

A New National Security Court?
The Case for a Provisional Approach to the Guantánamo
Habeas Suits

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Introduction

A preventive detention court sits today in Washington, D.C. It has jurisdiction over more than 200 people. In each case before the court, the government claims that the petitioner can be detained by the executive without trial because he is part of a terrorist organization and would pose a threat to the United States if released. The petitioner, who is hundreds of miles away but may participate via telephone or video access, denies the claim and on occasion presents countervailing evidence of his¹ own. Hearsay evidence is admissible, and the standard of proof is preponderance of the evidence. Often the government's case is based largely on the petitioner's own statements. Hearings rarely last more than a day or two. If the petitioner loses, and loses on appeal, he may not ever have a right to return to a court for the rest of his life.

Several years ago, some began calling for Congress to create a new “national security court” that would perform this function or something like it. But Congress has done no such thing. Instead, this system is the result of a Supreme Court victory on behalf of Guantánamo Bay detainees. In *Boumediene v. Bush*²—after several years of habeas litigation from multiple detainees—the Court settled a core issue: people being held in Guantánamo have a constitutional right to bring habeas petitions in Article III courts. Dozens of petitions that had been filed were allowed to proceed; for the sake of organization and some measure of uniformity, they were channeled through the United States District Court for the District of Columbia. The D.C. judges have been left to improvise; with only a vague balancing test envisioned by the Court in *Hamdi v.*

¹ I use the pronoun “he” in this Article because the entire population to which I refer is male.

² 128 S. Ct. 2229 (2008).

*Rumsfeld*³ and an invitation to “innovat[e]” in *Boumediene*,⁴ they have come up with their own set of rules for the habeas proceedings. Gradually, they have been building through common law what looks substantially like a “national security court”: a specialized judicial body that decides on preventive detention through abbreviated hearings.

The habeas decisions rendered by the D.C. District Court have created a substantial body of law in their wake. The D.C. district judges have had to decide what presumptions will be afforded to the government’s evidence; whether the government must prove that the detainee poses an ongoing threat, or only that he met the detention criteria at some point; and, most importantly, what categories of people are actually detainable.⁵ Some commentators have taken note of the wide ranging and sometimes disparate outcomes that this decision-making process has produced,⁶ but most have taken the core consensus for granted: every single judge to have considered a habeas case agrees that the government may preventively detain someone found to be “part of . . . Taliban or al Qaeda forces,” and every judge agrees that the proceeding for making this determination need not approximate a criminal trial.⁷ For the Guantánamo detainees, preventive detention—not merely leading up to trial, but *instead of* a trial—is now firmly on the menu of options.

Taken broadly, the habeas decisions might suggest that the executive is now free to apprehend and detain anyone without trial so long as the government can show—by preponderance of the evidence—that he is part of a terrorist organization. But the

³ 542 U.S. 507, 527-39 (2004).

⁴ *Boumediene*, 128 S. Ct. at 2276.

⁵ See discussion *infra* notes _____ and accompanying text.

⁶ See Benjamin Wittes & Robert Chesney, Op-Ed, *The Courts’ Shifting Rules on Guantánamo Detainees*, WASH. POST, Feb. 5, 2010.

⁷ See Sophia Brill, Comment, *The National Security Court We Already Have*, 28 YALE L. & POL’Y REV. _____ (2010).

enactment of this system through common law should not mean that preventive detention as a general matter is now the law of the land. The system should extend no further than the current Guantánamo population because the legal regime governing the Guantánamo habeas cases has been a product of default by all three branches of government. Unwilling to make the prison into a “legal black hole,” the courts over the past several years have insisted on some degree of jurisdiction and process for the detainees there. But the separation of powers, strong national security claims, and the specter of a constitutional crisis have all counseled against judges ordering that detainees be either tried or released. A natural compromise, tossed out at one point by Justice Breyer in the course of an oral argument in 2004⁸ and now formally grafted into law, has been to settle on some sort of procedure to ensure the legality of detention. The problem is that, whatever procedures are now in place, the underlying authority to detain is extraordinarily tenuous. While numerous commentators and policy experts have suggested that Congress create a “national security court” or some other special body to oversee a preventive detention program, no such law has come into existence, and the Obama Administration has stated that it does not intend to enact one. Instead, it has relied on judicial interpretations that the 2001 Authorization for Use of Military Force (AUMF) includes the authority to detain.

This Article will not argue for any one correct interpretation of the AUMF in the abstract; it will argue, instead, that the dynamics between the political branches frame the context in which those interpretations have been made and should be taken into account in determining how far they extend. The courts’ interpretations of the AUMF at all levels

⁸ Transcript of Oral Argument at 36-37, *Rasul v. Bush*, 542 U.S. 466 (2004) (No. 03-334) (Justice Breyer asking Solicitor General Olson, “[W]hy not say, sure, you get your foot in the door, prisoners in Guantánamo, and we’ll use the substantive rights to work out something that’s protective but practical?”).

have been tailored to solve a series of policy crises: What is to be done with people whom the President, acting under asserted wartime authority, has detained with no legal remedy? What should a legal remedy look like? Should it be any different when a new President has come in and is attempting to “clean up the mess”?⁹ When courts make decisions under such extraordinary circumstances, their holdings are often contained to the unique circumstances at hand. A decision undertaken to resolve a crisis is fundamentally different from one that pronounces a broad interpretation of a statute or a constitutional provision, or one that seeks to create a new area of common law. A crisis-resolving decision is not a judicial exercise in expounding upon the general principles of a law; instead, it is an exercise in pushing and pulling at the law to fit a set of unique facts. As such, this type of decision will be provisional to the specific case and narrowly limited as precedent. This provisional approach is especially appropriate in the realm of national security law, where judges are asked to render opinions in the shadow of executive claims of sensitive intelligence interests and military necessity. While a court may choose to make broad pronouncements under such circumstances,¹⁰ it may also choose to engage in an ad hoc balancing or to dispose of the claims at hand in some other way so as simply to resolve the immediate dispute.¹¹

This Article argues that because the Guantánamo habeas jurisprudence has come about as an accident of both politics and policy, it falls firmly in the latter category and

⁹ See President Barack Obama, Remarks by the President on National Security (May 21, 2010), *available at* http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-On-National-Security-5-21-09/ (“Even as we clean up the mess at Guantánamo, we will constantly reevaluate our approach . . .”).

¹⁰ See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring) (setting out a broad, three-level scheme in evaluating executive authority in relation to Congress).

¹¹ See, e.g., *United States v. American Tel. & Tel. Co.*, 551 F.2d 384, 394-95 (D.C. Cir. 1976) (directing the parties to explore a settlement where the Department of Justice had sued to enjoin a telephone company from complying with a congressional subpoena, on claims of national security secrets).

should be afforded only the most provisional status as legal precedent. Though the recent case law hinges on an interpretation of the AUMF—that the word “force” includes the power to detain—that interpretation has been a product of judicial crisis-management born of necessity. The D.C. judges have been handed a docket from what President Obama himself has called “the mess at Guantánamo.”¹² They have improvised a system for separating out those who truly ought to be released from those who might pose some sort of threat, but in the context of assurances from the government that it is seeking to shut down the facility and develop some alternative detention policy.¹³ Absent any interventions by Congress, the rulings so far should serve as no more than provisional means for dealing with a political and policy crisis. A provisional approach to the rulings’ interpretation of the AUMF is appropriate because Congress did not discuss any issues related to detention at the time of its passage and never has voted upon the matter since; higher courts have left trial courts with almost no guidance on the matter; and the executive branch under the Obama Administration has shown no desire to make preventive detention the law of the land.

Whether the D.C. habeas jurisprudence becomes a broad common law framework for widespread preventive detention in the fight against terrorism will be determined by executive policy-making, subsequent judicial opinions, and potential intervention by Congress (or lack thereof). By some measures, the body of D.C. habeas law from Guantánamo today is comprehensive. There have been more than **twenty-five** trial court rulings and one ruling by the D.C. Circuit, and they have answered a range of complex

¹² President Barack Obama, Remarks by the President on National Security, **supra note 1**.

¹³ See Respondents’ Memorandum Regarding the Government’s Detention Authority Relative to Detainees Held at Guantánamo Bay at 10-11, *In Re* Guantánamo Bay Detainee Litigation, 581 F. Supp. 2d 33 (D.D.C. 2008) (Misc. No. 08-0442 (TFH)) [hereinafter Obama Memo].

questions on war powers, application of international law, and the ability of judges to craft new types of proceedings as the necessity arises. The habeas cases have their own procedural code and, in true common law fashion, judges have begun to cite one another's prior rulings as settled law. However, each case to have come before the D.C. District Court involves detainees who have been in Guantánamo Bay for several years, most of whom were captured in Afghanistan or Pakistan within the year following the September 11, 2001 attacks,¹⁴ and almost all of whom are accused of being part of al Qaeda specifically.¹⁵ The Obama Administration is working to close the facility and has repeatedly expressed its intention of doing so¹⁶ and its plans to either try or repatriate the majority of the remaining detainees.¹⁷

In other words, the repeated statements of the D.C. courts—that the AUMF authorizes the executive to detain without trial anyone found by a preponderance of the evidence to be “part of . . . Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners”—can and should be cabined narrowly to their context. Without a narrowing approach, the D.C. District and Circuit courts are in danger of creating a “loaded weapon” that could sanction long-term prevention detention as a broader option for national security policy. Such a policy,

¹⁴ *But see* Boumediene v. Bush, 579 F. Supp. 2d 191 (D.D.C. 2008) (petitioners arrested in Bosnia).

¹⁵ *But see* Al Warafi v. Obama, Civil No. 09-2368(RCL), 2010 WL 1404001 (D.D.C. Mar. 24, 2010) (petitioner found to be a part of the Taliban); Al-Bihani v. Obama, 590 F.3d 866 (petitioner found to have served under the 55th Arab Brigade, a group affiliated with the Taliban). While Al-Bihani had conceded that the 55th Arab Brigade was closely affiliated with the Taliban, the District Court and the majority panel for the D.C. Circuit also found evidence that it was commanded by or affiliated with al Qaeda personnel. *Id.* at 872; Al-Bihani v. Obama, 594 F. Supp. 2d 35, 39-40 (D.D.C. 2009). Thus, *Al Warafi* appears to be the only habeas case (aside from the litigation concerning the Uighurs) in which the government has not alleged affiliation with al Qaeda.

¹⁶ Exec. Order 13,492, 74 Fed. Reg. 4897 (Jan. 22, 2009).

¹⁷ *See* Peter Finn, *Justice Task Force Recommends About 50 Guantanamo Detainees Be Held Indefinitely*, WASH. POST, Jan. 22, 2010 (reporting an estimate by the Guantanamo task force that about 35 detainees could be prosecuted in federal or military courts, 110 could eventually be released, and “nearly 50” would have to be detained without trial).

which was never voted on by Congress and has not been adopted as a policy goal of the Obama Administration, could allow the executive (or some future executive in a new administration) to detain without trial alleged members or supporters of dozens of different terrorist organizations captured anywhere in the world; such persons could be brought to Guantánamo or even to a facility inside the United States and detained there for life without ever receiving a criminal trial. In short, an expansive reading of the D.C. habeas rulings would essentially enact, through common law, the type of new “national security court” that has been so controversial as a legislative proposal.

This would be a serious mistake. The developing case law should be viewed instead as an exercise in crisis-management—not as the foundation for an enduring common law construction. This Article proceeds in five Parts. Part I discusses the “democracy gap” in our current detention policy, arguing that the AUMF was never understood as an authorization for long-term detention at the time of its passage and was never discussed as such. It also argues that subsequent legislation, including the 2006 and 2009 Military Commissions Acts and the 2005 Detainee Treatment Act, should not be seen as congressional ratifications of detention policy. Part II briefly describes the substance of the habeas rulings, their broad areas of consensus, and the disconnect that this emerging consensus has produced when compared to public discourse over detention in Guantánamo. Part III explores the gaps that the dynamic between the Supreme Court and Congress has produced, the Court having insisted on some level of legal process but refusing to set any concrete guidelines, and Congress failing to pass any serious policy resolutions. Within Congress, Part III argues that the issue has become so politically radioactive that the only potential outcomes are extremist proposals and gridlock.

Part IV turns to examine the executive branch, arguing that the Obama Administration has delegated detention law to the courts as its least bad option for “unwinding” the situation it inherited. It examines the Administration’s legal position with regard to detention and argues that this position, while similar on the surface to that of the Bush Administration, should also be viewed as provisional and backward looking. Part V stakes out the case for a provisional approach, given the default of all three branches and the extraordinary circumstances that have framed the courts’ decision making. It argues that an expansive reading of the habeas cases could lead to a number of alarming outcomes in some future time or administration and discusses the merits of narrow rulings and narrow readings in this line of cases. It then describes the contours that such a provisional approach would take, including how and to whom this line of cases should be limited.

I. What Habeas Has Wrought

Is preventive detention already the law of the land? Scholars, practitioners, and rights advocates debated the wisdom of detention without trial in the years following the September 11 attacks. In its more abstract terms, the debate is still ongoing.¹⁸ What do we do with people who we catch but cannot try? If we can use military detention, can it only be for people captured on an actual battlefield in a foreign country? What about someone

¹⁸ Some of the most recent influential scholarship includes Douglass Cassel, *Pretrial and Preventive Detention of Suspected Terrorists: Options and Constraints Under International Law*, 98 J.L. & CRIMINOLOGY 811 (2008); Robert Chesney, *Terrorism, Criminal Prosecution, and the Preventive Detention Debate*, 50 S. TEX. L. REV. 669 (2009); Robert Chesney & Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 STAN. L. REV. 1079 (2009); David Cole, *Out of the Shadows: Preventive Detention, Suspected Terrorists, and War*, 97 CAL. L. REV. 693 (2009); Ashley S. Deeks, *Administrative Detention in Armed Conflict*, 40 CASE W. RES. J. INT’L L. 403 (2009); and Matthew C. Waxman, *Detention as Targeting: Standards of Certainty and Detention of Suspected Terrorists*, 108 COLUM. L. REV. 1365 (2008).

who facilitates travel plans for al Qaeda in an office hundreds of miles away from any combat zone?¹⁹ What about someone captured inside the United States?

These questions have filled the volumes of law reviews over recent years. But many fewer observers have begun to notice that most of them questions are already being answered, reinforced, and normalized through a common law process in Washington, D.C. While there remain disagreements in the courts—some minor, some not—many key issues are on a dangerous course to becoming settled through a body of federal trial judges in the United States District Court for the District of Columbia. Section A briefly outlines the legal developments in the D.C. courts following the Supreme Court’s decision in *Boumediene v. Bush*,²⁰ which held that detainees could petition for writs of habeas corpus in federal court. Section B describes some parallel evolutions in public discourse that mostly fail to track the emerging body of law. Section C underscores the disconnect between what remain profound issues of public disagreement and the common law train that is beginning to leave the station.

A. Rulings So Far

i. *Hamdi*: Authorization for Detention Under the AUMF

The first essential ruling on the legality of detention came from *Hamdi v. Rumsfeld*, in 2004.²¹ Hamdi had been seized in Afghanistan by the Northern Alliance and turned over to U.S. forces during the early stages of the invasion. He was transferred to Guantánamo Bay in January of 2002, and was later brought into a military brig in the United States when authorities learned that he was an American citizen. The government alleged that,

¹⁹ See *Boumediene v. Bush*, 579 F. Supp. 2d 191, 198 (D.D.C. 2008) (discussing the government’s case against petitioner Belkacem Bensayah).

²⁰ 553 U.S. 723 (2008).

²¹ 542 U.S. 507.

during the conflict in Afghanistan, Hamdi had taken up arms with the Taliban.²² When he filed a petition for habeas corpus, the Bush Administration argued that he was an “enemy combatant,” and that therefore (1) it had inherent executive authority under Article II of the Constitution to detain him, and (2) it had further authority under the 2001 Authorization for Use of Military Force (“AUMF”) to do so.²³

The Court ruled only on the latter argument, in favor of the government. It reasoned that the AUMF, which authorizes the President to use “all necessary and appropriate force” against “nations, organizations, or persons” who planned or helped plan the September 11 attacks, necessarily includes the authority to capture and detain persons subject to the use of force.²⁴ Detention was deemed to be “so fundamental and accepted an incident of war as to be an exercise of the ‘necessary and appropriate force’ Congress authorized the President to use.”²⁵ Notably, the Court limited the definition of an “enemy combatant” for the purposes of the case as someone who was “‘part of or supporting forces hostile to the United States or coalition partners’ in Afghanistan and who ‘engaged in an armed conflict against the United States’ there.”²⁶ It added, however, that “[t]he

²² *Id.* at 510.

²³ Brief for the Respondents at 13-21, *Hamdi*, 542 U.S. 507 (2004) (No. 036696).

²⁴ *Hamdi*, 542 U.S. at 518. The outcome of *Hamdi* hinged on a plurality ruling by Justices O’Connor, Kennedy, and Breyer, and Chief Justice Rehnquist, which held that Hamdi’s detention was authorized by the AUMF but that he was entitled to some form of due process to determine whether he was indeed an enemy combatant. *Hamdi*, 542 U.S. at 509-39. Justices Souter and Ginsburg concurred that Hamdi was entitled to a hearing, but rejected the argument that the AUMF (or any other law) actually authorized his detention. Justices Scalia and Stevens dissented to say that Hamdi should either be tried for treason or released, *id.* at 533, 554-75, while Justice Thomas agreed that the AUMF (in addition to Article II of the Constitution) authorized Hamdi’s detention, *id.* at 577, but rejected the argument that he was entitled to a hearing. Thus, a total of five Justices (the O’Connor plurality plus Justice Thomas) supported with the AUMF argument.

²⁵ *Id.* at 518.

²⁶ *Id.* at 516 (quoting Brief for the Respondents, *supra* note [L], at 3.

permissible bounds of the category [would] be defined by the lower courts as subsequent cases are presented to them.”²⁷

ii. *Boumediene* and the D.C. Rulings: A Common Law of Detention?

