration’s proposed

²⁰⁵ 343 U.S. 579, 637 (1952); see OLC Torture Memo, *supra* note 203, at 204–07.

²⁰⁶ Statement on United Nations International Day in Support of Victims of Torture, 40 WEEKLY COMP. PRES. DOC. 1167, 1167 (June 26, 2004).

²⁰⁷ The Bush Administration kept the memo secret until the Senate pressured release in connection with the confirmation hearing of Attorney General nominee Alberto Gonzales. Michael Isikoff, *2001 Memo Reveals Push for Broader Presidential Powers*, DAILY BEAST (Dec. 17, 2004, 7:00 PM), <http://www.thedailybeast.com/newsweek/2004/12/17/2001-memo-reveals-push-for-broader-presidential-powers.html>.

²⁰⁸ Memorandum from John Yoo, Deputy Assistant Attorney Gen., Office of Legal Counsel, to Timothy Flanigan, Deputy Counsel to the President, The President’s Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them (Sept. 25, 2001), in THE TORTURE PAPERS, *supra* note 59, at 3, 24.

²⁰⁹ See, e.g., *id.* at 22–24.

²¹⁰ OLC Torture Memo, *supra* note 203, at 207.

interpretation of the AUMF as support for its military commissions in briefs submitted in *Hamdan*.²¹¹ In December 2005 the press uncovered another secret counterterrorism program that did not comply with federal statutory requirements, and which the Bush Administration justified based in part on the same, flawed Commander-in-Chief theory: for years, the Bush Administration had engaged in electronic surveillance in the United States without complying with the court-order requirements set forth in the federal Foreign Intelligence Surveillance Act.²¹² The months before the Court issued *Hamdan* also brought detailed press reports of secret overseas black sites holding certain “high value” detainees,²¹³ waterboarding and other extreme forms of interrogations (such as dousing detainees with extremely cold water in cells maintained at very low temperatures) used repeatedly and over long periods;²¹⁴ and U.S. involvement in extraordinary renditions of detainees, including some later found to be innocent of any wrongdoing, to other countries where they were tortured.²¹⁵

In response, Congress enacted the Detainee Treatment Act (DTA), which, among other things, prohibited not only torture but also “cruel, inhuman, or degrading treatment or punishment.”²¹⁶ When the Bush Administration could not stop the law, it achieved amendments to minimize what it viewed as the DTA’s harms.²¹⁷ In signing the law, President Bush issued a statement in which he appeared to claim the right not to comply

²¹¹ The Administration, however, did not present them directly to the Court, as Justice Stevens’s opinion for the Court would pointedly note. Justice Stevens wrote: “Whether or not the President has independent power, absent congressional authorization, to convene military commissions, he may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring). “The Government does not argue otherwise.” *Hamdan v. Rumsfeld*, 548 U.S. 557, 593 n.23 (2006).

²¹² DOJ issued an unusual, unsigned “white paper”—rather than the more typical signed OLC memorandum—laying out its statutory and constitutional arguments in defense of noncompliance with the statute. Memorandum from U.S. Dep’t of Justice, Legal Auths. Supporting the Activities of the Nat’l Sec. Agency Described by the President (Jan. 19, 2006), reprinted in David Cole & Martin S. Lederman, *The National Security Agency’s Domestic Spying Program: Framing the Debate*, 81 IND. L.J. 1355, 1374 (2006); see David Johnston & Neil A. Lewis, *Defending Spy Program, Administration Cites Law*, N.Y. TIMES, Dec. 23, 2005, at A20.

²¹³ See Michael A. Fletcher, *Bush Defends CIA’s Clandestine Prisons*, WASH. POST, Nov. 8, 2005, at A15; Brian Ross & Richard Esposito, *CIA’s Harsh Interrogation Techniques Described*, ABC NEWS (Nov. 18, 2005), <http://abcnews.go.com/Blotter/Investigation/story?id=1322866>.

²¹⁴ Ross & Esposito, *supra* note 213.

²¹⁵ See Jane Mayer, *Outsourcing Torture: The Secret History of America’s “Extraordinary Rendition” Program*, NEW YORKER, Feb. 14 & 21, 2005, at 106.

²¹⁶ 42 U.S.C. § 2000dd(a) (2006).

²¹⁷ The meaning of one such provision, depriving the federal courts of jurisdiction, was at issue in *Hamdan*. See *Hamdan v. Rumsfeld*, 548 U.S. 557, 572–84 (2006); *supra* Part I.D; see also Jonathan Mahler, *The Bush Administration vs. Salim Hamdan*, N.Y. TIMES MAG., Jan. 8, 2006, at 44, 88 (describing how Senator Lindsey Graham “effectively interced[ed] on the administration’s behalf in what amounted to an end run around the Supreme Court” by securing approval of an amendment that stripped Guantánamo detainees of habeas rights).

with the DTA or, alternatively, to interpret it to be consistent with his expansive view of his constitutional authorities.²¹⁸ This signing statement provoked strong objections from members of Congress, led by the DTA’s principal sponsor, former Vietnam prisoner of war and victim of torture Senator John McCain, and the *Washington Post* editorialized about the risk that illegal abuse would continue.²¹⁹ OLC, in fact, proceeded to interpret the DTA as not prohibiting waterboarding or other extreme forms of interrogation, in opinions reported in the press but which the Bush Administration refused to release.²²⁰

Through signing statements, President Bush controversially claimed the right to refuse to enforce literally hundreds of federal statutory provisions in addition to the DTA, or to interpret them to avoid conflicts with his extreme view of his constitutional powers.²²¹ Although President Bush began releasing such statements at the outset of his presidency—and had objected to the constitutionality of over a thousand statutory provisions by the end of 2006²²²—the radical import of these abbreviated and vague

²¹⁸ His signing statement announced he would construe the DTA “in a manner consistent with the constitutional authority of the President . . . as Commander in Chief and consistent with the constitutional limitations on the judicial power.” Statement on Signing the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006, 41 WEEKLY COMP. PRES. DOC. 1918, 1919 (Dec. 30, 2005).

²¹⁹ Editorial, *Unchecked Abuse*, WASH. POST, Jan. 11, 2006, at A20 (“Without aggressive monitoring—and possibly further action—by Congress, illegal abuse of foreign prisoners in the custody of the United States is likely to continue.”); see also David E. Sanger & Eric Schmitt, *Bush Says He’s Confident that He and McCain Will Reach Agreement on Interrogation Policy*, N.Y. TIMES, Dec. 13, 2005, at A22.

²²⁰ Scott Shane, David Johnston & James Risen, *Secret U.S. Endorsement of Severe Interrogations*, N.Y. TIMES, Oct. 4, 2007, at A1 (“In the end, Mr. Bradbury’s opinion delivered what the White House wanted: a statement that the standard imposed by Mr. McCain’s Detainee Treatment Act would not force any change in the C.I.A.’s practices, according to officials familiar with the memo.”). The memos, made public years later by the Obama Administration, confirm the press accounts. See Memorandum from Steven G. Bradbury, Principal Deputy Assistant Attorney Gen., Office of Legal Counsel, to John A. Rizzo, Senior Deputy Gen. Counsel, CIA, Application of 18 U.S.C. §§ 2340-2340A to the Combined Use of Certain Techniques in the Interrogation of High Value al Qaeda Detainees (May 10, 2005); Memorandum from Steven G. Bradbury, Principal Deputy Assistant Attorney Gen., Office of Legal Counsel, to John A. Rizzo, Senior Deputy Gen. Counsel, CIA, Application of 18 U.S.C. §§ 2340-2340A to Certain Techniques that May Be Used in the Interrogation of a High Value al Qaeda Detainee (May 10, 2005); Memorandum from Steven G. Bradbury, Principal Deputy Assistant Attorney Gen., Office of Legal Counsel, to John A. Rizzo, Senior Deputy Gen. Counsel, CIA, Application of United States Obligations Under Article 16 of the Convention Against Torture to Certain Techniques That May Be Used in the Interrogation of High Value al Qaeda Detainees (May 30, 2005). These and other opinions released by the Obama Administration, along with memoranda explaining their release and withdrawal, can be found at *Office of Legal Counsel: Selected Opinions*, FED’N AM. SCIENTISTS, <http://www.fas.org/irp/agency/doj/olc/index.html> (last visited May 18, 2012).

