THE U.S. SUPREME COURT, THE WAR ON TERROR, AND THE NEED FOR THICK CONSTITUTIONAL REVIEW

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INTRODUCTION

In certain mystery stories, the murder weapon is made of ice and melts, causing difficulties identifying the murderer.[1] This is a useful metaphor for describing three of the U.S. Supreme Court's major cases regarding the "war on terror."[2] The media and some experts pronounced the cases as rule of law victories.[3] Undoubtedly, the Court deserves praise for rejecting the most extreme executive power claims being made. Yet the cases are like the disappearing weapon, since some Guantanamo detainees remain in limbo. Paradoxically, these opinions have even aided presidential administrations in holding the detainees indefinitely.

Part I of this paper will show that each of these three Court decisions did not go far enough in addressing key issues about how the U.S. military commission system for detainees should work. Part II will discuss the resulting lower court difficulties in determining what procedures the commissions must follow, and even whether the Supreme Court's rulings

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[1] *See, e.g.*, EDGAR JEPSON & ROBERT EUSTACE, THE TEA-LEAF (1925), *available at* http://gaslight.mtroyal.ca/tealeaf.htm.

[2] Boumediene v. Bush, 553 U.S. 723 (2008); Hamdan v. Rumsfeld, 548 U.S. 557 (2006); Hamdi v. Rumsfeld, 542 U.S. 507 (2004).

[3] David Stout, *Justices Rule Terror Suspects Can Appeal in Civilian Courts,* N.Y. TIMES, June 13, 2008, *available at* http://www.nytimes.com/2008/06/13/washington/12cnd-gitmo.html.

apply to detainees outside of Guantanamo, such as at the Bagram military base in Afghanistan. Finally Part III will argue that Article III judges should be sent to Guantanamo to conduct trials on a rotating basis to ensure independence and promote legitimacy. This solution rejects various arguments from the Bush and Obama Administrations. I will also suggest that the Supreme Court's unwillingness to address certain questions, or challenge certain assumptions, in wartime cases, is frequently a mistake. Specificity is needed when vital rights are at stake.

I. THE TRILOGY

The Bush Administration responded to the horror of September 11, 2001 by attacking the Taliban and Al Qaeda in Afghanistan.[4] Yet the Administration maintained this was not a typical war, covered by the Geneva Convention, since neither group was the legitimate government of a nation.[5] Moreover, Al Qaeda did not follow the laws of war since they deliberately murdered innocent civilians.[6] The September 11 conspirators were not ordinary criminals as they had primarily political goals, were hostile to the U.S., and were part of an international movement of Jihad.[7]

The Administration also had practical motivations, namely to reduce the enemy's legal protections in a stated effort to ensure future attacks against Americans did not occur.[8] Thus, the U.S. engaged in coercive and even torturous interrogation techniques at times, used rendition to foreign countries, and deprived detainees of contact with attorneys,

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[4] *See Hamdan*, 548 U.S. at 568-69.

[5] *See id.* at 628-29.

[6] *See id.* at 673-74.

[7] *See* NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 47-70 (2004).

[8] *See* Tim Golden & Don Van Natta, Jr., *Administration Officials Split Over Stalled Military Tribunals*, N.Y. TIMES, Oct. 25, 2004, *available at* http://www.nytimes.com/2004/10/25/international/worldspecial2/25gitmo.html ("'[Prisoners] may well have information about future terrorist attacks against the United States,' said Vice President Dick Cheney. 'We need that information.'").

humanitarian organizations, and family for as long as feasible.[9] These actions violated Geneva as well as American criminal law.[10] The President labeled many of the detainees "enemy combatants" to confirm their novel status.[11] Indeed the U.S. opened Guantanamo because it was presumed to be a law-free zone where U.S. courts lacked jurisdiction.[12] The Supreme Court in *Rasul v. Bush*,[13] however, ruled otherwise about Guantanamo.[14] This was one of numerous serious legal errors made by Bush's legal counsel.[15]

A. Hamdi

The U.S. Supreme Court decided *Hamdi v. Rumsfeld*[16] in 2004. The issue was whether the U.S. government could detain an American citizen as an enemy combatant.[17] Mr. Yaser Esam Hamdi was being held in a South Carolina military brig with no apparent charges against him, no access to counsel, no access to family, and no visits by NGO's allowed.[18] Fortunately, his father found out and retained an attorney who challenged this situation.[19] The government responded that the President had such inherent executive authority in wartime, as part of the unitary executive theory.[20] Moreover, a Congressional Authorization of the Use of Military Force ("AUMF"), adopted shortly after September 11, also supported the detainment. The

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[9] *Id.*

[10] *See generally* Wayne McCormack, *The War on the Rule of Law*, 36 J. NAT'L SEC. F. 101 (2010). Numerous books have chronicled these gruesome events. *See, e.g.*, DAVID COLE, THE TORTURE MEMOS: RATIONALIZING THE UNTHINKABLE (2009); JANE MAYER, THE DARK SIDE: THE INSIDE STORY OF HOW THE WAR ON TERROR TURNED INTO THE WAR ON AMERICAN IDEALS (2008).

[11] *See* Golden & Van Natta Jr., *supra* note 8.

[12] *Id.*

[13] Rasul v. Bush, 542 U.S. 466 (2004).

[14] *Id.* at 484.

[15] *See, e.g.*, Eric Lichtblau & Scott Shane, *Report Faults 2 Authors of Bush Terror Memos*, N.Y. TIMES, Feb. 19, 2010, *available at* http://www.nytimes.com/2010/02/20/us/politics/20justice.html.

[16] Hamdi v. Rumsfeld, 542 U.S. 507 (2004).

[17] *Id.* at 509.

[18] *Id.* at 510-11.

[19] *Id.* at 511-12.

[20] *See, e.g.*, JOHN YOO, CRISIS AND COMMAND (2009).