The full implications of *Hamdi* were only felt recently in the years following the Supreme Court’s 2008 ruling in *Boumediene*.²⁸ While *Hamdi*’s habeas petition had been entertained on unusual grounds (he was an American citizen being held in the United States when he filed), it was only *Boumediene* that definitively settled the broader issue of habeas jurisdiction for citizens and non-citizens alike in Guantánamo Bay. By holding that the detainees there have a constitutional right to file habeas petitions in federal court, the *Boumediene* decision allowed a bevy of cases to go forward. These cases have been routed through the United States District Court for the District of Columbia, and over **twenty-five** substantive rulings have issued from that court in the ensuing time.²⁹

In each instance, the government will generally claim that the petitioner is detainable because he is (or was) part of the Taliban or al Qaeda. Most petitioners in these cases were captured several years ago in Afghanistan and brought to Guantánamo during the earlier stages of the conflict. In the typical case, the petitioner is accused of having traveled into Afghanistan to join the fight (sometimes against the United States specifically,³⁰ and sometimes against the Afghan Northern Alliance, the U.S.’s coalition partner³¹). In some cases, the petitioner is said to have engaged in actual battle,³² while in

²⁷ *Id.* at 522 n.1.

²⁸ 128 S. Ct. 2229 (2008).

²⁹ See Brill, *supra* note [redacted]

³⁰ *E.g.*, *Sлити v. Bush*, 592 F. Supp. 2d 46, 51 (D.D.C. 2008) (finding that petitioner traveled to Afghanistan as an al Qaeda recruit).

³¹ *E.g.*, *Al Warafi v. Obama*, No. 09-2368(RCL), 2010 WL 1404001, at *7 (D.D.C. Mar. 24, 2010) (alleging that the petitioner traveled to Afghanistan to help the Taliban fight the Northern Alliance); *Al Bihani v. Obama*, 594 F. Supp. 2d 35, 36-37 (D.D.C. 2009), *aff’d*, 590 F.3d 866 (D.C. Cir. 2010) (petitioner captured by Northern Alliance forces).

many others the petitioner is said to have attended some sort of training camp or to have carried a weapon at some point during the conflict.³³ Very often, the government's evidence comes primarily from the petitioner's own admissions³⁴ or from those of other Guantánamo detainees made during interrogations.³⁵ Judges have treated evidence gained from interrogations with varying degrees of skepticism, with some using strong language condemning torture or cruel treatment.³⁶ As of [REDACTED], [REDACTED] petitions for

³² *E.g.*, *El Gharani v. Bush*, 593 F. Supp. 2d 144, 148 (D.D.C. 2009) (alleging that petitioner fought against U.S. forces in Tora Bora).

³³ *E.g.*, *Al Mutairi v. United States*, 644 F. Supp. 2d 78, 90 (D.D.C. 2009) (alleging that petitioner attended an al Qaeda-affiliated training camp); *Al Bihani*, 594 F. Supp. 2d at 38-29 (alleging that petitioner carried a rifle and served as a cook for a Taliban-affiliated military brigade).

³⁴ *E.g.*, *Al Warafi v. Obama*, No. 09-2368(RCL), 2010 WL 1404001, at *5 (D.D.C. Mar. 24, 2010) (the Government "primarily rel[ies] on statements of petitioner"); *Anam v. Obama*, -- F.Supp.2d ----, 2010 WL 58965 at *1 (D.D.C. 2010) ("[T]he Government's allegations are primarily derived from twenty-six documents containing statements [the petitioner] provided at Guantánamo."); *Al Rabiah v. United States*, 658 F. Supp. 2d 11, 15 (D.D.C. 2009) ("The evidentiary record on which the Government seeks to justify his indefinite detention is surprisingly bare. The Government has withdrawn its reliance on most of the evidence and allegations that were once asserted against Al Rabiah, and now relies almost exclusively on Al Rabiah's "confessions" to certain conduct."); *Al Bihani v. Obama*, 594 F. Supp. 2d 35, 38 ("The Government's evidence is a combination of certain statements of the petitioner that the Court finds credible and certain classified documents."); *Sliti v. Bush*, 592 F. Supp. 2d 46, 50 (D.D.C. 2008) ("The Government's evidence is a combination of certain statements by petitioner Sliti which the Court found credible and certain supporting classified documents."); *Al Alwi v. Bush*, 593 F. Supp. 2d 24, 28 (D.D.C. 2008) ("The Government's evidence is a combination of certain statements of the petitioner which the Court found credible, and certain supporting classified documents.").

³⁵ *E.g.*, *Al Mutairi v. Obama*, 644 F. Supp. 2d 78 (D.D.C. 2009) ("The Government's allegation [that the petitioner attended a training camp] is supported by one reference, in a portion of one sentence, in one interrogation report of [redacted] . . . ; [redacted] stated that: "he went to visit [redacted] and [redacted] who were attending the camp."); *Ahmed v. Obama*, 613 F. Supp. 2d 51, 65 (D.D.C. 2009) ("The Government's chief pieces of evidence are the statements made by four witnesses, who are or have been detained at Guantánamo Bay."); *El Gharani v. Bush*, 593 F. Supp. 2d 144, 147 (D.D.C. 2009) ("[T]he Government's evidence against el Gharani consists principally of the statements made by two other detainees while incarcerated at Guantánamo Bay.").

³⁶ *See, e.g.*, *Abdah v. Obama*, No. 04-1254 (HHK), 2010 WL 1626073, at *3 (D.D.C. Apr. 21, 2010) ("The Court will not rely on statements of [two Guantánamo detainees] because there is un rebutted evidence in the record that, at the time of the interrogations at which they made the statements, both men had recently been tortured."); *Anam v. Obama*, No. 04-1194 (TFH), 2010 WL 58965 at *1 (D.D.C. Jan. 6, 2010) ("The Court observed that twenty-three of [twenty-six] documents are tainted by the coercive interrogation techniques to which [the petitioner] was subject and lack sufficient indicia of reliability."); *Hatim v. Obama*, 677 F. Supp. 2d 1, 3 (D.D.C. 2009) ("The government's allegations rest almost entirely upon admissions made by the petitioner himself—admissions that the petitioner contends he made only because he had previously been tortured while in U.S. custody. Significantly, the government does not contest the petitioner's claims of torture"); *Al Rabiah v. Obama*, 658 F. Supp. 2d 11, 39 ("[Al Rabiah's] interrogators grew increasingly frustrated with the inconsistencies and implausibilities associated with his confessions and began threatening him with rendition and torture These tactics violated both the Army Field Manual and the 1949 Geneva Convention Relative to the Treatment of Prisoners of War").

habeas have been granted, while [REDACTED] have been denied, and [REDACTED] are currently being appealed.

Some have described this process as haphazard,³⁷ while others have celebrated the fact that many petitions have been granted as a victory for civil liberties.³⁸ Both perspectives are correct in some senses and crucially wrong in others. The judges who have entertained habeas suits have indeed varied widely in their treatment of some major issues, such as whether providing “substantial support” for the Taliban or al Qaeda but not being “part of” the organization is sufficient for detention,³⁹ and whether the government must show that the detainee poses an ongoing threat to the United States, or only that he fit the detention criteria at some prior point.⁴⁰ However, they have also reached a core of consensus that is widely unacknowledged—or perhaps hiding in plain sight. Every single D.C. District (and, more recently, Circuit) judge who has considered a habeas petition after *Boumediene* agrees that the AUMF authorizes the government to detain—for a seemingly indefinite period of time—anyone found to be “part of . . . Taliban or al Qaeda forces.”⁴¹ Moreover, they have processed these cases under a relatively uniform set of unique procedural rules that require only a showing of a

³⁷ See, e.g., Wittes & Chesney, *supra* note __; see also BENJAMIN WITTES, ROBERT CHESNEY & RABEA BENHALIM, BROOKINGS INST.: GOVERNANCE STUDIES, *THE EMERGING LAW OF DETENTION: THE GUANTÁNAMO HABEAS CASES AS LAWMAKING* 65-72 (2010).

³⁸ See, e.g., Carol Rosenberg, *Judges Siding with Detainees in Guantanamo Habeas Cases*, MIAMI HERALD, Sept. 7, 2009.

³⁹ Compare *Al-Adahi v. Obama*, No. 05-280 (GK), 2009 WL 2584685 (D.D.C. Aug. 21, 2009); *Al Bihani v. Obama*, 594 F. Supp. 2d 35 (D.D.C. 2009); and *Gherebi v. Obama*, 609 F. Supp. 2d 243 (D.D.C. 2009), with *Awad v. Obama*, 646 F. Supp. 2d 20 (D.D.C. 2009); *Al Mutairi v. United States*, 644 F. Supp. 2d 78 (D.D.C. 2009); *Mattan v. Obama*, 618 F. Supp. 2d 24 (D.D.C. 2009); and *Hamlily v. Obama*, 616 F. Supp. 2d 63 (D.D.C. 2009). See also WITTES ET AL., *supra* note [], at 17-21; Brill, *supra* note [], at []

⁴⁰ WITTES ET AL., *supra* note [], at 22-31; Brill, *supra* note [], at []

⁴¹ The Obama Administration’s position is that the AUMF authorizes it to detain “persons who were part of, or substantially supported, Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners.” Obama Memo, *supra* note [], at 2. The judges have quibbled over the “substantially supported” prong and do not appear to have ruled in any cases involving persons alleged to be part of forces outside the control of al Qaeda or the Taliban.

preponderance of the evidence by the government and that allow the admission of hearsay evidence.⁴² In celebrating the habeas rulings as victories (many of which have granted release because of the inadequacy of the government's evidence) civil libertarians are wrong for the same reason as critics of the rulings' inconsistencies: the core consensus of the opinions supports an alternative legal regime for handling detainees—with its own criteria for detention and its own relaxed procedural rules—that is outside both the typical criminal framework and common notions of a “theater of combat.” This consensus has gone unchallenged by the courts, and it is beginning to sprout roots.

B. The Shifting Political Discourse: From Lawlessness to Normalization

This common law evolution has also gradually yet radically shifted the lines of public discourse around detention issues. When the September 11 attacks kicked off a debate familiar to this nation's history on balancing civil liberties and national security, a flood of commentators, practitioners, politicians, and news organizations pondered and disputed the legality of the Bush Administration's new detention program in Guantánamo Bay. Many were quick to condemn the policy as lawless and unconstitutional, while others pushed for broad innovations to our legal system to handle this new “war on terror.” Many of these debates are ongoing, and some may never end. But on a basic issue—whether we can detain al Qaeda and/or Taliban members indefinitely without trial under an alternative legal regime—most experts and political leaders are slouching toward consensus. This Section traces this evolution, while the next Part will argue that this consensus has not been explicitly considered or blessed by Congress.

⁴² See Case Management Order, *In Re* Guantánamo Bay Detainee Litigation, 581 F. Supp. 2d 33 (D.D.C. 2008) (Misc. No. 08-0442 (TFH)) [hereinafter Hogan CMO]; Brill, *supra* note [], at [].

It took less than a week after the September 11 attacks for spirited debates about issues such as racial profiling, the use of air marshals, and new surveillance powers for the government to emerge.⁴³ When the popular media first learned that prisoners from the invasion into Afghanistan were being taken to Guantánamo Bay, most commentators focused their concerns on physical treatment, such as whether sedating and shackling the prisoners for the duration of the flight there constituted cruel or inhumane treatment,⁴⁴ and whether the Geneva Conventions for prisoners of war would apply.⁴⁵ When debates over the legal status of the detainees became more pronounced, the threshold focus was on access to U.S. courts: that is, whether courts could entertain habeas petitions. More specifically, once the Bush Administration had begun classifying detainees as “enemy combatants,” the natural litigating position for detainees and the organizations that represented them was to challenge their status as such in habeas courts.

The underlying question—if they are enemy combatants, then what?—was left by many parties for another day. But it is clear that most of the rights groups representing the detainees, along with a broader coalition of civil libertarians, viewed the prospect of indefinite detention without trial as a serious departure from constitutional norms. For example, in early 2002, when Defense Secretary Donald Rumsfeld listed prolonged detention without trial as one of several options facing Guantánamo detainees, a lawyer from the Center for Constitutional Rights responded, “It’s unheard of in American law that you can put people in indefinite preventive detention.”⁴⁶ Even David B. Rivkin, a

⁴³ See, e.g., Linda Greenhouse, *War Zone: What Price Liberty?; The Clamor of a Free People*, N.Y. TIMES, Sept. 16, 2001.

⁴⁴ See James Dao, *A Nation Challenged: Military; U.S. Is Taking War Captives to Cuba Base*, N.Y. TIMES, Jan. 11, 2002 (noting concerns from Amnesty International).

⁴⁵ See Editorial, *The Prisoners at Guantánamo*, N.Y. TIMES, Jan. 22, 2002.

⁴⁶ Katharine Q. Seelye, *A Nation Challenged: The Prisoners; Rumsfeld Lists Outcomes for Detainees Held in Cuba*, N.Y. TIMES, Feb. 27, 2002.

Contributing Editor at the *National Review* who has vigorously defended the CIA's interrogation practices⁴⁷ and criticized judicial review over Guantánamo cases,⁴⁸ wondered (back in 2002), "Would I be comfortable keeping [the detainees] in Guantánamo for twenty years on the theory that the war on terrorism was still going on? Probably not."⁴⁹ Professor Jack Goldsmith, former Assistant Attorney General for the Office of Legal Counsel under the Bush Administration, notes that "[t]he idea of military detentions without charge or trial until the end of hostilities came in for special scrutiny" by rights groups.⁵⁰ And as recently as 2008, Harold Hongju Koh, former Dean of Yale Law School and now chief legal advisor to the Secretary of State, described the view that the Authorization for Use of Military Force permits indefinite detentions as part of "a distorted constitutional vision."⁵¹

Perhaps the clearest angle from which to view some groups' perspective on indefinite detention is to view their responses to proposals to create new "national security courts." The first major such proposal was advanced by Professor Goldsmith along with Neal Katyal, who had represented Salim Hamdan in *Hamdan v. Rumsfeld*⁵² and is now Deputy Solicitor General under the Obama Administration. On the Op-Ed page of the *New York*

⁴⁷ David B. Rivkin & Lee A. Casey, Op-Ed, *The Memos Prove We Didn't Torture*, WALL ST. J., Apr. 20, 2009.

⁴⁸ David B. Rivkin & Lee A. Casey, Op-Ed, *McCain Is Right: High Court Was Wrong*, WASH. TIMES, June 26, 2008 (describing Senator John McCain's assessment of *Boumediene v. Bush* as "one of the worst" Supreme Court decisions in history as "right on target").

⁴⁹ Seelye, *supra* note 1.

⁵⁰ JACK GOLDSMITH, THE TERROR PRESIDENCY 116 (2007).

⁵¹ *Restoring the Rule of Law: Hearing Before the Senate Judiciary Comm., Subcomm. on the Constitution, Civil Rights, and Property Rights*, [REDACTED] Cong. [REDACTED] (2008) (statement of Harold Hongju Koh, Dean and Gerard C. & Bernice Latrobe Smith Professor of Law, Yale Law School) ("[W]e have increasingly heard claims that the executive can infringe upon our civil liberties without clear legislative statements, relying on such broadly worded laws as the [AUMF] of September 2001 to justify secret National Security Agency surveillance, indefinite detentions, and torture of foreign detainees."). Koh went on to state, "As a nation, we should not accept that indefinite detention without trial, abusive interrogation, and other unacceptable practices have somehow become necessary features of a post-9/11 world." *Id.*

⁵² 548 U.S. 557 (2006).

Times, Goldsmith and Katyal proposed that Congress establish “a comprehensive system of preventive detention that is overseen by a national security court.”⁵³ Operating under a “congressionally approved definition of the enemy,” the court, composed from a pool of federal judges, would use a set of modified procedural rules and evidentiary standards to determine whether there is a continuing rationale for detention.⁵⁴ Goldsmith and Katyal’s proposal provoked immediate dismay from civil liberties activists, who described preventive detention as “cut[ing] the heart out of any concept of human liberty,”⁵⁵ while another Letter to the Editor wondered, “Will any member of Congress dare to propose such draconian measures?”⁵⁶

More such proposals continue to surface, the most recent and forceful coming from Benjamin Wittes at the Brookings Institution⁵⁷—and each time civil libertarians treat the idea as novel and dangerous.⁵⁸ Harold Hongju Koh, now chief legal advisor to Secretary of State Hillary Clinton, testified before the Senate in 2008,

[A]ny new national security legislation should resist authorizing a new system of preventive detention or creating a special ‘terror court’ of the kind being urged by some commentators. . . . The goal of the next Administration and Congress should be to end debacles like Guantánamo, not set its worst features in concrete. Any tailor-made ‘terror court’ would plainly fail the most relevant test of ‘credible justice’ Few abroad will likely respect the judgments of an extraordinary court designed to convene in secret to punish a

⁵³ Jack L. Goldsmith & Neal Katyal, Op-Ed, *The Terrorists’ Court*, N.Y. Times, July 17, 2007.

⁵⁴ *Id.*

⁵⁵ Michael Ratner, President, Ctr. for Constitutional Rights, Letter to the Editor, *Re ‘The Terrorists’ Court*, N.Y. TIMES, July 16, 2007.

⁵⁶ John R. Merrill, Letter to the Editor, *Re ‘The Terrorists’ Court*, N.Y. TIMES, July 16, 2007. The *Times* also published one letter approving of the proposal. See Steven G. Calabresi, Letter to the Editor, *Re ‘The Terrorists’ Court*, N.Y. TIMES, July 16, 2007.

⁵⁷ See BENJAMIN WITTES, LAW AND THE LONG WAR: THE FUTURE OF JUSTICE IN THE AGE OF TERROR 162-66 (2008); BENJAMIN WITTES & COLLEEN A. PEPPARD, BROOKINGS INST.: GOVERNANCE STUDIES, DESIGNING DETENTION: A MODEL LAW FOR TERRORIST INCAPACITATION (2009), available at http://www.brookings.edu/~media/Files/rc/papers/2009/0626_detention_wittes/0626_detention_wittes.pdf.

⁵⁸ See, e.g., Jameel Jaffer & Ben Wizner, *Don’t Replace the Old Guantánamo with a New One*, SALON.COM, Dec. 9, 2008, <http://www.salon.com/opinion/feature/2008/12/09/guantánamo/>.

particular class of suspect . . . for crimes that could not be prosecuted in a standing, open, regularly constituted court.⁵⁹

The American Civil Liberties Union, meanwhile, maintains a web page that proclaims, “No Indefinite Detention Without Charge or Trial.”⁶⁰ In response to the latest proposed draft legislation on the matter—a measure circulated by Senator Lindsey Graham that would provide congressional authority for detention—an ACLU representative stated, “Indefinite detention without charge or trial flies in the face of American values and violates this country’s commitment to the rule of law. . . . If Senator Graham’s legislation is introduced, Congress must stand strong and uphold our most cherished values, not cement into law policies that rival the worst of the Bush administration’s legacy.”⁶¹

In other words, from the look of things, preventive detention remains a deeply contested issue in the public eye. Though the hard view advocated by John Yoo and others (that the President’s Article II power in fighting terrorists is virtually unchecked) has been somewhat repudiated, a reformist view champions a legislative model for detention, while others remain convinced that, outside an immediate battlefield context, the government should not be permitted to hold individuals indefinitely without trying them on a criminal charge.