²²¹ See, e.g., Charlie Savage, *Bush Challenges Hundreds of Laws: President Cites Powers of His Office*, BOSTON GLOBE, Apr. 30, 2006, at A1.

²²² See Neil Kinkopf, *Signing Statements and Statutory Interpretation in the Bush Administration*, 16 WM. & MARY BILL RTS. J. 307, 308 (2008).

references to his Commander in Chief authority remained unclear until the secret opinions on torture and war powers became publicly available in 2004.

Thus, the Court knew at the time of its *Hamdi* and *Rasul* rulings against unreviewable indefinite detention that the Administration opposed habeas review because of perceived interference with its desired methods of detainee interrogation. Similarly, the *Hamdan* Court was well aware that its Common Article 3 ruling doomed not only the military commissions before it, but also the Bush Administration's use of waterboarding and many other extreme interrogation methods.²²³ The Court knew that the Administration's contrary interpretation of Common Article 3 came over the objection of the State Department,²²⁴ and that as Counsel to the President, Alberto Gonzales described the protections of Geneva Conventions as "quaint" and "obsolete."²²⁵ (Gonzales was Attorney General at the time of *Hamdan*.) The Court also knew that the Administration developed the particulars of the military commissions—including the possibility of a detainee being sentenced to death following a military trial that admitted evidence secured by torture—by largely excluding or ignoring the advice of key executive branch officials, both career experts and top political appointees like Secretary of State Colin Powell and National Security Advisor Condoleezza Rice.²²⁶ The press also had reported on strong opposition within the Executive Branch to the extreme interrogation methods.²²⁷

²²³ In response to the Court's ruling in *Hamdan*, President Bush ordered a halt to the CIA program of "enhanced" interrogations at secret black sites overseas and ordered that fourteen "high-value" al Qaeda suspects be moved to Guantánamo Bay from the black sites to await legal proceedings. See Remarks on the War on Terror, 42 WEEKLY COMP. PRES. DOC. 1569 (Sept. 6, 2006); David E. Sanger, *President Moves 14 Held in Secret to Guantánamo*, N.Y. TIMES, Sept. 7, 2006, at A1. The CIA also prepared a new list of approved interrogation techniques that no longer included waterboarding. Scott Shane, *White House Retreats Under Pressure*, N.Y. TIMES, Jan. 18, 2007, at A22. In July 2007, President Bush issued an executive order that allowed the CIA to resume certain harsh interrogation techniques, but not waterboarding. Mark Mazzetti, *Rules Lay Out C.I.A.'s Tactics in Questioning*, N.Y. TIMES, July 21, 2007, at A1.

²²⁴ The President rejected the Department of State's interpretation in favor of the position elaborated in an OLC opinion of January 22, 2002, that concluded the best interpretation of "armed conflict not of an international character" limited its reach to civil-war conflicts. See Memorandum from Jay S. Bybee, Assistant Attorney Gen., Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, Gen. Counsel of the Dep't of Defense, Application of Treaties and Laws to al Qaeda and Taliban Detainees (Jan. 22, 2002) in THE TORTURE PAPERS, *supra* note 59, at 81, 81.

²²⁵ Eric Lichtblau, *Bush Nominee Plans to Stand Firm on War-Captive Memo*, N.Y. TIMES, Jan. 6, 2005, at A25.

²²⁶ Tim Golden, *After Terror, a Secret Rewriting of Military Law*, N.Y. TIMES, Oct. 24, 2004, at A1; see also Memorandum from Patrick F. Philbin, Deputy Assistant Attorney Gen., Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President, Legality of the Use of Military Commissions to Try Terrorists (Nov. 6, 2001), available at <http://www.justice.gov/olc/2001/pub-millcommfinal.pdf>.

²²⁷ See, e.g., Mayer, *supra* note 203 (describing internal opposition and highlighting that of U.S. Navy General Counsel Alberto Mora).

By the time the Court issued its 2008 opinion in *Boumediene v. Bush*, journalist Charlie Savage had been awarded the 2007 Pulitzer Prize for his pre-*Hamdan* coverage of Bush’s signing statements.²²⁸ That same year, Savage published a highly acclaimed and widely read account of the Bush Administration’s efforts, led by Vice President Dick Cheney, to conduct itself in ways aimed at expanding the constitutional powers of the presidency.²²⁹ Vice President Cheney believed that responses to Watergate and Vietnam had dangerously weakened the presidency and that Congress in particular had encroached on executive power.²³⁰ Professor Jack Goldsmith, the Assistant Attorney General heading OLC in 2003 and 2004, published a valuable and truly remarkable insider’s account confirming that the desire to expand presidential power greatly influenced the way in which the Bush Administration formulated counterterrorism policy.²³¹ He reported feeling “astonished, and immensely worried” to learn of OLC’s then-secret advice, which he found “deeply flawed . . . sloppily reasoned, overbroad, and incautious.”²³²

Finally, also in 2007, the nation—and the Court—witnessed the dramatic story of DOJ’s refusal to sanction continuation of the then-current formulation of the Terrorist Surveillance Program. Goldsmith later described the program to Congress as “the biggest legal mess I’ve ever encountered,”²³³ complete with top White House officials attempting to pressure a hospitalized and highly sedated Attorney General to approve the plan and threatened mass resignations from the entire leadership of DOJ.²³⁴ Goldsmith resigned nine months after taking office (and has reported drafting three resignation letters in that time). He concluded that, ironically,

²²⁸ See Katharine Q. Seelye & James Barron, *Wall Street Journal Wins 2 Pulitzer Prizes; History of Civil Rights Reporting Also Wins*, N.Y. TIMES, Apr. 17, 2007, at B8.

²²⁹ See CHARLIE SAVAGE, TAKEOVER: THE RETURN OF THE IMPERIAL PRESIDENCY AND THE SUBVERSION OF AMERICAN DEMOCRACY (2007); *id.* at 9 (quoting Cheney’s 1996 speech, noting that “it was important to go back and try to restore that balance” in favor of “a strong presidency” (internal quotation mark omitted)).

²³⁰ Numerous reports have described Cheney’s aspirations and efforts to expand presidential power. See, e.g., Jonathan Mahler, *After the Imperial Presidency*, N.Y. TIMES MAG., Nov. 9, 2008, at 42.

