

MUSCULAR PROCEDURE: CONDITIONAL DEFERENCE IN THE EXECUTIVE DETENTION CASES

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Abstract: The executive detention cases of the past several years demonstrate a rare but critical assertion of procedural law where the political branches fail to legislate or to properly implement substantive law. This is “muscular procedure”—the invocation of a procedural device to condition deference on political branch integrity. Courts have affected the law of national security in profound ways by requiring the political branches to adhere to a judicially imposed standard of transparency and deliberation. Courts have resolved the merits of individual enemy combatant challenges by rejecting executive branch decisions based on absolute secrecy, innuendo, tentativeness, or multiple levels of hearsay, while affirming executive determinations that satisfy minimal standards of reliability. More broadly, courts have used procedural rules to smoke out and put in check Congress’s lack of oversight of the executive branch and the President’s inadequate interpretation and implementation of authorizing legislation. Although the prevailing descriptive and normative frameworks advocate either blind deference to the collective expertise of the political branches or judicial resolution of large, complex and highly fractious substantive questions, courts have instead put procedure to muscular uses—focusing on the means of coordinate branch decision-making, while still allowing the political branches to define the content of the substantive law. This theory of judicial review, which is grounded in the judiciary’s comparatively greater expertise in procedure, has implications beyond the national security context.

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INTRODUCTION

The executive detention cases of the past several years have prompted renewed debate over the proper scope of judicial deference to the executive branch's claimed need to limit individual liberties during times of crisis. Some theorists argue that courts should resolve large policy questions raised by individual challenges to assertions of executive power.¹ Others believe that courts should decide as little as

1. See Owen Fiss, *The War Against Terrorism and the Rule of Law*, 26 OXFORD J. LEGAL STUD. 235, 235 (2006) ("fault[ing]" the Supreme Court "for doing less than it should have" in resolving constitutional questions of individual liberty); Jenny S. Martinez, *Process and Substance in the "War on Terror,"* 108 COLUM. L. REV. 1013, 1029, 1092 (2008) (noting that "the Supreme Court has left the final, substantive outcome of the cases at bar uncertain" and that the decisions have "resulted in a great deal of process, and not much justice"); see also Muneer I. Ahmad, *Resisting Guantánamo: Rights at the Brink of Dehumanization*, 103 NW. U. L. REV. (forthcoming Fall 2009)

possible, asking only whether executive action is grounded within statutory authority.² However, a number of the post-9/11 national security decisions have accomplished a great deal without following either approach. In these cases, the Supreme Court and a number of lower courts have put procedural devices to surprisingly “muscular” uses. The decisions illustrate a rare but critical assertion of procedural law where the political branches fail to legislate or properly implement substantive law. This is “muscular procedure”—the invocation of a procedural rule to condition deference on coordinate branch integrity. The cases provide a framework for understanding the role of judicial review in the post-9/11 executive detention decisions, with implications for other fields of law as well.³

Many commentators have criticized the Supreme Court’s executive detention decisions as “merely” procedural rulings, pointing out that the Court has generally addressed itself to questions about adjective law or the ground rules of litigation: whether the Court has jurisdiction; whether detainees can access the courts; and whether the government is required to provide discovery, and if so, how much.⁴ Far fewer decisions have resolved substantive questions such as the scope of executive

(manuscript at 3, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1268422) (“Indeed, the pronouncement [in *Boumediene v. Bush*] that a provision of the Constitution extended to noncitizen wartime prisoners held outside of the sovereign United States was breathtaking, particularly in the face of six years of government insistence that the prisoners at Guantánamo had no rights whatsoever, and could be held indefinitely, even for life, without charge or meaningful opportunity to contest their treatment or detention. It was a rebuke to the Executive’s claims of outsize authority, and, the Court told us, a re-assertion of the supremacy of law. It was a rights moment. Or so it seemed.”); David Cole, *Rights Over Borders: Transnational Constitutionalism and Guantanamo Bay*, 2007–2008 CATO SUP. CT. REV. 47; cf. *Boumediene v. Bush*, 553 U.S. ___, 128 S. Ct. 2229, 2293 (2008) (Roberts, C.J., dissenting) (“So who has won? Not the detainees. The Court’s analysis leaves them with only the prospect of further litigation to determine the content of their new habeas right, followed by further litigation to resolve their particular cases, followed by further litigation before the D.C. Circuit . . .”).

2. See RICHARD A. POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY 34 (2006) (arguing that during times of crisis, courts should “decid[e] cases narrowly, preferably on statutory grounds, hesitating to trundle out the heavy artillery of constitutional invalidation”); Cass R. Sunstein, *Minimalism at War*, 2004 SUP. CT. REV. 47, 50 (advancing “a minimalist [judicial] approach to intrusions on freedom amidst war”); see also Samuel Issacharoff & Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime*, 5 THEORETICAL INQUIRIES L. 1 (2004) (making the case that courts historically uphold executive decisions when grounded in congressional authorization).