At the same time, however, a parallel discourse has been sliding to a consensus. This discourse can trace its roots to the courts and their interpretations of the AUMF, which would seem to suggest that preventive detention is already the law of the land. The same

⁵⁹ *Restoring the Rule of Law*: Hearing Before the Senate Judiciary Comm., Subcomm. on the Constitution, [redacted] Cong. [redacted] (2008) (statement of Harold Hongju Koh, Dean and Gerard C. & Bernice Latrobe Smith Professor of Law, Yale Law School).

⁶⁰ American Civil Liberties Union, No Indefinite Detention Without Charge or Trial, <http://www.aclu.org/indefinitedetention/> (last visited Apr. 6, 2010).

⁶¹ Press Release, American Civil Liberties Union, Senator Graham Proposes Indefinite Detention Legislation to White House (Mar. 23, 2010), available at <http://www.aclu.org/national-security/senator-graham-proposes-indefinite-detention-legislation-white-house>.

Harold Koh who vigorously championed resistance to new detention law stated recently that the Obama Administration has “relied on legislative authority expressly granted to the President by Congress in the 2001 AUMF” as authority for detaining individuals at Guantánamo Bay,” and that “while the various judges who have considered these arguments have taken issue with certain points, they have accepted the overall proposition that individuals who are part of an organized armed group like al Qaeda can be subject to law of war detention for the duration of the current conflict..”⁶²

Koh’s position is remarkable not because he should be accused of compromising on his principles; rather, it is remarkable because it reflects a bizarre disjunction pervading current discourse on the matter: A new preventive detention law is a bad idea and contradicts our core values—and preventive detention is legal and has been since 2001.

II. The Democracy Gap in Congress

This entire regime of emerging law rests almost singularly upon the 2001 Authorization for Use of Military Force (AUMF), passed by Congress just four days after the September 11 attacks.⁶³ The AUMF, which authorizes the President to use “to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons,” provided obvious legal authority for attacks on al Qaeda and Taliban targets in Afghanistan that ensued in the

⁶² Harold Hongju Koh, Legal Adviser, U.S. Department of State, Address at the Annual Meeting of the American Society of International Law: The Obama Administration and International Law (Mar. 25, 2010), available at <http://www.state.gov/s/l/releases/remarks/139119.htm>. This speech received far more attention for its defense of the use of drone attacks. That Koh’s embrace of the evolving detention consensus was seen as unremarkable underscores the extent to which this area of law is slowly moving away from any standards that have been discussed or articulated by the public at large. See, e.g., Ari Shapiro, *U.S. Drone Strikes Are Justified, Legal Adviser Says*, NPR.ORG, Mar. 26, 2010, <http://www.npr.org/templates/story/story.php?storyId=125206000>.

⁶³ Pub. L. 107-40, 115 Stat. 224 (2001).

following months. But almost nine years later, the resolution—which weighs in at less than 400 words—is also now cited by legal experts ranging from Harold Koh to John Yoo as providing clear authority for the indefinite detention of prisoners in Guantánamo Bay.

This Part argues that, whether or not the AUMF can plausibly be read to include detention authority, the lack of Congress’s involvement in the matter is glaring. The significant developments outlined are not products of democratic decision-making; they are its substitutes. There exists a significant democracy gap in what could become a new law of preventive detention. Section A describes how far afield the courts’ interpretation of the AUMF have departed from an originalist view of the resolution’s enactment. Section B rebuts claims that the courts’ interpretations of the AUMF have been “ratified” by Congress in subsequent legislation.

A. An Originalist Angle on Statutory Interpretation

This Section outlines an analysis of the AUMF as a basic matter of statutory interpretation. Though I do not argue for any particular reading of the AUMF, I attempt to illustrate what a reading of it might look like *outside* the context of habeas cases and Guantánamo Bay, and closer to the context of its original understanding. Of course, dozens of judicial rulings, from D.C. habeas cases and elsewhere, have grappled with the issue of what the AUMF means and what it authorizes. They have always done so, however, in the shadow of a politically difficult situation that raises grave issues of international law, war powers, and constitutional and human rights. A reading of the AUMF that takes a more originalist approach and confines itself more strictly to the text and legislative history of the authorization looks quite different, and illustrates how unstable the edifice for preventive detention might be.

After a preamble describing the devastations of the September 11 attacks, the AUMF 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, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.”⁶⁴

The word “detention” does not appear anywhere in the text. The resolution authorizes “force” against the September 11 attackers and their various affiliates, and the primary hook for the view that the AUMF also authorizes detention is an argument that the ability to use force and to wage war requires the ability to detain. This argument was

⁶⁴ The following is the text of the AUMF in full:

Joint Resolution

To authorize the use of United States Armed Forces against those responsible for the recent attacks launched against the United States.

Whereas, on September 11, 2001, acts of treacherous violence were committed against the United States and its citizens; and

Whereas, such acts render it both necessary and appropriate that the United States exercise its rights to self-defense and to protect United States citizens both at home and abroad; and

Whereas, in light of the threat to the national security and foreign policy of the United States posed by these grave acts of violence; and

Whereas, such acts continue to pose an unusual and extraordinary threat to the national security and foreign policy of the United States; and

Whereas, the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States: Now, therefore, be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This joint resolution may be cited as the ‘Authorization for Use of Military Force’.

SEC. 2. AUTHORIZATION FOR USE OF UNITED STATES ARMED FORCES.

- (a) IN GENERAL- That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.
- (b) War Powers Resolution Requirements-
 - (1) SPECIFIC STATUTORY AUTHORIZATION- Consistent with section 8(a)(1) of the War Powers Resolution, the Congress declares that this section is intended to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution.
 - (2) APPLICABILITY OF OTHER REQUIREMENTS- Nothing in this resolution supercedes any requirement of the War Powers Resolution.

sustained by the Supreme Court in *Hamdi v. Rumsfeld*, where the Court held that “Congress’ grant of authority for the use of ‘necessary and appropriate force’ . . . include[s] the authority to detain.”⁶⁵ On its face, the proposition—that using “necessary and appropriate force” in a war includes detaining some combatants—is not especially novel. Certainly, no one argues that U.S. troops are not permitted *ever* to detain persons captured while engaged in active combat in Afghanistan. The relevant questions have centered on whether this authority extends to non-battlefield contexts and/or to people who deny ever being combatants,⁶⁶ what sorts of procedural requirements are constitutionally necessary,⁶⁷ and, if detention is permitted, whether there are boundaries on duration.

All of these questions have been subject to intensive argumentation in the courts, where oftentimes both sides will cite lengthy authority from international law and the laws of war. In *Al-Marri v. Pucciarelli*, for example—a case that dealt with the military detention of a lawful U.S. resident—the judges of the Fourth Circuit Court of Appeals rather notoriously came up with at least four different definitions of an “enemy combatant” under the AUMF.⁶⁸ But while the judges in *Al-Marri* and other cases have deployed arguments ranging from the Geneva Conventions to death tolls from the latest

⁶⁵ *Hamdi v. Rumsfeld*, 542 U.S. 507, 521 (2004).

⁶⁶ *See, e.g.*, *Al-Bihani v. Obama*, 590 F.3d 866 (D.C. Cir. 2010) (detainee served as a cook for a military brigade that fought with the Taliban); *Al-Marri v. Pucciarelli*, 534 F.3d 213 (4th Cir. 2008), *vacated as moot sub nom.* *Al-Marri v. Spagone*, 129 S. Ct. 1545 (2009) (lawful resident captured in the U.S.); *Al Warafi v. Obama*, No. 09-2368(RCL), 2010 WL 1404001 (D.D.C. Mar. 24, 2010) (detainee provided medical treatment to Taliban fighters).

⁶⁷ *See Boumediene v. Bush*, 128 S. Ct. 2229, 2266-71; *Hamdi*, 542 U.S. at 524-29

⁶⁸ *See Al-Marri*, 534 F.3d at 259 (Traxler, J., concurring); *id.* at 285 (Williams, C.J., concurring in part and dissenting in part); *id.* at 323 (Wilkinson, J., concurring in part and dissenting in part); *id.* at 243-47 (Motz, J., concurring in judgment) (rejecting the other judges’ definitions, and arguing that the AUMF cannot be construed to authorize detention of civilians).

week of warfare,⁶⁹ few have considered the particularities of the AUMF beyond its catchphrase authorization for “force.” Once we concede that the extent of the meaning of “force” is ambiguous, ordinary rules of statutory interpretation require an analysis of the context of the AUMF’s passage, available legislative history, and other indicators of the “plain meaning” of the resolution as it might have been understood at the time.⁷⁰

A common canon of statutory construction, known as the “dog did not bark” rule, posits that courts should not interpret statutes to have enacted major changes in public policy if there has not been much deliberation over the matter in the enacting legislature.⁷¹ In *FDA v. Brown & Williamson Tobacco Corp.*, for example, the Supreme Court considered the question of whether the Food, Drug, and Cosmetic Act granted the FDA authority to regulate tobacco products. The Court ruled that it did not, in part on the ground that if the FDA could regulate tobacco, then it could remove it from the market entirely—a possibility drastic enough that Congress would have indicated an express purpose had that been its real intent.⁷²

The legislative history of the AUMF is slim—it was passed hastily following the attacks, and even amidst bomb scares in the Capitol⁷³—but nowhere in the legislative record is there any mention or discussion of detention authority. By most accounts, any

⁶⁹ See *Boumediene*, 128 S. Ct. at 2294 (Scalia, J., dissenting).

⁷⁰ See, e.g., William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 353-62 (1990) (describing a process of practical reasoning by which judges generally look first at the immediate text of the statute, and then take contextual and historical considerations into account before resorting to more abstract theories).

⁷¹ See WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* Ch. 8 § 2(b)(4), at 1035 (4th ed. 2007); see also *Chisom v. Roemer*, 501 U.S. 380, 396 n.23 (1991) (“Congress’ silence in this regard can be likened to the dog that did not bark.”); *Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 602 (1980) (Rehnquist, J., dissenting) (“In a case where the construction of legislative language such as this makes so sweeping and so relatively unorthodox a change as that made here, I think that judges as well as detectives may take into consideration the fact that a watchdog did not bark in the night.”).

⁷² See *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133-43 (2000).

⁷³ Alison Mitchell & Philip Shenon, *After the Attacks: Congress; Agreement on \$40 Billion for Aid and a Response*, N.Y. TIMES, Sept. 14, 2001.

debates that occurred leading up the passage centered around limits on which organizations or nations could be targeting militarily.⁷⁴ An original draft resolution from the White House had a phrase stricken that would have granted the President authority “to deter and preempt any future acts of terrorism or aggression against the United States,” on grounds that it was too open-ended.⁷⁵ Then-Senator Joseph Biden, for example, praised Congress in his floor speech for giving the President “all the authority he needs to prosecute war against the individuals or countries responsible, without yielding our constitutional right to retain the judgment in the future as whether or not force against others could, should, or would be used.”⁷⁶

But throughout the floor statements offered in the Senate and the House, not a single lawmaker broached the concept of a new detention regime.⁷⁷ Though one might be tempted to argue not to read too much into a lack of deliberation on the grounds that *every* decision in the weeks and months following the attacks was made hastily and under extraordinary circumstances of pressure, the records from both Houses do show lengthy floor statements on the limitation of AUMF’s authority to specified military objectives, and the President’s continuing obligation to consult with Congress.⁷⁸ The simple vote tally is also illustrative: it passed by a vote of 98-0 in the Senate, and by 420-1 in the House,⁷⁹ which are hardly the numbers that one would expect for a Goldsmith-Katyal

⁷⁴ *Id.*

⁷⁵ *Id.* at 2-3.

⁷⁶ 147 Cong. Rec. S9422-01 (2001).

⁷⁷ The complete records from the floors of both Houses are available at 147 Cong. Rec. S9411-30, and 147 Cong. Rec. H5638-83.

⁷⁸ *See, e.g.*, 147 Cong. Rec. S9422-23 (statement of Sen. Biden); 147 Cong. Rec. H5651 (2001) (statement of Rep. DeFazio).

⁷⁹ RICHARD F. GRIMMET, CONG. RESEARCH SERV., AUTHORIZATION FOR USE OF MILITARY FORCE IN RESPONSE TO THE 9/11 ATTACKS (P.L. 107-40): LEGISLATIVE HISTORY 3 (2007), available at <http://fas.org/sgp/crs/natsec/RS22357.pdf> (last visited Mar. 30, 2010).

type of proposal. Moreover, the statement issued by President Bush when he signed the resolution contained no mention or discussion of detention power.⁸⁰

In terms of the general public, too, the passage of the AUMF was not greeted with particular fanfare. This, of course, was likely due to the fact that the entire nation was still reeling from the attacks, with the wreckage at the World Trade Center still burning, and the death tally fluctuating day to day.⁸¹ The passage of a joint resolution authorizing some form of retaliation in the immediate aftermath of the attacks hardly came as a surprise, and was not received by the press as any sort of monumental legislation. A *New York Times* article detailing the events of Saturday, September 15, for example, describes President Bush's visit to the site of the World Trade Center and his speech to the firefighters gathered there, and only mentions as an aside that "[e]ven as the day unfolded, the Bush administration moved to call up 35,000 to 50,000 military reserves, and the Senate authorized Mr. Bush to order what could be prolonged military strikes in retaliation for the terrorism. The House was expected to concur today."⁸² Another article from the previous day describes the negotiations between members of Congress over the authorization for military force, but frames the issue as primarily a question of whether a formal declaration of war was necessary—and lumps the discussion in with the issuance of a \$40 billion aid package to New York and a bomb threat that had caused an evacuation of the Capitol.⁸³ Presumably, a headline that read "*Congress Authorizes Use*

⁸⁰ Statement on Signing the Authorization for Use of Military Force, 37 WEEKLY COMP. PRES. DOC. 1333 (Sept. 18, 2001).

⁸¹ See, e.g., Robert D. McFadden, *After the Attacks: The President; Bush Leads Prayer, Visits Aid Crews; Congress Backs Use of Armed Force*, N.Y. TIMES, Sept. 15, 2001.

⁸² *Id.*

⁸³ Alison Mitchell & Philip Shenon, *After the Attacks: Congress; Agreement on \$40 Billion for Aid and a Response*, N.Y. TIMES, Sept. 14, 2001.

of Military Force and Indefinite Detention for Anyone Found To Be a Part of Al Qaeda or the Taliban” would have been greeted somewhat differently.

Even proponents of broad preventive detention legislation acknowledge—as they must—that the AUMF is hardly a bedrock of statutory authorization for a comprehensive detention regime. Professor Goldsmith writes that the habeas regime as it now exists “is almost entirely a creature of the federal courts” because “Congress has done little more than authorize the use of force against al Qaeda and its affiliates in September 2001.”⁸⁴ Benjamin Wittes and Robert Chesney, meanwhile, cite the “joint irresponsibility” of the political branches as having produced “an unprecedented delegation of a major legislative function to the courts.”⁸⁵ Even the Bush Administration did not initially rely on the AUMF as its primary authority for detention. Its brief filed in *Hamdi* argues primarily that the President possesses inherent authority under Article II of the Constitution to detain combatants; it simply claims that this authority is “bolstered” by the AUMF.⁸⁶ It was the Supreme Court plurality in *Hamdi* that chose to hang the authorization for detention on specifically on the AUMF, thus avoiding the Article II issue.⁸⁷

In short, hardly anyone at the time of the AUMF’s passage or in the years immediately following would have read the resolution as legislation for preventive detention. Whether or not the phrase “necessary and appropriate force” can be read to include authority for the military to capture a cook for a Taliban-affiliated brigade and

⁸⁴ Jack Goldsmith, *Long-Term Terrorist Detention and Our National Security Court* 7 (Brookings Inst., Georgetown Univ. Law Ctr. and Hoover Inst., Working Paper), available at http://www.brookings.edu/~media/Files/rc/papers/2009/0209_detention_goldsmith/0209_detention_goldsmith.pdf. Goldsmith also mentions the authorization of judicial review of Combatant Status Review Tribunal decisions in 2006, but notes that its resistance is essentially redundant with the courts’ habeas jurisdiction.

⁸⁵ Benjamin Wittes & Robert Chesney, Op-Ed, *The Courts’ Shifting Rules on Guantánamo Detainees*, WASH. POST, Feb. 5, 2010.

⁸⁶ Brief for Respondents at 12-18, 19, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (No. 03-6696).

⁸⁷ *Hamdi v. Rumsfeld*, 542 U.S. 507, 516-19 (2004).

bring him to Guantánamo Bay to be held for eight years⁸⁸—or the authority to detain a man arrested in Bosnia and accused of facilitating travel for al Qaeda members⁸⁹—are questions that international law experts might never answer. But it is clear that Congress did not answer them either, and did not even contemplate them being asked, when it enacted the AUMF.

B. Ratification by Subsequent Legislation?

Some judges and other experts have claimed that, in any case, Congress’s subsequent legislation on detention matters shows an endorsement or ratification of the courts’ interpretation of the AUMF.⁹⁰ In *Al-Bihani v. Obama*, for example, Judge Brown (writing for the majority) claims that the category of persons subject to trial by military commission in the Military Commissions Act (MCA) is congressional “guidance on the class of persons subject to detention under the AUMF.”⁹¹ The MCA, passed first in 2006 and then revised in 2009, authorizes trial by military commission for “unprivileged enemy belligerents,” a class that includes those who “purposefully and materially supported hostilities against the United States or its coalition partners.”⁹² The logic, as Judge Brown would have it, is that anyone subject to military commission is also

⁸⁸ *Al-Bihani v. Obama*, 590 F.3d 866 (D.C. Cir. 2010).

