

# The Supreme Court Goes to War

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## KEY TAKEAWAYS

The Supreme Court of the United States has drifted away from its proper role in national security cases.

It has trampled on the plain meaning of statutes and the Constitution, assuming powers that are properly placed within the executive branch or legislative branch.

This is fundamentally inconsistent with the original design of the Founders.

**T**he conduct of war in the modern era has been a complicated matter. But in the 21st century, at a time when the United States is engaged in the longest war in its history, unprecedented changes have been introduced that involve major increases in that complexity. A new regimen of legal and judicial restrictions has been imposed on the military forces that are engaged in combat operations necessary for the national defense. This has raised a host of questions and practical problems that affect all three branches of the federal government.

## Original Intent and the Founders' Design

The Supreme Court's recent trend of inserting itself in national security cases into matters where it traditionally has exercised judicial restraint is a deviation from its historical practice.<sup>1</sup> The Court (as

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have some lower courts) has drifted away from its proper role in national security cases. Ignoring historical facts and original public meaning, the Court instead has substituted its preferred policy outcomes as guides for decision, often with little or no regard for their practical implications for our warfighters. In doing so, it has trampled on the plain meaning of statutes and the Constitution and assumed powers that are properly placed within either the executive branch or the legislative branch.

This is fundamentally inconsistent with the original design of the Founders.

The Court's decisions are directly applicable to uniformed officers in the Judge Advocate General's Corps (JAGS) in the exercise of their professional duties. Senior JAGs are on the front lines of our war effort and nation's defense, advising commanders on what the Court has said, or might say, in a myriad of circumstances. They don't have the luxury of time to make decisions, because ever-changing real-world events and battlefield questions require answers, answers that come from the written word, from case law, from statutes, as well as directives, regulations, and field manuals that stem directly from that law. Nor can they make up the law to satisfy their preferred outcome, as some judges do, safe from harm, thousands of miles away from the battlefield in the marbled halls of stately courtrooms.

Exploring the judicial role in national security cases is part of a broader examination of the courts and their constitutional powers. In 1985, one of the authors of this paper, Edwin Meese III, who was the Attorney General of the United States at the time, was invited to give a keynote address to the American Bar Association's House of Delegates.<sup>2</sup> Meese used his address to start what he hoped would be a national dialogue on the proper role of the judiciary in general and the Supreme Court in particular. In general, the speech was framed around certain major decisions of the Supreme Court that changed the law. The main point was that constitutional jurisprudence "should be a Jurisprudence of Original Intention."<sup>3</sup> A "jurisprudence seriously aimed at the explication of original intention would produce defensible principles of government that would not be tainted by ideological predilection."<sup>4</sup>

This speech and others like it started a national dialogue on the topic of originalism and the proper mode of constitutional analysis in deciding cases.<sup>5</sup> Legal giants such as the late Judge Robert Bork and the late Justice Antonin Scalia drove the dialogue in the academy and in the Court's jurisprudence. There are, of course, many others who have contributed to this movement and are too numerous to mention.

This belief in a jurisprudence of original intention—or, as it has come to be known today, original public-meaning originalism—reflects a deeply rooted commitment to the idea of democracy. As Meese said in 1985:

[Our] Constitution represents the consent of the governed to the structures and powers of the government. The Constitution is the fundamental will of the people; that is why it is the fundamental law. To allow the [Court] to govern simply by what it views at the time as fair and decent, is a scheme of government no longer popular; the idea of democracy has suffered. The permanence of the Constitution has been weakened. A Constitution that is viewed as only what the judges say it is, is no longer a Constitution in the true sense.<sup>6</sup>

## Constitutional Fidelity and Separation of Powers

Before diving into some of the more troublesome trends of the Court, it is necessary to discuss further the meaning of constitutional fidelity and the importance of the separation of powers and what that means for the Supreme Court and its jurisprudence.

Later in 1985, before the D.C. Chapter of the Federalist Society Lawyers Division, Meese expanded on the ABA speech.<sup>7</sup> He said that, with respect to constitutional fidelity, one must begin with the document itself: “It exists.”

In *Marbury v. Madison*, John Marshall rested his rationale for judicial review on the fact that we have a written constitution with meaning that is binding upon judges. “[I]t is apparent...that the framers of the constitution contemplated that instrument as a rule for government of *courts*, as well as of the legislature. Why otherwise does it direct judges to take an oath to support it?”<sup>8</sup>

The Framers chose their words carefully, and the language they chose meant something. In places, it is very specific, such as where it says that Presidents of the United States must be at least 35 years of age. In other places, it expresses principles, such as the right to be free from an unreasonable search or seizure, or guarantees of equal protection under the law and due process of law.