3. See *infra* Part IV.B.

4. See *infra* note 29 and accompanying text; *infra* Part I.A.

power and the content of individual liberty—that is, whom the Executive can hold and for how long, and the specific constitutional protections that apply. But regardless of whether a particular decision turns on “process” or “substance”—an age-old distinction that resists clear definition⁵—courts have affected the law of national security in profound ways by explicitly requiring the political branches to adhere to a judicially imposed standard of transparency and deliberation. In individual cases, rulings about seemingly mundane procedural issues such as discovery and evidentiary standards have accelerated the release of enemy combatant detainees who were held at Guantánamo Bay years after being cleared of any wrongdoing.⁶ More broadly, procedural devices have been used to smoke out and put in check Congress’s lack of oversight of the executive branch and its misguided interpretations and implementation of authorizing legislation.⁷

In a number of these cases, courts have resolved the merits of an enemy combatant⁸ challenge by scrutinizing the Executive’s adherence

5. See Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 192–224 (2004) (summarizing debates over relationship between substance and procedure); see also JERRY L. MASHAW, *DUE PROCESS IN THE ADMINISTRATIVE STATE* 5 (1985) (“Although much ink has been spilled by courts and commentators in the attempt to separate questions of substance and process, the attempt can never be wholly successful because the questions are functionally inseparable.”); Frank H. Easterbrook, *Substance and Due Process*, 1982 SUP. CT. REV. 85, 85 (“[S]ubstance and process are two aspects of the same phenomenon.”); Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625, 1630 (1992) (“The distinction [between process and substance] has proved to be elusive (and perhaps illusory) in the numerous areas of law in which it has acquired rhetorical significance. In spite of its elusiveness, and no doubt partly because of it, the boundary between substance and procedure remains a Holy Grail of legal analysis.”); Peter J. Rubin, *Square Pegs and Round Holes: Substantive Due Process, Procedural Due Process, and the Bill of Rights*, 103 COLUM. L. REV. 833, 848 (2003) (“At the margin, at least, the distinction between substance and procedure blurs.”).

6. See *infra* Parts II.A.1–A.2. The Guantánamo Bay Naval Base was used as a facility to house alien detainees. Yasir Hamdi, a U.S. citizen, was originally held at Guantánamo but eventually transferred to a naval brig in Charleston, South Carolina, and later to Norfolk, Virginia, after it was determined he was a U.S. citizen. See JOSEPH MARGULIES, *GUANTÁNAMO AND THE ABUSE OF PRESIDENTIAL POWER* 25 (2006).

7. See *infra* Part II.B.

8. The term “enemy combatant,” first used by the Bush Administration to describe certain terror suspects held at Guantánamo Bay and elsewhere after 9/11, was jettisoned by the Obama Administration in March 2009. See William Glaberson, *U.S. Won’t Label Terror Suspects as Combatants*, N.Y. TIMES, Mar. 13, 2009, at A1. But the Obama Administration claims authority to detain virtually the same range of individuals as those included in the Bush Administration definition. See Respondents’ Memorandum Regarding the Government’s Detention Authority Relative to Detainees Held at Guantanamo Bay at 2, *In re Guantanamo Bay Detainee Litig.*, No. 08-0442 (D.D.C. Mar. 13, 2009) (claiming the authority to detain not only persons who were “part of”

to baseline procedural safeguards—rejecting determinations based on absolute secrecy, innuendo, tentativeness, or multiple levels of hearsay, while affirming executive branch decisions satisfying minimal standards of reliability.⁹ In the process, the judiciary has rebuffed the President’s extreme interpretations of vague authorizing legislation,¹⁰ reexamined inadequately reasoned decisions by various arms of the executive branch in implementing a congressional delegation,¹¹ and stimulated legislative action where Congress has failed to oversee executive decision-making through the legislative process.¹² Throughout these decisions, procedure functions as a corrective to decision-making by one (or both) of the political branches that, if left undisturbed, would violate a judicially imposed standard requiring lucid, intelligible procedures.

Sometimes judicial review is overtly exacting in these cases, with courts imposing burdensome procedural obligations on a party to litigation (usually the government).¹³ Other times the review is relatively light—as in the imposition of a relaxed standard of review when ruling on an enemy combatant designation—but heavy enough to invalidate executive branch decisions lacking sufficient indicia of reliability.¹⁴ Still other times the review is moderately demanding, requiring a co-equal branch to reconsider its interpretation of a statute (in the case of the Executive)¹⁵ or to reaffirm its position through clear and more purposeful language (in the case of the legislature).¹⁶ These varying procedural demands are generally consistent with the deference norms that obtain under prevailing doctrine,¹⁷ but they impose enhanced procedural conditions that require the political branches to satisfy a judicially imposed level of transparency and deliberation—conditions

but also those that “substantially supported” the Taliban, al-Qaida, or other associated forces and recognizing the ambiguousness of the phrase “substantially supported” and its potentially broad application). For a discussion of the previous definition of “enemy combatant,” see *infra* note 150.

9. See *infra* Part II.A.2.

10. See *infra* Part II.B.1.

11. See *infra* Part II.B.2.

12. See *infra* Part II.B.3.

13. See *infra* Part II.A.1.

14. See *infra* Part II.A.2.

15. See *infra* notes 149–52, 163–68 and accompanying text.

16. See *infra* Part II.B.3.

17. See *infra* notes 59–60 and accompanying text.

that make procedural review far more muscular than might otherwise be expected.

Muscular procedure highlights a process-oriented approach¹⁸ to legal decision-making in national security through a judicial insistence on procedural regularity, a matter over which the judiciary has a comparative advantage in expertise.¹⁹ The theory presents an alternative to much of the conventional wisdom within the relevant literature. Although the prevailing frameworks advocate either blind deference to the collective expertise of the political branches or judicial resolution of large, complex, and highly fractious substantive questions, courts have put procedure to muscular uses by focusing on the means of coordinate branch decision-making, while still allowing the political branches to define the content of the substantive law. The cases discussed in this article, by integrating baseline procedural standards into cases of inter-branch importance, present new ways of thinking about the relationship between judicial decision-making and procedural values such as transparency and deliberation, with implications beyond the national security context.²⁰

This Article proceeds in four Parts. Part I reviews the debate within the post-9/11 literature regarding the proper judicial role in resolving the tension between individual liberty and the President's claimed security needs. Some scholars advance the view that procedural devices merely delay resolutions and that courts should decide an array of substantive policy questions, while others argue for the virtual elimination of judicial review where Congress and the President agree on a particular policy pronouncement. The balance of this Article seeks to challenge these conceptions of judicial review, both descriptively and normatively.