⁸⁹ *Boumediene v. Bush*, 579 F. Supp. 2d 191, 198 (D.D.C. 2008). Belkacem Bensayah, accused by the government of being an al Qaeda facilitator, was the only detainee out of the six in *Boumediene* whose habeas petition was denied. *See also* Charlie Savage, *Obama Team is Divided on Anti-Terror Tactics*, N.Y. TIMES, Mar. 28, 2010 (describing disagreements over how to litigate Bensayah’s case).

⁹⁰ *See Boumediene v. Bush*, 583 F. Supp. 2d 133, 134 (D.D.C. 2008).

⁹¹ *Al-Bihani v. Obama*, 590 F.3d 866, 872 (D.C. Cir. 2010).

⁹² Military Commissions Act of 2009 § 948a(7), 123 Stat. 2190, 2575-76. The previous Military Commissions Act of 2006 included a similar definition. Military Commissions Act of 2006 § 948a(1)(A)(i).

necessarily subject to detention; thus, since Taliban and al Qaeda members are engaged in hostilities against the United States, they are detainable in Guantánamo Bay.⁹³

The problem is that the power to try cannot be equivalent to the power to detain *indefinitely*. Certainly, a common tenet of criminal law is that the power to try can include the power to detain pending trial.⁹⁴ But to argue that the power to try includes the power to detain without trial is absurd on its face. Judge Brown’s logic may rest more generally on the inference that certain categories of people—unprivileged enemy belligerents such as al Qaeda members—are subject to military *treatment* broadly understood. However, the enactment of a “crime and punishment” statute like the MCA would not have been necessary at all if certain categories of people could be detained outside the battlefield indefinitely. But any mention of detention authority without trial is conspicuously missing from the legislation.

Lastly, while one might view the MCA as a congressional ratification of the Guantánamo regime more generally, the political deadlock around the detention issue supports a more minimalist view. The MCA was passed in the wake of the Supreme Court’s ruling in *Hamdan v. Rumsfeld*,⁹⁵ and was essentially a legislative “fix” that implemented procedures for the (tenuously) agreed upon institution of military commissions. Congress could also have included language about detention authority, but it did not. Instead, it tried to strip habeas jurisdiction from the courts—a provision that was overturned in *Boumediene*.⁹⁶ That the enacting Congress chose simply to deny

⁹³ *Al-Bihani*, 590 F.3d at 872.

⁹⁴ *See, e.g.*, *Greenwood v. United States*, 350 U.S. 366, 375 (1956) (grounding the government’s authority to detain a person declared mentally incompetent on a pending indictment for prosecution). There are, of course, limits to traditional detention pending trial. Bail must not be excessive, U.S. CONST. amend. VIII, and the defendant enjoys the right to a speedy trial, U.S. CONST. amend. VI.

⁹⁵ 548 U.S. 557 (2006).

⁹⁶ 128 S. Ct. 2229 (2008).

judicial review to detainees rather than expressly authorize preventive detention demonstrates how reluctant the political branches are to acknowledge or ratify the idea of a preventive detention regime.

A similar analysis should apply were one to argue that the 2005 Detainee Treatment Act (DTA) constitutes legislative ratification of detention. The DTA was initially introduced by Senator John McCain as a means to ensure that detainees in U.S. custody would not be subject to torture or to cruel, inhuman, or degrading treatment.⁹⁷ Thus, the language on humane treatment applies to anyone “in the custody or under the physical control of the United States Government” and not just to prisoners in Guantánamo Bay.⁹⁸ The portion addressing judicial review of detention in Guantánamo does add various procedural glosses to the detention regime, such as the creation of Combatant Status Review Tribunals,⁹⁹ and therefore could be seen as a legislative ratification of the policy. But, like the MCA, the DTA was also a legislative “fix” to a Supreme Court ruling: the Court had held that habeas petitions from Guantánamo could be entertained¹⁰⁰ and that habeas proceedings would have to follow certain requirements,¹⁰¹ and the DTA was an attempt to meet some of those requirements and foreclose further review. Congress had an opportunity to address the larger issue of detention authority when it passed the statute, and it declined to do so.

⁹⁷ See Charles Babington & Shailagh Murray, *Senate Supports Interrogation Limits*, WASH. POST, Oct. 6, 2005.

⁹⁸ Detainee Treatment Act, Sec. 1003(a).

⁹⁹ *Id.* sec. 1005.

¹⁰⁰ *Rasul v. Bush*, 542 U.S. 466 (2004).

¹⁰¹ *Hamdi v. Rumsfeld*, 542 U.S. 507, 524-39 (2004).

III. The Courts and Congress: Political Paralysis

The next two Parts argue that all three branches of government have faced what is essentially a political breakdown on the issue of preventive detention. This Part discusses the political standstill that has emerged between Congress and the courts, while Part IV discusses the Obama Administration's default to the courts as policymakers. The Supreme Court can perhaps be most excused for its avoidance of some key issues: courts, after all, are only supposed to "say what the law is."¹⁰² The Court, however, has nonetheless played an integral part in the inter-branch dynamic, both by repeatedly declining to leave Guantánamo Bay as a "legal black hole" and by refraining from describing exactly who can be detained under the AUMF and how. Congress, as described above, has in some limited senses replied to the Court's invitations to step in, but has similarly been unwilling or incapable of enacting a preventive detention law *or* of clarifying that the AUMF does not authorize it.

A. The Supreme Court's Engagement and Avoidance

The Court could have avoided the issue of Guantánamo Bay entirely by declining to find federal jurisdiction. It has done the opposite, however, at each opportunity—first, through modes of statutory interpretation,¹⁰³ and then as a constitutional matter.¹⁰⁴ Still, the Court has pulled back from issuing any sweeping rulings as to who is detainable and what the contours of a habeas-based detention process would look like. As Linda Greenhouse argues, the Court's early treatments of the matter in *Hamdi* and in *Rasul v. Bush* were self-consciously accommodating of the Bush Administration's asserted

¹⁰² *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

¹⁰³ *Rasul v. Bush*, 542 U.S. 466 (2004); *Hamdan*.

¹⁰⁴ *Boumediene*.

needs.¹⁰⁵ Greenhouse, for example, cites an exchange during the oral argument between Justice Breyer and then-Solicitor General Ted Olson, in which Justice Breyer asked, “[W]hy not say, sure, you get your foot in the door, prisoners in Guantánamo, and we’ll use the substantive rights to work out something that’s protective but practical?” (He was rebuffed by Olson, who stuck to the argument of unreviewability.)¹⁰⁶ And while the Court’s ruling in *Rasul v. Bush* held that the federal habeas statute applied to Guantánamo Bay, while that in *Hamdi* found the petitioner entitled to a hearing, *Hamdi* declined to prescribe any hard-and-fast rules about the form that the substantive rights of the petitioner would take.

The Court’s ruling in *Hamdi* was minimalist both in its stance toward the executive and toward lower courts. The Court adopted the procedural balancing test employed in *Matthews v. Eldridge* to say essentially that—apart from core requirements of notice and an opportunity to rebut the government’s asserted claims—“enemy-combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict.”¹⁰⁷ Thus, hearsay could be admissible, and the government’s evidence could potentially be afforded a presumption in its favor.¹⁰⁸ This stance, derided by Justice Scalia as a “Mr. Fix-It Mentality,”¹⁰⁹ asserted a role for the judiciary while shying away from any pronouncement that would impose a potentially unworkable burden on the government. Moreover, the Court noted

¹⁰⁵ Linda Greenhouse, *The Mystery of Guantánamo Bay*, 27 BERKELEY J. INT’L L. 1, 8-9 (2009).

¹⁰⁶ *Id.* at 9 (quoting Transcript of Oral Argument at 36-37, *Rasul*, 542 U.S. 466 (No. 03-334)).

¹⁰⁷ *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004).

¹⁰⁸ *Id.* at 534. Notably, the D.C. habeas courts have uniformly declined to allow an evidentiary presumption in the government’s favor.

¹⁰⁹ *Id.* at 576 (Scalia, J., dissenting). Though Justice Scalia has ruled in the government’s favor in *Rasul*, *Hamdan*, and *Boumediene*, he did not shy away in *Hamdi*—which concerned a citizen held inside the United States—from expressing what is essentially the American Civil Liberties Union’s position: absent a suspension of the writ of habeas corpus, the government could either try Hamdi for a crime or release him. *Id.* at 573.

that “[t]he legal category of enemy combatant has not been elaborated upon in great detail” and that “[t]he permissible bounds of the category will be defined by the lower courts as subsequent cases are presented to them.”¹¹⁰ Thus, *Hamdi* reflects a willingness both to make accommodations to the Executive and to allow the lower courts a wide berth in determining the scope of those accommodations.

In *Hamdan v. Rumsfeld*,¹¹¹ the Court issued a broad rebuke to the executive but adopted at least a pose of deference toward Congress. *Hamdan*, though imbued with constitutional concerns over fundamental rights and the separation of powers, was in fact an interpretation of statutes and treaties, holding that the executive’s proposed military commissions violated both the Uniform Code of Military Justice¹¹² and the Geneva Conventions.¹¹³ Thus, the Court’s ruling abounds with language about the President acting in contravention of legislative authority.¹¹⁴ Justice Kennedy’s concurrence, in particular, emphasized that “[i]f Congress, after due consideration, deems it appropriate to change the controlling statutes, in conformance with the Constitution and other laws, it has the power and prerogative to do so.”¹¹⁵

The Court was clearly less deferential in *Boumediene*, where it struck down the provision of the MCA that eliminated judicial review of habeas petitions as a violation of the Suspension Clause.¹¹⁶ But *Boumediene* is of a piece with *Hamdi* and *Rasul*: it reflects an unwillingness of the Court to step out of the picture entirely, but an equal unwillingness to elaborate further on exactly what shape and form the asserted

¹¹⁰ *Id.* at 522 n.1.

¹¹¹ 548 U.S. 557 (2006).

¹¹² *Id.* at 617-25.

¹¹³ *Id.* at 625-35.

¹¹⁴ *See, e.g., id.* at 587 (“[T]he tribunal convened to try Hamdan is not part of the integrated system of military courts . . . that Congress has established.”).

¹¹⁵ *Id.* at 637 (Kennedy, J., concurring).

¹¹⁶ 128 S. Ct. 2229, 2262-75 (2008).

constitutional claims would take. From the *Hamdi-Rasul-Hamdan-Boumediene* line of cases, two key principles can be gleaned: Guantánamo Bay is not and cannot be made into a “legal black hole,” and the Executive should have to work with Congress, and, potentially, the lower courts in devising whatever additional policies and legal parameters should apply there. Thus, even in *Boumediene*, the Court held fast to the “proposition that the Suspension Clause does not resist innovation in the field of habeas corpus,” and that “[c]ertain accommodations can be made to reduce the burden habeas corpus proceedings will place on the military without impermissibly diluting the protections of the writ.”¹¹⁷

Given the extraordinary sensitivity of the Guantánamo cases—touching upon executive national security claims, the separation of powers, fundamental due process rights, and the specter of the political question doctrine—it is unsurprising that the Court hesitated to do more than necessary in each case. And on an individual rather than institutional level, the decisions have hung on thin margins. Justice Kennedy was the pivotal “swing vote” in the 5-4 *Boumediene* decision—and in *Hamdan*, his was the vote largely considered to have caused the Court to deny a writ of certiorari before reconsidering and then granting it.¹¹⁸ While a five-Justice coalition took the substantial step of applying the Suspension Clause to Guantánamo, it is doubtful that five—or even any—of the Justices would have been willing to do much more. Thus, though it ruled that the review procedures supplied by the government in the Detainee Treatment Act were

¹¹⁷ *Id.* at 2276.

¹¹⁸ See Greenhouse, *supra* note [redacted], at 17. Greenhouse’s hypothesis is that a coalition of Justices Breyer, Souter, Ginsburg, and Stevens, though capable of granting certiorari with their four votes, would have found no use in doing so without Justice Kennedy as a fifth. *Id.* at 16; see also Linda Greenhouse, *Supreme Court Turns Down Detainees’ Habeas Corpus Case*, N.Y. TIMES, Apr. 3, 2007, at A1.

inadequate substitutes for habeas corpus proceedings,¹¹⁹ the majority declined to say anything more than what it had said in *Hamdi* about how those proceedings would run, and whom they would cover.

This lack of direction has prompted considerable vexation from the lower courts, on whom the *Boumediene* majority essentially unloaded an enormous docket with little or no instructions. In *Hamlily v. Obama*, a habeas case decided in May of 2009, Judge Bates of the D.C. District Court wrote,

[W]hat is the scope of the government's authority to detain these, and other, detainees pursuant to the [AUMF], as informed by the law of war? In *Hamdi v. Rumsfeld*, the Supreme Court acknowledged that the district courts would have to address this issue in a piecemeal fashion by delimiting ‘[t]he permissible bounds’ of the government's detention authority ‘as subsequent cases are presented to them.’ Since *Hamdi* was decided, the Supreme Court has not revisited this question and no court of appeals has clarified the issue, although one has tried. . . . It is with this limited guidance, then, that the Court undertakes its inquiry.¹²⁰

B. Congress's Blind Eye

The absence of legislative guidance prompted several D.C. district judges to step forward in January of 2010 and plead for Congress to intervene.¹²¹ Judge Reggie Walton, for example, said in an interview, “It should be Congress that decides a policy such as this that has a monumental impact on our society and makes a monumental impression on the world community.”¹²² And Judge Janice Rogers Brown of the Court of Appeals for the D.C. Circuit took the anomalous step of concurring in her own majority opinion in *Al-Bihani* to urge Congress to act, writing, “These cases present hard questions and hard

¹¹⁹ *Boumediene*, 128 S. Ct. at 2262-75.

¹²⁰ *Hamlily v. Obama*, 616 F. Supp. 2d 63, 66-67 (D.D.C. 2009) (internal citations omitted). The appellate court Judge Bates refers to that “tried” to clarify the issue is the Fourth Circuit in its ruling in *Al-Marri*, with its multifarious definitions of the “enemy combatant.” *Al-Marri v. Pucciarelli*, 534 F.3d 213 (4th Cir. 2008), *vacated as moot sub. nom.* *Al-Marri v. Spagone*, 129 S. Ct. 1545 (2009).

¹²¹ Chisun Lee, *Judges Urge Congress To Act on Indefinite Terrorism Detentions*, PROPUBLICA, Jan. 22, 2010, <http://www.propublica.org/feature/judges-urge-congress-to-act-on-indefinite-terrorism-detentions-122>.

¹²² *Id.*

choices, ones best faced directly.”¹²³ Yet Congress has so far turned a blind eye. This Section describes the overall institutional paralysis within Congress on the preventive detention issue, arguing that political actors are either adopting extremist views or backing away altogether.

Neither the Bush nor the Obama administrations have made detention policy a legislative priority. The Bush Administration devoted the lion’s share of its energies simply to keeping the rule of law—judicial or legislative—out of Guantánamo Bay. Its primary arguments for detention authority centered not on the AUMF, but on a claim of inherent Article II executive authority that countenanced little or no role for the other two branches of government.¹²⁴ It was not until mid-2008, with the Supreme Court’s ruling in *Boumediene*, that judicial review of detention in Guantánamo became a constitutional fixture. Little more than a year later, the Obama Administration announced that it would not be seeking any new legislation to authorize detentions.¹²⁵ It has instead chosen to rely on the AUMF argument adopted by the Court in *Hamdi*.¹²⁶

In the absence of initiative on the matter from the White House, most legislative proposals that have surfaced so far have hewed to the right. Whether the bills now being introduced are political posturing or good-faith policy efforts, much of the new proposed legislation emerged in the wake of the Attorney General Holder’s announcement (now under reconsideration) that Khalid Sheikh Mohammed and four other alleged masterminds of the September 11 attacks would receive criminal trials in New York, and

¹²³ *Al Bihani v. Obama*, 590 F.3d 866, 882 (D.C. Cir. 2010) (Brown, J., concurring).

¹²⁴ Brief for the Respondents at 13-18, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (No. 036696). As described above, the 2006 Military Commissions Act was one exception where President Bush sought Congress’s involvement—and when it acted, the result was a broad regime for military commissions and what amounted to a suspension of the writ of habeas corpus. [See supra notes ____ and accompanying text.](#)

¹²⁵ Peter Baker, *Obama To Use Current Law To Support Detentions*, N.Y. Times, Sept. 23, 2009, at A23.

¹²⁶ [See infra Part ____](#)

the subsequent thwarting of the 2009 Christmas Day bombing attack. The Enemy Belligerent, Interrogation, Detention, and Prosecution Act of 2010,¹²⁷ introduced in March of 2010 by Senators John McCain and Joseph Lieberman, would provide for detention without criminal charges and without trial for anyone determined to be an “unprivileged enemy belligerent”¹²⁸—a category that includes anyone (aside from “privileged belligerents”) who has engaged in or purposefully and materially supported hostilities against the United States or its coalition partners.¹²⁹ Remarkably, the Act would categorically block the use of Department of Justice funds for the Article III prosecution of any non-citizen determined to be an “unprivileged enemy belligerent”;¹³⁰ would require that any *suspected* “unprivileged enemy belligerent” captured in the territorial United States be placed in military custody for interrogation purposes and a determination of status;¹³¹ and would prohibit the reading of Miranda rights to such suspected persons.¹³² Several other Senators and Congressmen have introduced similar pieces of legislation that would authorize preventive detention or even strip habeas review (again) for cases involving “unprivileged enemy belligerents.”¹³³

¹²⁷ S. 3081, 111th Cong. (2010). A similar bill has since been introduced in the House of Representatives. H.R. 4892, 111th Cong. (2010).

¹²⁸ *Id.* § 5.

¹²⁹ *Id.* § 6(9).

¹³⁰ *Id.* § 4.

¹³¹ *Id.* § 2.

¹³² *Id.* § 3(b)(3). In introducing the proposed legislation, Senator McCain referred to this Miranda provision as a “key provision.” 156 Cong. Rec. S1171-81 (daily ed. Mar. 4, 2010) (statement of Sen. McCain).