AUMF permitted 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."[21]

The U.S. Supreme Court issued a decision that split on the merits.[22] The plurality opinion, authored by Justice O'Connor, upheld the President's power under the AUMF to declare Hamdi to be an enemy combatant.[23] This was a significant victory, though the Court refused to rule on the inherent authority theory.[24] Moreover, the plurality rejected the Administration effort to deprive Hamdi of all due process.[25] The Court said the government had to inform Mr. Hamdi of why he was being held, provide some contact with a lawyer, and give him a chance to rebut the accusations.[26] Justice O'Connor relied on a 1970s due process case called *Mathews v. Eldridge*,[27] which involved the termination of social security disability benefits. In *Matthews*, the Court said the amount of due process owed required weighing three factors: the burden on the individual, the interest of the government, and the risk of error.[28]

The *Hamdi* due process victory was also limited.[29] The Court said that Mr. Hamdi did not possess the right to a full criminal trial given his enemy combatant status.[30] The government need only provide some sort of military tribunal.[31] Moreover, evidentiary presumptions at trial could favor the

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[21] *Hamdi*, 542 U.S. at 510 (quoting Authorization for Use of Military Force, Pub. L. No. 107-40, § 2, 115 Stat. 224, 224 (2001)).

[22] *See generally id.*

[23] *See id.* at 516-24.

[24] *See generally id.*

[25] *See id.* at 524-39.

[26] *Id.* at 533.

[27] Mathews v. Eldridge, 424 U.S. 319, 323 (1976).

[28] *Hamdi*, 542 U.S. at 529 (citing *Mathews*, 424 U.S. at 335).

[29] *See id.* at 533-35.

[30] *Id.* at 535.

[31] *Id.* at 534.

government.[32] In addition, hearsay and other irregular evidence could be admitted.[33]

Hamdi unfortunately never elaborated on these parts of its ruling.[34] The plurality didn't describe when hearsay should be admissible, whether coerced testimony could be admitted, or how far the evidentiary presumption shift could go.[35] It also didn't explain what kinds of military tribunals are permitted, how they should be structured, or what role at the hearing could be played by defense counsel and the accused.[36] The plurality could have retained its balancing test while still providing some specifics.[37]

The most disturbing part, however, is that the Court never set a time limit for when an enemy combatant must be brought to trial in front of a military commission.[38] All the Court said was that the detainees could be held until the end of hostilities.[39] Yet, this is a potentially never-ending "war on terror."[40] The Court therefore effectively permitted indefinite detention.[41] The Court also missed a chance to prohibit coercive interrogation, at least of American citizens.

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[32] *Id.*

[33] *Id.* at 533-34.

[34] *See generally id.*

[35] *See generally id.*

[36] *See generally id.*

[37] Notably, Justice Scalia authored an opinion finding that the Second Amendment guaranteed the right of individuals to bear arms. District of Columbia v. Heller, 554 U.S. 570 (2008). However, he went further and provided clarification that this did not preclude concealed weapons laws, as well as prohibitions on felons or the mentally disabled from carrying a weapon. *Id.* at 626-27.

[38] *See generally Hamdi*, 542 U.S. 507.

[39] *Id.* at 521.

[40] *See* Geoffrey Nunberg, *The -Ism Schism; How Much Wallop Can a Simple Word Pack?*, N.Y. TIMES, July 11, 2004, *available at* http://people.ischool.berkeley.edu/~nunberg/terror.html ("'The war on terror,' . . . suggests a campaign aimed not at human adversaries but at a pervasive social plague. . . . Like wars on ignorance and crime, a 'war on terror' suggests an enduring state of struggle—a 'never ending fight against terror and its relentless onslaughts,' as Camus put it . . . .").

[41] *See* Brief for ACLU et al., as Amici Curiae Supporting Petitioners at 6, *Hamdi*, 542 U.S. 507 (No. 03-6696), 2004 WL 354185 ("The Executive . . . has claimed this unlimited authority for an unlimited time. In the government's view, Hamdi can remain imprisoned for the rest of his life if the Executive deems it expedient. Nor is that scenario far-fetched. The conflict in Afghanistan has been expressly linked to the

Obviously, the plurality followed the tradition of judicial avoidance, especially during wartime.[42] Yet this was the beginning of a set of cases that allowed much military action regarding enemy combatants to go ungoverned. This in turn has facilitated tragedy. Military law expert Scott Horton has revealed the numerous suicides that took place at Gitmo.[43] Moreover, the resulting lower court chaos shows that the plurality's minimalism was misplaced.[44]

There were two well reasoned opinions. Justice Souter relied on a federal statute that prohibited the detention of U.S. citizens without charges, absent an act of Congress.[45] Souter concluded that Hamdi therefore could not be held.[46] Souter noted that the anti-detention law was passed in 1971 in reaction to the Japanese-American internment during World War II, and to the horrific decision in *Korematsu v. United States.*[47] Souter explained that the statute was controlling as it addressed the confinement issue more specifically than did the AUMF.[48] O'Connor, however, responded that the AUMF provided the Congressional authorization required by the statute.[49] O'Connor's argument is weak as AUMF's discussion about the use of force applied to the war abroad.[50] Souter

broader 'war' against terrorism, and we have repeatedly been told that the 'war' against terrorism may never have a conclusive end.").

[42] Brief for the Respondents at 22, *Hamdi*, 542 U.S. 507 (No. 03-6696), 2004 WL 724020 ("The canon of constitutional avoidance counsels against interpreting [18 U.S.C. §] 4001(a) in a manner that would interfere with the well-established authority of the Commander in Chief to detain enemy combatants in wartime." (citing Pub. Citizen v. U.S. Dep't of Justice, 491 U.S. 440, 466 (1989))).

[43] Scott Horton, *The Guantanamo "Suicides": A Camp Delta Sergeant Blows the Whistle,* HARPER'S MAG., Jan. 18, 2010, *available at* http://harpers.org/archive/2010/01/hbc-90006368.

[44] *See, e.g.*, Bostan v. Obama, 662 F. Supp. 2d 1, 3 (D.D.C. 2009) (calling the court's statements on the admissibility of evidence "ambiguous").

[45] *Hamdi*, 542 U.S. at 539-54 (Souter, J., concurring) (citing 18 U.S.C. § 4001(a) (2000)).

[46] *Id.* at 551-53.

[47] *Id.* at 542-43 (citing Korematsu v. United States, 323 U.S. 214, 223-24 (1944); H.R. REP. No. 92-116, at 2, 4-5 (1971), *reprinted in* 1971 U.S.C.C.A.N. 1435, 1435-38).