Meese noted that the “text and structure of the Constitution is instructive” and “contains very little in the way of specific political solutions.”<sup>9</sup> Rather, “the first three articles set out clearly the scope and limits of three distinct branches of national government.”<sup>10</sup> The powers of each were carefully and specifically enumerated.

The Constitution's "undergirding premise remains that democratic self government is subject only to the limits of certain constitutional principles. This respect for the political process was made explicit early on."<sup>11</sup>

A jurisprudence that seeks fidelity to the Constitution is not a jurisprudence of political results or one that hinges rulings on popular social theories, moral philosophies, or personal notions of human dignity or preferable policy results. Rather, "it is very much concerned with process, and it is a jurisprudence that in our day seeks to de-politicize the law."<sup>12</sup>

Original public-meaning originalism has been criticized by some as old-fashioned and a product of conservatives who have a cramped view of the Framers' intent. We disagree. "A jurisprudence based on first principles is neither conservative nor liberal, neither right nor left. It is a jurisprudence that cares about committing and limiting to each organ of government the proper ambit of its responsibilities."<sup>13</sup>

That may be why Elena Kagan testified during her Supreme Court nomination that "we're all originalists,"<sup>14</sup> in recognition that it really does make sense to begin one's examination of the meaning of the Constitution by reading the actual words in the text and then use that as the basis for interpretation. The same could be said of statutes: A court should rely upon the actual text of that statute and then go from there.

That process should be the means of dealing with the issues involved in answering legal questions relating to national security.

## Presidential Power and Military Force

The Supreme Court of the United States traditionally has given great deference to the Commander in Chief on issues of national security over the centuries. Why? For a variety of reasons, not the least of which is that the Court has no particular expertise in national security issues; most (but not all) Justices never served in the military or the intelligence services, and they do not get routine intelligence briefings as do members of the executive branch and select Members of Congress.

Nor under separation of powers principles would it have made sense for the Court to have played a major role in the defense of the nation's security. The judiciary is the least accountable branch of the three co-equal branches of government, the least informed as to national security and foreign policy issues, the least acquainted with the geopolitical ramifications of policy decisions, and the least equipped to deal with the real-time decisions that must be made in national emergencies. To quote former Homeland Security Secretary Michael Chertoff from a speech he gave at Rutgers University

on the 10-year anniversary of 9/11, “judges...are not necessarily adapted to weigh the practical exigencies of what happens on the battlefield.”<sup>15</sup>

Article II of the Constitution says: “The executive Power shall be vested in a President of the United States of America.”<sup>16</sup> The Founders assigned the President, and the President alone, the authority as “The Commander in Chief of the Army and Navy of the United States.”<sup>17</sup> This made eminent sense from a structural standpoint, an accountability standpoint, and a practical standpoint. The President takes an oath to “preserve, protect and defend the Constitution of the United States,” but he is also the person who leads the executive branch and decides whether, when, and how to use the military in the defense of our national interests. The Supreme Court has no role whatsoever in making those decisions, nor is it equipped to do so.

Moreover, in those rare instances when national security issues reached the high court, the Court has traditionally deferred to the executive branch, given the latter’s superior access to intelligence and diplomatic communications, as well as its ultimate constitutional responsibility to protect the nation.

It is worth noting that under our constitutional framework, the President, under Article II, has independent authority to protect the nation above and beyond any declaration of war or other statutory authorization for use of military force.<sup>18</sup> The United States, like all countries, enjoys the inherent right of self-defense. The President may take such actions as he deems necessary to protect the country, including military action, consistent with the War Powers Resolution.<sup>19</sup> Every President has done so.

Congress does have a specific role in national security. Article I, Section 8 of the U.S. Constitution gives Congress the power “to declare war.” In the history of the United States, Congress has declared war 11 times relating to five different wars. It also has adopted over 40 authorizations for the use of military force.<sup>20</sup> Every authorization is unique in its breadth and scope.

The 2001 Authorization for Use of Military Force (AUMF), which has been used to prosecute the war against the Taliban and al-Qaeda, authorizes 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 that occurred on September 11, 2001.”<sup>21</sup> Note that this authorization *describes* but does not specifically *name* enemies who can be targeted.<sup>22</sup>

That AUMF and the 2002 Iraq AUMF are the primary statutory authorities under which the nation has been operating since September 11, 2001, against not only the Taliban and al-Qaeda, but also persons and forces associated with those organizations. Both the Obama and Trump

Administrations have claimed that the 2001 AUMF covers ISIS. The statute nominally gives the President the authority to make the determination about which organizations or persons fall under the class of individuals covered by an AUMF, and the courts have played a major role in defining the scope, most notably through the context of Guantanamo detainee habeas corpus litigation.<sup>23</sup>

## Presidential Power and Detainee Policy

As some have noted, rarely in the history of warfare, and certainly not in U.S. history, have prisoners of war been able to challenge their wartime military detention in court. It would have been unheard of, for example, for the 400,000 German POWs held by the U.S. in World War II to be able to challenge their detention in civilian judicial proceedings. The Supreme Court's landmark World War II-era decisions in *Ex Parte Quirin*<sup>24</sup> and *Johnson v. Eisentrager*<sup>25</sup> illustrate this deference to the President with regard to detainee policy.

