

## Introduction

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AL QAEDA'S SEPTEMBER 11 attack on the United States marked the advent of a new era of warfare. Until that awful day, the dominant view held that only a state could threaten another state's political sovereignty or territorial integrity. But the destruction of the World Trade Center Towers, the assault on the Pentagon, the attempted strike on the Capitol Building or the White House thwarted by the heroic passengers of flight 91, and the murder of more than 3,000 innocent civilians demonstrated that the dominant view was inadequate. Modern technology had placed in the hands of nonstate actors—shadowy terrorist networks and bands of fanatical thugs—the power to bring a state to its knees.

Like all wars, the global war on terror proclaimed by the Bush administration—or better, the U.S.-led worldwide war against Islamic extremists whose weapon of choice is terror—has put strain on the rule of law. This is in part because of the ways in which American constitutional law is entangled with the modern laws of war and their long-standing assumption that the principal actors in war are states. The modern laws of war are a part of the law of nations that emerged in the writings of seventeenth- and eighteenth-century jurists and

political thinkers and that developed in accordance with the evolving practices of modern nation states. In the aftermath of World War II and the founding of the United Nations, those laws have been a subject of increasingly intense interest and elaboration by international human rights lawyers. Specifying the rights and duties laid down by the laws of war can be difficult, because the laws of war stem from diverse sources—treaties, customary state practice, and abstract speculation. But the main cause of difficulty today is that the laws of war were developed with a particular conception of war in mind—involving states with incentives to engage in reciprocal restraint—that does not apply to the conflict with the United States' new adversaries. To further complicate matters, although American jurists generally agree that the laws of war are pertinent under the Constitution, they disagree vigorously on how those laws apply. Still, the central challenge for American constitutional law in the war on terror, as for the laws of war more generally, arises from the nature of a new kind of adversary who controls no territory, defends no settled population, hides among and targets noncombatant civilian populations, and seeks to acquire and use weapons of mass destruction.

In spring 2004, the first set of challenges under the Constitution made its way to the U.S. Supreme Court. These challenges came in the form of three cases concerning the process due to detainees who the United States holds as enemy combatants—those who take up arms and wage war against the United States. All invoked the writ of habeas corpus, the venerable legal means by which a prisoner asks a court to review the legality of his detention. In *Rumsfeld v. Padilla* (124 S. Ct. 2711 [2004]), the least consequential, the Court declined to consider the merits of the case. Jose Padilla, a U.S. citizen arrested in Chicago in May 2002 on suspicion of involvement in an al Qaeda plot to detonate a "dirty bomb" in the United States, had been held as an enemy combatant in a military brig in South Carolina without charges, without trial, and without access to a lawyer. In a lawsuit filed in the Southern District—which includes New York, where

Padilla was initially detained in federal criminal custody—Padilla contended that in detaining him, the government had violated his constitutional rights. The government responded that the war powers entrusted by the Constitution to the executive branch permitted the president to designate Padilla as an enemy combatant and that such designation overrode the rights to criminal due process that Padilla would otherwise enjoy as a U.S. citizen. Refusing to deal with either argument, Chief Justice William Rehnquist's 5–4 majority opinion ruled that Padilla had filed his petition for review of the grounds of his detention in the wrong federal district and would have to refile in the federal district in which he was detained. Writing for the dissenters, Justice John Paul Stevens would have held that the Southern District had jurisdiction and that Padilla was entitled to a review of his detention there.

In *Hamdi v. Rumsfeld* (124 S. Ct. 2633 [2004]), the Court did reach the merits. Yaser Esam Hamdi was seized by Coalition forces on the battlefield in Afghanistan in fall 2001. He was brought to the U.S. naval base at Guantanamo Bay, Cuba, for detention as an enemy combatant, but when the army discovered that Hamdi was a U.S. citizen (he was born in Louisiana, but grew up in Saudi Arabia), he was transferred to a military brig in Virginia and was later moved to one in South Carolina. At the time the Court heard his case, Hamdi had been held for more than two years inside the United States without charge, trial, or access to counsel. Hamdi's lawyers argued that as a U.S. citizen, he was entitled to the full panoply of protections afforded by the Constitution to those accused of criminal offenses. Justice Sandra Day O'Connor wrote for a bare plurality, including Chief Justice Rehnquist, Justice Anthony Kennedy, and Justice Stephen Breyer. She held that Congress had formally authorized the use of military force against al Qaeda and the Taliban, and that under that authorization, the government, as it contended, could detain as an enemy combatant even a U.S. citizen on U.S. soil who had joined the wartime adversary of the United States. But such a designation,

she also ruled, did not altogether nullify citizen Hamdi's constitutional protections: Hamdi had the right to challenge, with the aid of a lawyer and before a neutral decision maker, his designation as an enemy combatant. Justice David Souter's concurring opinion, joined by Justice Ruth Bader Ginsburg, denied that Hamdi's detention had been properly authorized by Congress but affirmed the plurality position that Hamdi was entitled to a meaningful review of the government's reasons for detaining him.