18. The legal process school of thought was first advanced during the 1940s and 1950s by commentators who emphasized the "relative institutional competence of courts, legislatures and agencies to make and implement social policy decisions." Sidney A. Shapiro & Richard E. Levy, *Heightened Scrutiny of the Fourth Branch: Separation of Powers and the Requirement of Adequate Reasons for Agency Decisions*, 1987 DUKE L.J. 387, 407. Legal process scholars tend to stress the judiciary's relative advantage in deciding procedural matters and comparative disadvantage in deciding questions of substantive policy decisions, about which the democratically elected branches have greater expertise. *See id.*; *see also* William N. Eskridge, Jr. & Philip P. Frickey, *An Historical and Critical Introduction to THE LEGAL PROCESS*, HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW, at li (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994); Richard H. Fallon, Jr., *Reflections on the Hart and Wechsler Paradigm*, 47 VAND. L. REV. 953, 972-76 (1994).

19. *See infra* notes 215-17 and accompanying text.

20. *See infra* Part IV.B.

Part II develops a framework of muscular procedure by exploring decisions that condition judicial deference on the Executive's adherence to a judicially imposed standard of transparency and deliberation. Within that framework, procedure can perform different functions. In individual cases, courts can invoke procedural devices to precipitate detainee releases,²¹ guide merits determinations,²² halt the return of detainees to countries where they fear torture,²³ and endorse efforts by litigants to invoke additional procedural rules in aid of their respective claims or defenses.²⁴ More broadly, courts can use procedural rulings to reject decision-making by the coordinate branches that lacks professional judgment—including occasions when the President overreaches in interpreting a statutory mandate,²⁵ when various arms of the executive branch fail to manage their own internal processes of review,²⁶ or when Congress abdicates its responsibility to oversee executive branch decision-making through clear legislation.²⁷ The cases demonstrate how judicial decisions about procedural rules can have a far greater effect on the substantive law than many commentators have recognized.

Part III moves to a normative discussion by demonstrating how the framework of muscular procedure sheds light on the leading scholarly positions regarding the proper judicial role in resolving the conflict between liberty and security. That scholarship generally treats procedural resolutions as inferior substitutes for substantive decisions or presents an overly formal or idealized account of procedure's appropriate role. Muscular procedure, by contrast, demonstrates how a process-oriented approach to decision-making in the national security context can have the type of concrete effects on the law championed by civil libertarian scholars, without treading into purely substantive areas of law generally seen as the province of the political branches.

Part IV extends that normative discussion by considering the value of procedural decisions in the national security context, contrasting the specific function of muscular procedure with other procedural devices

21. See *infra* note 69 and accompanying text; *infra* Part II.A.1.

22. See *infra* Part II.A.2.

23. See *infra* Part II.A.3.

24. See *infra* Part II.A.4.

25. See *infra* Part II.B.1.

26. See *infra* Part II.B.2.

27. See *infra* Part II.B.3.

that, when applied within immigration law, also express the judiciary's commitment to deeper rule-of-law values. Within these different legal frameworks, courts use transparency and deliberation requirements to insist on an enhanced procedural regularity in political branch decision-making, without rejecting outright political branch expertise on substance. This process-based approach clarifies the role of the judiciary based on its comparatively greater expertise in procedure.

I. CRITICISM OF THE 9/11 DECISIONS AS MERE PROCEDURE

While some commentators have hailed the Supreme Court's executive detention cases as watersheds,²⁸ others see them "less like landmarks and more like small signposts directing the traveler to continue toward an eventual, more significant fork in the road."²⁹ In some ways, each critique hits its mark. But, landmarks or not, the cases demonstrate a form of procedural review that has surprisingly muscular implications. To understand how, it is useful first to recap briefly the Supreme Court holdings and subsequent criticism.

A. *The Supreme Court's Decisions from Rasul to Boumediene*

In 2004, the Court issued three major decisions regarding executive detention. *Rasul v. Bush*³⁰ held that alien detainees at Guantánamo could invoke the federal habeas corpus statute to challenge their confinement, but offered nothing (save a cryptic footnote)³¹ about the scope of their constitutional rights in habeas.³² In *Hamdi v. Rumsfeld*,³³ the Court

28. See Ronald Dworkin, *Why It Was a Great Victory*, N.Y. REV. OF BOOKS, Aug. 14, 2008, at 18, 18 (calling *Boumediene* "one of the most important Supreme Court decisions in recent years" and "a landmark change in our constitutional practice"); see also Emily Calhoun, *The Accounting: Habeas Corpus And Enemy Combatants*, 79 U. COLO. L. REV. 77, 78 (2008) ("From *Hamdi v. Rumsfeld* to *Rasul v. Bush* to *Hamdan v. Rumsfeld*, the Supreme Court has protected individuals' access to federal courts to challenge the constitutionality of unilateral executive detention. This access has justifiably been celebrated by advocates for alleged enemy combatants.").

29. Martinez, *supra* note 1, at 1029; see generally *supra* note 1.

30. 542 U.S. 466 (2004).

31. *Id.* at 483 n.15 ("Petitioners' allegations—that, although they have engaged neither in combat nor in acts of terrorism against the United States, they have been held in executive detention for more than two years in territory subject to the long-term, exclusive jurisdiction and control of the United States, without access to counsel and without being charged with any wrongdoing— unquestionably describe 'custody in violation of the Constitution or laws or treaties of the United States.'" (quoting 28 U.S.C. § 2241(c)(3) (2006))).