[48] *See id.* at 547-48.

[49] *See id.* at 516-24 (plurality opinion).

[50] *See id.* at 547-48 (Souter, J., concurring).

nonetheless concurred in the part of O'Connor's decision stating that Hamdi was entitled to due process.[51]

Surprisingly, Justice Scalia dissented on the grounds that the plurality did not protect Hamdi's rights enough.[52] He explained that the government could not hold a U.S. citizen indefinitely without charges unless habeas was suspended.[53] The government therefore had to charge Hamdi with treason or let him go.[54] Interestingly, the Administration released Mr. Hamdi not long after the Court decision, suggesting he may not have been as dangerous as advertised.[55]

It's worth noting that one reason the media and scholars perceived *Hamdi* as a major rights victory was because of the government's extreme position, namely that this was a kind of political question that the Court could not decide.[56] This extreme approach facilitated the illusion of a major government defeat, even though the government actually got its military commissions and enemy combatants.

B. Hamdan

After *Hamdi*, each Gitmo detainee was supposedly given minimal due process in the form of a Combatant Status Review Tribunal ("CSRT") hearing.[57] The CSRT was required to allow

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[51] *See id.* at 553.

[52] *See id.* at 554 (Scalia, J., dissenting).

[53] *See id.* at 563-69.

[54] *Id.* at 573.

[55] *See* Joel Brinkley & Eric Lichtblau, *U.S. Releases Saudi-American It Had Captured in Afghanistan*, N.Y. TIMES, Oct. 14, 2004, *available at* http://www.nytimes.com/2004/10/12/international/middleeast/12hamdi.html. The one troubling aspect of Justice Scalia's opinion is his disregard for the rights of legal aliens, as opposed to just citizens.

[56] *See, e.g.*, James Vicini, *Supreme Court Deals Blow to War on Terror*, REUTERS, June 28, 2004, *available at* http://www.commondreams.org/headlines04/0628-07.htm (quoting an ACLU representative who called *Hamdi* "a strong repudiation of the administration's argument that its actions in the war on terrorism are beyond the rule of law and unreviewable by American courts").

[57] *See* Christopher Marquis, *Pentagon Will Permit Captives At Cuba Base to Appeal Status*, N.Y. TIMES, July 8, 2004, *available at* http://www.nytimes.com/2004/07/08/world/reach-war-justice-pentagon-will-permit-captives-cuba-base-appeal-status.html.

the detainee to show he was not an enemy combatant.[58] President Bush also worked with the Defense Department and unilaterally established a military commission system.[59] The detainees would be tried in these commissions.[60] Mr. Salim Ahmed Hamdan, a Yemeni citizen, was Osama Bin-Laden's former driver and challenged the legality of the military commissions.[61] He was a non-citizen held at Guantanamo.[62]

The Court in 2006 ruled that the military commissions were illegal on two grounds.[63] First, the tribunal procedures did not comply with the Uniform Code of Military Justice ("UCMJ").[64] The commissions could exclude counsel and the accused from the proceedings, and deny them access to classified information being used as evidence.[65] And Congress had never approved the commissions.[66]

Second, the Court said Article III of the Geneva Convention applied (since these were supposedly not prisoners of war) and required that the government only place such detainees on trial in a "regularly constituted court."[67] These newly created tribunals did not qualify.[68] Justice Alito contested this latter point.[69] The Court also said there was no proof that use of more regular courts was "impracticable," as required by Geneva.[70] The problem with *Hamdan*, however, is that it did not establish specific rules for what must be done in

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[58] *See id.*

[59] *See* Hamdan v. Rumsfeld, 548 U.S. 557, 568–69 (2006); *see also* Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259, 1260-66 (2002).

[60] *See Hamdan*, 548 U.S. at 569.

[61] *Id.* at 570.

[62] *Id.* at 566.

[63] *Id.* at 567.

[64] *Id.* at 613.

[65] *Id.* at 613-15. Justice Kennedy did not agree that the rules for excluding the accused from hearing certain evidence were illegal, so that part of the Stevens opinion was technically a plurality, not a majority.

[66] *See id.* at 568-69.

[67] *Id.* at 625-35.

[68] *See id.*

[69] *Id.* at 725 (Alito, J., dissenting).

[70] *Id.* at 623-24 (majority opinion).

a military commission, short of copying the UCMJ.[71] The ruling also licensed the Administration to work with Congress and therefore changed very little.[72] That is what happened.[73] Interestingly, the Court created more uncertainty by not addressing various constitutional issues, though Justice Kennedy touched on them in a concurrence.[74]

C. Boumediene

The issue in this 2008 case was whether the revised military commission law was constitutional since it deprived Gitmo detainees of the right to file habeas petitions in U.S. federal courts.[75] Moreover, the law only provided for judicial review of CSRT determinations in the U.S. Court of Appeals for the D.C. Circuit.[76] The Supreme Court ruled 5-4 against the law in an opinion by Justice Kennedy.[77] This case almost never reached the Court, which denied certiorari towards the end of the previous term.[78] Justices Kennedy and Stevens, however, had warned then that they might reconsider if certain

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[71] *See generally id.*

[72] *See generally id.*

[73] *See* Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600.

[74] *See Hamdan*, 548 U.S. at 636-55 (Kennedy, J., concurring). Martin Flaherty has authored a powerful article describing how the Court was hesitant and could have issued a ruling that had a stronger legal foundation. Martin S. Flaherty, *More Real than Apparent: Separation of Powers, the Rule of Law, and Comparative Executive "Creativity" in* Hamdan v. Rumsfeld, 2006 CATO SUP. CT. REV. 51. Stephen Vladeck likewise argues that courts should play an important role in such disputes, and contrasts his views with scholars such as Ben Wittes. Stephen Vladeck, *The Long War, the Federal Courts, and the Necessity/Legality Paradox,* 43 U. RICH. L. REV. 893 (2009) (reviewing BEN WITTES, LAW AND THE LONG WAR: THE FUTURE OF LAW IN THE AGE OF TERROR (2008)).

[75] Boumediene v. Bush, 553 U.S. 723, 732-33 (2008).