²³¹ “Cheney and the President told top aides at the outset of the first term that past presidents had ‘eroded’ presidential power, and that they wanted ‘to restore’ it so that they could ‘hand off a much more powerful presidency to their successors.’” GOLDSMITH, *supra* note 195, at 89. Goldsmith described extreme pressures from the White House to tailor OLC’s legal advice to support desired terrorism policies. Goldsmith described Counsel to the Vice President David Addington’s dramatic response to his legal advice on a counterterrorism initiative: “If you rule that way, the blood of the hundred thousand people who die in the next attack will be on *your* hands.” *Id.* at 71 (internal quotation marks omitted).

²³² *Id.* at 10.

²³³ *Preserving the Rule of Law in the Fight Against Terrorism: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. 7 (2007) (testimony of Jack Goldsmith, former Assistant Att’y Gen., Dep’t of Justice).

²³⁴ See *id.*; *Preserving Prosecutorial Independence: Is the Department of Justice Politicizing the Hiring and Firing of U.S. Attorneys?: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. 219 (2007) (testimony of James B. Comey, former Deputy Att’y Gen., Dep’t of Justice).

the Bush Administration's desire to "hand off a much more powerful presidency" to their successors" led the Bush Administration to "unnecessary unilateralism"²³⁵ and a "go-it-alone approach" that threatened legitimate presidential power.²³⁶ Details of the Terrorist Surveillance Program, and the legal advice informing it, still have not been made public.

This was the backdrop against which the Supreme Court construed the meaning and reviewed the application of federal statutes and international treaties to the 9/11 detainees and, more to the point, against which the Court reviewed the Bush Administration's determinations in the first years after 9/11 about those meanings and applications. As discussed above, legal scholars continue to debate the intricacies of the appropriate deference under *Chevron* and other theories, considering, for example, whether and under what circumstances the AUMF and the UCMJ are the types of statutes regarding which the Executive's interpretations merit deference. The *Hamdan* Court's silence probably reflects that the Court did not think in these terms. Under any theory, except perhaps one of absolute deference, President Bush's claim for deference in *Hamdan* fails.²³⁷ Recall the delegation theory behind *Chevron*: the presumption that Congress would prefer the Executive, a politically accountable branch with superior expertise, to resolve statutory ambiguities and fill gaps. That presumption is utterly defeated by evidence that the Executive's legal interpretations were not aimed at providing the best view of the law; not informed by relevant experts; reportedly and self-evidently skewed, including to facilitate cruel, inhuman, and degrading treatment and even torture; often reached initially in secret and without accountability; and driven by an effort to expand executive power to the exclusion of Congress, the courts, and international treaty obligations.

B. President Bush's Predecessors

The argument for deference might be stronger if this were business as usual, that is if Congress regularly legislated against a backdrop of presidents who claimed expansive constitutional war powers to act contrary to statutory requirements and fundamental treaty obligations. In their comprehensive review of presidential war powers throughout U.S. history, Professors David Barron and Marty Lederman demonstrate that this is

²³⁵ GOLDSMITH, *supra* note 195, at 89, 140.

²³⁶ *Id.* at 205. This seems true, for example, of signing statements: President Bush's abuse of the practice tarnished legitimate, longstanding uses of signing statements. See Dawn E. Johnsen, *What's a President to Do? Interpreting the Constitution in the Wake of Bush Administration Abuses*, 88 B.U. L. REV. 395, 407 (2008) (arguing that "excessive and misguided reactions can threaten legitimate interpretive practices" such as the use of signing statements).

²³⁷ See *supra* Part I (detailing the Bush Administration's arguments for deference in the Court's 9/11 detainee cases).

clearly not the case.²³⁸ *The Commander in Chief at the Lowest Ebb* focuses precisely on the extent to which presidents have claimed constitutional authority to act in defiance of a statute—in other words, examples of Justice Robert Jackson’s famous “zone three” in *Youngstown*, in which presidential power is at its “lowest ebb.”²³⁹ After an exhaustive review beginning with the Founding Era and continuing chronologically from George Washington to George W. Bush, Barron and Lederman conclude that President Bush’s view of the President’s “preclusive” war powers—that is, authority to act in contravention of congressional statute—indeed was exceptional: “There is a radical disjuncture between the approach to constitutional war powers the current President [Bush] has asserted and the one that prevailed at the moment of ratification and for much of our history that followed.”²⁴⁰

Noting that President Bush’s defenders cite for historical support President Abraham Lincoln’s Civil War actions (generally viewed as the historical high-water mark of presidential assertions of preclusive war powers), Barron and Lederman make this period “the centerpiece” of their historical survey.²⁴¹ They compellingly establish that President Lincoln provided no precedent for President Bush. To summarize just the most well-known, controversial incident: when President Lincoln authorized army generals where necessary to “suspend the writ of habeas corpus for the public safety” after the Confederacy had fired on Fort Sumter, it was only as an emergency measure because Congress was not in session.²⁴² Far from claiming any preclusive power, President Lincoln used his constitutional authority to call Congress back into session, and his message on the day of its return expressly acknowledged that Congress had the last

²³⁸ See Barron & Lederman, *Commander in Chief—Framing the Problem*, *supra* note 25; Barron & Lederman, *Commander in Chief—History*, *supra* note 25. Barron and Lederman both served in the OLC as career attorneys during the Clinton Administration, and later in leadership positions in the OLC at the outset of the Obama Administration, with Barron as the acting Assistant Attorney General heading the office and Lederman as Deputy Assistant Attorney General.

²³⁹ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

²⁴⁰ Barron & Lederman, *Commander in Chief—History*, *supra* note 25, at 1112. Barron and Lederman adopt the term “preclusive” from Justice Robert Jackson to describe presidential assertions of war powers that “would supersede any effort by Congress to use its own constitutional authorities to enact statutes that would limit the discretion the President would otherwise be constitutionally entitled to exercise.” Barron & Lederman, *Commander in Chief—Framing the Problem*, *supra* note 25, at 694 n.6.

²⁴¹ Barron & Lederman, *Commander in Chief—History*, *supra* note 25, at 993. For a very different reading of history, and favorable comparisons between President Bush and Presidents Lincoln and Roosevelt, see JOHN YOO, *CRISIS AND COMMAND: THE HISTORY OF EXECUTIVE POWER FROM GEORGE WASHINGTON TO GEORGE W. BUSH* ix (2009) (“I trace the genealogy of today’s [Bush Administration] controversies back to the nation’s first Chief Executive, George Washington, then describe how Thomas Jefferson, Andrew Jackson, Abraham Lincoln, and Franklin Roosevelt used the powers of their office in times of crisis.”).

²⁴² Barron & Lederman, *Commander in Chief—History*, *supra* note 25, at 998.

word on the subject.²⁴³ That message to Congress also contained President Lincoln's famous statement, sometimes quoted out of context, suggesting that in order to save the nation, the President might violate a single law lest "all the laws but one . . . go unexecuted."²⁴⁴ Noting that this suggestion of a narrow claim of emergency power is not analogous to President Bush's claims, Professors Barron and Lederman scrutinize the historical record and find that "no President, as far as we know, has ever actually acted on Lincoln's suggestion that a single law must be violated in order that all others—that the nation—be preserved."²⁴⁵

Regarding President Franklin Roosevelt, also cited by President Bush's supporters, Barron and Lederman demonstrate that President Roosevelt simply never claimed preclusive constitutional war powers, even in the face of desperate circumstances during World War II. Roosevelt openly worked with Congress to secure necessary authority and otherwise relied on existing statutory authorities—which his Administration sometimes interpreted in legally questionable ways, but never to deny Congress's ultimate authority.²⁴⁶ Professor Jack Goldsmith also rejects comparisons between Presidents Lincoln and Roosevelt and President Bush. For example, he unfavorably compares Bush's "go-it-alone approach"²⁴⁷ to Roosevelt's approach, which was "premised on the notion that presidential power is primarily about persuasion and consent rather than unilateral executive action."²⁴⁸

More generally, Barron and Lederman observe that, with the exception of the far narrower "superintendence power" of the Commander in Chief to direct military subordinates,²⁴⁹ presidents did not assert preclusive war

²⁴³ Barron and Lederman also review President Lincoln's constitutional argument in support of his authority, Congress's ultimate suspension of the writ of habeas corpus (and almost immediate ratification of all of his other unilateral actions), and the Supreme Court's response. *Id.* at 997–1018.