¹³³ The Terrorist Detention and Prosecution Act, introduced in January of 2010, would authorize the President to detain “unprivileged enemy belligerents” indefinitely and would give the President the power to make that status determination. H.R. 4415, 111th Cong. (2010). Another bill, introduced in March of 2010, would modify the federal habeas corpus statute to prohibit any court from granting habeas relief to any non-citizen or non-resident determined to be an “unprivileged enemy belligerent.” There would be a presumption that the government has the authority to detain the individual unless there is a showing “that any determination that the United States has such authority would be clearly erroneous.” H.R. 4975, 111th Cong. (2010). Other bills have been introduced that, while not addressing the issue of detention, would require that certain categories of persons be prosecuted under military commissions and preclude prosecutions by the Department of Justice in Article III courts. *See* Military Tribunals for Terrorists Act of 2010, H.R. 4463, 111th Cong. (2010); H.R. 4127, 111th Cong. (2009); H.R. 4111, 111th Cong. (2009); *see*

Of course, it is unlikely that a Congress controlled by Democrats would ever pass, or that President Obama would ever sign, a law that effectively suspends habeas review or that makes it a crime for a federal official to notify a person in U.S. custody that he has the right to a lawyer. But Congress has been able to act in other ways that signify a one-way ratchet toward more “toughness” on terrorism. Just a few months after President Obama had taken office and signed his Executive Order for the closure of the Guantánamo detention facility, the Senate voted—90 to 6—to strike an amendment from a military appropriations bill containing funding for closing Guantánamo, and inserted language barring the use of military funds for transferring detainees into the United States.¹³⁴ As a “not-in-my-backyard” mentality took hold, political leaders from both sides capitulated toward a de facto consensus that detainees would have to remain in Guantánamo.¹³⁵ Months later, as the Obama Administration continued discussing plans to open facilities inside the United States to house detainees, its efforts were largely rebuffed: Democratic leaders on the House Appropriations Committee refused to include a provision in the 2010 military spending bill that would have financed the federal purchase of a prison in Illinois to house detainees, despite requests from the White House.¹³⁶ One Democratic congresswoman from California referred to plans to build such a facility in the United States as “inciting [terrorists] to attack something on U.S. soil,” while Senator Jim Webb, Democrat of Virginia, stated that terrorism suspects “do

also JENNIFER K. ELSEA, CONGRESSIONAL RESEARCH SERVICE, COMPARISON OF RIGHTS IN MILITARY COMMISSION TRIALS AND TRIALS IN FEDERAL CRIMINAL COURT 6-7 (2010).

¹³⁴ S. Amdt 1133, 110th Cong. (2009); see David M. Herszenhorn, *Funds To Close Guantánamo Denied*, N.Y. TIMES, May 20, 2009.

¹³⁵ See, e.g., Lesley Clark, *Political Firestorm Brewing Over Fate of Guantánamo Detainees*, MIAMI HERALD, May 8, 2009.

¹³⁶ Charlie Savage, *Plan To Move Guantánamo Detainees Faces New Delay*, N.Y. TIMES, Dec. 22, 2009.

not belong in our country, they do not belong in our courts, and they do not belong in our prisons.”¹³⁷

Soon after President Obama had signed his Executive Order, Senator John McCain, who had previously expressed a desire to see Guantánamo closed, made a wry comparison of the problem with finding placement for the detainees to the issue of nuclear disposal at Yucca Mountain.¹³⁸ But the detainees truly have become the political equivalent of nuclear waste—and not just in terms of where they will go. Any solicitude for greater due process rights, for lesser presidential power, or even for the basic application of the criminal justice system has become politically radioactive. There is perhaps no better example than Senator McCain himself. A former proponent of closing Guantánamo and moving the detainees to Fort Leavenworth, Kansas,¹³⁹ McCain is now thwarting the Obama Administration’s efforts at every turn, saying he is against transferring any detainees into the United States until a “comprehensive plan” is introduced by the President and passed by Congress.¹⁴⁰ And instead of involving himself in such a plan, he has worked with Senator Joe Lieberman to propose sweeping legislation that would block the use of DOJ funds to try terrorism suspects and would

¹³⁷ *Id.*

¹³⁸ Lisa Mascaro, *What Guantánamo, Yucca Have in Common: NIMBY [Not in My Backyard] Issues*, LAS VEGAS SUN, Jan. 27, 2009.

¹³⁹ *60 Minutes* (CBS television broadcast Apr. 8, 2007), transcript available at http://www.cbsnews.com/stories/2007/04/06/60minutes/main2658405_page5.shtml

(“[Reporter Scott] PELLELY: Would you close Guantánamo Bay?

MCCAIN: Yes. I would close Guantánamo Bay. And I would move those prisoners to Fort Leavenworth. . . .

[PELLEY]: Why? What’s wrong with the way it was handled?

MCCAIN: Guantánamo Bay has become an image throughout the world which has hurt our reputation.”).

¹⁴⁰ Joan Walsh, *What Won’t the GOP Do To Block Obama on Security?*, SALON.COM, Feb. 2, 2010, http://www.salon.com/news/opinion/joan_walsh/politics/2010/02/02/republicans_play_politics_with_national_security.

provide clear authority for indefinite detention—in Guantánamo or anywhere else.¹⁴¹ In short, the political radioactivity of the detainees has resulted in either total legislative paralysis, in which only legislation with a one-way ratchet toward more extreme policy is introduced and never passed or even seriously debated, or in a series of demonstrations meant to stymie the Obama Administration’s efforts and to deflect political costs.

IV. The Obama Administration: Delegation to the Courts

The Obama Administration’s approach to detention issues has been a matter of much speculation, and, so far, few definitive answers. While President Obama has expressed clear disapproval of some of the Bush Administration’s counterterrorism policies, his administration has at many turns aroused the dismay of civil libertarians. Perhaps most enigmatic of all is the Obama Administration’s position on detention without trial. The Executive branch under the Obama Administration has, so far, essentially clung to the AUMF argument as a litigation position—but has declined to state or show its intentions as a matter of public policy. So far, executive policy has been a matter of policy-making by brief-writing. Simultaneously, however, the administration remains committed to closing Guantánamo Bay and, so far, has not sought new detention legislation. This Part first traces some of the broader evolutions and ambiguities of President Obama and his administration on counterterrorism and civil liberties issues, illustrating some of the dynamics both within and without that have resulted in largely centrist positions.¹⁴² It then argues that the Obama Administration, through its AUMF-based litigation strategy in habeas suits, has delegated key policymaking decisions to the

¹⁴¹ See *supra* note [redacted] and accompanying text.

¹⁴² By “centrist,” I do not mean to suggest an unprincipled splitting of differences between “left” and “right.” Rather, I take “centrist” to mean *pragmatic*, with certain broad principles shaping the boundaries of decision-making.

courts. Lastly, I argue that because of the current pathologies in both political branches on the detention issue, this delegation is the Obama Administration's least bad choice. As I will argue in Part V, this default toward a court-driven policy process in turn counsels restraint by the courts.

A. A Change in Course . . . or Centrism all Along?

During his presidential campaign, then-Senator Obama was clear about his intentions to close Guantánamo Bay, and, more generally, to restore the rule of law to American national security policy.¹⁴³ A similar theme was sounded in his Inaugural Address, when he stated, “As for our common defense, we reject as false the choice between our safety and our ideals. Our Founding Fathers, faced with perils that we can scarcely imagine, drafted a charter to assure the rule of law and the rights of man—a charter expanded by the blood of generations. Those ideals still light the world, and we will not give them up for expedience sake.”¹⁴⁴ On his first day in office, the President signed three major Executive Orders that, respectively, (1) ended some of the harsher Bush-era interrogation techniques and ordered compliance with the Army Field Manual and Common Article 3 of the Geneva Conventions;¹⁴⁵ (2) ordered the closure of Guantánamo Bay within one year and called for a review of all Guantánamo detentions;¹⁴⁶ and (3) created a Special Task Force to review broader options for

¹⁴³ See, e.g., Senator Barack H. Obama, Address at DePaul University (Oct. 2, 2007), *available at* http://andrewsullivan.theatlantic.com/the_daily_dish/2007/10/obama-lets-it-r.html (“To lead the world, we must lead by example. We must be willing to acknowledge our failings, not just trumpet our victories. And when I’m President, we’ll reject torture—without exception or equivocation; we’ll close Guantánamo [T]hese last few years we’ve seen an unacceptable abuse of power at home. We face real threats. Any President needs the latitude to confront them swiftly and surely. But we’ve paid a heavy price for having a President whose priority is expanding his own power. The Constitution is treated like a nuisance. . . . I’ll turn the page on the imperial presidency”).

¹⁴⁴ President Barack H. Obama, Inaugural Address (Jan. 20, 2009), *available at* <http://www.whitehouse.gov/blog/inaugural-address/>.

¹⁴⁵ Exec. Order No. 13,491, 74 Fed. Reg. 4893 (Jan. 22, 2009).

¹⁴⁶ Exec. Order 13,492, 74 Fed. Reg. 4897 (Jan. 22, 2009).

detention policy.¹⁴⁷ The Executive Order on interrogation policy also took the important step of withdrawing “[a]ll executive directives, orders, and regulations” inconsistent with the Order, including those issued (presumably by the Bush Office of Legal Counsel) to the CIA “concerning detention or the interrogation of the detained individuals.”¹⁴⁸

But the President—known to choose his words carefully—has not adopted, and indeed never promised to adopt, the policy platforms of the ACLU or similar groups.¹⁴⁹ A year and some months into his first term in office, he has declined to create a “truth commission” to investigate abuses in the previous administration; invoked the state secrets doctrine in civil litigation;¹⁵⁰ ordered the use of drone attacks in the border areas of Afghanistan and Pakistan against al Qaeda targets;¹⁵¹ and argued successfully against the extension of habeas rights to detainees in Bagram Air Force Base in Afghanistan.¹⁵² The President’s White House Counsel, Greg Craig, largely considered to have championed civil liberties causes,¹⁵³ announced his departure less than a year after the inauguration. And Dawn Johnsen, who had unambiguously denounced some of President

¹⁴⁷ Exec. Order No. 13,493, 74 Fed. Reg. 4901 (Jan. 22, 2009).

¹⁴⁸ Exec. Order No. 13,491 § 1, 74 Fed. Reg. 4893 (Jan. 22, 2009).

¹⁴⁹ Indeed, even when he was just a state senator denouncing the invasion of Iraq, the President made a point of emphasizing that he did not oppose all wars—only a “dumb war.” He noted that he supported President Bush’s pledge “to hunt down and root out those who would slaughter innocents in the name of intolerance,” and declared, “I would willingly take up arms myself” to prevent another September 11 tragedy. Barack H. Obama, Illinois State Senator, Speech at the Federal Plaza in Chicago (Oct. 2, 2002) (transcript available at <http://www.barackobama.com/pdf/warspeech.pdf>).

¹⁵⁰ See, e.g., John Schwartz, *Obama Backs off a Reversal on Secrets*, N.Y. TIMES, Feb. 9, 2009 (in the case of detainees suing Boeing for arranging flights in an extraordinary rendition); see also Michael Scherer, *Civil-Liberties Advocates Dismayed by Obama’s Moves*, TIME, Apr. 21, 2009.

¹⁵¹ Jane Mayer, *The Predator War: What Are the Risks of the C.I.A.’s Covert Drone Program?*, THE NEW YORKER, Oct. 26, 2009.

¹⁵² *Al Maqaleh v. Gates*, No. 09-5265, 2010 WL 2010783 (D.D.C. May 21, 2010); see also Joe Palazzolo, *Obama Stays the Course on Bagram*, THE BLT: THE BLOG OF LEGAL TIMES, Feb. 20, 2009, <http://legaltimes.typepad.com/blt/2009/02/obama-stays-the-course-on-bagram-.html>.

¹⁵³ See Massimo Calabresi & Michael Weisskopf, *The Fall of Greg Craig, Obama’s Top Lawyer*, TIME, Nov. 19, 2009.

Bush's counterterrorism policies¹⁵⁴ and was the President's initial choice to head the Office of Legal Counsel (OLC), has recently withdrawn her nomination after waiting for more than a year for confirmation.¹⁵⁵

As for Guantánamo, the Obama Administration's positions on the surface are very similar to those of its predecessors. President Obama remains committed to seeing it closed—but his administration has missed its one-year deadline and continues to send lawyers day after day to the federal district courthouse in Washington D.C. to argue for the continued detention of habeas petitioners. In doing so, it has adopted the Bush Administration's argument, sustained to some extent in *Hamdi*, that the AUMF authorizes detention without trial of certain categories of people. Soon after President Obama took office, the government requested a stay in one of the pending cases in order to reassess its position on detention authority.¹⁵⁶ The stay was granted, and in March of 2009, DOJ lawyers submitted a memorandum that can either be seen as a tectonic shift in national security legal policy, or as a cosmetic adjustment bringing no real change at all. In truth, the memo is both: it signals a significant restoration of rule-of-law—including international law—principles in counterterrorism matters; and it largely preserves the same substantive parameters governing the continued detention of Guantánamo detainees.

¹⁵⁴ See Dawn Johnsen, *Outrage at the Latest OLC Memo*, SLATE.COM, Apr. 3, 2008, <http://www.slate.com/blogs/blogs/convictions/archive/2008/04/03/outrage-at-the-latest-olc-torture-memo.aspx>.

¹⁵⁵ Charlie Savage, *Obama Nominee to Legal Office Withdraws*, N.Y. TIMES, Apr. 9, 2010. Notably, Johnsen was not among several recess appointments that the President had made in late March. Sheryl Gay Stolberg, *Obama Bypasses Senate Process, Filling 15 Posts*, N.Y. TIMES, Mar. 27, 2010.

¹⁵⁶ See *Gherebi v. Obama*, 609 F. Supp. 2d 43, 52-53 (D.D.C. 2009).

The memorandum (the “Obama Memo”) sets out the AUMF as its sole enabling authority for detention.¹⁵⁷ The administration has never explicitly renounced the Bush Administration’s arguments that Article II of the Constitution gives the President inherent detention power, but this claim is conspicuously absent in the Obama Memo. Its removal is a significant departure from the legal positions of the Bush Administration because it brings Congress in as a coequal branch and indicates that congressional approval (or disapproval) is not mere nicety. Presumably, were Congress to withdraw the AUMF or pass some new statute specifically clarifying that the AUMF does not include detention authority, the Obama Administration would actually have to change its policy. In that sense, the inclusion of Article II arguments in the Bush Administration’s positions and filings was a sort of reservation clause: “even if the law changes, we can still do what we want.” In filing its modified memo, the Obama Administration took that reservation off the table.¹⁵⁸ More recent accounts indicate that the decision to revoke the Article II argument was not taken lightly, and that the President himself weighed in at a meeting concerning the matter to say he did not want to invoke unrestrained commander-in-chief authority.¹⁵⁹

¹⁵⁷ Obama Memo, *supra* note [REDACTED]. Other legal authority, of course, is cited to support the government’s arguments *about* the AUMF.

¹⁵⁸ The argument does remain available in a technical sense, but it would certainly be politically awkward to resuscitate, and presumably its conditional deployment would be greeted skeptically by judges.

¹⁵⁹ Charlie Savage, *Obama Team Is Divided on Anti-Terror Tactics*, *supra* note [REDACTED]. Moreover, leaving the Article II argument in would have been relatively costless. The constitutional “avoidance canon” dictates that courts will find statutory or other resolutions to cases before reaching constitutional issues—which is exactly what the Supreme Court did in *Hamdi*. Thus, the argument would likely have never been touched by a reviewing court.

The Obama Memo does contain a (somewhat meek) footnote arguing that courts should defer to the President’s interpretation of the AUMF. But even this argument is considerably restrained compared to some of the deference arguments invoked by President Bush’s lawyers. In *Hamdan*, for example, the government argued that, regarding the President’s determination that the Geneva Conventions did not apply to Hamdan, “Even if some judicial review of the President’s determination were appropriate, . . . the standard of review would surely be extraordinarily deferential to the President.” Brief for Respondents at 38, *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (No. 05-184).

Moreover, the memorandum draws pointedly and substantially on principles of international law. Rather than arguing that international treaties and norms like the Geneva Conventions are inapplicable, the memo appropriates them for its arguments in interpreting the AUMF. Drawing on the Supreme Court's statement in *Hamdi* that its interpretation of "force" (as including the power to detain) is "based on longstanding law-of-war principles,"¹⁶⁰ the Obama memo draws on the United Nations Charter; a U.N. Security Council Resolution adopted the day after the September 11 attacks; principles from NATO and the Organization of American States; the Geneva Conventions; and the International Committee of the Red Cross."¹⁶¹ In short, the message of the Obama Memo is that detention policy should be carried out according both to authorization from Congress and to common principles of war and international law.

But where the rubber hits the road, the Obama position on *who* is detainable is almost identical to that adopted by President Bush. It has dropped the term "enemy combatant," but creates essentially the same functional category of detainable persons. In addition to being authorized to detain persons involved in the September 11 attacks, the Obama Memo contends that President has the authority under the AUMF "to detain persons who were part of, or substantially supported, Taliban or al Qaeda forces or associated forces that are engaged in hostilities against the United States or its coalition partners."¹⁶² The only actual difference between this position and the Bush Administration's is the word "substantially."¹⁶³ Indeed, one judge noted that this change

¹⁶⁰ *Hamdi v. Rumsfeld*, 542 U.S. 507, 521 (2004).

¹⁶¹ Obama Memo, *supra* note [redacted], at 4-5 & n.1, 8-10.

¹⁶² *Id.* at 2.

¹⁶³ The Bush Administration had defined an "enemy combatant," for the purposes of its Combatant Status Review Tribunal proceedings, as "an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners." This

“strikes the casual reader as a distinction of purely metaphysical difference, particularly when the government declines to provide any definition as to what the qualifier ‘substantially’ means.”¹⁶⁴

Many have scoffed at this entire exercise, writing it off as no more than a cosmetic change.¹⁶⁵ Others have found it to be yet another example of the President trying to have it both ways—embracing civil liberties principles with one hand and holding fast to Guantánamo with the other. But these perspectives neglect a longer term view. While the Obama Administration may be adhering to similar positions as its predecessors with regard to these *particular* detainees, these positions are largely backward-looking. Unless it was prepared to release all of the detainees immediately after January 20, 2009, the Obama team needed a legal argument for holding them while it figured out what to do. Faced with a population of some 240 people confined in Guantánamo—some of whom may be dangerous terrorists, others of whom may be innocent, and yet others for whom a determination of status could still be pending—the administration may simply have crafted the Obama Memo to buy itself more time. Indeed, apart of any legal argumentation, Part III of the Obama Memo “commits to apprising the Court” of its ongoing efforts to review the status of each detainee and to undertake “a comprehensive review of the lawful options available.”¹⁶⁶

The AUMF and international law arguments, in other words, are quintessentially minimalist. They preserve a status quo with regard to particular detainees but contain no broader ambitions for enlarging executive power, asserting an isolationist approach to

definition was adopted by Judge Richard Leon of the D.C. District Court shortly after the Supreme Court’s ruling *Boumediene*. *Boumediene v. Bush*, 583 F. Supp. 2d 133, 135 (D.D.C. 2008).