In *Ex parte Quirin*, the Supreme Court unanimously determined that the President had the authority to order eight German saboteurs to be tried by military commission rather than in federal courts. In *Johnson v. Eisentrager*:

[The Supreme Court was] confronted with the claims of 21 Germans held at Landsberg Prison, an American military facility located in the American Zone of occupation in postwar Germany. They had been captured in China, and an American military commission sitting there had convicted them of war crimes—collaborating with the Japanese after Germany's surrender. The Germans claimed that their detentions violated the Constitution and international law, and sought a writ of habeas corpus.<sup>26</sup>

**Writing for the Court, Justice Robert Jackson held that American courts lacked habeas jurisdiction:**

We are cited to no instance where a court, in this or any other country where the writ is known, has issued it on behalf of an alien enemy who, at no relevant time and in no stage of his captivity, has been within its territorial jurisdiction. Nothing in the text of the Constitution extends such a right, nor does anything in our statutes.<sup>27</sup>

Through these two cases, the Supreme Court affirmed the President's broad power to detain enemy combatants for the duration of a conflict when

acting pursuant to a declaration of war and denied the detainees the right to challenge their detention in federal court.

That all changed after September 11, 2001. The Court became actively involved in wartime detention decisions. Through a succession of cases—*Hamdi v. Rumsfeld*,<sup>28</sup> *Rasul v. Bush*,<sup>29</sup> *Hamdan v. Rumsfeld*,<sup>30</sup> and *Boumediene v. Bush*<sup>31</sup>—the Supreme Court has interpreted the 2001 AUMF and the law of war to constrain the President’s power. To quote Jack Goldsmith<sup>32</sup> on this issue, the “courts engaged the president during wartime like never before and issued decisions that narrowed presidential power in unprecedented ways.”<sup>33</sup>

Arguably, each of those decisions would have come out differently if the Court had exercised its traditional deference to the political branches, interpreted statutes as written, and read history as it is, not as the Court wished it were. “To interpret the Constitution in light of history, which is what originalism amounts to, you have to interpret history. How well you perform the task of the historian will determine how accurately you interpret the Constitution.”<sup>34</sup>

In the case of *Boumediene v. Bush*, the issue was “whether the statutes depriving federal courts, judges, and Justices of jurisdiction over Guantanamo habeas actions violated the Suspension Clause of the Constitution.”<sup>35</sup> In that case, the first question under the Suspension Clause was “how far geographically the writ of habeas corpus reached in 1789.”<sup>36</sup>

Judge Raymond Randolph of the U.S. Court of Appeals for the D.C. Circuit wrote the *Boumediene* decision for that court when the case was there. He noted in a 2011 article that because Guantanamo is not “now, and never has been, part of this country’s sovereign territory,”<sup>37</sup> and because Congress recognized that when it defined the “United States” to exclude Guantanamo Bay in the Detainee Treatment Act of 2005, an analysis of the geographical scope of the writ should turn toward our common-law historical understanding of the scope of the writ.

To that end, he read Sir Robert Chambers’ lectures given at Oxford between 1767 and 1773. Chambers relied on an opinion of Lord Chief Justice Mansfield, who is often considered the greatest lawyer of 18th century England. “[Mansfield] delivered a lengthy opinion in 1759 that the Habeas Corpus Act of 1679, which Blackstone described as the bulwark of English liberties, provided that the writ of habeas corpus did not extend beyond England’s sovereign territories.”<sup>38</sup> Relying on Lord Mansfield, along with other historical material, Judge Randolph held that the constitutional writ did not extend to Guantanamo.<sup>39</sup>

There were dozens of amicus briefs supporting *Boumediene* before the Supreme Court, and none cited a “single case or any contemporary

commentary indicating that habeas reached beyond the nation's sovereign territory in 1789."<sup>40</sup> But the Court ignored those facts and ruled that the writ of habeas corpus did run to detainees in Guantanamo. Justice Antonin Scalia, in his dissent, states clearly the other side of the issue:

Today, for the first time in our Nation's history, the Court confers a constitutional right to habeas corpus on alien enemies detained abroad by our military forces in the course of an ongoing war.... The writ of habeas corpus does not, and never has, run in favor of aliens abroad; the Suspension Clause thus has no application, and the Court's intervention in this military matter is entirely *ultra vires*.<sup>41</sup>