[76] *Id.* at 734.

[77] *Id.* at 730.

[78] Boumediene v. Bush, 549 U.S. 1328 (2007) (denying certiorari).

circumstances changed.[79] Ultimately, the Court did change its mind and take the case which is rather unusual.[80]

First, the Court held that these detainees had a right to seek habeas even though they were foreign citizens, were held outside the fifty states, and were labeled enemy combatants.[81] The Court focused on three criteria above all: the citizenship status of the detainee and the adequacy of the process for determining that, the nature of the sites where apprehension and detention took place, and the practical obstacles in the way of resolving the matter.[82]

Second, the Court ruled that the revised system did not adequately substitute for habeas.[83] The Court explained that the CSRTs were deficient since the detainee did not have a lawyer, may not know all the allegations, and may not be able to confront witnesses if the evidence is hearsay.[84] Indeed, studies by Seton Hall University, and reports by journalists, called into question how the CSRT's functioned, showing that they made errors and operated in procedurally irregular ways.[85]

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[79] *Id.* at 1329 ("Were the Government to take additional steps to prejudice the position of petitioners in seeking review in this Court, 'courts of competent jurisdiction,' including this Court, 'should act promptly to ensure that the office and purposes of the writ of habeas corpus are not compromised.'" (quoting Padilla v. Hanft, 547 U.S. 1062, 1064 (2006)).

[80] *See* William Glaberson, *In Shift, Justices Agree to Review Detainees' Case*, N.Y. TIMES, June 30, 2007, at A1, *available at* http://www.nytimes.com/2007/06/30/washington/30scotus.html ("Some experts on Supreme Court procedure said they knew of no similar reversal by the court in decades.").

[81] *See Boumediene*, 553 U.S. at 765-72.

[82] *See id.*

[83] *See id.* at 770-92.

[84] *See id.* at 783-86.

[85] MARK DENBEAUX ET AL., REPORT ON GUANTANAMO DETAINEES: A PROFILE OF 517 DETAINEES THROUGH ANALYSIS OF DEPARTMENT OF DEFENSE DATA 2 (2006), *available at* http://law.shu.edu/publications/guantanamoReports/guantanamo_report_final_2_08_06.pdf. It's noteworthy that West Point issued an academic rebuttal, but conceded there were some people at Guantanamo who probably should not be there. William Glaberson, *Pentagon Study Sees Threat in Guantanamo Detainees*, N.Y. TIMES, July 26, 2007, at A16, *available at* http://www.nytimes.com/2007/07/26/washington/26gitmo.html.

The Court also found that D.C. Circuit review was insufficient for two reasons.[86] That court could really only assess legal determinations, not factual findings.[87] And that court could not receive any newly discovered evidence produced by the detainee or his lawyers.[88] There were strong dissents.[89]

This case has been described as a victory for the detainees.[90] While the decision has allowed habeas cases, it still failed to clarify what the CSRT and the military commissions must do.[91] Thus, the Obama Administration proceeded with re-revised military commission procedures,[92] but those were also vigorously challenged.[93]

Moreover, some of these people have been held for over seven years and haven't been charged, though others have been released.[94] Even some high ranking Bush military commission officials and JAG lawyers resigned in dismay.[95] Several prosecutions have been dropped due to mistreatment of the detainee.[96] In addition, virtually no commission trials have

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[86] *See Boumediene*, 553 U.S. at 786-92.

[87] *See id.* at 788-89.

[88] *See id.* at 788-91.

[89] *Id.* at 800-26 (Roberts, C.J., dissenting); *id.* at 826-50 (Scalia, J., dissenting).

[90] *See* William Glaberson, *Lawyers for Detainees Plan to Use Justices' Ruling to Mount New Attacks*, N.Y. TIMES, June 14, 2008, at A14, *available at* http://www.nytimes.com/2008/06/14/washington/14gitmo.html (quoting a detainee's counsel as saying that *Boumediene* "'appears to demolish this argument that the Constitution does not apply in Guantanamo Bay'").

[91] *See id.* ("'Now,' [a detainee's counsel] said, 'the battle lines are: Exactly what are the protections?'").

[92] *See* Military Commissions Act of 2009, Pub. L. No. 111-84, § 1801–07, 123 Stat. 2190.

[93] *See, e.g.*, Obaydullah v. Obama, 609 F.3d 444 (D.C. Cir. 2010); Al-Bihani v. Obama, 590 F.3d 866 (D.C. Cir. 2010), (en banc rehearing denied Aug. 31, 2010 (113 pages of concurring and dissenting views on rehearing)); Khadr v. Obama, 2010 WL 2814416 (D.D.C. July 20, 2010).

[94] *See* Charlie Savage, *Obama Team Split on Tactics Against Terror*, N.Y. TIMES, Mar. 29, 2010, at A1, *available at* http://www.nytimes.com/2010/03/29/us/politics/29force.html.

[95] Peter Finn, *Guantanamo Prosecutor Quits, Says Evidence Was Withheld*, WASH. POST, Sept. 25, 2008, at A6, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2008/09/24/AR2008092402101.html.

[96] Bob Woodward, *Detainee Tortured, Says U.S. Official,* WASH. POST, Jan. 14, 2009, at A1, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2009/01/13/AR2009011303372.html. This has also caused the detainees to prevail in a

occurred and serious problems have arisen in those few that commenced.[97]

II. CHAOS REIGNED

These cases left chaos. First the D.C. federal courts adopted divergent standards on many crucial habeas issues because the judges formulated rules with constitutional implications via an ad-hoc common law method.[98] Second, it's not even clear whether *Boumediene* applies to other U.S. military bases, such as Bagram in Afghanistan.

A. Procedures

The Brookings Institution issued a powerful report in January 2010 regarding *Boumediene*'s legacy.[99] The Report is titled, "The Emerging Law of Detention: The Guantanamo

variety of federal court habeas actions. Editorial, *Legacy of Torture*, N.Y. TIMES, Aug. 27, 2010, at A20 ("A new report prepared jointly by ProPublica and The National Law Journal showed that the government has lost more than half the cases where Guantanamo prisoners have challenged their detention because they were forcibly interrogated.").