In a strange pairing, Justice Antonin Scalia, joined by Justice Stevens, drew a bright line, arguing in dissent that the government lacked constitutional authority to hold a U.S. citizen in the United States as an enemy combatant. The Constitution, in Scalia's view, gave the government only two options: It could charge Hamdi with treason, or Congress could suspend the writ of habeas corpus. Justice Clarence Thomas, in dissent, rejected the propriety of the Court's intervention. He argued that although the plurality had properly concluded that the congressional authorization of the use of military force provided the president with the power to designate citizens as enemy combatants, courts nevertheless lacked the information and the expertise to determine whether Hamdi was accurately so designated; therefore, the Court was obligated to leave the matter to the discretion granted to the president in wartime by the Constitution.

In *Rasul v. Bush* (124 S. Ct. 2686 [2004]), a 6–3 majority of the Court went further, revealing still sharper divisions among the justices. Circumventing a half-century-old precedent, it ruled that *alien* enemy combatants captured in Afghanistan and held at the U.S. naval base at Guantanamo Bay were entitled to challenge their detentions in U.S. federal court. Justice Stevens's majority opinion emphasized that although the United States did not exercise "ultimate sovereignty" over Guantanamo Bay, which still belonged to Cuba, the long-term leasing arrangement into which the United States had entered in 1903 brought the territory where the Guantanamo detainees were held under the "plenary and exclusive jurisdiction" of the

United States. Yet Stevens also used language that suggested a more sweeping holding—that alien enemy combatants held by U.S. forces *anywhere* in the world could seek relief in U.S. federal courts. In an angry dissent, joined by Chief Justice Rehnquist and Justice Thomas, Justice Scalia declared that the Court produced a ruling that not only had no foundation in the Constitution or previous law but also that would impose an immense burden on the U.S. military, requiring it to divert time, energy, and resources from battlefields around the world to judicial proceedings in U.S. federal courts.

The enemy combatant cases represent the leading edge of U.S. efforts to devise legal rules, consistent with American constitutional principles and the laws of war, for waging the global war on terror. As the distinguished contributors to this volume demonstrate, *Padilla*, *Hamdi*, and *Rasul* raise crucial questions about the balance between national security and civil liberties in wartime; they generate knotty separation of powers issues; and they call upon the courts, the political branches, and the country to reexamine the complicated connections between the Constitution and international law. Spanning the spectrum of informed legal opinion, the essays gathered here show that debating the enemy combatant cases is indispensable to meeting the legal challenges to come in the long war that lies ahead.

Seth Waxman puts the cases in historical and theoretical perspective. His point of departure is the confidence that Justice O'Connor expresses in *Hamdi* that today's courts will prove up to the task of balancing civil liberties and national security. Although he applauds O'Connor's decision and hopes time will vindicate her confidence, Waxman observes that the Court's conduct during past national security crises scarcely justifies optimism. In late eighteenth-century hostilities with France, during the Civil War, and in World War II, the Court showed a pronounced deference to the executive branch's penchant for overriding the claims of liberty in the name of security. So why has the current Court displayed considerably less deference to the executive branch and provided, in the enemy com-

batant cases, significantly more protection for civil liberties? Waxman offers two paradigms for explaining the departure. One views the enemy combatant cases from the perspective of "crisis jurisprudence" and suggests a variety of explanations: Over time, the Court has learned from its mistakes; civil liberties precedents have achieved a critical mass; as war comes to be seen as a constant feature of the political landscape, judges cannot postpone the preservation of individual liberty to peacetime; and as the immediate threat of September 11 recedes, the Supreme Court has grown less inclined to show deference to national security interests. The other paradigm focuses on changes in the Court's perception of its institutional powers. From this perspective, the Court's enemy combatant decisions may reflect its steadily increasing confidence and assertiveness over the past several decades. Although it is too early to identify accurately the balance of factors involved, in all likelihood, both paradigms are needed to account for the Court's reluctance in the present war to defer to executive branch judgment.