32. *Id.* at 485 ("Whether and what further proceedings may become necessary after respondents

determined that the President could detain a U.S. citizen enemy combatant but had to provide him with a due process hearing before a neutral decision-maker.³⁴ The Court provided little detail regarding the contours of that hearing, which was left in the hands of the executive branch.³⁵ In *Padilla v. Rumsfeld*,³⁶ the Court held that a U.S. citizen enemy combatant had filed his petition in the wrong judicial district.³⁷ The Court did not make an inquiry into the legality of Padilla's detention; it merely resolved a jurisdictional question, requiring Padilla to lodge a fresh petition in a different federal court.³⁸

In 2006, the Court held in *Hamdan v. Rumsfeld*³⁹ that the Uniform Code of Military Justice and Common Article 3 of the Geneva Conventions, which applies to an armed conflict with a foreign terrorist organization, did not authorize the Guantánamo military commissions.⁴⁰ However, the Court's ruling implied that Congress could reauthorize the

make their response to the merits of petitioners' claims are matters that we need not address now. What is presently at stake is only whether the federal courts have jurisdiction to determine the legality of the Executive's potentially indefinite detention of individuals who claim to be wholly innocent of wrongdoing."); see Fiss, *supra* note 1, at 245–46 ("Although the *Rasul* Court ruled that the prisoners had a right to file a habeas application in a federal district court and to require a response by the government, it did not specify what further rights—procedural or substantive—they had before that court. Even more significantly, the Court grounded the limited right it did provide in the federal habeas statute, not the Constitution, and left uncertain whether the prisoners had any constitutional rights that might be vindicated in the habeas proceeding it allowed. The Court simply granted the prisoners the right to file a piece of paper.").

33. 542 U.S. 507 (2004).

34. *Id.* at 509.

35. See Martinez, *supra* note 1, at 1048 ("[The Court] left a great deal undecided. For example, [it] did not specify in any detail what procedures should be used in the hearing on remand. Could Hamdi call witnesses? Would the government be required to produce witnesses if Hamdi wanted to cross examine them? Would the government be required to provide other forms of discovery to Hamdi? Who would have the burden of proof, and what would that burden be?"). Also left unaddressed in *Hamdi* was the range of individuals that the Executive could hold as enemy combatants, which the Court explicitly left to "be defined by the lower courts as subsequent cases are presented to them." *Hamdi*, 542 U.S. at 522 n.1.

36. 542 U.S. 426 (2004).

37. *Id.* at 442, 451.

38. *Id.* at 446, 451; see Martinez, *supra* note 1, at 1038 ("From a normative perspective, the Padilla case is troubling. . . . [T]he practical effect . . . was to enable the government to keep Padilla isolated and subject to coercive interrogation for twenty-one months, and to keep him in military custody for a total of forty-three months on uncertain legal grounds.").

39. 548 U.S. 557 (2006).

40. *Id.* at 624–33.

Executive's favored commissions through a statute,⁴¹ and Congress followed suit by enacting the Military Commissions Act (MCA).⁴² In 2008, the Court ruled in *Boumediene v. Bush*⁴³ that constitutional habeas protections applied at Guantánamo Bay, restoring the detainees' access to the Great Writ to challenge their confinement.⁴⁴ *Boumediene* also invalidated jurisdiction-stripping legislation, ruled that a congressional act violated the Constitution's Suspension Clause, and found that a policy created by the legislative and executive branches exceeded their collective constitutional authority.⁴⁵ However, the Court explicitly left untouched "the content of the law that governs petitioners' detention."⁴⁶ *Boumediene*, like the four previous executive detention cases to come before the Court, decided threshold issues of law while deliberately leaving unresolved a host of additional questions.⁴⁷

41. As Justice Breyer noted in his *Hamdan* concurrence, "[n]othing prevents the President from returning to Congress to seek the authority he believes is necessary." 548 U.S. at 636 (Breyer, J., concurring); *id.* at 637 ("If 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."); *see also* Martinez, *supra* note 1, at 1029–30 ("In its decision in *Hamdan v. Rumsfeld* . . . the Supreme Court minimized the impact of its decision on national security by referring in an almost offhand way to the possibility that Congress could simply change the rules to allow military commissions.").

42. Military Commissions Act (MCA) of 2006, Pub. L. No. 109-366, 120 Stat. 2600.

43. 553 U.S. ___, 128 S. Ct. 2229 (2008).

44. *Id.* at 2262 ("We hold that Art. I, § 9, cl. 2, of the Constitution has full effect at Guantanamo Bay.").

45. *See* Gerald L. Neuman, *The Extraterritorial Constitution After Boumediene v. Bush*, 82 S. CAL. L. REV. 259, 260–61 (2009) ("[F]or the first time in history the Court found it necessary to strike down a statute as violating the Suspension Clause, rather than construe it to avoid invalidity."); *see also* Cole, *supra* note 1, at 47–48 ("First, for the first time in its history, the Supreme Court declared unconstitutional a law enacted by Congress and signed by the president on an issue of military policy in a time of armed conflict Second, and also for the first time, the Court extended constitutional protections to noncitizens outside U.S. territory during wartime Third, the Court declared unconstitutional a law restricting federal court jurisdiction.").