The decision represented "an inflated sense of judicial supremacy"<sup>42</sup> to Justice Scalia, who predicted it would "almost certainly cause more Americans to be killed."<sup>43</sup>

After the *Boumediene* decision, detainees held in Bagram, Afghanistan, sought to extend the writ—using *Boumediene*'s functional test—to their cases even though they were detained in an active theater of war?<sup>44</sup>

In 2018, U.S. officials released an ISIS member from military custody after a year of detention in Iraq.<sup>45</sup> He held both American and Saudi citizenship. Why was he released even though he was a member of ISIS, an opposing enemy force? Was there evidence that he was not a member of ISIS or al-Qaeda? Or that this was a case of mistaken identity? Or that the war had ended? No, this prisoner was released because a panel of the D.C. Circuit interpreted the Hamdi decision as requiring them to do so.

A review of the facts shows that a member of ISIS, "John Doe," was captured in 2017 by Kurdish militia in Syria, whereupon they turned him over to the U.S. military, who held him in military detention in Iraq. There was no doubt of his membership in ISIS: The United States had his Islamic State "intake form" as clear identification.

The American Civil Liberties Union became involved. A federal district court judge ordered the military to let the ACLU lawyers talk to the detainee. Then they filed a habeas corpus case on his behalf. While the habeas petition was pending, the U.S. decided to transfer him to a third country. The district court required the government to give 72 hours' notice before transferring Doe to the custody of any other country. After the government reached an agreement with a different country to transfer Doe and gave the court the requisite notice of intent to transfer, the court enjoined the government from effecting the transfer, claiming that the government had failed to demonstrate the necessary legal authority to do so.



It is instructive to review the *Hamdi* case on which the *Doe* decision was based. The government appealed, and the D.C. Circuit affirmed the district court, claiming that the Supreme Court's decision in *Hamdi v. Rumsfeld*<sup>46</sup> compelled them to do so.<sup>47</sup> Yasar Hamdi was an enemy combatant who was captured in Afghanistan, brought to Guantanamo, and then transferred to a brig in the United States after it was discovered that he was an American citizen. He challenged the legality of his detention. The Supreme Court rejected his argument, holding that the 2001 Authorization for Use of Military Force authorized the President to hold him, but it also held that he was entitled to due process and a meaningful opportunity to challenge his detention.

Returning to the *Doe* case, Judge Karen Henderson wrote a dissent in which she says, "Affirmance [of *Doe's* release] portends a hazardous expansion of the judiciary's role into matters of war and diplomacy."<sup>48</sup> To make matters worse, Henderson noted, "In defending the Order, *Doe* relies on *Hamdi v. Rumsfeld*, by which a habeas court reviews the lawfulness of a U.S. citizen's extended military detention. But *Hamdi* does not empower a court to enjoin our military from *transferring* a battlefield captive not facing extended detention."<sup>49</sup>

Judge Henderson's dissent pointed out that the "district court did not find—because there is no evidence—that *Doe* will be mistreated if transferred. Instead, the point of the Order is to ensure that *Doe* can challenge his custody in the hope of winning release therefrom on his own terms."<sup>50</sup> Finally, the dissent argued that the order is at odds with the Supreme Court's holding in *Munaf v. Geren*. There, the Supreme Court vacated a preliminary injunction that blocked "our military from transferring to Iraqi custody an American citizen determined by military officers—without *Hamdi's* judicial review—to be an enemy combatant."<sup>51</sup>

Judge Henderson ended her dissent with the following thought: "It seems to me that today's result gives the military an incentive to avoid custody when possible, especially if it is not immediately clear in the heat of combat that the captive is a U.S. citizen."<sup>52</sup>

## Targeting Enemies Overseas

The complexities arising from judicial intervention in military decision-making are not limited to detainee matters. For example, can the Commander in Chief lawfully target for attack an enemy of the United States overseas during a period of authorized armed conflict even if that enemy happens to be a citizen of the United States? More to the point,

does that enemy combatant have access to our courts to prevent being a lawful target?

This issue is very real. A public debate arose during the Obama Administration when Anwar Al-Aulaqi, Samir Khan, Adam Gadahn, and Ahmed Farouq were all killed by American drone strikes.<sup>53</sup> The ACLU filed a lawsuit challenging the government's targeted killing of Al-Aulaqi and his son, claiming that the drone strikes that killed them in Yemen violated the Constitution's fundamental guarantee against deprivation of life without due process of law.<sup>54</sup>

That raises the question: What process is due an enemy combatant before he can be targeted? And who decides what that due process is? The executive branch? The legislative branch? The courts?