¹⁶⁴ *Gherebi v. Obama*, 609 F. Supp. 2d 43, 70 (D.D.C. 2009).

¹⁶⁵ *See, e.g.*, Review & Outlook, *Prisoners of War*, WALL ST. J., Mar. 18, 2009.

¹⁶⁶ Obama Memo, *supra* note [redacted], at 10-11.

international law, or reserving the right to ignore Congress. And they are quintessentially *realist* in they see the policy context of an ongoing effort to clean up a difficult mess as germane to their legal claims about what the AUMF means. In short, the Obama Memo shows an administration trying to maintain some sort of order as it unwinds an institution whose closure was written into an Executive Order on the President’s first full day in office. And this unwinding approach means that courts should respond in kind by not treating the AUMF rulings as broad new enterprises in the law of detention.

B. Delegation to the Courts; Policy-Making by Brief-Writing

The Obama Memo and the series of habeas suits that the administration has litigated have delegated key policymaking issues to the courts—or, more specifically, to the trial judges of the District Court for the District of Columbia. The D.C. judges are deciding, in a common law process, issues such as who is detainable, what sort of deference will be afforded to the government’s evidence, and how the hearings will proceed.¹⁶⁷ With regard to the first question, the courts have had to decide what makes someone a “part of” al Qaeda or another such organization;¹⁶⁸ what constitutes “substantial support”—and whether substantial support on its own is sufficient grounds for detention;¹⁶⁹ what types of other organizations count as “associated forces” of the Taliban or al Qaeda;¹⁷⁰ and whether the government has an ongoing obligation to show that a detainee remains dangerous.¹⁷¹ While the Obama DOJ has certainly taken positions on these issues in its court filings, the implication on a general level is that having trial

¹⁶⁷ See Wittes, Chesney & Benhalim, *supra* note ____, at ____; Brill, *supra* note ____, at ____.

¹⁶⁸ *E.g.*, Gherebi v. Obama, 609 F. Supp. 2d 43, 69 (D.D.C. 2009).

¹⁶⁹ *Compare Gherebi*, 609 F. Supp. 2d at 69-70 with *Hamlily v. Obama*, 616 F. Supp. 2d 63, 69 (D.D.C. 2009).

¹⁷⁰ *Al Bihani v. Obama*, 590 F.3d 866, 872-73 (D.C. Cir. 2010); *Hamlily*, 616 F. Supp. 2d at 70.

¹⁷¹ *Al-Bihani*, 590 F.3d at 874. *Compare Basardh v. Obama*, 612 F. Supp. 2d 30, 34-35 (D.D.C. 2009) (requiring that the government show continuing dangerousness) with *Awad v. Obama*, 646 F. Supp. 2d 20 (D.D.C. 2009).

judges be the arbiters is ultimately acceptable. This decision to delegate was arguably the administration's least bad option—but it also cautions against courts seizing upon their role to create large new areas of law.

The delegation of policy to the courts was made most clear when the Obama Administration announced, in the summer of 2009, that it would not be seeking new detention legislation.¹⁷² Instead, it had decided that “existing law”—the AUMF—provides sufficient authority for detaining the individuals at Guantánamo Bay. By the time of this announcement, the Obama Memo had already been written, and some of the key D.C. habeas decisions had come down largely endorsing the administration's position. The most comprehensive was Judge Walton's decision in *Gherebi v. Obama*,¹⁷³ which, after a lengthy analysis of international and domestic law, adopted the Obama detention criteria wholesale. A weighty counterpart to Judge Walton's decision came from Judge John Bates, in *Hamlily v. Obama*, in which Bates rejected the “substantial support” prong; but even there, Judge Bates noted that most “substantial supporters” would probably fit in a “part of” category anyway.¹⁷⁴ With the former decision having been issued in April of 2009 and the latter in May, the Obama Administration had a relatively clear picture of what its habeas litigation would look like in an AUMF-based, court-driven process. Moreover, the manner of the proceedings had been made mostly uniform pursuant to Judge Hogan's 2008 Case Management Order.¹⁷⁵ Thus, when it announced shortly thereafter that it would not be seeking new legislation, the administration must have found this picture acceptable.

¹⁷² Peter Baker, *Obama To Use Current Law To Support Detentions*, N.Y. TIMES, Sept. 23, 2009, at A23.

¹⁷³ 609 F. Supp. 2d 43 (D.D.C. 2009).

¹⁷⁴ *Hamlily v. Obama*, 616 F. Supp. 63, ___ (D.D.C. 2009).

¹⁷⁵ See *supra* note ___ and accompanying text.

It also bears noting that, while the government has lost the majority of its habeas cases, it has never taken to fulminating against any of the rulings. One might think that, where the court ordered the actual release of a petitioner whom the government had alleged was a dangerous terrorist, there might be some statement of outrage or even simple disagreement from the administration. But while it has quietly filed appeals, public pronouncements have been lacking.¹⁷⁶ And while one perhaps might not expect the President (or any White House representative) to comment on the minutiae of district court cases, there have also been no major statements from the White House that anything is wrong as a general matter with the overall process as it has been unfolding, despite the fact that the government often loses.

This is not to say, of course, that “delegation” to the courts means total passivity from the executive branch. Rather, the Obama Administration has signed on to a court-driven *process*, by which it files briefs and makes arguments case by case, and trial judges render opinions. While the judges have become the primary decision-makers, the administration has been able to shape those decisions quite substantially in what I will call policy-making by brief-writing. The first major instance of this, of course, came in the Obama Memo. In arguing that the AUMF authorized it to detain people meeting certain criteria, the administration was not simply litigating a case; it was announcing a policy. And while the courts could choose whether to endorse or reject this policy, the government’s pronouncements—and the skills of some of its best lawyers—obviously had considerable weight.

¹⁷⁶ By contrast, one might recall the President’s characterization of the Supreme Court’s controversial *Citizens United* ruling during his State of the Union Address, in which he accused the Court of “revers[ing] a century of law to open the floodgates for special interests.” President Barack H. Obama, State of the Union Address (Jan. 27, 2010).

On a smaller but perhaps no less significant level, the administration sets policy whenever it takes a yet-unexplored position in a habeas case. For example, in the case of Belkacem Bensayah, a man arrested in Bosnia and accused of facilitating travel for al Qaeda members, the administration had to grapple with exactly how far it would take its “substantial support” arguments.¹⁷⁷ Was the government prepared to argue that someone giving support to al Qaeda far away from any combat zone was detainable under the AUMF and the laws of war? Administration officials deemed the government’s litigating position so significant, in fact, that a lengthy debate was held in the Office of Legal Counsel’s conference room, in which Harold Koh squared off against Jeh Johnson, the Pentagon’s General Counsel.¹⁷⁸ (The government ended up arguing that Bensayah’s support effectively made him “part of” al Qaeda, thus hoping to avoid the substantial support issue.¹⁷⁹) Most of the habeas litigation is handled by elite teams of lawyers in the Justice Department’s Federal Programs division, in consultation with the Departments of State and Defense.¹⁸⁰ Of course, the DOJ has routine policies for vetting government filings and opinions to ensure that they comply with broader policy—there is, after all, an entire Office of Legal Policy, and the Solicitor General’s office examines every federal appeal—but the policy oversight in the habeas context is significant because it is essentially the *only* policy that the government is currently making on the matter. As the D.C. judges have often noted (or complained), the terrain is a blank slate; and each case presents a potentially new canvass.

¹⁷⁷ Charlie Savage, *Obama Team Is Divided on Anti-Terror Tactics*, *supra* note [REDACTED].

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* [Note: decision from D.C. Cir. not out yet.]

¹⁸⁰ *See, e.g.*, United States Department of Justice, Federal Programs Branch, <http://www.justice.gov/civil/Federal%20Programs.htm> (last visited Apr. 10, 2010).

C. The Least Bad Option

It might appear at first blush that this state of affairs is deplorable: the administration avoids going through Congress for new legislation and hides behind court filings rather than even openly announce its positions. The Supreme Court is unwilling to dirty its hands by setting any concrete parameters. And Congress vacillates between incompetent paralysis and vague gesticulations toward “toughness” that fail to provide workable solutions. Yet it is precisely because of the dynamics in the political branches that executive delegation to the courts is the least bad choice. By defusing sound bite posturing and forcing reasoned argumentation, the courtroom process lends itself to the most pragmatic resolutions available for the Guantánamo detainees. Moreover, the courts have the advantage of being case-specific, and where appropriate, the ability to *not* set broader precedent.

While one often hears talk of judges “legislating from the benches” and of courts taking over political functions, few tend to ask whether political actors may intentionally or at least knowingly drop certain issues in the courts’ laps. Commentary about “activist” judges tends to assume a one-way power grab by the courts over and against the political branches. But political actors may also push costly decision-making functions onto courts. If one concedes that certain issues are politically toxic, that lawmakers would like to see certain outcomes but are unwilling to pay the political cost, and that judges could potentially impose those outcomes as a result of litigation, it makes perfect sense that lawmakers might rely on courts for certain policy interventions. Keith Whittington, for example, writes of instances in which “elected politicians . . . shift political blame to

judges for unpopular actions.”¹⁸¹ Political actors are well aware that courts can fill key gaps, or correct certain wrongs, where they are unable or unwilling to act.¹⁸² And in the preventive detention conundrum, courts have proven an especially useful dumping ground for the political branches.

Senator Arlen Specter’s stance on the habeas provision of the 2006 Military Commissions Act is a perfect example. As the Senate began debating the contours of the new MCA, Specter vociferously opposed the provision that stripped habeas review from federal courts. “What the bill seeks to do,” he stated on the floor of the Senate, “is set back basic rights by some nine hundred years.”¹⁸³ When the Senate voted against his proposed amendment to allow habeas review, Specter told reporters that he thought the ban was “patently unconstitutional” and that he would vote against the MCA.¹⁸⁴ Nevertheless, Specter ultimately voted for it. His justification was that having procedures for military commissions was imperative, that the habeas provision was severable, and that he expected the Supreme Court to invalidate it.¹⁸⁵ And, of course, Specter was vindicated in *Boumediene*, in which he even filed an amicus brief in support of the petitioners.¹⁸⁶ Prior to *Boumediene*, Professor Akhil Amar had commented, “It’s a pretty odd position for Specter to take. He trusts the courts to take care of a problem when he’s voting for something that strips them of their jurisdiction to do it.”¹⁸⁷ Yet—as Amar was surely aware—Specter’s position was not odd at all from a purely results-oriented

¹⁸¹ KEITH WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY 138 (2007).

¹⁸² Whittington, for example, cites politically toxic issues such as abortion and flag-burning as instances where policy makers would take positions they know would be softened or even nullified by judicial review. *Id.* at 137-38, 139-42.

¹⁸³ Jeffrey Toobin, *Killing Habeas Corpus: Arlen Specter’s About-Face*, *The New Yorker*, Dec. 4, 2006.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ Brief of United States Senator Arlen Specter as Amicus Curiae in Support of Petitioners, *Boumediene v. Bush*, 553 U.S. 723 (2008) (Nos. 06-1195, 06-1196).

¹⁸⁷ Toobin, *supra* note ____.

calculus. Senator Specter wanted a law for military commissions, but also believed that stripping federal courts of habeas review was wrong and unconstitutional. In voting for the MCA, he took a calculated risk that five Justices on the Supreme Court would agree; and when they did, the offending clause would be severed and Specter's version of the bill would prevail.

The point of the Specter example is not to condemn politicians as hypocrites or even as weak-willed. Specter was clear about his views on habeas throughout and made a zealous effort to have his amendment prevail.¹⁸⁸ And while a cynic might read his ultimate vote for the MCA as political cowardice, Specter claims to have been acting on a genuine, expedient need to put lawful procedures in place for military commissions.¹⁸⁹ Still, the Specter dynamic is troubling as a precedent. Members of Congress are duty-bound to uphold the Constitution, and simply passing this duty off to courts is a sad abrogation of civic values. Indeed, even judges and justices may sometimes chafe at the notion of performing triage on bad (or non-existent) legislation. In *Hamdi*, after the plurality had gone through several contortions of the AUMF and a judicially engineered balancing framework, Justice Scalia accused the Court of taking on a “Mr. Fix-it Mentality” that “not only . . . steps out of the courts’ modest and limited role in a democratic society; but that by repeatedly doing what it thinks the political branches ought to do . . . encourages their lassitude and saps the vitality of government by the people.”¹⁹⁰

But even if Justice Scalia is right—even if, ideally, the political branches ought to

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* (“If we had not passed the bill, we would be going on into next year without having a procedure to try these people.”).

¹⁹⁰ *Hamdi v. Rumsfeld*, 542 U.S. 507 577-78 (Scalia, J., dissenting).

hash out tough compromises in complex and novel circumstances—the present state of Congress seems to indicate, quite simply, that this is impossible. Congress’s actions regarding Guantánamo Bay have been almost entirely a one-way ratchet away from due process norms,¹⁹¹ and, perhaps more damningly, have been more gesticulations than serious solutions.¹⁹² It has twice passed laws that would strip courts of habeas review,¹⁹³ has blocked funding to close Guantánamo, and now has bills pending that, *inter alia*, would make it a crime to read a detainee his Miranda rights, and would directly interfere with the Department of Justice’s prosecutorial discretion by forbidding the prosecution of certain crimes depending upon the identity of the defendant.¹⁹⁴ That such measures have virtually no chance of passing is beside the point; they are symptoms of a condition in which fulminations about “toughness” on terrorism are politically advantageous (or, at least, costless), and any breath toward moderation is bait for the next negative campaign ad.

In short, while Benjamin Wittes and others may come up with meticulously thought-out model detention laws,¹⁹⁵ such laws are unlikely to pass. Even a broad policy like the one proposed by Wittes has provisions that require certain procedural constraints guaranteed to outrage the right. For example, the government would have to provide the detainee with an attorney upon filing for longer term detention,¹⁹⁶ and evidence gained in violation of Common Article 3 of the Geneva Conventions (which prohibits both torture

¹⁹¹ Cite 2009 MCA modifications as a small counter-example.

¹⁹² *See supra* notes _____ and accompanying text.

¹⁹³ DTA & MCA.

¹⁹⁴ Cite bill. Because the bill would block prosecution of a non-citizen arrested in the United States for terrorism-related charges, FBI agents and the myriad counterterrorism units in the DOJ that handle such cases would presumably have to determine the citizenship of any suspect before moving forward on an arrest or an indictment.

¹⁹⁵ *See* Benjamin Wittes & Colleen A. Peppard, Brookings Inst.: Governance Studies, *Designing Detention: A Model Law for Terrorist Incapacitation* (2009).

¹⁹⁶ *Id.* at 16.

and “outrages upon personal dignity, in particular humiliating and degrading treatment”¹⁹⁷) would be barred from admission.¹⁹⁸ Civil libertarians, meanwhile, would resist the very notion of preventive detention and the creation of an entirely new procedural universe for certain classes of people.¹⁹⁹ All this, of course, is assuming that any such proposal could ever get to the floor of either house of Congress. But Congress has its hands full. After an explosive debate about health care, and faced with tasks of financial regulation, climate legislation, and immigration reform (to name only a few), it is hard to imagine that any lawmakers would spend political capital on an issue so divisive and so politically unrewarding. Especially when the D.C. district judges essentially appear to be performing the function of a “national security court” on their own.

Thus, the Obama Administration’s announcement last summer that it would not seek detention legislation begins to look more understandable. But it also presents a compelling case for limiting the resulting rulings: judicial resolutions of political defaults should not become long-term policy. There is no reason to think the Obama Administration would even be hostile to this view: an *advantage* of the court-driven approach may be that judicial rulings can be narrowed in a case-specific manner. In other words, the Obama Administration may be crafting a particular legal framework to “clean up the mess” for these particular Guantánamo detainees, most of whom were captured back in 2002 and all of whom were captured before Barack Obama became President. Though it has missed its deadline, the administration remains firmly committed to closing

¹⁹⁷ Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

¹⁹⁸ Wittes & Peppard, *supra* note ____, at 19.

¹⁹⁹ See, e.g., Koh, *supra* note ____.

Guantánamo Bay and to resolving the cases of as many detainees as possible—whether through trial, military commission, or return to another country. Though the President has noted that some detainees may need to be held further without trial,²⁰⁰ there has been no indication that the administration plans to go on apprehending *additional* detainees, outside zones of conflict, whom it intends to hold indefinitely in Guantánamo or in the United States.²⁰¹ In short, detention without trial for these Guantánamo detainees may be the exception rather than the rule. And court rulings, unlike legislative enactments or executive orders, are capable of limitation to the circumstances at hand. In this light, the disjunction in Part I espoused by Koh and others—that a preventive detention law is a bad idea but that preventive detention is legal²⁰²—makes sense when one considers the limited role that judicial precedent can play when perceived in its proper context. Part V argues that, given the context described in this Article, that proper role is provisionalism.

V. The Case for Provisionalism

The courts have acted as a last resort, operating against a background of political default. Given this crisis-resolving role, the reach of these decisions should be limited to apply only to the population currently detained in Guantánamo Bay. Just as delegation to the courts has been the least bad option for the Obama Administration, a provisional approach is the least bad option for the judiciary. Provisionalism allows for the pragmatic approach that the D.C. judges have taken to the habeas cases without embedding any

²⁰⁰ President Barack H. Obama, Remarks by the President on National Security (May 21, 2009) [hereinafter National Archives Speech], available at http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-On-National-Security-5-21-09/.

²⁰¹ Though this Article does not attempt to resolve issues relating to detention in other U.S. military facilities abroad, such as Bagram Air Force Base, it is important to note that this area of law—and issues of sovereignty in these facilities—are rapidly evolving. See *infra* notes ____-____ and accompanying text.

²⁰² See *supra* Section ____.

longer lasting rules or norms that have not been signed off upon by Congress. Section A first outlines what an expansive approach would look like, illustrating how far the reach of the habeas cases could potentially be. Section B describes some of the general attributes of judicial minimalism in politically contentious contexts, and argues that a provisional approach it is particularly suited to the Guantánamo detention conundrum. Section C outlines the details that a provisional approach could take.