²⁴⁴ *Id.* at 999.

²⁴⁵ Barron & Lederman, *Commander in Chief—Framing the Problem*, *supra* note 25, at 747. They also consider instances where Presidents claimed that lesser emergencies not threatening the nation's existence required them to act for a limited time in advance of Congress, due to urgent needs. *Id.* at 747–48. However, President Bush did not make this type of claim.

²⁴⁶ Barron & Lederman, *Commander in Chief—History*, *supra* note 25, at 1042–55.

²⁴⁷ GOLDSMITH, *supra* note 195, at 205 ("The Bush Administration's go-it-alone approach to many terrorism-related legal policy issues is the antithesis of Roosevelt's approach in 1940–1941.")

²⁴⁸ *Id.* at 212; *see also id.* at 215 ("Lincoln and Roosevelt understood that, as Schlesinger said, the 'truly strong President is not the one who relies on his power to command but the one who recognizes his responsibility, and opportunity, to enlighten and persuade.'" (quoting ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* 326 (1973))).

²⁴⁹ Professors Steven Calabresi and Christopher Yoo explore "The Unitary Executive" theory in a recent book of that name, by surveying the positions taken by all Presidents from George Washington to George W. Bush with regard to their preclusive constitutional authority to remove and direct all executive branch officials. Presidents clearly possess some such authority in certain circumstances, but the precise contours have been sharply disputed throughout our nation's history. Most relevant to this Article, Calabresi and Yoo, who are leading proponents of a strong unitary executive authority beyond

powers until President Harry Truman and the Korean War,²⁵⁰ and then only inconsistently—until George W. Bush. The Bush Administration went far beyond its predecessors, pushing theory to extremes and moving from mere assertions of theoretical powers to “outright defiance” of statutes “for prolonged periods of time and on multiple fronts.”²⁵¹

C. The Obama Administration

Writing just before President Obama’s election, Professors Barron and Lederman cautioned that, whoever was next elected, President Bush’s unprecedented claims of preclusive authority might prove difficult to roll back.²⁵² This concern was well founded and widely shared: Presidents (and their lawyers) face strong temptations and pressures—heightened in the context of national security threats—to claim and preserve all the powers of their predecessors. It is a testament to our constitutional system that, in large measure, those fears have not been realized. The Obama Administration’s approach to executive authority and the absence of continued Supreme Court intervention suggest that the post-9/11 Court’s unusually nondeferential stance reflected, in part, the extraordinary nature of the Bush Administration’s claims of sweeping and preclusive executive authority. In this regard, President Bush continues to stand as an outlier.

As President Obama’s first term neared its end, a contrary narrative emerged that emphasized continuity across the Bush and Obama Administrations on issues of national security and executive power, with

Congress’s ability to constrain, pointedly distinguish and sharply criticize President Bush’s assertion of preclusive war powers, particularly for his insistence on acting in secret:

Importantly, the [Bush] administration has taken many of its most ambitious actions . . . by secret classified executive orders. . . . Secret, classified, and broad uses of implied, inherent executive power may be problematic because they could undermine one of the core reasons why both of us have defended the unitary executive for our entire academic careers. One of the foundational arguments made in support of a unitary executive from Alexander Hamilton on down to the present is that a unitary executive promotes accountability by making it clear who is the one person responsible for the conduct of the executive branch. Such accountability is completely lost when the executive branch acts in secret. . . .

Support for the unitariness of the executive branch does not necessarily require supporting all of the broad claims of inherent executive authority in the foreign policy context advanced by the Bush administration.

STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH* 411 (2008).

²⁵⁰ The Court of course rejected President Truman’s assertion of war powers in *Youngstown* to support the seizure of the nation’s steel mills in furtherance of the war effort, but this did not constitute a claim of preclusive authority. There, President Truman argued that Congress had not legislated to preclude the seizure (in effect, it was a zone two, not a zone three, matter, as the dissenters would have held), and he sent a message to Congress acknowledging its ultimate authority to resolve the matter. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 583 (1952).

²⁵¹ Barron & Lederman, *Commander in Chief—History*, *supra* note 25, at 1095–96. Barron & Lederman identify only one comparably consequential instance of statutory disregard: “the actions of President Ford in the extraordinary chaos of the last days of the Vietnam War.” *Id.* at 1095.

²⁵² *See id.* at 1112.

headlines like *It's Obama's White House, but It's Still Bush's World*,²⁵³ and *George W. Obama?*²⁵⁴ Some critics express profound disappointment with President Obama for not delivering expected change;²⁵⁵ others describe longstanding institutional pressures that they argue require structural changes.²⁵⁶ Yet others, including some former Bush Administration officials, emphasize continuity not to criticize but to praise President Obama's choices, which presumably serves to vindicate President Bush's policies.²⁵⁷

President Obama's policy choices understandably have disappointed some supporters who hoped for greater change and now observe significant continuity with policies in place at the end of the Bush Administration. Much of that continuity, however, resulted from the Supreme Court's disapproval of some of the most extreme Bush Administration policies, which President Bush then abandoned or moderated by the time he left office. Justice Stevens's leadership on the Court was vital to that change, as was pressure from within the Executive Branch and from outside the government—from the press, the public, nongovernmental organizations, and other nations.

With regard to the claims of preclusive executive authority of central

²⁵³ Julian E. Zelizer, *It's Obama's White House, but It's Still Bush's World*, WASH. POST, Aug. 15, 2010, at B1.

²⁵⁴ David Bromwich, *George W. Obama?*, CBS NEWS (Aug. 18, 2011, 10:14 AM), <http://www.cbsnews.com/stories/2011/08/18/scitech/main20094046.shtml>; see also Ross Douthat, Op-Ed, *Whose Foreign Policy Is It?*, N.Y. TIMES, May 9, 2011, at A23 (speaking of the “Bush-Obama era” and describing the structural imbalance of criticism against Bush coming from a major political party, but criticism of Obama coming only from the far left and the libertarian right). But see Andrew Sullivan, *What Continuity?*, DAILY BEAST (May 9, 2011, 12:22 PM), <http://andrewsullivan.thedailybeast.com/2011/05/what-continuity.html> (rebutting Douthat's assertions).

²⁵⁵ See, e.g., Jonathan Turley, Op-Ed., *Taking Liberties: Obama May Prove Disastrous in Terms of Protecting Our Rights*, L.A. TIMES, Sept. 29, 2011, at A17 (“Candidate Obama . . . portrayed himself as the champion of civil liberties. However, President Obama not only retained the controversial Bush policies, he expanded on them.”); Glenn Greenwald, *Miranda Is Obama's Latest Victim*, SALON (Mar. 24, 2011, 9:25 AM), http://www.salon.com/2011/03/24/miranda_5 (arguing that “Obama has violently breached his own alleged principles when it comes to the War on Terror and the rule of law” on so many instances that they “are too numerous to chronicle in one place”).