[97] *Australia Lawyers Group Says Hicks Military Commission Trial 'A Charade'*, JURIST, July 24, 2007, http://jurist.law.pitt.edu/paperchase/2007/07/australia-lawyers-group-says-hicks.php; *see also* Carol Rosenberg, *Khadr's attorney airlifted from Guantanamo, trial delayed one month*, MIAMI HERALD, Aug. 14, 2010, http://www.miamiherald.com/2010/08/13/1776146/khadrs-attorney-airlifted-from.html.

[98] *Al-Bihani*, 590 F.3d at 870 ("The Supreme Court has provided scant guidance on these questions, consciously leaving the contours of the substantive and procedural law of detention open for lower courts to shape in a common law fashion."). The Chief Judge for the U.S. District Court for the District of Columbia gave a speech at the Brookings Institution regarding the Guantanamo disputes: "The majority opinion of the Supreme Court said we want these cases acted on expeditiously but we're not going to give the district court any guidance; we're sure they can figure it out. Very helpful." Larkin Reynolds, *Judicial Vacancies and Guantanamo*, LAWFARE BLOG (Mar. 2, 2011), http://www.lawfareblog.com. *See also* David G. Savage, *Little Headway Made at Guantanamo*, L.A. TIMES, Apr. 3, 2011, *available at* http://www.latimes.com/news/nationworld/nation/la-na-gitmo-20110403,0,2303087.story ("[*Boumediene*] only opened the door into court for detainees. The justices left much undecided, including the legal rules for determining who was an enemy combatant. The high court also did not say that judges could order the release of prisoners.").

[99] BENJAMIN WITTES, ROBERT CHESNEY & RABEA BENHALIM, BROOKINGS INST., THE EMERGING LAW OF DETENTION: THE GUANTÁNAMO HABEAS CASES AS LAWMAKING (2010), *available at* http://www.brookings.edu/~/media/Files/rc/papers/2010/0122_guantanamo_wittes_chesney/0122_guantanamo_wittes_chesney.pdf.

Habeas Cases as Lawmaking."[100] Here was a partial list of unresolved judicial issues:

> 1. Can only enemy forces be detained or how about supporters, and how is this distinction defined? Must any support be substantial and what does that mean?
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> 2. Can a detainee sever their relationship with the enemy and, if so, when? Is cooperation with the U.S. needed for this?
>
> 3. What evidentiary presumptions should be employed? Should relaxed standards be used since wartime evidence is harder to obtain? What kinds of hearsay should be allowed?
>
> 4. What happens with evidence obtained involuntarily? Must there be torture or some lesser standard?[101]

What is most significant is this statement from the Report's Executive Summary:

> So fundamentally do the judges disagree on the basic design elements of American detention law that their differences are almost certainly affecting the bottom-line outcomes in at least some instances. That is, some detainees freed by certain district judges would likely have had the lawfulness of their detentions affirmed had other judges—who have articulated different standards—heard their cases. And some detainees whose incarceration these other judge have approved would likely have had habeas writs granted had the first group of judges heard their cases.[102]

Admittedly, judges in ordinary federal criminal and civil cases can help bring about varied outcomes in similar cases. Yet this is not due to systematic confusion on governing legal

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[100] *Id.*

[101] *See id.* at 2.

[102] *Id.* at 3.

principles and the like.[103] It's also true that the D.C. Circuit has finally resolved most of these issues in various appeals, but only after several years and not in ways that aggressively ensure fairer procedures.[104]

Ironically, Chief Justice Roberts predicted exactly this result when he dissented in *Boumediene*.[105] Yet his solution was to conclude that the CSRT and the review process were sufficient,[106] which is clearly incorrect.

B. Bagram

The D.C. courts are also divided over whether non-Afghan detainees brought to Bagram have a habeas right. Judge Bates of the U.S. District Court for the District of Columbia said yes,[107] but the D.C. Circuit Court of Appeals reversed.[108] The U.S. Supreme Court ruling in *Boumediene* should have addressed this type of scenario. One scholar has even compared the ambiguity of Justice Kennedy's opinion there with his

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[103] Another disturbing element is the disparity in sentences for various convicts. John Walker Lindh pled guilty related to fighting the U.S. in Afghanistan and got a lengthy term of imprisonment while others have received far less. *See* Adam Liptak, *A Case of Buyer's Remorse That Could Linger for Years*, N.Y. TIMES, Apr. 23, 2007, at A12, *available at* http://query.nytimes.com/gst/fullpage.html?res=9C0DEEDA173EF930A15757C0A9619C8B63&sec=&spon=&pagewanted=all (comparing Walker, who accepted a plea deal for twenty-years imprisonment, with Yaser Hamdi, who faced no prison time, and David Hicks, who accepted a plea deal for nine-months imprisonment despite admitting involvement in more serious crimes than Walker).

[104] *See, e.g.*, Hatim v. Gates, No. 10-5048, 2011 WL 553273 (D.C. Cir. Feb. 15, 2011) (per curiam) (referencing other D.C. Circuit decisions resolving many of these questions). Of course, it is not clear whether the U.S. Supreme Court would agree with the D.C. Circuit's choices, as many experts do not. Deborah Pearlstein, *America's Panel on Guantanamo*, BALKINIZATION BLOG (Feb. 20, 2011), http://balkin.blogspot.com ("[T]he D.C. courts have now in key respects answered questions of what habeas hearings look like procedurally, and even who may be detained. I hardly agree with the courts' answers in all these respects . . . . We were also quite in agreement about many of the deficits of the military commissions."). The reference to "We" includes some former Bush Administration officials.

[105] *See* Boumediene v. Bush, 553 U.S. 723, 823-26 (2008) (Roberts, C.J., dissenting).

[106] *See id.*

[107] Al Maqaleh v. Gates, 604 F. Supp. 2d 205 (D.D.C. 2009).