46. *Boumediene*, 128 S. Ct. at 2277. The Court called it "a matter yet to be determined." *Id.*

47. *See* Cole, *supra* note 1, at 56 ("[*Boumediene*] leaves government officials guessing as to which, if any, constitutional constraints will apply to official action abroad, and gives the Court a relatively free hand in future cases."); Matthew C. Waxman, *Administrative Detention Of Terrorists: Why Detain, And Detain Whom?*, 3 J. OF NAT'L SEC. L. & POL. 1, 2 (forthcoming 2009) ("The [*Boumediene*] Court expressly left unresolved important substantive questions such as the scope of the Executive's power to detain, and delegated to lower courts resolution of the procedural issues likely to arise in hundreds of resulting habeas petitions.").

B. Scholarly Criticism of the Court's Procedural Decisions

Civil libertarianism and “bilateral endorsement”⁴⁸ represent the two leading theories that have emerged in light of the Court’s decisions. While both conceptions of judicial review advance at least some role for the courts in deciding questions of national security—only a third position, executive unilateralism, rejects judicial review entirely⁴⁹—they take very different approaches to the issue of how courts should decide the substance of the liberty/security debate.

Civil libertarians argue that courts should decide substantive claims, and they tend to criticize the five recent Supreme Court decisions for leaving unresolved questions such as the proper definition of the term “enemy combatant,” the presumptive period that such individuals can be held without formal charge, and the scope of their constitutional rights.⁵⁰ Jenny Martinez argues, for example, that the pre-*Boumediene* decisions have “resulted in a great deal of process, and not much justice.”⁵¹ Owing to the procedural nature of many of the post-9/11 decisions, “so little seems to have been decided”⁵² because the Court “left the final, substantive outcome of the cases at bar uncertain.”⁵³ Muneer Ahmad

48. Issacharoff and Pildes use “bilateral endorsement” generally to advance a descriptive project. See Issacharoff & Pildes, *supra* note 2, at 27, 33, 35. Posner and Sunstein champion bilateral endorsement (or something very similar to it) on normative grounds as the ideal role for the courts in times of crisis. See Posner, *supra* note 2, at 34; Sunstein, *supra* note 2, at 50.

49. Executive unilateralists reject almost any role for judicial review of executive branch decisions on matters of national security, arguing that courts should yield entirely to the political branches, which are more ably equipped to manage questions of individual liberty during times of crisis. For a description of the executive unilateralist position, see, for example, Issacharoff & Pildes, *supra* note 2, at 4. Issacharoff and Pildes characterize executive unilateralists as “advocates of national security” who, “[r]easoning from the correct starting point that these contexts necessitate a greater degree of the distinct qualities the executive branch tends to possess . . . conclude that unilateral executive discretion, not subject to oversight from other institutions, is required.” *Id.* The Supreme Court has resoundingly rejected that approach, and it will not be considered at great length here. See *infra* note 137 and accompanying text.

50. See Fiss, *supra* note 1, at 245–46; *id.* at 256 (“What is missing from this calculus, and in my judgment from all three of these much celebrated cases [*Rasul*, *Hamdi* and *Padilla*] . . . is a full appreciation of the value of the Constitution—as a statement of the ideals of the nation and as the basis of the principle of freedom—and even more, a full appreciation of the fact that the whole-hearted pursuit of any ideal requires sacrifices, sometimes quite substantial ones.”); Martinez, *supra* note 1, at 1028 (“Each of these decisions [*Rasul*, *Hamdi*, *Padilla*, *Hamdan*] focused primarily on issues of process, while more substantive questions were left lurking in the background.”).

51. Martinez, *supra* note 1, at 1092.

52. *Id.* at 1032.

53. *Id.* at 1029.

argues that “[w]hile commentators can point to an unbroken record of legal victories” from *Rasul* through *Boumediene*, “the view from the prisoners’ perspective is quite different, and throws into question the claim of transformative legal practice that the Court cases might otherwise suggest.”⁵⁴

Bilateral endorsement, by contrast, takes a “process-based, institutionally-oriented (as opposed to rights-oriented) [approach to] . . . examining the legality of governmental action in extreme security contexts.”⁵⁵ Its adherents argue that judicial intervention is unnecessary and inappropriate where the executive and legislative branches agree on a common course of action.⁵⁶ This “minimalist approach to intrusions on freedom amidst war”⁵⁷ defers to the greater institutional capability of the political branches to decide national security policy given the “different democratic pedigrees, different incentives, and different interests to which they respond.”⁵⁸ Bilateral endorsement tends to reinforce the framework advanced by Justice Jackson in his concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*,⁵⁹ according to which courts review executive action for coordinated efforts between the legislative and executive branches.⁶⁰

54. Ahmad, *supra* note 1, at 4.

55. Issacharoff & Pildes, *supra* note 2, at 5.

56. *Id.* at 8 (noting the “role of Congress as a partner in the determination of the nature and scope of national emergency”). Cass Sunstein, moreover, emphasizes the role of Congress as an important actor in responding to national security crises and an institution capable of providing “a check on unjustified intrusions on liberty” during times of crisis. Sunstein, *supra* note 2, at 54.

57. Sunstein, *supra* note 2, at 50. Under a minimalist jurisprudence, judges decide no more than necessary to resolve the case at hand by avoiding any resolution of questions that could create, or complicate, other cases. See, e.g., CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999). Minimalism is often discussed within the context of Alexander Bickel’s “passive virtues,” according to which courts decide questions of procedure and jurisdiction before turning to merits adjudications. See Alexander M. Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961).

58. Issacharoff & Pildes, *supra* note 2, at 5; see also Eric A. Posner & Cass R. Sunstein, *Chevronizing Foreign Relations Law*, 116 YALE L.J. 1170, 1176 (2007) (noting broad deference to the executive branch based on its foreign policy expertise).

59. 343 U.S. 579 (1952).