In targeting decisions, the U.S. exercises a high degree of care to comply with the law of armed conflict, the Geneva Conventions, and other applicable statutes, treaties, and rules and regulations before and during military operations. For much of our nation's history, complying with those legal authorities has constituted, by definition, due process--the process due anyone who is an enemy of the United States. The courts were reluctant, absent extraordinary circumstances, to infringe upon the considered view and application of force by the executive branch during a time of war. To quote Justice Jackson in *Eisentrager*, "such trials would hamper the war effort, and bring aid and comfort to the enemy. They would diminish the prestige of our commanders not only with enemies, but with wavering neutrals."<sup>55</sup>

The principle was clear before 9/11: If you became an enemy of the United States of America during a time of war, you subjected yourself to the full range of combat options available to military forces. In other words, there is a price to be paid for offering your allegiance to an opposing enemy force. Yet given the Court's post-9/11 detainee jurisprudence, it is entirely possible that future courts might enjoin the executive branch from carrying out lawful kinetic activity against an opposing enemy force simply because an enemy combatant happens to be an American citizen. One judge has already weighed in on that issue.<sup>56</sup>

## Immigration and National Security

Another aspect of judicial involvement in national security involves the issue of immigration, and in particular the travel ban cases during the Trump Administration. The President's executive order included a finding that immigrant and nonimmigrant entry into the United States by aliens

from seven countries “would be detrimental to the interests of the United States” and ordered suspension of entry for nationals from those countries for 90 days.<sup>57</sup> It also directed the Secretary of State to suspend the U.S. Refugee Admissions Program for 120 days (with exceptions on a case-by-case basis) and suspended indefinitely the entry of Syrian refugees.

Traditionally, immigration policy is an area in which both the Supreme Court and inferior courts have held that the courts must defer to the political judgment of the President and Congress. Courts have distinguished between two groups of aliens: those who are present within our borders and those seeking admission.

After proceedings in the courts, and despite a revised executive order, the 9th Circuit Court of Appeals essentially struck down President Trump’s travel ban.<sup>58</sup> However, as 9th Circuit Court Judge Jay Bybee made clear in a dissent from the denial of reconsideration *en banc*, which was joined by four other judges, the Immigration and Nationality Act of 1952 delegated authority to the President to suspend entry of “any class of aliens” as he deems appropriate. It reads in part:

Whenever the President finds that the entry of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry any restrictions he may deem appropriate.<sup>59</sup>

Bybee made clear that the “appropriate test for judging executive and congressional action affecting aliens who are outside our borders and seeking admission is set forth in *Kleindienst v. Mandel*.”<sup>60</sup> In *Mandel*, the government denied a visa to a Marxist journalist who had been invited to address conferences at some universities in the United States. The Supreme Court found that Mandel was “an unadmitted and nonresident alien, [who] had no constitutional right of entry,” and declined to revisit the principle that the political branches may decide whom to admit and whom to exclude. Despite the logical relevance of this case law, the ruling of the panel of the 9th Circuit gave short shrift to *Mandel* because it “involved only a decision by a consular officer, not the President.”<sup>61</sup>

After pointing out the absurdity of giving deference to a consular officer yet none to the President, the dissenters also pointed out how the panel ignored the Supreme Court’s decisions in *Fiallo v. Bell*<sup>62</sup> and *Kerry v. Din*,<sup>63</sup> and even prior 9th Circuit precedent. Bybee concluded: “It is our duty to say what the law is; and the meta-source of our law, the U.S. Constitution,

commits the power to make foreign policy, including the decisions to permit or forbid entry into the United States, to the President and Congress.”<sup>64</sup>

## Foreign Intelligence Surveillance After the *Carpenter* Decision

How far will the federal judiciary extend its involvement in other critical areas of national security? Will it restrict foreign intelligence surveillance after the Supreme Court’s decision in *Carpenter v. United States*?<sup>65</sup> *Carpenter* involved the issue of whether the government conducts a search under the Fourth Amendment when it accesses historical cell phone records that provide a comprehensive chronicle of the user’s past movements.

*Carpenter* and his coconspirators had robbed a series of Radio Shack and T-Mobile stores in Detroit. One of the criminals confessed and gave the FBI some cell phone numbers, and after some investigation, the FBI applied for a court order under the Stored Communications Act to obtain cell phone records for *Carpenter*. A magistrate judge ordered Sprint and Metro PCS to disclose cell-site sector information for *Carpenter*’s telephone at call origination and at call termination for incoming and outgoing calls for the four-month period when the robberies occurred. Not surprisingly, the information they obtained placed *Carpenter*’s phone near four of the charged robberies at the exact day and time of the robberies. After he was convicted, he appealed, and the Sixth Circuit affirmed, citing *Smith v. Maryland*.<sup>66</sup>