A. An Unbounded Common Law of Preventive Detention

The judges of the District Court for the District of Columbia have coalesced around several important principles that have been largely taken for granted, particularly by those content with a quantitative “scorekeeping” of habeas grants and denials. Each habeas ruling has agreed that the 2001 Authorization for Use of Military Force empowers the President to detain anyone “part of . . . Taliban or al Qaeda forces, or associated forces, that are engaged in hostilities against the United States or its coalition partners.”²⁰³ Each has also agreed to a broader set of procedural rules that allow hearsay evidence, limit the petitioner’s access to discovery, and set the government’s burden only at a preponderance of the evidence.²⁰⁴ The length of detention is indefinite, with most judges having settled upon the duration of hostilities.²⁰⁵ The only appellate ruling to date has been unnecessarily broad and extreme. In *Al-Bihani v. Obama*,²⁰⁶ a panel for the D.C. Circuit asserted that (1) “substantial support” is also permissible grounds for detention;²⁰⁷ (2) the government does not have to prove that the detainee continues to pose any threat

²⁰³ See *supra* notes _____ and accompanying text.

²⁰⁴ See *supra* notes _____ and accompanying text.

²⁰⁵ See *Al-Bihani v. Obama*, 590 F.3d 866, 874 (D.C. Cir. 2010).

²⁰⁶ *Id.*

²⁰⁷ *Id.* at 872.

(only that he met the detention criteria at some point),²⁰⁸ and (3) international law is entirely irrelevant to interpretations of the AUMF.²⁰⁹

Several troubling implications present themselves, which can be illustrated from the most immediate to the more far reaching. The first, quite simply, is that the Obama Administration is free to capture additional Taliban or al Qaeda members and to bring them to Guantánamo. The administration is under no obligation to close the facility, and, indeed, now has a legal blessing to keep it open for every detainee whom it can show, in an abbreviated proceeding, is (or was) more likely than not a part of the Taliban or al Qaeda.

The same could also be said for members or substantial supporters of many of the other forty-four designated Foreign Terrorist Organizations that associate with al Qaeda or the Taliban.²¹⁰ An Algerian fighter for al Qaeda in the Islamic Maghreb fighting to overthrow his government, for example, would be “part of” an al Qaeda-associated force that is engaged in hostilities against the U.S. or its coalition partners.²¹¹ It is unclear exactly how far the “associated forces” language might go, but al Qaeda’s web of nebulous networks is extraordinarily broad. At the very least, it is clear that there are al Qaeda members outside of the conflict zones in Afghanistan.²¹²

²⁰⁸ *Id.* at 874 (“[R]elease is only required when the fighting stops.”).

²⁰⁹ *Id.* at 871 (“Before considering [the petitioner’s] arguments in detail, we note that all of them rely heavily on the premise that the war powers granted by the AUMF and other statutes are limited by the international laws of war. This premise is mistaken.”).

²¹⁰ Including al Qaeda, the State Department currently lists forty-five FTOs. U.S. Department of State, Foreign Terrorist Organizations, <http://www.state.gov/s/ct/rls/other/des/123085.htm> (last visited Apr. 12, 2010). (The Taliban is not a designated FTO.)

²¹¹ See National Counterterrorism Center, Al-Qa’ida in the Lands of the Islamic Maghreb (AQIM), <http://www.nctc.gov/site/groups/aqim.html> (last visited Apr. 12, 2010). AQIM is—obviously—aligned with al Qaeda; it targets Westerners and has claimed responsibility for killing at least one U.S. citizen.

²¹² See, e.g., Kenneth Katzman, Cong. Research Serv., Al Qaeda: Profile and Threat Assessment (2005), available at <http://www.fas.org/sgp/crs/terror/RL33038.pdf>.

The habeas rulings also suggest that detention of the same population is permissible inside the territorial United States. Because habeas jurisdiction has been extended to Guantánamo, there is no longer a legal distinction between holding someone there and holding him anywhere else within U.S. jurisdiction. In either instance, the detainee can file a habeas suit, which can either be granted or denied by a district court applying the same AUMF-based legal system.²¹³ This possibility is not especially worrisome for the purpose of *transferring* the current Guantánamo detainees (except for those who have “not in my backyard” objections)—but it also stands to reason that it applies to any *additional* captives—even those arrested or detained inside the United States. If the AUMF authorizes the President to detain anyone part of or substantially supporting al Qaeda, and if the capture does not need to be made on a battlefield or zone of conflict,²¹⁴ then it is hard to see why any exception would apply where a capture or arrest is made inside the United States. Indeed, the Obama Memo asserts that its AUMF authority extends beyond Afghanistan, and it does not except the territorial U.S. from its argument.²¹⁵ In other words, if the government could show (by a preponderance of the

²¹³ The only difference might be that “statutory habeas”—that is, habeas proceedings outlined specifically in 28 U.S.C. §§ 2241-53, might apply to someone detained inside the United States. The habeas proceedings contemplated in *Boumediene* and fleshed out by the D.C. courts are constitutional minima, whereas the provisions in 28 U.S.C. includes details such as rough timelines for hearings that have been passed by Congress. While the ruling in *Boumediene* technically voided the jurisdiction-stripping provision of the MCA (28 U.S.C. § 2241(e)) and thus arguably made §§ 2241-53 once again applicable to Guantánamo petitioners, the D.C. courts do not seem to have had any statutory requirements in mind as they have shaped the habeas proceedings.

²¹⁴ *E.g.*, *Boumediene v. Bush*, 579 F. Supp. 2d 191 (D.D.C. 2009) (detainees arrested in Bosnia).

²¹⁵ Obama Memo, *supra* note _____, at _____. Of course, the Posse Comitatus Act, 18 U.S.C. § 1385, and general constitutional norms against military action inside the U.S. might dictate against members of the armed forces actually making captures (though the Bush Administration’s Office of Legal Counsel argued that this, too, could be acceptable. *See* Memorandum for Alberto R. Gonzales, Counsel to the President, and William J. Haynes, General Counsel, Department of Defense, from John C. Yoo, Deputy Assistant Attorney General and Robert J. Delahunty, Special Counsel, *Re: Authority for Use of Military Force to Combat Terrorist Activities Within the United States* at 18 (Oct 23, 2001)). But law enforcement agents could make an arrest and then simply send the arrestee over to military custody, either by flying him to Guantánamo or taking him to some other military detention facility.

evidence) that the “Christmas Day Bomber,” Umar Farouk Abdulmutallab, was part of the Taliban, or that Faisal Shahzad, the man who attempted to detonate a car bomb in Times Square, was part of al Qaeda or some affiliated terrorist group, either man could presumably be held indefinitely without trial—inside the U.S., or in Guantánamo—under the very arguments advanced in the Obama Administration’s habeas filings.²¹⁶ Debates on the use of Article III trials versus military commissions would seem trivial by comparison to the use of an abbreviated, preponderance-of-the-evidence, habeas hearing in which the detainee cannot even be present.

Moreover, a broad extension of the AUMF-based habeas rulings would be grounds for construing any future congressional authorization for military force to include a broad detention authority over anyone with some asserted nexus against the military cause. Recall that the AUMF only authorizes the use of force against “those nations, organizations, or persons [the President] determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons.”²¹⁷ But this language, along with the purpose clause, “in order to prevent any future acts of international terrorism against the United States,”²¹⁸ has been interpreted to include all al Qaeda and Taliban members—and to include authority to detain all such members outside of conflict zones without trial. In some distant

²¹⁶ As described below, *see infra* notes [redacted] and accompanying text, the Obama Administration has shown no desire to take persons apprehended inside the United States into military custody despite strong political pressures to do so. The point is not that the Obama Administration is cynically burying an option in its court filings that it is planning to exercise later. Rather, the troubling aspect of these arguments is that some future administration with less restraint might well unearth these claims, arguing that the AUMF-based habeas rulings logically extend to people like Abdulmutallab or Shahzad. As described by Professor Bruce Ackerman, a persistent structural problem with government lawyering offices is that the usual practice or goal of keeping options open for clients leads to inevitably expanding notions of executive power, even when ambitious claims to authority are not directly sought. *See* BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* [redacted] (2010).

²¹⁷ AUMF

²¹⁸ *Id.*

universe, an authorization for force against North Korea could be taken to mean that the government can indefinitely detain someone picked off the streets of London and accused of providing aid for its government.

Though this latter scenario may be far-flung, others, like the fact that the Guantánamo population could readily and legally be expanded, are clear implications from a broad view of the D.C. rulings. Moreover, one should not forget that a habeas denial for an admitted Nazi saboteur in 1942²¹⁹ is now regularly cited as authority for unreviewable detention in Guantánamo.²²⁰ As Justice Jackson stated in his famed dissent in *Korematsu v. United States*, a judicial principle that rationalizes a disputed wartime authority

lies about like a loaded weapon ready for the hand of any authority than can bring forward a plausible claim for an urgent need. Ever repetition imbeds that principle more deeply in our law and thinking and expands it to new purposes. . . . [I]f we review and approve, that passing incident becomes the doctrine of the Constitution. There it has a generative power of its own, and everything that it creates will be in its own image.²²¹

B. The Cures of Provisionalism

The mission of this Article has not been to say that the habeas courts' interpretation of the AUMF is necessarily wrong. It has been to show that these interpretations have been made under extraordinary circumstances, and that this context counsels against a broad reading of the law emerging from the D.C. habeas courts. Whatever glosses can be put on the word "force," it is clear that nobody thought Congress was enacting a domestic preventive detention law on September 18, 2001, and it is equally clear that Congress has not enacted a domestic preventive detention law since. Instead, the interpretation of the word "force" as authorizing detention in Guantánamo allowed the courts to, as Justice

²¹⁹ *Ex Parte Quirin*, 317 U.S. 1 (1942).

²²⁰ Cite examples (gov't briefs and court rulings)

²²¹ 323 U.S. 214, 246 (1944).

Breyer put it, give detainees an opportunity to get a “foot in the door” so as to work to a solution that would be “protective but practical.”²²² Neither President Bush nor President Obama has made preventive detention a legislative priority or even a matter of publicized executive policy. The Obama Administration has so far espoused no broader ambitions for writing preventive detention into the legal landscape beyond what is needed to clean up what the President has called “the mess at Guantánamo.”²²³ Given these circumstances, future courts reviewing that legality of military custody should view the body of Guantánamo habeas cases in a “one ticket only” framework. Limiting judicial interpretations of the AUMF so as to apply only to the current Guantánamo population would stem the outgrowth of a significant body of law that has never been blessed by Congress, and that has been adopted by courts as more of a matter of expedience than of detached principle.

Some general virtues of minimalism, espoused most clearly by Cass Sunstein, are that it reduces burdens of decision making and makes judicial errors less damaging, and that, in “economiz[ing] on moral disagreements” by seeking narrower grounds, it helps diffuse deep-seated constitutional and moral divides.²²⁴ Sunstein also speaks of minimalism as “democracy-forcing” or “democracy-enabling.” In leaving the big questions undecided, courts throw the central issues of the day back to Congress and to the people. “[C]ase-specific and theoretically unambitious judgments,” Sunstein writes, “operate as kind of ‘remand’ to the public for further proceedings.”²²⁵ Sunstein argues that this type of “remand” is particularly appropriate where the case at hand involves an

²²² See *supra* note ____.

²²³ National Archives Speech, *supra* note ____.

²²⁴ CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 4, 5 (1999).

²²⁵ SUNSTEIN, *supra* note ___, at 121.

interpretation of a statute that could raise serious constitutional issues. Courts, he argues, should require “clear statements” from Congress before proceeding to an interpretation that would raise constitutional doubts or depart from a longstanding norm or practice.²²⁶

In the detention context, the unprecedented nature of the case law—which has driven some of the D.C. habeas judges to open despair²²⁷—certainly dictates circumspection. And the high-stakes constitutional and moral dimensions involved in the cases, though they may not always counsel judicial narrowness or avoidance, become particularly muddled when they are fought over in the arena of statutory interpretation (of the AUMF). That is, a judicial effort at statutory interpretation ought not to be a substitute for an ongoing and visible public debate. In *Oregon v. Gonzales*, for example, the Court was asked to consider whether the Controlled Substances Act contained authority for the Attorney General to essentially override Oregon’s law allowing euthanasia by criminally banning the substances used for the process.²²⁸ It held that the Act contained no such authority, in part on the grounds that Congress would not have buried such a major policy decision into an unexplored interpretation of the statute (that the phrases “currently accepted medical use” or “consistent with the public interest” would give implementing agencies wide range to override state policies²²⁹); as the Court put it, a legislature does not “hide elephants in mouseholes.”²³⁰ Similarly, reading one word of the AUMF, “force,” to enact an entire policy of long-term preventive detention would permit exactly the sort of executive “bootstrapping”—by which a statutory

²²⁶ SUNSTEIN, *supra* note ___, at 27.

²²⁷ See *supra* notes ___ and accompanying text.

²²⁸ 546 U.S. 243 (2006).

²²⁹ *Id.* at 257, 261-64.

²³⁰ *Id.* at 267; see also William N. Eskridge & Kevin S. Schwartz, Commentary, *Chevron and Agency Norm-Entrepreneurship*, 115 YALE L.J. 2623, 2627-29 (2006).

interpretation is allowed to substitute for a change in the law—that democracy norms have lead the Court to avoid.

Though one might point to *Hamdi* and the **twenty-five-plus** habeas decisions as proof that this train has already left the station, a judicial construction that puts the decisions in their proper context could readily narrow their scope. Viewing the habeas courts' interpretations of the AUMF as matters of judicial accommodation and provisional problem solving would place the burden squarely back with Congress to devise—or not devise—a broader detention policy. It would, in other words, serve the “democracy-forcing” function to which Sunstein refers. Though, as described above, Congress does not appear particularly likely or well suited to enact a new policy, the very failure of democratically elected representatives to agree on long-term preventive detention does not mean that judges should enact it for them instead.

In addition to the “democracy gap” from Congress, the executive branch under the Obama Administration has shown no desire to make preventive detention the law of the land, at least not beyond that which is necessary to resolve the situation it inherited at Guantánamo. One of the President's immediate priorities was to sign an Executive Order for the closure of the facility,²³¹ a task he set about by creating a special task force to review the files and potential options for each detainee.²³² The administration indicated within its first few months that it would not seek a new detention law, and, so far, it has not done so. Thus, while the administration's formal position with regard to the AUMF—that it authorizes detention of anyone who was “part of or substantially supported Taliban

²³¹ Exec. Order No. 13,491, 74 Fed. Reg. 4893 (Jan. 22, 2009).

²³² Exec. Order 13,492, 74 Fed. Reg. 4897 (Jan. 22, 2009).

or al Qaeda forces” or associated forces—is almost identical to that of the Bush Administration, its context is fundamentally backward-looking: the AUMF interpretation can be used to hold the detainees already in Guantánamo while the government figures out what to do with them.

Indeed, the Obama Administration has drawn considerable political heat for *not* treating certain individuals under a military or AUMF-based framework. After the arrests of Umar Farouk Abdulmutallab (the alleged attempted “Christmas Day Bomber”) and of Faisal Shahzad, the man alleged to have attempted to detonate a car bomb in Times Square, there was widespread outrage from the right that both were placed in the federal criminal justice system and read their Miranda rights. The administration, however, has adhered to a principle against military treatment or custody for anyone captured inside the U.S. In a public letter to Senator Mitch McConnell, Attorney General Eric Holder stated that “the practice of the U.S. government, followed by prior and current Administrations *without a single exception*, has been to arrest and detain under federal criminal law all terrorist suspects who are apprehended inside the United States,” and that the transfer of persons apprehended in the U.S. into law of war custody has “raised serious statutory and constitutional questions.”²³³ In other words, while the government may assert that the AUMF *could* cover such situations, it has shown no inclinations to push forward in this direction.

With no direction from Congress and only a backward-looking direction from the executive, the courts should go no further than is absolutely necessary. Essentially, the

²³³ Letter from Eric Holder, Attorney General, to Senator Mitch McConnell at 3 (Feb. 3, 2010), *available at* <http://www.justice.gov/cjs/docs/ag-letter-2-3-10.pdf>.

courts have been asked to clean up a breakdown in the democratic process and the fallout of a presidential administration attempting to unwind a situation that it inherited. In a more sinister sense, Justice Scalia is absolutely right that the courts have espoused a “Mr. Fix-it” mentality.²³⁴ But while Justice Scalia sees this role as entirely inappropriate to the judiciary, others, such as Justice Breyer, see it as a legitimate if not inevitable exercise.²³⁵ Whatever its abstract legitimacy, narrow treatment has an especially compelling appeal when judges take this role on. When courts make “fixes,” they are departing from the usual pose of abstract application of law to fact;²³⁶ in finding ways to make the law “fix” or fit into some particular set of circumstances, a judge must pull or push on the boundaries of permissible interpretation to fit into the facts at hand. This is particularly so when decisions are made in the shadow of separation of powers and national security claims, where a court’s first goal may be to avoid escalation of a constitutional conflict. Finding it impossible or unwise to simply declare the government had no detention authority and order all non-battlefield detainees released,²³⁷ yet desiring some mode of process to separate out those who truly (in the courts’ opinions) are not terrorists, the habeas courts have pushed and pulled at the AUMF and at various procedural balancing frameworks to get the system that we have today.

²³⁴ See *Hamdi v. Rumsfeld*, 542 U.S. 507, 576 (Scalia, J., dissenting).

²³⁵ See *supra* note ___ and accompanying text (Justice Breyer asking about finding a “practical” solution). One might also compare Justice Scalia’s dissent in *Hamdi*, for example, to a question put by Judge Richard Posner in an opinion dealing with the complex ramifications of a drug sentencing law. Viewing some of the results in a particular case as totally irrational, Judge Posner asked, “Well, what if anything can we judges do about this mess?” *United States v. Marshall*, 908 F.2d 1312, 1334 (7th Cir. 1990) (Posner, J., dissenting).

²³⁶ See, e.g., Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 640-42 (1995).

²³⁷ Recall that *Hamdi* was captured in a conflict zone having engaged in actual armed conflict; a lower court seeking to limit *Hamdi*’s import could simply have drawn a line there.