60. See *id.* at 634 (Jackson, J., concurring). Justice Jackson draws an inverse relationship between judicial review and legislative endorsement, arguing that executive acts based on an express congressional grant are entitled “the strongest of presumptions and the widest latitude of judicial interpretation,” while executive action lacking congressional backing will be “scrutinized with caution.” *Id.* at 637–38. In the “absence of either a congressional grant or denial of authority,” the President acts within a “zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain.” *Id.* at 637. Sunstein argues that Jackson’s model “captures

C. *The Effect of Procedural Decisions on Detainee Releases*

Civil libertarian critics, some of whom write from the detainees' perspectives,⁶¹ note that procedural decisions often create uncertainty in the law and delay final resolutions.⁶² They observe that procedure can prolong the confinement of detainees who may be innocent.⁶³ But the data on Guantánamo releases sheds a different light on that analysis. Very few detainees released from Guantánamo have been transferred after a judicial order resolving the merits⁶⁴ of a case: only eleven of the thirty detainees who have been ordered released at the conclusion of a full merits hearing⁶⁵ have been transferred from Guantánamo.⁶⁶

the practices of the American courts when national security is threatened." Sunstein, *supra* note 2, at 50–51; *see also* Sarah H. Cleveland, Hamdi Meets Youngstown: *Justice Jackson's Wartime Security Jurisprudence and the Detention of "Enemy Combatants,"* 68 ALA. L. REV. 1127, 1128 (2005) ("Justice Jackson's concurrence . . . established the starting framework for analyzing all future foreign relations and individual liberties problems."); Issacharoff & Pildes, *supra* note 2, at 5 (noting that in times of crisis courts have deferred to executive decisions couched within congressional authorization and that "[c]ontrary to the modern civil libertarian stance, the American courts have only rarely addressed these issues through the framework of individual constitutional rights"); *cf.* Adrian Vermeule, *Holmes On Emergencies*, 61 STAN. L. REV. 163, 175 (2008) ("[T]he passive virtues . . . [and] . . . judicial minimalism . . . are sometimes said to apply even more strongly during emergencies; on this view the higher stakes of emergency decisions, the inflammation of public passions, and the possibility of setting bad precedents under the pressure of extraordinary circumstances all counsel courts to keep a low profile until the emergency has passed.").

61. *See* Ahmad, *supra* note 1, at 4; *supra* text accompanying note 54; *see also infra* notes 62–63 and accompanying text.

62. Martinez, for example, argues that "substantive and procedural law may be left in a more uncertain state as a result" of the Court's post-9/11 decisions. Martinez, *supra* note 1, at 1091.

63. *See id.* at 1031 ("The prevalence of procedural rulings in the 'war on terror' cases thus has significant implications for substantive rights in at least two ways. First, by delaying ultimate resolution of rights claims, it has allowed serious violations of human rights to continue for years. Second, this approach has foreclosed many rights-based challenges without actually considering the merits of those challenges."); *id.* at 1017 ("[T]he focus on process rather than substance comes at a human cost."); *see also* Ahmad, *supra* note 1, at 4; *supra* text accompanying note 54.

64. It should be noted that a favorable decision on the merits is not necessarily exoneration. Thus, a ruling by a district court that a detainee must be released because he is improperly held as an enemy combatant does not necessarily revoke the original enemy combatant label.

65. *Al Rabiah v. U.S.*, No. 02-828, 2009 WL 3083077, at *27 (D.D.C. Sept. 17, 2009) (Kollar-Kotelly, J.), ordered the release of Fouad Mahmoud Al Rabiah. Al Rabiah remains at Guantanamo. *Al-Adahi v. Obama*, No. 05-280, 2009 WL 2584685, at *16 (D.D.C. Aug. 21, 2009) (Kessler, J.), ordered the release of Mohammed Al-Adahi. Al-Adahi remains at Guantanamo. *Bacha v. Obama*, No. 05-2385, 2009 WL 2365846, at *1 (D.D.C. July 30, 2009) (Huvelle, J.), ordered the release of Mohammed Jawad. Jawad was returned to his native Afghanistan on August 24, 2009. *Al Mutairi v. U.S.*, No. 02-828, 2009 WL 2364173, at *15 (D.D.C. July 29, 2009) (Kollar-Kotelly, J.), ordered the

Moreover, many of the 552 releases⁶⁷ so far have occurred after a procedural ruling.⁶⁸ *Hamdi* exemplifies this latter point: shortly after the Court required the executive branch to provide Hamdi a due process hearing, the government chose to release him.⁶⁹ Although Hamdi was denied any opportunity to disprove his enemy combatant status,⁷⁰ he was

release of Khalid Abdullah Mishal Al Mutairi. He was transferred to Kuwait on Oct. 13, 2009. *Al Gingo v. Obama*, 626 F. Supp. 2d 123, 130 (D.D.C. June 22, 2009) (Leon, J.), ordered the release of Abdulrahim Abdul Razak al Gingo (the name can also be spelled “Janko”). Al Gingo remains imprisoned at Guantánamo. *Ahmed v. Obama*, 613 F. Supp. 2d 51, 66 (D.D.C. May 11, 2009), ordered the release of Alla Ali Bin Ali Ahmed. Ahmed remains imprisoned at Guantánamo. *Basardh v. Bush*, 612 F. Supp. 2d 30, 35 (D.D.C. Apr. 15, 2009) (Huvette, J.), ordered the release of Yasin Muhammed Basardh. Basardh remains imprisoned at Guantánamo. *El Gharani v. Bush*, 593 F. Supp. 2d 144, 149 (D.D.C. Jan. 14, 2009) (Leon, J.), ordered the release of Mohammed El Gharani. El Gharani was released to Chad on June 11, 2009. *Boumediene v. Bush*, 579 F. Supp. 2d 191, 198–99 (D.D.C. Nov. 20, 2008) (Leon, J.), ordered that Lakhdar Boumediene, Mohamed Nechla, Hadj Boudella, Ait Idir, and Saber Lahmar be released. Boumediene was released on May 15, 2009 to France. Nechla, Boudella, and Idir were released to Bosnia and Herzegovina on December 16, 2008. Lahmar remains imprisoned at Guantánamo. *In re Guantanamo Bay Detainee Litig.*, 581 F. Supp. 2d 33, 43 (D.D.C. Oct. 8, 2008), ordered the release of seventeen Uighur detainees. The D.C. Circuit reversed that opinion, and the Supreme Court granted the petition for certiorari. *Kiyemba v. Obama*, 555 F.3d 1022 (D.C. Cir. 2009), *cert. granted*, 77 U.S.L.W. 3577 (U.S. Oct. 20, 2009) (No. 08-1234). On June 11, 2009, four of these seventeen—Abdul Nassir, Huzaifa Parhat, Jalal Jalaldin, and Abdul Semet—were released and transferred to Bermuda.