²⁵⁶ Professor Bruce Ackerman, for example, advocates moving many of OLC's core responsibilities to a “Supreme Executive Tribunal.” See BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* (2010). But see Trevor W. Morrison, *Constitutional Alarmism*, 124 HARV. L. REV. 1688 (2011) (reviewing ACKERMAN, *supra*, and arguing persuasively to the contrary).

²⁵⁷ See, e.g., JACK GOLDSMITH, *POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11* 5 (2012) (“Contrary to nearly everyone's expectations, the Obama administration would continue almost all of its predecessor's policies, transforming what had seemed extraordinary under the Bush regime into the ‘new normal’ of American counterterrorism policy.”); YOO, *supra* note 241, at 443 (“President Obama has come to have more in common with the ends of the Bush Administration's terrorism policies than did Candidate Obama.”); Jane Mayer, *The Trial: Eric Holder and the Battle over Khalid Sheikh Mohammed*, NEW YORKER, Feb. 15, 2010, at 52, 54 (quoting Brad Berenson, former Assistant Counsel to President Bush, as saying that “from the perspective of a hawkish Bush national-security person the glass is eighty-five per cent full in terms of continuity”).

concern to this Article, it is plainly wrong to equate President Obama’s policies to the early Bush detainee policies, including those that prompted the Supreme Court’s robust review.²⁵⁸ President Obama, quite simply, has not asserted sweeping constitutional war powers to act in violation of federal statutes. Nor has there been any hint of secret violations of statutes. To the contrary, President Obama expressly rejected the Bush Administration’s approach as inconsistent with our legal traditions and values, and called instead for fighting terrorism “with an abiding confidence in the rule of law and due process; in checks and balances and accountability.”²⁵⁹

President Obama has grounded his assertions of presidential war powers in authorities conferred by Congress, principally in the AUMF. He ordered the closure of secret black sites overseas and barred the use of extreme interrogation methods, directing compliance with the Geneva Conventions (expressly including Common Article 3) and the methods detailed in the Army Field Manual.²⁶⁰ He announced his intent and tried to close the detention center at Guantánamo Bay,²⁶¹ but Congress thwarted that effort.²⁶² He has not sent a single additional detainee there. He expressed his preference to prosecute suspected terrorists in civilian Article III courts when feasible, and has often done so, but Congress by legislation has blocked that option for the Guantánamo detainees.²⁶³

Of course, strong grounds exist (beyond the scope of this Article) for policy-based disagreements with Obama Administration counterterrorism policies. But those policies respect legal constraints imposed by Congress and by international law, and reflect a more traditional and moderate approach to executive authority than that promoted by President Bush. For example, Justice Stevens, writing for the Court in *Hamdan*, correctly rejected as unlawful President Bush’s military commissions—and by implication his extreme interrogations policies—established without adequate respect for Congress, legal constraints, or expertise and good

²⁵⁸ David Cole has provided the best of the relatively rare refutations of the charge. See David Cole, *Breaking Away: Obama’s War on Terror Is Not “Bush Lite,”* NEW REPUBLIC, Dec. 30, 2010, at 17.

²⁵⁹ President Barack Obama, Remarks by the President on National Security (May 21, 2009), available at <http://www.whitehouse.gov/the-press-office/remarks-president-national-security-5-21-09>.

²⁶⁰ See Exec. Order No. 13,491, 74 Fed. Reg. 4893 (Jan. 27, 2009); Memorandum from David J. Barron, Acting Assistant Attorney Gen., Office of Legal Counsel, to the Attorney Gen., Withdrawal of Office of Legal Counsel Opinion (June 11, 2009); Memorandum from David J. Barron, Acting Assistant Attorney Gen., Office of Legal Counsel, to the Attorney Gen., Withdrawal of Office of Legal Counsel CIA Interrogation Opinions (Apr. 15, 2009).

²⁶¹ See Exec. Order No. 13,492, 74 Fed. Reg. 4897 (Jan. 27, 2009).

²⁶² See Supplemental Appropriations Act of 2009, Pub. L. No. 111-32, § 14103(a), 123 Stat. 1859, 1920 (barring transfers from Guantánamo to the United States).

²⁶³ Sources documenting this vociferous, multi-year debate are voluminous. See, e.g., Mayer, *supra* note 257; Charlie Savage, *In a Reversal, Military Trials for 9/11 Cases*, N.Y. TIMES, Apr. 5, 2011, at A1; see also Obama, *supra* note 259 (“[W]henver feasible, we will try those who have violated American criminal laws in federal courts—courts provided for by the United States Constitution.”).

judgment from within his own Administration. President Obama acted within his lawful options when he elected to work with Congress to reform (through greater procedural, evidentiary, and appellate protections) rather than eliminate military commissions as one available venue for trying Guantánamo detainees. Where he has been unable to persuade Congress, President Obama has abided by congressional restrictions on his ability to decide how best to prosecute the war authorized by the AUMF.²⁶⁴

President Obama confronted severe challenges in restoring rule-of-law values where discredited and discontinued Bush Administration policies regarding the Guantánamo detainees had continuing effect—including the use of torture and other extreme interrogation methods that complicate prosecution, and the very creation of the detention facility at Guantánamo in an effort to avoid the rule of law. Although President Obama has not added a single detainee to the 779 the Bush Administration sent to Guantánamo²⁶⁵ (down to 196 when President Obama took office on January 21, 2009),²⁶⁶ 169 Guantánamo detainees remained as of April 2012.²⁶⁷

In those cases in which the Obama Administration determined continued detention was appropriate, it has been strikingly—some would

²⁶⁴ One particularly complex and controversial example illustrates that President Obama's generally commendable efforts to work with Congress and abide by statutory limits occasionally brought costs for both executive authority and individual rights. President Obama worked with Congress to achieve substantial improvements in the National Defense Authorization Act for Fiscal Year 2012 (NDAA), Pub. L. No. 112-81, 125 Stat. 1298 (2011). Despite continuing concerns with restrictions it placed on the detention, interrogation, and prosecution of suspected terrorists and to considerable criticism, he ultimately signed the NDAA into law in order to secure funding and other provisions he viewed as vital. See Presidential Statement on Signing the National Defense Authorization Act for Fiscal Year 2012, 2011 DAILY COMP. PRES. DOC. 978 (Dec. 31, 2011), available at <http://www.gpo.gov/fdsys/pkg/DCPD-201100978/pdf/DCPD-201100978.pdf>. President Obama pledged to implement the law so as to avoid its potential harms; for example, he would not subject a U.S. citizen to indefinite military detention without trial. *Id.* He noted the possibility, however, that he would assert preclusive constitutional authority if circumstances developed in which the NDAA could not be applied in a constitutional manner:

My Administration will design the implementation procedures authorized by section 1022(c) to provide the maximum measure of flexibility and clarity to our counterterrorism professionals permissible under law. And I will exercise all of my constitutional authorities as Chief Executive and Commander in Chief if those procedures fall short, including but not limited to seeking the revision or repeal of provisions should they prove to be unworkable.