The Supreme Court reversed the Sixth Circuit, holding that the receipt of over a week’s worth of retrospective cell-site location information (CSLI) was a search under the Fourth Amendment, distinguishing *Smith v. Maryland* and *United States v. Miller*,<sup>67</sup> claiming that cell-site location information was “an entirely different species of business record.”<sup>68</sup> However, as David Kris,<sup>69</sup> former Assistant Attorney General for the National Security Division, asks in a thoughtful post:

[D]oes *Carpenter* extend to any or all of (1) single-user collection of long-term, retrospective CSLI under the business records provision of the Foreign Intelligence Surveillance Act; (2) bulk collection of non-location telephony metadata under FISA; or (3) the procedure for ongoing production of non-location cell detail records approved by Congress in the USA Freedom Act of 2015?<sup>70</sup>

The Court’s majority states near the end of its opinion, “Our decision today is a narrow one,” adding that “our opinion does not consider other collection techniques involving foreign affairs or national security.”<sup>71</sup> But

the previous examples of judicial expansionism make it hard not to imagine a case in the near future in which a nonresident alien, located overseas, subject to authorized surveillance under FISA, challenges the collection of information about him based on an interpretation of the *Carpenter* decision.

## Conclusion

The consequences of these decisions affecting national security are very real. They have a direct impact on the advice that military lawyers give commanders and, potentially, on the outcome of the conflict involved.

Gone are the days when United States armed forces could capture and hold a member of the opposing enemy force and not think about litigation. Naturally, we cannot deny quarter to the enemy who is *hors de combat*, but now one also has to worry about what evidence to collect in the midst of war to justify military detention. When judges are able to second-guess good-faith decisions made in the handling of prisoners taken in combat, or change the rules of war, those fighting the enemy are plunged into new sources of jeopardy.

Military attorneys exercise extraordinary care when providing rules of engagement and operational advice to those making decisions at the various levels of battle. They may be frontline infantrymen, aircraft pilots, drone operators, or generals commanding theaters of war, but increasingly, there is in the back of their minds the potential threat of litigation. The imminent dangers inherent in combat operations are now compounded by the specter of legal jeopardy when the battle has ended.

The U.S. Constitution gives Congress the specific authority to declare war, to raise and support armies, to make rules for the government and regulation of land and naval forces, and to provide and maintain a navy. It gives to the President the power as commander in chief of the nation's armed forces. Nowhere in that document is the judiciary mentioned in regard to national defense. It would be hoped that the Founders' doctrine of judicial restraint would guide the Supreme Court and other elements of the federal judiciary when they deal with matters of national security.