Judge Patricia Wald focuses on the doctrinal puzzles to which the enemy combatant cases give rise. But first she insists that the Court was right to hear the cases. The question of the Court's job in war, she points out, is part of a larger and long-standing political and academic debate about "the appropriate role of the judiciary in the complex social, economic, and moral issues of our national life." Given the civil liberties questions at stake, she applauds the Court's entry into the controversy. Yet she also believes the Court's hand was forced. Had the enemy combatant cases involved the possibility of a solution along federalism lines using the fifty states as laboratories, or had Congress attempted legislative action or even held hearings to explore what should be done with al Qaeda members after they had been captured, or had the executive branch shown greater respect for the process owed detainees under international law, she believes the Court might not have felt compelled to intervene as forcefully as it did. Although Wald largely agrees with the Court's judgments, she

concentrates on elaborating a variety of big questions that remain unanswered by the enemy combatant cases: Does habeas lie for foreign detainees housed elsewhere than at Guantanamo? Does it lie for claims of abuse or violations of international law apart from total innocence of being a combatant at all? Do foreigners have the same rights at a habeas hearing as do American-born defendants? How far can the designation of "enemy combatant" carry beyond the battlefield? Do targets of intelligence covert actions abroad have any rights comparable with enemy combatants? She concludes that these critical questions are not of the kind that the Court can resolve alone. Rather, they demand responses that are, in significant measure, legislative in nature, and so require Congress to accept its responsibility in waging the global war on terror.

Like Judge Wald, John Yoo thinks that the Court alone cannot provide all the solutions to questions posed by the enemy combatant cases. But Yoo believes that the Court did more to limit its involvement than is commonly perceived. According to the conventional wisdom, the cases "dealt the Bush administration a defeat in the war on terrorism." The reality, Yoo argues, is more complicated. In fact, the Court embraced the administration's "fundamental legal approach" by agreeing that the country was at war with a new kind of enemy, that Congress had authorized that war, and that U.S. citizens fighting on al Qaeda's side could be detained as enemy combatants. Yet Yoo also contends that with its rulings in *Hamdi* and *Rasul*, the Court "took a wrong turn and overstepped the traditional boundaries of judicial review." The Court thereby unwisely injected itself into military matters and "thrust the federal courts into the center of policy making in the war on terrorism." The crux of the problem is that compared with the political branches, courts lack competence in foreign policy and national security. Their comparative disadvantage in these areas, Yoo argues, stems both from the nature of the adversarial process and the structure of the federal judiciary. American federal courts present high barriers to access, they



impose severe limits on the acquisition and processing of information, their role is limited to the interpretation of the law, and they are poorly situated to adjudicate issues involving the ambiguities of international law. At the same time, the federal judiciary tends to select for generalists who lack the specialized knowledge that national security and foreign policy questions require; with its ninety-two district courts and thirteen courts of appeals, the federal judiciary is highly decentralized and, therefore, could create a multiplicity of opinions in a domain where the Constitution aims to centralize functions and project a single voice; and the federal judiciary proceeds very slowly, whereas national security and foreign policy questions often require rapid responses. Accordingly, in Yoo's view, the Court ought to refrain from entangling itself any further in the review of the military's handling of enemy combatants and leave the matter to the political branches.

Benjamin Wittes explores the variety of institutions and actors that shaped the outcome in the enemy combatant cases. Although he agrees with the conventional wisdom that the cases represent a "stinging rebuke" to the Bush administration, Wittes also agrees with John Yoo that the Court endorsed the administration's "fundamental approach." And though he admires the manner in which the Court balanced constitutional values in *Hamdi*, he is also in agreement with Yoo that it went too far in *Rasul*, sidestepping the governing precedent in an utterly unconvincing manner. But Wittes believes that the Court is far from alone in having failed to rise to the occasion. He does not quarrel with the administration's "desire to use the traditional presidential wartime powers to detain enemy combatants," but he does criticize it for its "Article II fundamentalism"—for acting, that is, as if decisions about enemy combatants were purely a matter of executive discretion and not also legislative in nature. Congress made matters worse by failing to assert its responsibility to legislate in the face of the challenges presented by al Qaeda. Wittes also faults human rights and civil liberties groups. They played a major role by

filing amicus briefs in the cases and presenting the Court with a prominent alternative to the administration's Article II fundamentalism. Unfortunately, Wittes observes, the alternative put forward by these groups embodied an extreme civil liberties fundamentalism that was both unpragmatic and tendentious in its reading of settled doctrine. In the face of this array of failures, Wittes expresses sympathy for the Court's "desire to split the baby between the claims of liberty and the claims of military necessity." But, echoing Judge Wald, Wittes would much prefer "a serious and deliberative legislative process," which would require not only a more engaged and responsible Congress but also an executive branch more attuned to the limits of its powers and a human rights and civil liberties community more appreciative of wartime exigencies and the laws of war.