Id. For a thoughtful evaluation of the pros and cons of the much-misunderstood NDAA, see Marty Lederman & Steve Vladeck, *The NDAA: The Good, the Bad, and the Laws of War—Part I*, OPINIO JURIS (Dec. 31, 2011, 5:19 PM), <http://opiniojuris.org/2011/12/31/the-ndaa-the-good-the-bad-and-the-laws-of-war-part-i>, and Marty Lederman & Steve Vladeck, *The NDAA: The Good, the Bad, and the Laws of War—Part II*, OPINIO JURIS (Dec. 31, 2011, 5:20 PM), <http://opiniojuris.org/2011/12/31/the-ndaa-the-good-the-bad-and-the-laws-of-war-part-ii> [hereinafter Lederman & Vladeck, Part II].

²⁶⁵ GUANTANAMO REVIEW TASK FORCE, U.S. DEP'T OF JUSTICE, FINAL REPORT 1 (2010), available at <http://www.justice.gov/ag/guantanamo-review-final-report.pdf>.

²⁶⁶ Julie Tate & Peter Finn, *The Prisoners of Guantanamo Bay*, WASH. POST (Jan. 22, 2010), <http://www.washingtonpost.com/wp-dyn/content/graphic/2010/01/22/GR2010012200359.html>.

²⁶⁷ Press Release, U.S. Dep't of Def., Detainee Transfer Announced, No. 291-12 (Apr. 19, 2012), available at <http://www.defense.gov/releases/release.aspx?releaseid=15202>.

say disappointingly—successful in withstanding legal challenge. Not a single detainee has prevailed on appeal and secured release since the Supreme Court ordered habeas corpus review in *Boumediene* in 2008 (though in many cases the government chose not to appeal, or voluntarily released or transferred detainees).²⁶⁸ This success and the Supreme Court’s decisions not to reverse any of these rulings may be attributed at least in part to the Obama Administration’s more modest view of executive authority and specifically the grounds on which it has evaluated and justified continued detention.

Soon after President Obama took office, DOJ notified the courts of a change in position in the pending Guantánamo habeas litigation: the government would rely solely upon Congress’s enactment of the AUMF rather than an expansive view of the President’s constitutional authority. Also, in stark contrast to the Bush Administration, it argued that the interpretation of the AUMF is “necessarily informed by principles of the laws of war.”²⁶⁹ The Obama Administration maintained this view of the constraining effect of international law even in the face of remarkable opposition from a D.C. Circuit panel in *Al-Bihani v. Obama*, which found “mistaken” “the premise that the war powers granted by the AUMF and other statutes are limited by the international laws of war.”²⁷⁰ In the face of the panel’s efforts—essentially to expand executive power to act contrary to international law, even beyond that claimed by the Executive—the Obama Administration stood firm and argued to the full D.C. Circuit that the panel’s statement “does not properly reflect the state of the law,” including the Court’s view of international law in *Hamdi* and the longstanding canon that statutes should be construed as consistent with applicable international law.²⁷¹ In denying rehearing en banc, the D.C. Circuit effectively sided with the Obama Administration and issued a statement, joined by seven judges, explaining that the panel’s discussion of international law “is not necessary to the disposition of the merits.”²⁷² Congress later affirmed the Administration’s view that the detention authority should be construed in

²⁶⁸ *Boumediene v. Bush*, 553 U.S. 723 (2008); see Wittes, Chesney & Reynolds, *supra* note 22, at 9–11.

²⁶⁹ Respondents’ Memorandum Regarding the Government’s Detention Authority Relative to Detainees Held at Guantánamo Bay at 1, *In re Guantánamo Bay Detainee Litig.*, Misc. No. 08-442, Nos. 05-0763, 05-1646, 05-2378 (D.D.C. Mar. 13, 2009). In this memorandum, DOJ argued for far more limited deference than it had during the Bush Administration: “[C]ourts should defer to the President’s judgment that the AUMF, construed in light of the law-of-war principles that inform its interpretation, entitle him to treat members of irregular forces as state military forces are treated for purposes of detention.” *Id.* at 6 n.2.

²⁷⁰ *Al-Bihani v. Obama*, 590 F.3d 866, 871 (D.C. Cir. 2010), *cert. denied*, 131 S. Ct. 1814 (2011).

²⁷¹ Response to Petition for Rehearing and Rehearing En Banc at 5, *Al-Bihani*, 590 F.3d 866 (No. 09-5051).

²⁷² *Al-Bihani v. Obama*, 619 F.3d 1, 1 (D.C. Cir. 2010) (denying rehearing en banc).

accordance with the law of war.²⁷³ The court of appeals also accepted the Administration's position that the government is required to demonstrate that detainees are part of enemy forces by a preponderance of the evidence standard,²⁷⁴ even as some judges on the court have criticized the Obama Administration for arguing for a position that might impose on itself a higher-than-necessary burden of proof.²⁷⁵

Of more general application, President Obama's OLC publicly released a memorandum that outlines "Best Practices for OLC Legal Advice and Written Opinions" to guide the work of OLC lawyers on all matters, domestic as well as foreign.²⁷⁶ The memorandum "reaffirms the longstanding principles" that typically guide OLC (though clearly did not for some post-9/11 advice). Most important, consistent with the President's constitutional obligation to "take Care that the Laws be faithfully executed," OLC's lawyers must "provide an accurate and honest appraisal of applicable law, even if that appraisal will constrain the Administration's or an agency's pursuit of desired practices or policy objectives."²⁷⁷ As the memorandum correctly notes, this obligation is especially important because OLC "is frequently asked to opine on issues of first impression that are unlikely to be resolved by the courts—a circumstance in which OLC's advice may effectively be the final word on the controlling law."²⁷⁸ From all that is publicly known, OLC has adhered to these best practices under President Obama and has restored integrity to the critical function of advising the President and his executive officers.

Although a comprehensive review of the Obama Administration's assertions of executive authority is beyond the scope of this Article, two matters merit note for prompting serious criticism on rule-of-law grounds. According to public reports, President Obama disagreed with and did not follow OLC's advice on the interpretation of the War Powers Resolution as

²⁷³ Lederman & Vladeck, *Part II*, *supra* note 264.

²⁷⁴ *See Al-Bihani*, 590 F.3d at 878.

²⁷⁵ *See, e.g., Al-Adahi v. Obama*, 613 F.3d 1102, 1105 (D.C. Cir. 2010), *cert. denied*, 131 S. Ct. 1001 (2011) ("We are thus left with no adversary presentation on an important question affecting many pending cases Although we doubt, for the reasons stated above, that the Suspension Clause requires the use of the preponderance standard, we will not decide the question in this case."). Judge Laurence Silberman suggested that the D.C. Circuit actually might not apply the preponderance standard: "I doubt any of my colleagues will vote to grant a [habeas] petition if he or she believes that it is somewhat likely that the petitioner is an al Qaeda adherent or an active supporter." *Esmail v. Obama*, 639 F.3d 1075, 1078 (D.C. Cir. 2011) (Silberman, J., concurring). For a careful review of the D.C. Circuit's detainee rulings, see Vladeck, *supra* note 14.

²⁷⁶ Memorandum from David J. Barron, Acting Assistant Attorney Gen., Office of Legal Counsel, to Attorneys of the Office of Legal Counsel, Best Practices for OLC Legal Advice and Written Opinions (July 16, 2010), *available at* <http://www.justice.gov/olc/pdf/olc-legal-advice-opinions.pdf> (internal quotation marks omitted).

²⁷⁷ *Id.* at 1.