[108] Al Maqaleh v. Gates, 605 F.3d 84 (D.C. Cir. 2010).

vague ruling in the gay rights case of *Lawrence v. Texas*,[109] where Kennedy never announced a level of scrutiny.[110]

Admittedly, the D.C. Circuit used the three criteria adopted by the Supreme Court in *Boumediene* for determining whether habeas petitions should be allowed.[111] The Circuit then ruled that allowing habeas petitions from the Bagram base in proximity to the war zone could create practical problems.[112] Judge Bates found to the contrary.[113] The federal appeals court conceded that it would rule differently if there was evidence that the U.S. was moving prisoners to Bagram with the purpose of avoiding habeas.[114] The court, however, said such evidence was lacking.[115]

But the federal district court in February 2011 may have re-opened the door to Bagram habeas based on supposed new evidence and developments.[116] Indeed, critics have questioned why these prisoners were moved there, and suggested the appeals court has been overly deferential to the government. Bagram has now been called a "law free" zone by scholars such as David Cole.[117] Perhaps it's more accurate to call it a legal confusion zone given some recent investigative reporting on how detention works there.[118] Moreover, there is no way to be

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[109] Lawrence v. Texas, 539 U.S. 558 (2003).

[110] Posting of Steve Vladek to Balkinization, http://balkin.blogspot.com/2010/05/more-on-al-maqaleh-discomfiting-analogy.html (May 29, 2010).

[111] *Al Maqaleh*, 605 F.3d at 94: (1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner's entitlement to the writ.

[112] *Id.* at 97-99.

[113] Al Maqaleh v. Gates, 604 F. Supp. 2d 205, 227-31 (D.D.C. 2009).

[114] *See Al Maqaleh*, 605 F.3d at 98-99.

[115] *See id.*

[116] Al Maqaleh v. Gates, Case 1:06-cv-01669-JDB Document 57, Feb. 15, 2011 (granting Joint Motion to Amend Petitions for Writ of Habeas Corpus); Lyle Denniston, *New Opening for Bagram Challenge*, SCOTUSBLOG (Feb. 15, 2011, 6:32 PM), http://www.scotusblog.com/2011/02/new-opening-for-bagram-challenge/.

[117] David Cole, *Law-Free Zoning*, THE NATION, May 27, 2010, *available at* http://www.thenation.com/article/law-free-zoning.

[118] Dianna Cahn, *Parwan Detention Center Reviews Ssuspects' Cases, But Finds Neither Guilt Nor Innocence in a War Zone*, STARS & STRIPES (Feb. 21, 2011), http://www.stripes.com/parwan-detention-center-reviews-suspects-cases-but-finds-neither-guilt-nor-innocence-in-a-war-zone-1.135491.

sure how the Supreme Court will vote if a Bagram or Parwan case reaches it. The Court's approach in these "war on terror" cases has not even created a minimally sufficient rule of law to govern a vital constitutional area.

III. ARTICLE III JUDGES ARE THE ONLY SOLUTION

The federal courts are the only place that have a strong record of successfully trying terrorism cases.[119] These courts already have procedures in place so judges don't have to make them up. These courts adjudicated the first World Trade Center bombing cases.[120] Courts can also solve classified information problems, and security issues, as they have in the past.[121] The Obama Administration offered to help with the security question by purchasing an unused rural Illinois prison, though that is now a moot point.[122]

Thus the allegations by two administrations that courts can't handle some of these cases have been disproved by concrete evidence to the contrary, and by the military commission failures. This is no longer a philosophical, political, or legal debate. This is the real world.

Yet Congress ignored this reality in January 2011 by placing the President in the untenable position of having to sign needed defense legislation that contained a provision that prohibits the transfer of any Guantanamo detainees to the U.S. The President responded by issuing a signing statement contesting Congressional authority to limit his military related

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[119] Posting of Deborah Pearlstein to OPINIO JURIS, http://opiniojuris.org/2010/02/15/the-politics-of-gitmo-2/ (Feb. 15, 2010, 16:17 PM) ("Among other things, after 8 years, the commissions have convicted 3 defendants, 2 of whom are already back on the streets. In the same time, according to NYU, the criminal justice system has pursued 800 terrorism prosecutions with a conviction rate of 90%.").

[120] *See* United States v. Salameh, No. S5 93 Cr. 0180 (KTD), 1993 WL 364486 (S.D.N.Y. Sept. 15, 1993), *aff'd* 152 F.3d 88 (2d Cir. 1998).

[121] *See, e.g.*, United States v. Smith, 780 F.2d 1102 (4th Cir. 1985) (ruling on the admissibility of classified information under the Classified Information Procedures Act). The *Salameh* case had to deal with these problems frequently. *See supra* note 116.

[122] Christi Parsons, *U.S. to House Guantanamo Detainees in Illinois, Officials Say*, L.A. TIMES, Dec. 15, 2009, *available at* http://articles.latimes.com/2009/dec/15/nation/la-na-guantanamo15-2009dec15.

transfer power. The President, however, then essentially conceded defeat and issued a new executive order authorizing Guantanamo military commissions to go forward, as well as providing enhanced review procedures for those indefinitely detained.[123] Indeed, Attorney General Eric Holder announced on April 4, 2011 that military commission trials will now proceed at Guantanamo against the main September 11 conspirators.[124]

Three important questions remain. First, are the federal courts now out of the picture entirely? Second, would using courts mean some deadly terrorists could be freed? Third do these recent cases show that the Supreme Court must use more aggressive judicial review during wartime than it has in the past?

A. Article III Judges

The President still has the ability to utilize the federal courts despite this new defense legislation. He can propose that Article III judges hear detainee trials at Guantanamo using federal court procedures, as Deborah Pearlstein and others have recently suggested.[125] Legislation would be needed but nothing prohibits this now. This would be the only way for the President to keep his campaign promise regarding the insufficiency of Guantanamo, and to ensure the proceedings fully meet constitutional and international law obligations. If necessary, perhaps senior federal judges could be called upon. There is a legal basis for Article III judges sitting outside the fifty United States. For example, there is a federal district court in Guam. Justice Robert Jackson served at Nuremburg. Though these are not exactly the same situations, strong U.S. Supreme Court rulings that Guantanamo is American soil, for habeas purposes, should suffice.

There would be some logistical problems to work out involving a jury, classified information, and other trial

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[123] Editorial, *The Prison That Won't Go Away*, N.Y. TIMES, Mar. 9, 2011, at A26.