In *Hamdi*, Justice Scalia wrote, “This judicial remediation of executive default is unheard of. The role of habeas corpus is to determine the legality of executive detention, not to supply the omitted process necessary to make it legal.”²³⁸ This “remediation,” of course, is not unheard of and has been used in the application of habeas principles for decades.²³⁹ It is, however, different from general constitutional or statutory interpretation, and it is different even from general principles of common law, where courts build on areas of law generally left to their domain. Judicial remediation of political and constitutional crises is a solution of last resort. Because it comes about from a failure of the political branches to resolve a live and pressing policy matter, political actors should not be permitted to bootstrap this last-resort remediation into long-term policy. Instead, courts should take a provisional approach that looks no further than the specific circumstances at hand.

C. Contours of a Provisional Approach

A provisional approach to the D.C. habeas opinions could apply on several levels. First, the opinions could simply be read only to apply to the population detained in Guantanamo Bay at the time of the Supreme Court’s ruling in *Boumediene*, in 2008. Because no additional transfers have been made to Guantanamo since then, this reading would be consistent with the goal of closing the facility and resolving the fates of the detainees there. Second and less narrowly, the AUMF interpretations could apply only to

²³⁸ *Hamdi v. Rumsfeld*, 542 U.S. 507, 576 (Scalia, J., dissenting).

²³⁹ Over the years, habeas review has extended from formalistic assessments of whether the convicting court had jurisdiction, *e.g.*, *Ex Parte Lange*, 85 U.S. (18 Wall.) 163, 180 (1874) (applying habeas review to instances where federal courts have made judgments “without authority of law”), to more comprehensive judgments on the integrity of the trial process, *e.g.*, *Moore v. Dempsey*, 261 U.S. 86 (1923) (applying habeas review for claims of defective process in state convictions); *Townsend v. Sain*, 372 U.S. 293, 312 (1963) (requiring federal courts in habeas actions to hold evidentiary hearings if the applicant “did not receive a full and fair evidentiary hearing in a state court”). *See also* *Jones v. Cunningham*, 371 U.S. 236, 243 (1963) (habeas review is not “a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose.”).

those captured in the course of U.S. military operations in or around Afghanistan. Lastly and at the very least, the pronouncements of the D.C. Circuit panel in *Al-Bihani v. Obama* should be construed as narrowly as possible.

Cabining the D.C. habeas decisions to apply only to the current Guantánamo population is easily workable and would not be arbitrary. The post-*Boumediene* habeas process has been specifically tailored to these detainees; petitioners from Guantánamo have had their cases channeled through the D.C. District Court, and the Hogan Case Management Order setting the ground rules for the proceedings applies only to their dockets. The reasoning in *Boumediene* was also specific not only to the land (with the sovereignty implications of the Guantánamo lease) but to the population currently on it. The Court noted that the detainees had been captured in the period immediately following the September 11 attacks and had been “denied meaningful access to a judicial forum” for periods of up to six years.²⁴⁰ The decision repeatedly emphasizes the novelty of the case at hand and the corresponding need for a case-specific solution.²⁴¹

AUMF-based detentions outside Guantánamo have fallen into two categories: those detained outside the territorial United States and those detained within. Neither category can easily be molded to fit the AUMF-plus-habeas preventive detention model now employed in Guantánamo. As to the first, individuals detained outside Guantánamo and outside the territorial United States are, at least at the moment, outside the jurisdiction of our courts.²⁴² Thus, the processes used to review detention in Afghanistan and Iraq have

²⁴⁰ *Boumediene v. Bush*, 128 S. Ct. 2229, 2262-63, 2275 (2008).

²⁴¹ *Id.* at 2251, 2276.

²⁴² The D.C. Circuit recently held that federal courts lack jurisdiction to hear habeas cases of non-citizen detainees held in Bagram Air Force Base in Afghanistan. *Al Maqaleh v. Gates*, No. 09-5265, 2010 WL 2010783 (D.C. Cir. May 21, 2010). Though the ruling did not categorically bar jurisdiction for all foreign

hewed closer to traditional military models. Moreover, the host countries in each exercise at least some degree of sovereignty over these facilities. Thus, whatever one's position on whether habeas should extend to these locations, it is clear that their legal regimes will not be the pure creatures of U.S. courts and their interpretations of the AUMF.²⁴³ Military needs and cooperation with host governments, potentially including transfer into domestic criminal systems, will be key factors shaping these regimes as they unfold.

As to the second category, only three detainees have been held under AUMF authority inside the territorial United States, and none of their cases provides solid ground for a more expansive reading of the statute. One was Hamdi himself, who was being held in a naval brig in North Carolina when his case reached the Supreme Court.²⁴⁴ But like most of the other detainees, Hamdi had been captured in Afghanistan in the early stages of the 2001 invasion by the United States. He was brought to Guantánamo and was only transferred when authorities learned of his citizenship. Another, Jose Padilla, obtained a ruling by the Second Circuit that his detention under the AUMF was unlawful.²⁴⁵ Though the ruling was reversed on jurisdictional grounds²⁴⁶ and the Fourth Circuit reached the

military bases, it emphasized that proximity to the theater of combat was a strong factor to be considered. *Id.* at *11-12. There would likely be an exception, however, for U.S. citizens. *See id.* at *10; *see also Boumediene*, 128 S. Ct. at 2236-37 (placing the citizenship of the petitioner as the first among three factors that a court must examine in determining habeas jurisdiction). In *Munaf v. Geren*, 128 S. Ct. 2207 (2008), the Supreme Court held that federal courts have jurisdiction to hear habeas claims from U.S. citizens being held in Iraq. But the habeas petitions in *Munaf* were not general attacks on the government's authority to hold the petitioners without trial—they were injunctions filed to prevent their transfer into and prosecution in the Iraqi criminal justice system. *Id.* at 2214-15.

²⁴³ Whether the government makes a broad policy out of sending new detainees captured around the world to Bagram Air Force Base or other such facilities remains to be seen. The court in *Al Maqaleh* did suggest that this sort of willfully evasive tactic might provide a rationale for extending habeas review. *Al Maqaleh*, No. 09-5265, 2010 WL at *13.

²⁴⁴ *Hamdi*, 542 U.S. at 510.

²⁴⁵ *Padilla v. Rumsfeld*, 352 F.3d 695 (2d Cir. 2003).

²⁴⁶ *Rumsfeld v. Padilla*, 542 U.S. 426 (2004).

opposite conclusion when it heard his case,²⁴⁷ Padilla was transferred into criminal custody before the issue was resolved. The third, Ali Saleh Kahleh al-Marri, was captured and detained inside the United States, but the Fourth Circuit’s fractured en banc decision upholding his detention and granting him habeas review was vacated as moot when he was transferred for criminal proceedings.²⁴⁸ Both his and Padilla’s cases, in fact, are cited by Attorney General Holder for the proposition that “transfer to law of war custody [has] raised serious statutory and constitutional questions.”²⁴⁹ In short, a rule limiting the current AUMF-based legal regime only to Guantánamo would not change any substantive law. It would allow alternative interpretations to unfold if jurisdiction ever reaches other facilities abroad, while preventing some future administration from claiming that anyone accused of terrorism related offenses can simply be sent to a facility in Florida or Kansas for detention without trial (subject only to a preponderance-of-the-evidence habeas hearing).

A limitation to only the current *population* in Guantánamo would also not force any reversal of policy. Though some sources vary, it appears that the last detainee to be transferred into Guantánamo arrived in March of 2008.²⁵⁰ The lion’s share of detainees arrived in early 2002, and the population there hit its peak in May of 2003.²⁵¹ Unsurprisingly, President Obama has not placed any new detainees there during his

²⁴⁷ Padilla v. Hanft, 423 F.3d 386 (4th Cir. 2005).

²⁴⁸ Al-Marri v. Spagone, 129 S. Ct. 1545 (2009).

²⁴⁹ Letter from Eric Holder, Attorney General, to Senator Mitch McConnell, *supra* note ____, at 3.

²⁵⁰ Press Release, United States Department of Defense, Defense Department Takes Custody of a High-Value Detainee (Mar. 14, 2008), *available at* <http://www.defense.gov/releases/release.aspx?releaseid=11758>. A *New York Times* timeline that lists nine detainees as arriving in Guantánamo in January of 2009 appears to be mistaken; the profiles for the detainees listed show that each was transferred *out* of Guantánamo before this date. *See* The Guantánamo Docket: Timeline: 2009, N.Y. TIMES, <http://projects.nytimes.com/guantanamo/timeline/2009> (last visited May 22, 2010).

²⁵¹ *See* Guantanamo Bay Timeline, WASH. POST, <http://projects.washingtonpost.com/guantanamo/timeline/> (last visited May 22, 2010).

presidency and has shown no intentions of doing so. A limitation to the current population would acknowledge and accommodate all of the practical difficulties and political breakdowns described above: the lack of legislative debate or direction, the courts' refusals to allow Guantánamo to become a "legal black hole," and the new administration's attempts to "clean up the mess." But an accommodationist stance—that the government may continue to detain people without trial if it gives them a habeas hearing—would clearly be less warranted were the Obama Administration to go out and bring *more* detainees to the place it determined to shut down.

If the courts do not adopt a rule limiting the Guantánamo cases to the current population, they should at least limit the AUMF's application to additional detainees captured in the course of U.S. military operations in or around Afghanistan. The AUMF's original import, as described above, was an authorization to retaliate against those "nationals, organizations, or persons" responsible for the September 11 attacks.²⁵² This was broadly understood to include military action in Afghanistan and the disposal of the Taliban regime. Though military operations there today might not maintain the same immediate nexus to the September 11 attacks, the U.S. mission there is broadly understood in the same vein: that of disrupting and defeating al Qaeda and preventing the reestablishment of a regime that supports and sponsors terrorist organizations.²⁵³ Were the Obama Administration (or any future administration) to bring more detainees into U.S. jurisdiction, a habeas court should at least require that their detention be a part of this mission. It could read the AUMF to cover alleged al Qaeda or Taliban fighters

²⁵² See *supra* notes _____

²⁵³ See, e.g., U.S. Department of Defense, Securing Afghanistan: Stabilization & Growth, <http://www.defense.gov/home/features/2007/afghanistan/index.html> (last visited May 24, 2010).

operating in Afghanistan or its border areas; it should not, however, read the AUMF to cover, for example, an alleged financier in the Philippines. The main point will be that whatever lines are drawn, courts can justifiably narrow them over time as the other two branches are given room to work out solutions that might not have been available in the months immediately following the passage of the AUMF.

Lastly, the D.C. Circuit's ruling in *Al-Bihani* should be construed as narrowly as possible. One might understand the court to have been attempting—amid justifiable frustration over the lack of uniformity—to set some broader ground rules on detention criteria and various procedural matters. It is clear from Judge Brown's concurrence that she emphatically believed the issues before the court were best resolved by Congress—but since they weren't and probably won't be, the question was whether the next best option was for an appellate court to fill in with a broadly comprehensive approach. The ruling in *Al-Bihani* demonstrates why this was unwise. In announcing that the government does not have any obligation to show a detainee continues to pose a threat and that international law would not shape detention decisions,²⁵⁴ the court took its decision up by several levels of abstraction. Rather than make its ruling about whether the government could detain this particular person at this particular time based on the evidence before it, the court produced a decision that became a broader statement about detention policy.²⁵⁵ In a normal common law context, of course, this extrapolation of principles from specific facts is precisely what is expected of the courts. But where a

²⁵⁴ *Al-Bihani v. Obama*, 590 F.3d 866, 871-74 (D.C. Cir. 2010).

²⁵⁵ One irresistible irony of the *Al-Bihani* decision is that President Obama himself had stridently opposed Judge Brown's judicial nomination in the Senate because he viewed her as excessively ideological. *See* [<http://obamaspeeches.com/021-Nomination-of-Justice-Janice-Rogers-Brown-Obama-Speech.htm>] (“Justice Brown’s mission is not blind justice but political activism. The only thing that seems to be consistent about her overarching judicial philosophy is . . . a willingness to consistently side with the powerful over the powerless.”).

court is remediating a default from the other two branches—as Judge Brown surely acknowledged it was—judicial modesty becomes the best principle available.

Accordingly, the *Al-Bihani* ruling should be read by the district judges only for its specific holdings and not its broader policy pronouncements. And this, in fact, is what two judges have already done. In *Salahi v. Obama*,²⁵⁶ a recent habeas case, Judge Robertson narrowed *Al-Bihani*'s general pronouncement that providing “substantial support” to al Qaeda was sufficient grounds for detention. In borrowing the MCA's language, the panel had noted that the definition of an “unprivileged enemy belligerent” triable by military commission includes those who “purposefully and materially supported hostilities against the United States or its coalition partners.”²⁵⁷ In extending its logic that anyone triable by military commission is also detainable under the AUMF, the panel had thus concluded that the AUMF covers “those who purposefully and materially support [al Qaeda or Taliban] forces in hostilities against U.S. Coalition partners.”²⁵⁸ Taking this statement as literally as possible, Judge Robertson held that support had to be provided *in* the actual course of hostilities; general organizational support, even if substantial, would not suffice.²⁵⁹ Thus, despite showings that Salahi had provided “sporadic support to members of al Qaeda,” Judge Robertson granted Salahi's habeas petition, finding that the government had not met its burden of showing that he was either “part of” the organization or had provided support “in hostilities.”²⁶⁰

²⁵⁶ No. 05-CV-0569, 2010 WL 1443542 (D.D.C. Apr. 9, 2010).

²⁵⁷ *Al-Bihani*, 590 F.3d at 872 (quoting the Military Commissions Act of 2009 sec. 1802, §§ 948a(7), 948b(a), 948c, 123 Stat. 2190, 2575-76).

²⁵⁸ *Id.*

²⁵⁹ *See Salahi*, 2010 WL at *2, 9. Providing general organizational support could still be probative, of course, as to whether an individual is or was actually “part of” al Qaeda or the Taliban. *Id.*

²⁶⁰ *Id.* at *10.

In *Abdah v. Obama*,²⁶¹ meanwhile, Judge Kennedy simply ignored *Al-Bihani*'s framework for detention criteria altogether, citing instead the two rulings that had come earlier from other D.C. district judges.²⁶² The first, from Judge Walton, had accepted the “substantial support” prong, but with a proviso that “[t]he key question is whether an individual receive[s] and execute[s] orders from the enemy force’s combat apparatus.”²⁶³ The latter ruling, from Judge Bates, had rejected substantial support altogether and held that an individual must be “part of” al Qaeda or the Taliban (or an associated force).²⁶⁴ In *Abdah*, Judge Kennedy simply combined these two criteria²⁶⁵ and then left other “support” arguments out of the picture. The only substantial mention of *Al-Bihani* came in a footnote where Judge Kennedy bracketed a pronouncement by the panel—that visiting an al Qaeda guesthouse might alone justify detention—as mere dicta that was logically questionable.²⁶⁶

In short, although *Al-Bihani* might have been an attempt by a frustrated panel of the D.C. Circuit to establish some broader uniformity, some district judges have already pushed back through narrow readings. While one might argue that lower court judges generally do this to get around rulings they disagree with—and while disagreement may very well have been the judges’ actual motive here—there are principled reasons for this approach as well. A broad panel ruling should not substitute for legislative craftsmanship, and where it threatens to do so, judges may rightly push back. Lastly, the fact that more cases will doubtless reach different panels of the D.C. Circuit justifies a more provisional

²⁶¹ No. 04-1254(HKK), 2010 WL 1626073 (D.D.C. Apr. 21, 2010).

²⁶² *Id.* at *1.

²⁶³ *Gherebi v. Obama*, 609 F. Supp. 2d 43, 69 (D.D.C. 2009).

²⁶⁴ *Hamlily v. Obama*, 616 F. Supp. 2d 63, 69-70 (D.D.C. 2009).

²⁶⁵ *Abdah*, 2010 WL at *1.

²⁶⁶ *Id.* at *10 n.17.

approach to the *Al-Bihani* ruling, as it surely will not be the final word on any of these matters.²⁶⁷ While this dissonance between the D.C. courts is chaotic on several levels, the price of uniformity—the judicial enactment of a broad new preventive detention regime when neither political branch has asked for it—would be much greater.

Conclusion

Many have wondered since 2001 whether a new type of legal regime will be needed to deal with terrorists and terrorism suspects, and what shape this sort of regime could take under our Constitution. Few might have predicted the circuitous route that the answers to these questions have begun to take: an authorization for military force and an invasion of Afghanistan, a prolonged legal battle from a naval base in Cuba ending in a victory for the detainees, and then a case-by-case adjudication of dozens of habeas petitions in a district courthouse in Washington D.C. This turn of events has forced judges to answer who can be detained under an authorization for force and under what standards of proof and evidence.

But the legal analyses that have gone into these opinions should not be divorced from the circumstances that gave rise to them. At every step, justices and judges have been self-consciously attempting to craft a system that might provide some avenue of relief for those detained truly wrongfully while avoiding unmanageable rulings that could trigger a constitutional crisis. By the time habeas cases had begun to reach judges, the fact of Guantánamo was already established: the Bush Administration had acted, and now the Navy stood guard over hundreds of people alleged to be dangerous terrorists. The

²⁶⁷ Cite cases being appealed.

result has been a body of law that is tentatively workable for the current Guantánamo population, but should be extended no further.

Congress has had ample time and opportunity to pass preventive detention legislation and has not done so. Forces of political paralysis continue to make either a rejection of preventive detention *or* an explicit acceptance of it unlikely. The Obama Administration, in turn, has handed the issue over to the courts—perhaps viewing the minimalist case-by-case approach as the least bad option, and perhaps also unwilling to expend political capital by taking positions more publicly than necessary. It should not be the role of the courts to fill these gaps left by the political branches any more than absolutely necessary. While courts rightly build common law systems and expand upon statutory interpretations, they should not embark upon such a dramatically new project—the creation of a national security court—when Congress and the President have failed to do so.

Even the most provisional approach to the habeas rulings, however, still presents a troubling precedent. Rather than attempt to work out issues of legal authority, congressional approval, or even constitutionality before embarking on a new course, the executive may find a legal advantage by acting sooner and answering questions later. A claim of national security necessity will always be greater if it pertains to a practice already in operation. Rather than seek authority to bring detainees to Guantánamo, the executive can claim that it *must* have this authority since they are already there and releasing them would be a disaster. The simple fact of doing what cannot easily be undone will force accommodation by the courts along with any warping of the law that

that might entail. For proponents of expanding executive power, asking permission first will always be a mistake.

At the very least, however, the executive branch is on notice that actions taken in the fight against terrorism can and will be subject to judicial review. And if these bounds are disregarded again by an executive that acts firsts and asks questions later, perhaps the courts may not find themselves so accommodating.