For release information concerning all of the Guantánamo detainees discussed in this footnote, see *The Guantánamo Docket*, N.Y. TIMES, <http://projects.nytimes.com/guantanamo?scp=4&sq=guantanamo&st=cse> (last visited Oct. 20, 2009).

66. This is because, in many cases, the government simply ignores a judicial order directing the release of a detainee—despite a stated desire to comply with those orders and the larger goal of closing the Guantánamo facility. See, e.g., President Barack Obama, Remarks by the President on National Security (May 21, 2009), available at http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-On-National-Security-5-21-09/ (“The courts have spoken. They have found that there’s no legitimate reason to hold 21 of the people currently held at Guantanamo . . . I cannot ignore these rulings because as President, I too am bound by the law. The United States is a nation of laws and so we must abide by these rulings.”).

67. As of October 20, 2009, 221 detainees remained in custody (six have died while imprisoned at Guantánamo). See *The Guantánamo Docket*, *supra* note 65.

68. See *infra* note 69 and accompanying text; *infra* Part II.A.1.

69. Jerry Markon, *Hamdi Returned to Saudi Arabia: U.S. Citizen’s Detention as Enemy Combatant Sparked Fierce Debate*, WASH. POST, Oct. 12, 2004, at A2.

70. See Peter Irons, “*The Constitution Is Just a Scrap of Paper*”: *Empire Versus Democracy*, 73 U. CIN. L. REV. 1081, 1097 (2005) (“In September 2004, bowing to the Supreme Court’s ruling, the Bush administration grudgingly released Hamdi from the Navy brig . . . Whether he was innocent of any terrorist acts, of course, was a question the Bush administration refused to permit a court to decide.”); see also Emily Calhoun, *The Accounting: Habeas Corpus and Enemy Combatants*, 79 U. COLO. L. REV. 77, 104 (2008) (“[Hamdi’s] release suggests the executive was more worried about a public accounting than about the fate of Hamdi as an individual.”).

spared the near-certainty of remaining in detention throughout trial and a likely period of extended confinement during a protracted appellate process.

While advocates claim that the rule of law will be better served through decisions resolving substantive legal questions, there is no guarantee that substantive rulings would redound to the benefit of the causes they champion. Moreover, procedural rulings have provided critical remedies in contexts where substantive law is generally unavailing, as for instance where detainees have sought judicial protection against torture overseas.⁷¹ It would not be a stretch therefore to argue that many of the detainees—if they could choose—might be better off with a procedural resolution than a decision of substance.⁷²

Beyond the debate about the relative merits and deficiencies of “procedural” versus “substantive” decisions lies a deeper point about the role of certain procedural values in precisely the types of complex and highly charged scenarios raised within the executive detention context. Where courts have placed a premium on coordinate branch adherence to procedural ideas such as deliberation, transparency, and accountability, judicial decisions have had a forceful effect on the individual cases and the law more generally. By invoking these procedural devices, courts have brought hundreds of cases to effective resolution. In other cases, courts have rebuffed extreme interpretations of statutes by the Executive, rejected decision-making by various arms of the executive branch that inadequately implemented a congressional delegation, and provided executive oversight where Congress failed to do so. This is muscular procedure, which provides opportunities for thinking about how procedure can affect the law—and substantive rights—in new and unexplored ways.

II. FROM MERE PROCEDURE TO MUSCULAR PROCEDURE

In a number of executive detention cases, the Supreme Court and lower courts have expressed a willingness to bend to the executive

71. See *infra* Part II.A.3.

72. One could even argue that from a detainee’s perspective, procedural victories are preferable to a decision on the merits: procedural controversies carry less risk (given the possibility of an adverse decision on the merits) and in some cases can lead to a favorable outcome more quickly than litigation addressing substantive claims. From the government’s perspective, this outcome could be preferable, too, because it avoids the potentiality of a substantive decision invalidating its preferred detention policy.

branch's claimed security need, but only on condition that baseline procedural standards are satisfied. This conditional deference norm is manifested more narrowly when courts require the government to supply clearer and more specific evidence to sustain a determination regarding an individual detainee. Its broad manifestation occurs when courts require greater transparency or deliberation by one or both of the coordinate branches, regardless of their apparent agreement on a particular policy issue, to protect the integrity of a decision-making process that affects large numbers of individuals. Whether narrow or broad, muscular procedure ensures meaningful judicial review in individual cases while sharpening the judiciary's institutional role in placing checks on coordinate branch overreach.