[124] Charlie Savage, *In a Reversal, Military Trials for 9/11 Cases*, N.Y. TIMES, Apr. 4, 2001, at A1.

[125] Pearlstein, *supra* note 104.

procedures but solutions exist. Defendants could agree to waive a jury trial in return for the Article III forum.[126] This would seem to be the only avenue left to solve the international stain that is Guantanamo given the new federal law.

B. Unrepentant

On May 28, 2010, the Obama Administration released to the public the Final Report of its Guantanamo Review Task Force, which was co-authored by several Cabinet Departments.[127] The Report was actually completed on January 22, 2010.[128] One conclusion was that:

> 48 detainees were determined to be too dangerous to transfer but not feasible for prosecution. They will remain in detention pursuant to the government's authority under the Authorization for Use of Military Force passed by Congress in response to the attacks of September 11, 2001. Detainees may challenge the legality of their detention in federal court and will periodically receive further review within the Executive Branch.[129]

Thus, these individuals could remain in detention indefinitely without trial.[130] This seems to be a serious violation of international law and should be considered a violation of constitutional law, especially given the incorrectness of the AUMF argument, shown by Justice

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[126] Though as Pearlstein points out, some detainees are getting good plea agreements at Guantanamo because of the Commissions. *Id.* But those pleas could decline if the commission prosecutors think the Obama commission rules make things less chaotic.

[127] Peter Finn, *Most Detainees Low-level Fighters; Guantanamo Report Task Force Advises 126 be Transferred*, WASH. POST, May 29, 2010, at A3, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/05/28/AR2010052803873.html?sub=AR&sid=ST2010052803890.

[128] *Id.*

[129] FINAL REPORT, GUANTANAMO REVIEW TASK FORCE, at ii (2010), *available at* http://media.washingtonpost.com/wp-srv/nation/pdf/GTMOtaskforcereport_052810.pdf?sid=ST2010052803890.

[130] *See id.*

Souter's concurrence in *Hamdi*.[131] Moreover, President Obama spoke out during the campaign against the Bush administration's position that the President has total unilateral power here, nor does a recent Supreme Court case on sex predators go so far.[132]

Unfortunately, the new Obama executive order does not ever require a trial, despite its improved procedural protections. Thus, the executive order still violates the rule of law for this nation, as well as presenting pragmatic problems.[133] Nothing seems less American, and more like a Gulag, than holding people in perpetuity.[134] In addition, supporters of maintaining Guantanamo virtually acknowledge that the goal is to ensure there are no releases. Take this statement from an article co-authored by Jack Goldsmith and Ben Wittes.[135] Indeed, what is to prevent this power from being used to hold other individuals throughout the world who are dangerous to the United States? What is to prevent other nations from using it against Americans?

It is also likely that most of these individuals have committed federal crimes, and can be prosecuted anyway, despite problems with tainted evidence, witness accessibility and the like.[136] These trials will probably take years anyway. Certainly, even innocent Guantanamo detainees are not being

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[131] Hamdi v. Rumsfeld, 542 U.S. 507, 539-54 (2004) (Souter, J., concurring in judgment). Alfred de Zayas persuasively argues that indefinite detention violates Article 9 of the International Covenant on Civil and Political Rights. *Human Rights and Indefinite Detention*, 87 INT'L REV. OF THE RED CROSS 857, 15 (Mar. 2005). Regarding the constitutional violation, see McCormack, *supra* note 10.

[132] United States v. Comstock, 130 S. Ct. 1949, 1954 (2010).

[133] *See supra* note 123; *see also* Hamdan v. Rumsfeld, 548 U.S. 557, 559-60 (2006) (finding international law and constitutional problems with novel "courts" for handling terror suspects"); Vladeck, *supra* note 74.

[134] *See* Richard Norton-Taylor, *Guantánamo is Gulag of Our Time, Says Amnesty*, GUARDIAN, May 26, 2005, at Foreign 15 (quoting an Amnesty International official).

[135] Jack Goldsmith & Benjamin Wittes, *Nuts and Deadbolts,* SLATE MAG., Dec. 8, 2008, http://www.slate.com/id/2206229 ("This conundrum gives the government an overwhelming incentive to use trials only when it is certain to win convictions and long sentences, and to place the rest in whatever detention system it creates.").

[136] *See* Pearlstein, *supra* note 119.

released quickly. The law of war simply cannot be invoked to justify these detentions when the war could go on forever.[137]

As a last resort, some acquitted or released detainees may have to be returned to their home countries or to where they were picked up.[138] A risk of recidivism exists, just as with other dangerous criminals who get out of prison. Yet, as several experts have pointed out, the idea that we can prevent all internationally antagonistic acts against us is a myth, especially if we don't want the rule of law to be a myth. In addition, holding them in a Gulag could foment more hostility abroad, and may even produce more terrorists in the long run.[139] For example, a few of those already released from Gitmo as harmless may have taken up arms against the U.S.,[140] but this may be partly due to their Gitmo mistreatment. Further, we can use our extensive military surveillance capabilities to track them since we will know where they were released. At least this way the U.S. maintains the constitutional traditions that it is supposedly fighting to preserve.

C. The Long Term

The U.S. Supreme Court's war on terror cases partly follow the tradition of being deferential to perceived military interests. Yet this has frequently led to deception. The most

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[137] Joanne Mariner, *Criminal Justice Techniques are Adequate to the Problem of Terrorism*, BOSTON REV., Dec. 10, 2008, http://bostonreview.net/BR34.1/mariner.php (responding to article by David Cole).

[138] *See, e.g.*, Brinkley & Lichtblau, *supra* note 55.

[139] Gary LaFree & Gary Ackerman, *The Empirical Study of Terrorism: Social and Legal Research*, 5 ANN. REV. L. & SOC. SCI. 5, 347 (2009) ("Terrorism feeds on the ability of groups to portray governments and their agents as illegitimate.").