²⁷⁸ *Id.*

applied to U.S. military action in Libya.²⁷⁹ The War Powers Resolution (among other things) requires the President to withdraw U.S. military forces from “hostilities” sixty days after introduction if Congress has not specifically authorized continuation of the use of force.²⁸⁰ OLC reportedly advised that operations in Libya, including multiple unpiloted drone air attacks, constituted hostilities.²⁸¹ Public reports can of course be inaccurate, but this reported interpretation seems the correct one—which means that the continued operations in Libya violated the War Powers Resolution.²⁸² Even assuming, however, that continuation of the Libya operation violated the law as best interpreted, comparisons with the Bush Administration’s flawed legal interpretations and claims of preclusive authority were misplaced.²⁸³ The Obama Administration publicly provided a plausible (if ultimately unconvincing) explanation of its interpretation that relied in part on past presidential practice, including through detailed Senate testimony by State Department Legal Advisor Harold Koh.²⁸⁴ Far from making any claim of preclusive authority, President Obama made plain he was not challenging the constitutionality of the sixty-day clock (as President Richard Nixon had in vetoing the War Powers Resolution) or other limits Congress might impose on the operation.²⁸⁵

²⁷⁹ See Charlie Savage, *2 Top Lawyers Lose Argument on War Power*, N.Y. TIMES, June 18, 2011, at A1. The President certainly may act against OLC’s advice (which, in fact, rarely happens), but he should do so based on a good-faith substantive difference as to the best legal interpretation, one that is not inappropriately driven by desired outcome. All accounts suggest OLC provided accurate advice in the Libya matter, but the process may have been complicated by the lack of a confirmed head of OLC. The Senate did not hold a vote on President Obama’s nominees for the first two and a half years of his administration. In the interest of full disclosure, I was President Obama’s first nominee and withdrew after waiting more than a year for a Senate vote.

²⁸⁰ See 50 U.S.C. § 1544(b) (2006).

²⁸¹ Savage, *supra* note 279; see also Memorandum from Caroline D. Krass, Principal Deputy Assistant Attorney Gen., to the Attorney Gen., Authority to Use Military Force in Libya (Apr. 1, 2011), available at www.justice.gov/olc/2011/authority-military-use-in-libya.pdf (memorializing the legal advice given by OLC to the Attorney General before the commencement of military operations in Libya).

²⁸² Dawn Johnsen, *Different Kinds of Wrong: The Difference Between Obama’s Libya Policy and Bush’s Torture Policy*, SLATE (July 5, 2011, 6:17 PM), <http://www.slate.com/id/2298436>.

²⁸³ The comparison came from both sides: those critical of the Libya operation, see Bruce Ackerman, Op-Ed., *Legal Acrobatics, Illegal War*, N.Y. TIMES, June 21, 2011, at A27, and those who argued it was lawful and helped vindicate the Bush Administration’s legal interpretations on torture, see Eric Posner, *Stop Complaining About Harold Koh’s Interpretation of the War Powers Act*, NEW REPUBLIC (July 1, 2011, 12:00 AM), <http://www.npr.com/article/politics/91166/harold-koh-war-powers-john-yoo-libya>.

²⁸⁴ *Libya and War Powers: Hearing Before the S. Comm. on Foreign Relations*, 112th Cong. 7 (2011) (testimony of Harold Hongju Koh, Legal Advisor, U.S. Department of State).

²⁸⁵ See Richard Nixon, Veto of the War Powers Resolution, PUB. PAPERS 893, 893 (Oct. 24, 1973). In fact, Department of State legal advisor Harold Koh, in responding to written questions from Senator Richard Lugar after the hearing on Libya, affirmed that the Obama Administration agreed instead with the Carter Administration’s conclusion that the sixty-day clock was constitutional. *Libya and War Powers: Hearing Before the S. Comm. on Foreign Relations*, 112th Cong. 53 (2011) (responses of legal

The second serious charge of unlawful action is aimed at the United States' use of unpiloted drones to target and kill certain suspected terrorist leaders abroad, and in particular the reported September 2011 killing in Yemen of U.S. citizen Anwar al-Awlaki.²⁸⁶ Preliminary to the merits, and salient to this Article's concerns, is whether the Obama Administration made public adequate information about the program and its legal rationale, sufficient for Congress, interested citizens, and other observers to provide the kind of external check on both the wisdom and legality of executive action that proved vital during the Bush Administration. Classified programs and covert actions often involve difficult judgments of how best to balance competing requirements for secrecy and democratic accountability. Thus far, the Obama Administration has refused to release or even acknowledge the existence of an OLC opinion that, according to the *New York Times*, provided the legal basis for proceeding with the operation.²⁸⁷ Instead, some months after al-Awlaki's killing, Attorney General Eric Holder and other Obama Administration officials gave speeches providing considerable detail on the circumstances in which the Administration considers such a killing lawful.²⁸⁸ The analysis turns on highly fact-dependent questions of both domestic and international law, which for a U.S. citizen include constitutional guarantees such as the Fifth Amendment's guarantee of due process. Here, the Administration should release additional information on the internal executive processes and standards and provide a redacted OLC opinion or substitute memorandum detailing the legal analysis. The Attorney General and other officials, however, already have provided adequate detail to establish that far from an

advisor Harold Koh to questions submitted by Sen. Richard G. Lugar).

²⁸⁶ Mark Mezzetti, Eric Schmitt & Robert F. Worth, *C.I.A. Strike Kills U.S.-Born Militant in a Car in Yemen*, N.Y. TIMES, Oct. 1, 2011, at A1.

²⁸⁷ See Charlie Savage, *Secret U.S. Memo Made Legal Case to Kill a Citizen*, N.Y. TIMES, Oct. 9, 2011, at A1.

²⁸⁸ John O. Brennan, Assistant to the President for Homeland Sec. & Counterterrorism, Remarks to the Woodrow Wilson International Center for Scholars: "The Ethics and Efficacy of the President's Counterterrorism Strategy" (Apr. 30, 2012), available at <http://www.lawfareblog.com/2012/04/brennanspeech/>; Att'y Gen. Eric Holder, Remarks at Northwestern University School of Law (Mar. 5, 2012), available at <http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html>; Jeh Charles Johnson, Gen. Counsel to the Dep't of Def., Remarks at Yale Law School, National Security Law, Lawyers and Lawyering in the Obama Administration (Feb. 22, 2012), available at <http://www.lawfareblog.com/2012/02/jeh-johnson-speech-at-yale-law-school>. The Obama Administration also relies on constitutional sources of executive authority for national security activities, as particularly noted in an April 2012 speech by another national security official. See Stephen W. Preston, Gen. Counsel to the Cent. Intelligence Agency, Remarks at Harvard Law School (Apr. 10, 2012), available at <https://www.cia.gov/news-information/speeches-testimony/2012-speeches-testimony/cia-general-counsel-harvard.html>. Still, nothing in this speech or elsewhere suggests the Obama Administration acted based on an overly broad theory of executive authority, whether in the absence of or in contravention of congressional action. If anything, the targeted drone killings, and even more the Libya/sixty-day clock examples are viewed by some as controversial interpretations of statutory provisions supportive of desired executive action.

assertion of preclusive executive power, President Obama has relied on his interpretation of authority granted by Congress through the AUMF.²⁸⁹