Mark Tushnet is less sanguine that the Court can be kept in check. This is because of the "perfect Constitution" assumption, which he argues is pervasive in constitutional theory and Supreme Court jurisprudence and indeed "nearly inescapable." According to this assumption, the Constitution, properly construed, "is entirely adequate to meet the perceived needs of contemporary society." This assumption, argues Tushnet, is at work in all the opinions in *Hamdi*. In her plurality opinion, Justice O'Connor concludes both that the Constitution provides the president with all the power he needs to detain an alleged enemy combatant and that the Constitution prescribes a method for determining the process constitutionally due such a detainee. Justice Souter's concurrence adopts the assumption by suggesting that though the president cannot detain a U.S. citizen without express congressional authorization, the Constitution may permit executive detention in times of "genuine emergency." Justice Scalia's sharp dissent draws upon the assumption in arguing that the Constitution gave to the president a perfectly clear choice in responding to a captured citizen enemy combatant: Prosecute for treason or suspend habeas corpus. And Justice Thomas's dissent relied upon it by declaring, "[T]he Federal government has all power necessary to

protect the Nation.” Of course, the Court can limit the reach of the perfect Constitution assumption by declaring questions nonjusticiable or properly left for resolution by the political branches. But the justices are inclined to proceed from the assumption, Tushnet argues, because they feel a responsibility to provide solutions to the nation’s urgent problems and because, under the cover of the assumption, they can place responsibility for controversial outcomes on those who long ago wrote and ratified the Constitution. However, the cost of the assumption is, in Tushnet’s eyes, considerable. Most significantly, it leads the Court to twist constitutional text and its own precedents while depriving the political branches and the public of the opportunity to have their say on weighty questions of national interest.

Ruth Wedgwood brings the volume to a close by examining the questions that the Guantanamo controversy raises about the limits of law, and particularly about the judicial adjudication of legal disputes, in wartime. *Rasul* placed the Court in unfamiliar territory because “the capture and internment of prisoners of war and irregular combatants in overseas military operations has not generally engaged the attention of civilian judges.” And the Court did not acquit itself well, in Wedgwood’s view. In deciding that enemy combatants held at Guantanamo Bay could challenge their detention in federal court, the Court proceeded with too little regard for precedent, too little attention to the canons of statutory construction, too little thought to whether federal law provided any substantive relief for alien enemy combatants, and too little concern for the implications of its holding for the waging of war. Wedgwood notes that in subsequent litigation, enemy combatants might search for substantive law in a variety of sources: the U.S. Constitution, treaties, customary international law (also called “the laws and customs of war” or “international humanitarian law”), and statutes. But all, she shows, pose significant problems. Accordingly, “federal courts will, at a minimum, need to be aware of their limitations in seeking to draw upon these intricate sources of law, especially in the minefield of military operations.”

Despite her serious criticisms of *Rasul*, Wedgwood appreciates the Court’s reasons for taking action: the desire of the justices to weigh in on the momentous legal questions raised by the government’s actions taken after September 11; the abuses at Abu Ghraib; and the Office of Legal Council memos, which suggested an almost boundless executive power in the conduct of war. Indeed, she speculates that the Court “may be inclined to maintain a type of ‘strategic ambiguity’ on questions of review, in order to summon the executive branch and Congress to appropriate moral attention.” In the end, though, she believes it should primarily be left to the political branches, by virtue of their superior tools and broader knowledge, to take the lead in crafting a new legal regime for the handling of enemy combatants and such other challenges as are bound to arise in the global war on terror.

The debate that the contributors to this volume have joined is still in its early stages, but thanks to their analysis and arguments, the key issues have come into better focus. Although they differ in their judgments about the proper extent of the Court’s involvement in the enemy combatant cases, the other contributors are in agreement with Judge Wald that with the September 11 attacks, the United States found itself engaged “in a new kind of war, with new dilemmas that needed new rules.” If they disagree as to the details of the new legal regime that the country is in the process of crafting, all are in agreement that each of the three branches of government must rise to the occasion and that each must perform its constitutional share of the labors, which includes defending against encroachment by other branches. Finally, the contributors are emphatic in agreement that fortifying the rule of law at home is itself both a demand of justice and a national security imperative.