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## Endnotes

1. The topic for this paper was inspired and informed in part by a speech delivered by former Secretary of Homeland Security Michael Chertoff as part of a February 3, 2011, symposium at Rutgers University on the 10-year anniversary of the 9/11 terrorist attacks. See Michael Chertoff, "The Decline of Judicial Deference on National Security," *Rutgers University Law Review*, Vol. 63, Issue 4 (Summer 2011), pp. 1117–1133, [http://www.rutgerslawreview.com/wp-content/uploads/archive/vol63/Issue4/Chertoff\\_Speech\\_PDF.pdf](http://www.rutgerslawreview.com/wp-content/uploads/archive/vol63/Issue4/Chertoff_Speech_PDF.pdf) (accessed December 2, 2018).
2. Attorney General Edwin Meese III, speech before House of Delegates of the American Bar Association, July 9, 1985, <https://www.justice.gov/ag/speeches-16> (accessed December 20, 2018).
3. *Ibid.*, p. 7.
4. *Ibid.*
5. Supreme Court Justice William J. Brennan, Jr., joined the debate in a speech at Georgetown University. Justice William J. Brennan, Jr., speech before Text and Teaching Symposium, Georgetown University, Washington, DC, October 12, 1985, <https://fedsoc.org/commentary/publications/the-great-debate-justice-william-j-brennan-jr-october-12-1985> (accessed December 20, 2018). See also *Harvard Journal of Law and Public Policy*, Vol. 31, No. 3 (Summer 2008), which includes over a dozen essays on the originalism debate; "Originalism 2.0: The Twenty-Ninth Annual Federalist Society Student Symposium on Law and Public Policy—2010," *Harvard Journal of Law and Public Policy*, Vol. 34, No. 1 (Winter 2010); and *Originalism: A Quarter-Century of Debate*, ed. Steven G. Calabresi, foreword by Justice Antonin Scalia (Washington: Regnery Publishing, 2007).
6. Meese, speech before House of Delegates of the American Bar Association, p. 7.
7. Attorney General Edwin Meese III, speech before D.C. Chapter of the Federalist Society Lawyers Division, Washington, DC, November 15, 1985, <https://www.justice.gov/sites/default/files/ag/legacy/2011/08/23/11-15-1985.pdf> (accessed December 2, 2018).
8. *Ibid.*, p. 4.
9. *Ibid.*, p. 6.
10. *Ibid.*
11. *Ibid.* Punctuation as in original.
12. *Ibid.*, p. 13.
13. *Ibid.*, pp. 13–14.
14. Quoted in "We Are All Originalists," *The BLT: The Blog of Legal Times*, June 29, 2010, <https://legaltimes.typepad.com/blt/2010/06/kagan-we-are-all-originalists.html> (accessed December 20, 2018).
15. See Chertoff, "The Decline of Judicial Deference on National Security," p. 1119.
16. See Constitution of the United States, Article II, Section 1, Clause 1.
17. See Constitution of the United States, Article II, Section 2, Clause 1.
18. See John Yoo, *Crisis and Command: A History of Executive Power from George Washington to George W. Bush* (New York: Kaplan Publishing, 2009), and Curtis A. Bradley and Jack L. Goldsmith, "Congressional Authorization and the War on Terrorism," *Harvard Law Review*, Vol. 118, No. 7 (May 2005), pp. 2047–2133. See also John Yoo, "Commander in Chief," an essay on Article II, Section 2, Clause 1 in *The Heritage Guide to the Constitution*, ed. David F. Forte and Mathew Spalding, foreword by Edwin Meese III (Washington: The Heritage Foundation, 2014), pp. 254–256, <https://www.heritage.org/constitution/#!/articles/2> (accessed December 20, 2018).
19. 50 U.S. Code, Chapter 33, Sections 1541–1548, <https://www.law.cornell.edu/uscode/text/50/chapter-33> (accessed December 20, 2018).
20. See Bradley and Goldsmith, "Congressional Authorization and the War on Terrorism."
21. Authorization for Use of Military Force, Public Law 107-40, 107th Cong., September 18, 2001, <https://www.congress.gov/107/plaws/publ40/PLAW-107publ40.pdf> (accessed December 20, 2018).
22. See Bradley and Goldsmith, "Congressional Authorization and the War on Terrorism." See also Charles D. Stimson, "Law of Armed Conflict and the Use of Military Force," testimony before the Committee on Armed Services, U.S. Senate, May 16, 2013, <https://www.heritage.org/testimony/law-armed-conflict-and-the-use-military-force>.
23. See Charles D. Stimson and Hugh Danilack, "The Case Law Concerning the 2001 Authorization for Use of Military Force and Its Application to ISIS," Heritage Foundation *Legal Memorandum* No. 203, April 17, 2017, [https://www.heritage.org/sites/default/files/2017-04/LM-203\\_1.pdf](https://www.heritage.org/sites/default/files/2017-04/LM-203_1.pdf).
24. 317 U.S. 1 (1942).
25. 339 U.S. 763 (1950).
26. See dissent by Justice Antonin Scalia in *Boumediene v. Bush*, 553 U.S. 723, at 834.
27. See *Johnson v. Eisentrager*, 339 U.S. at 768.
28. 542 U.S. 507 (2004).