President Obama may have contributed to exaggerated claims that he has simply continued Bush Administration policies by emphasizing the “need to look forward as opposed to looking backwards,”²⁹⁰ including when a week before even taking office he was asked whether he might appoint a special prosecutor to investigate possible Bush Administration violations of law. A few months later, when President Obama announced the clearly correct position that the government would not prosecute any government employee who reasonably relied in good faith on DOJ legal advice, he again elaborated more sweepingly: “[A]t a time of great challenges and disturbing disunity, nothing will be gained by spending our time and energy laying blame for the past.”²⁹¹ He similarly explained his opposition to creating a fact-finding commission to investigate torture or other potential wrongdoing:

I’ve opposed the creation of such a commission because I believe that our existing democratic institutions are strong enough to deliver accountability. The Congress can review abuses of our values, and there are ongoing inquiries by the Congress into matters like enhanced interrogation techniques. The Department of Justice and our courts can work through and punish any violations of our laws or miscarriages of justice.²⁹²

President Obama was right in theory: existing institutions—DOJ and the courts, as well as Congress—theoretically can provide for appropriate accountability and protect against future executive abuses. Whether steps taken toward public accountability will prove sufficient is not yet known. Early in his Administration, President Obama took a vital step by releasing and repudiating Bush-era OLC memos on harsh interrogation methods.²⁹³ It

²⁸⁹ For example, the Obama Administration views the President’s authority as not limited geographically, except to the extent international law imposes sovereignty-based limits on the use of force, and as authorizing the use of force against the operational leaders of al Qaeda and cobelligerent forces in the armed conflict with the United States. For the Administration’s public explanation to date of the extent of its authority to engage in targeted killings using drones, see sources cited *supra* note 288.

²⁹⁰ George Stephanopoulos, *Obama Leaves Door Open (a Bit) on Prosecuting Bush Officials*, ABC NEWS (Jan. 11, 2009, 9:16 AM), <http://abcnews.go.com/blogs/politics/2009/01/obama-leaves-do> (providing transcript of a *This Week* interview with Obama); see also *Aide: Obama Won’t Prosecute Bush Officials*, CBS NEWS (Apr. 20, 2009, 10:36 AM), <http://www.cbsnews.com/stories/2009/04/20/politics/main4955428.shtml>.

²⁹¹ Press Release, The White House Office of the Press Sec’y, Statement of President Barack Obama on Release of OLC Memos (Apr. 16, 2009), *available at* <http://www.whitehouse.gov/the-press-office/statement-president-barack-obama-release-olc-memos>.

²⁹² Obama, *supra* note 259.

²⁹³ See Press Release, *supra* note 291. His DOJ, however, also has vigorously defended against individual lawsuits alleging harm from the Bush Administration’s unlawful actions, including with assertions of state secrets, qualified immunity, and special factors to defeat *Bivens* claims—and it has failed to offer compensation or even acknowledgment in circumstances of clear governmental

seems that as a nation the United States has not yet reached consensus that the Bush Administration's abuses were fundamentally wrong and should not be repeated.²⁹⁴

CONCLUSION

Viewed together and in context, the Supreme Court's 9/11 detainee rulings, with Justice Stevens playing the leading role, effected substantial changes in national counterterrorism policies. Although not the direct subject of any of its cases, ending the unlawful practices of waterboarding and other methods of torture was surely among the most significant direct changes wrought by the Court. More fundamentally, the Court helped restore the rule of law and the constitutional balance of powers. The rulings are best understood in the context of an Administration that, following

wrongdoing. *See, e.g.,* Vance v. Rumsfeld, 653 F.3d 591 (7th Cir. 2011), *vacated and reh'g en banc granted*, Nos. 10-1687 & 10-2442, 2011 U.S. App. LEXIS 22083 (7th Cir. Oct. 28, 2011) (pending en banc rehearing of the panel's ruling in favor of a *Bivens* claim proceeding on allegations of torture); Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070 (9th Cir. 2010) (en banc) (dismissing case on basis of government's assertion of state secrets but encouraging voluntary action to compensate injured individuals whose meritorious claims cannot proceed due to secrecy concerns, emphasizing the government's responsibility to promote justice, especially when judicial review is not possible); Arar v. Ashcroft, 585 F.3d 559 (2d Cir. 2009) (en banc) (dismissing *Bivens* claim by a man to whom the Canadian government awarded millions of dollars following a governmental inquiry that found he was the victim of torture due to U.S. and Canadian action).

²⁹⁴ As President Obama's first term drew to an end, some of his critics have portrayed President Obama as dangerously weak and have continued to argue that waterboarding is not torture or unlawful and that, in any event, it yields valuable information. Even in the immediate wake of the killing of Osama bin Laden, some former Bush Administration officials sought to turn that Obama Administration success into support for Bush Administration policies of waterboarding and other extreme interrogation techniques. *See, e.g.,* Michael B. Mukasey, Op-Ed., *The Waterboarding Trail to bin Laden*, WALL ST. J., May 6, 2011, at A15 (criticizing Obama's interrogation practices and arguing that the intelligence leading to bin Laden could be traced to the Bush Administration's repeated waterboarding of detainees). *But see* John McCain, Op-Ed., *The Damage Torture Does*, WASH. POST, May 12, 2011, at A21 (describing former Attorney General Mukasey's claim as "false," and arguing that waterboarding "produced false and misleading information" and, in any event, is wrong). Justice Stevens himself, in remarks as part of this Northwestern University School of Law symposium, made news for his candid praise of President Obama with regard to killing bin Laden. *See* Jess Bravin, *Justice Stevens: Killing bin Laden Was Lawful*, WALL ST. J. BLOG (May 13, 2011, 7:14 AM), <http://blogs.wsj.com/washwire/2011/05/13/justice-stevens-killing-bin-laden-was-lawful> (quoting Justice Stevens as saying he had "not the slightest doubt that it was entirely appropriate for U.S. forces" to target bin Laden and that he was proud of President Obama for making the decision to execute the operation); *see also* 60 Minutes: *Hard Measures: Ex-CIA Head Defends Post-9/11 Tactics* (CBS television broadcast Apr. 29, 2012), *available at* <http://www.cbsnews.com/video/watch/?id=7406950n&tag=contentBody;storyMediaBox> (noting the comments of Jose Rodriguez, former head of CIA's clandestine operations, who defended his destruction of videotapes depicting waterboarding of suspected terrorists and other post-9/11 U.S. actions, expressing "no regrets"). A pending Senate Intelligence Committee investigation into the Bush Administration's interrogation policies promises to help set the public record straight. *See* Joint Statement of Sen. Dianne Feinstein, Chairman S. Intelligence Comm., and Sen. Carl Levin, Chairman, S. Armed Servs. Comm. (Apr. 27, 2012), *available at* http://www.feinstein.senate.gov/public/index.cfm/files/serve?File_id=026a329b-d4c0-4ab3-9f7e-fad5671917cc.

brutal attacks on America, sought unprecedented expansions of executive power, discretion, secrecy, and deference. The Court forced the Bush Administration to abandon its go-it-alone stance and instead to respect traditional checks on executive power: from the Court, from Congress, from within the Executive Branch, and—with greater transparency—from the American people. It is important to recall that the course of litigation and public response depended in part upon leaked documents, a contingency upon which the rule of law and constitutional balance should not depend. In time, the cases may well be remembered not primarily as post-9/11 cases concerning the Executive’s authority over suspected terrorists, but as part of a select line of landmark cases that secures the deep and lasting structure of our constitutional commitment to democracy, separation of powers, and the rule of law, even in the face of daunting challenges. Justice Stevens, more than any other Justice, ensured the Court’s continued commitment to these principles and earned posterity’s recognition for a job well done.