[140] *See* Tara Wall, *President Warns Against Releasing Gitmo Detainees*, WASH. TIMES, Jan. 16, 2009, at A1, *available at* http://www.washingtontimes.com/news/2009/jan/16/president-warns-against-releasing-gitmo-detainees (noting that, as of December 2008, the Pentagon estimates that sixty-one former detainees have returned to the battlefield after being released). These figures, however, are disputed. William Fisher, *Study Challenges Claims of Gitmo Recidivism*, ANTIWAR.COM, Feb. 5, 2009, http://www.antiwar.com/ips/fisher.php?articleid=14194 (quoting Seton Hall law professor who questions the Pentagon statistics). Moreover, some of the alleged recidivists were released precisely because they were perceived as not being dangerous based on their pre-Gitmo backgrounds.

infamous example is *Korematsu*[141] where historians have shown that the government lied to the Court.[142] Similarly, one wonders about the Bush Administration's representations of Mr. Hamdi's dangerousness.[143] Then there was the Vietnam War, where reports about the Gulf of Tonkin incident that was used to justify American involvement, now seem false.[144] And one cannot forget that no weapons of mass destruction were found in Iraq despite the Bush Administration assurances that such weapons justified our invasion.

Another troubling case of deference is *Rostker v. Goldberg*[145] where the Court upheld a ban on women registering for the draft. Registration of non-combatants would supposedly place an administrative burden on the military.[146] Yet this is puzzling since not everyone in the military needs to be fit for the front line.[147] A more lethal case is *Ex parte Quirin*[148] where the Court upheld summary executions of German saboteurs including one U.S. citizen. Even Justice Scalia said that case was not the Court's "finest hour" in his *Hamdi* dissent.[149] Finally, the Court in *Holder v. Humanitarian*

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[141] Korematsu v. United States, 323 U.S. 214 (1944).

[142] Claudia Luther, *Fred Korematsu, 86, Fought World War II Internment, Dies*, SEATTLE TIMES, Mar. 31, 2005, *available at* http://seattletimes.nwsource.com/html/nationworld/2002226476_webkorematsuobit31.html (discussing a 1944 Justice Department memo accusing the Solicitor General of "'lying to the Supreme Court'" about the threat of Japanese-Americans).

[143] *See* Brief for Respondents at 4–5, Hamdi v. Rumsfeld, 542 U.S. 507 (No. 03-6696), 2004 WL 724020.

[144] John Prados, *Essay: 40th Anniversary of the Gulf of Tonkin Incident*, NAT'L SECURITY ARCHIVE, Aug. 4, 2004, http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB132/essay.htm (last visited Aug. 30, 2010).

[145] Rostker v. Goldberg, 453 U.S. 57 (1981).

[146] *Id.* at 78-83.

[147] *See id.* at 83 (White, J., dissenting) ("I perceive little, if any, indication that Congress itself concluded that every position in the military, no matter how far removed from combat, must be filled, with combat-ready men.").

[148] *Ex parte* Quirin, 317 U.S. 1 (1942).

[149] Justice Scalia wrote of *Ex parte Quirin* that, "The Court upheld the [military] commission and denied relief in a brief per curiam issued the day after oral argument; a week later the Government carried out the commission's death sentence . . . . The Court eventually explained its reasoning in a written opinion issued several months later." Hamdi v. Rumsfeld, 542 U.S. 507, 569 (2004).

Law Project[150] largely ignored its traditional First Amendment rules that prohibit viewpoint discrimination. The Court generally upheld a law that prohibits the material support of so-called terrorist organizations, even where the support took the form of speech, encouraging a peaceful message.

By contrast, the following two Supreme Court military related opinions, where the Court acted vigorously, are frequently praised.[151] In *Youngstown Sheet & Tube Co. v. Sawyer*,[152] the Court overturned President Truman's seizure of the striking steel mills during the Korean War. The Court rejected Truman's Commander-in-Chief power assertion by labeling the case as a domestic matter.[153] Justice Jackson's famous concurrence also made the President's authority dependent on what Congress thought.[154] This is a rejection of anything like the Bush Administration's unitary executive theory.

In the "Pentagon Papers" case,[155] the Court rejected the government's arguments that newspaper publication would endanger national security. Admittedly, the Court has always been skeptical of prior restraints.[156] But there were enough dissenters accepting the government's representations to show the courage of the majority's authors.[157]

These few cases cannot conclusively prove that the Supreme Court should never defer to the military in wartime cases. Yet they support the idea that the Court has a serious

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[150] 130 S. Ct. 2705 (2010).

[151] Walter Dellinger, *Still "The Most Important Decision on Presidential Power Ever,"* SLATE MAG., June 30, 2006, http://www.slate.com/id/2144476 (describing "landmark" nature of Youngstown decision).

[152] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

[153] *Id.* at 587.

[154] *Id.* at 635-38 (Jackson, J., concurring).

[155] N.Y. Times Co. v. United States, 403 U.S. 713 (1971) (papers showed the government had lied to the public about the Vietnam War).

[156] *See, e.g.*, Near v. Minn. *ex rel* Olson, 283 U.S. 697, 733 (1931) ("[E]very man shall have a right to speak, write, and print his opinions upon any subject whatsoever, without any prior restraint . . . .").

[157] *See N.Y. Times Co.*, 403 U.S. at 748-52 (Burger, C.J., dissenting); *id.* at 752-59 (Harlan, J., dissenting); *id.* at 759-63 (Blackmun, J., dissenting).

role to play.[158] The government's temptation to falsify information when national security is supposedly at stake is simply too tempting. Martin Flaherty has also shown that such falsification has occurred in numerous foreign countries battling terrorism, such as with the United Kingdom's infamous actions against the Irish Republican Army.[159] Courts simply have to monitor the executive, concerns about political backlash notwithstanding. The U.S. Supreme Court and the Constitution should not disappear during wartime,[160] unlike the icy weapon used in some mystery novels. Moreover, the Court should answer key questions with specificity to provide the necessary guidance to protect civil liberties.

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[158] This is one of the basic points of Professor Geoffrey Stone's award winning book. GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME: FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM (2004).

[159] Flaherty, *supra* note 74, at 77.

[160] Justice Kennedy recently told the Ninth Circuit Judicial Conference that Article III courts should be the preferred forum for terrorism cases. Associated Press, *Justice Anthony Kennedy Favors Civilian Courts in Terrorism Cases*, Aug. 20, 2010, *available at* http://www.cnsnews.com/news/article/71373.