29. 542 U.S. 466 (2004).
30. 548 U.S. 557 (2006).
31. 553 U.S. 723 (2008).
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33. See Jack Goldsmith, “Power and Constraint: National Security Law After the 2012 Election,” *Case Western Reserve Journal of International Law*, Vol. 45, Issue 1 (2012), pp. 11–22.
34. See Judge A. Raymond Randolph, “Originalism and History: The Case of *Boumediene v. Bush*,” *Harvard Journal of Law and Public Policy*, Vol. 34, No. 1 (Winter 2010), p. 89.
35. *Ibid.*, p. 90.
36. *Ibid.*, p. 91.
37. *Ibid.*
38. *Ibid.*
39. 375 U.S.App.D.C. 48.
40. See Randolph, “Originalism and History: The Case of *Boumediene v. Bush*,” p. 92.
41. *Boumediene v. Bush*, 553 U.S. at 827–828.
42. *Ibid.*, at 842.
43. *Ibid.*, at 828.
44. *Maqaleh v. Gates*, 390 U.S.App.D.C. 352 (2010).
45. Charlie Savage, Rukmini Callimachi, and Eric Schmitt, “American ISIS Suspect Is Freed After Being Held More Than a Year,” *The New York Times*, October 29, 2018, <https://www.nytimes.com/2018/10/29/us/politics/isis-john-doe-released-abdulrahman-alsheikh.html> (accessed December 20, 2018).
46. 542 U.S. 507 (2004).
47. *Doe v. Mattis*, 889 F.3d 745 (2018). See also Charlie Savage, “Appeals Court Bars U.S. from Transferring American ISIS Suspect,” *The New York Times*, May 9, 2018, <https://www.nytimes.com/2018/05/09/us/politics/american-isis-suspect-appeals-ruling.html> (accessed December 20, 2018).
48. *Doe v. Mattis*, 889 F.3d at 769.
49. *Ibid.* Emphasis in original.
50. *Ibid.*
51. *Ibid.*
52. *Ibid.*, at 783.
53. Mark Mazzetti, “Killing of Americans Deepens Debate over Use of Drone Strikes,” *The New York Times*, April 23, 2015, <https://www.nytimes.com/2015/04/24/world/asia/killing-of-americans-deepens-debate-over-proper-use-of-drone-strikes.html> (accessed December 20, 2018).
54. American Civil Liberties Union, “ACLU and CCR Lawsuit: American Boy Killed by U.S. Drone Strike,” <https://www.aclu.org/video/aclu-ccr-lawsuit-american-boy-killed-us-drone-strike> (accessed December 20, 2018).
55. *Johnson v. Eisentrager*, 339 U.S. at 779.
56. See Judge Rosemary Collyer’s ruling in *Zaidan v. Trump*, U.S. District Court for the District of Columbia, Civil Action No. 17-581 (RMC), June 13, 2018, [https://ecf.dcd.uscourts.gov/cgi-bin/show\\_public\\_doc?2017cv0581-13](https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2017cv0581-13) (accessed December 20, 2018). See also Robert Chesney’s explanation of the ruling in “Judicial Review of Decisions to Kill American Citizens Under the AUMF: The Most Important Case You Missed Last Week,” *Lawfare*, June 18, 2018, <https://www.lawfareblog.com/judicial-review-decisions-kill-american-citizens-under-aumf-most-important-case-you-missed-last-week> (accessed December 20, 2018).
57. There were three executive orders banning entry of immigrants and refugees into the United States from Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen: “Executive Order Protecting the Nation from Foreign Terrorist Entry into the United States,” January 27, 2017, <https://www.whitehouse.gov/presidential-actions/executive-order-protecting-nation-foreign-terrorist-entry-united-states/> (accessed January 9, 2019); a revised “Executive Order Protecting the Nation from Foreign Terrorist Entry into the United States,” March 6, 2017, <https://www.whitehouse.gov/presidential-actions/executive-order-protecting-nation-foreign-terrorist-entry-united-states-2/> (accessed January 9, 2019); and a “Presidential Proclamation Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists or Other Public-Safety Threats,” September 24, 2017, <https://www.whitehouse.gov/presidential-actions/presidential-proclamation-enhancing-vetting-capabilities-processes-detecting-attempted-entry-united-states-terrorists-public-safety-threats/> (accessed January 9, 2019). The third order was challenged, and on June 26, 2018, the United States Supreme Court upheld the third executive order in *Trump v. Hawaii*, 585 U.S. \_\_\_\_ (2018), [https://www.supremecourt.gov/opinions/17pdf/17-965\\_h315.pdf](https://www.supremecourt.gov/opinions/17pdf/17-965_h315.pdf) (accessed January 9, 2019).

58. *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017).
59. *Washington v. Trump*, 858 F.3d 1168, 1174 (9th Cir. 2017). See also Judge Bybee's dissent in *Washington v. Trump*, No. 17-35105 (Motions Panel—February 9, 2017), <https://www.politico.com/f/?id=0000015a-d493-d536-a37b-d4d7f9b30000> (accessed January 9, 2019).
60. *Kleindienst v. Mandel*, 408 U.S. 753 (1972).
61. See *Washington v. Trump*, 858 F.3d at 1179.
62. *Fiallo v. Bell*, 430 U.S. 787 (1977).
63. *Kerry v. Din*, 135 S.Ct. 2128 (2015).
64. See *Washington v. Trump*, 858 F.3d at 1184–1185.
65. *Carpenter v. United States*, 138 S.Ct. 2206 (2018).
66. *Smith v. Maryland*, 442 U.S. 735 (1979). The United States Supreme Court held that the installation and use of a pen register by a telephone company does not constitute a search within the meaning of the Fourth Amendment.
67. *United States v. Miller*, 425 U.S. 435 (1976). The United States Supreme Court held that a bank depositor had no Fourth Amendment interests in bank records consisting of microfilms or checks, deposit slips, and other records relating to his accounts at two banks.
68. See *Kleindienst v. Mandel*, 408 U.S. at 2222.
69. Former Assistant Attorney General, National Security Division, U.S. Department of Justice (2009–2011).
70. David Kris, “Carpenter’s Implications for Foreign Intelligence Surveillance,” *Lawfare*, June 24, 2018, <https://www.lawfareblog.com/carpenters-implications-foreign-intelligence-surveillance> (accessed January 9, 2019).
71. See *Kleindienst v. Mandel*, 408 U.S. at 2220.