A. *How Procedural Rules Bring Cases to Resolution*

Courts have invoked procedural devices to accelerate final resolutions in large numbers of cases. In some cases, courts have imposed onerous discovery burdens on the government, refusing to allow it to assert without evidence the dangerousness of a particular detainee. In other cases, courts have resolved a merits determination regarding the propriety or impropriety of detention by imposing relatively mild procedural burdens on the government, while refusing to budge on core issues of procedural regularity. Courts have also used procedural rulings to block executive action, including the transfer of detainees to third countries where they could face torture, even though the substantive law appeared to prevent that outcome. Finally, courts have endorsed efforts by litigants to invoke additional procedural devices to secure vital exculpatory material and other information relevant to their various claims and defenses.

1. *Courts Have Accelerated Final Resolutions by Issuing Broad Discovery Orders*

In *Bismullah v. Gates*,⁷³ the D.C. Circuit imposed stiff discovery demands on the government in cases brought by enemy combatants challenging their confinement at Guantánamo.⁷⁴ The court held that the government would have to supply not only the records compiled by the

73. 501 F.3d 178 (D.C. Cir. 2007).

74. *Id.* at 180.

Guantánamo tribunals, which did not include the full array of information from the government's files, but the entire body of information within the government's possession on each detainee.⁷⁵ *Bismullah* established the scope of the record the D.C. Circuit would require for all Detainee Treatment Act (DTA) petitions, and thus the decision had broad application.⁷⁶ In the DTA, Congress attempted to eliminate federal jurisdiction over Guantánamo and create an alternate process consisting of a hearing before a Guantánamo Combatant Status Review Tribunal (CSRT) and a limited federal appeal before the D.C. Circuit.⁷⁷

The CSRT standards and procedures⁷⁸ contained a requirement that the tribunals obtain all “reasonably available information in the possession of the U.S. government bearing on the issue of whether the detainee meets the criteria to be designated as an enemy combatant.”⁷⁹ This included ordering the appearance of witnesses, including U.S. military personnel, when “reasonably available,” and ordering all relevant agency files, their “acceptable substitute[s],” or a certification that the requested information, if withheld, would not undermine an enemy combatant determination.⁸⁰ But it became apparent during the

75. *Id.* at 184–86, 192.

76. *Id.* at 191.

77. The Detainee Treatment Act (DTA) amended the general habeas statute (currently codified at 28 U.S.C. § 2241 (2006)) to require that “no court, justice, or judge shall have jurisdiction to hear or consider . . . an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantánamo Bay, Cuba . . .” DTA, Pub. L. No. 109-148 § 1005(e), 119 Stat. 2739, 2741–42 (2005). In the DTA, Congress sought to supplant habeas with an institutional process at Guantánamo coupled with limited federal review by the D.C. Circuit on only two matters: first, whether the Pentagon’s tribunal “was consistent with the standards and procedures specified by the Secretary of Defense for Combatant Status Review Tribunals (including the requirement that the conclusion of the Tribunal be supported by a preponderance of the evidence and allowing a rebuttable presumption in favor of the Government’s evidence),” *id.* § 1005(e)(2)(C)(i); and second, “to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to make the determination [was] consistent with the Constitution and laws of the United States,” *id.* § 1005(e)(2)(C)(ii).

78. Standards and practices for those tribunals, including evidence-gathering and other requirements, were set forth in two separate memos. See Memorandum from Gordon England, Sec’y of the Navy (July 29, 2004), available at <http://www.defenselink.mil/news/Jul2004/d20040730comb.pdf> [hereinafter England Memorandum]; Memorandum from Paul Wolfowitz, Deputy Sec’y of Def., for the Sec’y of the Navy, (July 7, 2004), available at <http://www.defenselink.mil/news/Jul2004/d20040707review.pdf>.

79. England Memorandum, *supra* note 78, at Enclosure 1 § E(3).

80. *Id.* at Enclosure 1 §§ 1(E)(2), 1(E)(3)(a).

Bismullah litigation that the government had not followed its own procedures: tribunals were unable to verify that they had examined all the relevant, available information; agencies routinely denied requests for confirmation by Guantánamo personnel that the agency had no exculpatory information on a particular detainee; and exculpatory evidence was withheld from tribunals if it was believed to be “duplicative” or “not relat[ing] to a specific allegation being made against the detainee.”⁸¹ *Bismullah*, by mandating strict adherence to the CSRT procedures, required the government to retrieve anew and produce all relevant material, exculpatory and otherwise, with respect to each detainee.⁸²

Although *Bismullah* merely required the government to do what it had promised to do, the decision put the government in a severely weakened and defensive position. Because the government had not kept intact the full range of information, it argued that it would not be able to comply with the discovery order, that it lacked the resources, and that it could not go back and retrieve information that may have been initially available but was not provided to a given tribunal.⁸³ This emboldened counsel for the detainees to seek compromises with the government even while most substantive (and many procedural) questions surrounding Guantánamo remained unresolved. Since, by the time of the decision, many of the detainees had been cleared for release and deemed not to pose a threat to the United States,⁸⁴ the discovery obligations put the government in a situation where its best option may have been to pursue transfer and resettlement, not additional litigation. While correlation is at

81. *Bismullah v. Gates*, 514 F.3d 1291, 1295 n.5 (D.C. Cir. 2008) (quoting Decl. of James M. McGarrah, Rear Admiral (Ret.), U.S. Navy ¶¶ 4–6, 10–13 (May 31, 2007)).

82. *Bismullah v. Gates*, 501 F.3d 178, 180 (2007) (“In order to review a Tribunal’s determination that, based upon a preponderance of the evidence, a detainee is an enemy combatant, the court must have access to all the information available to the Tribunal.”).

83. *See Bismullah v. Gates*, 503 F.3d 137, 140 (D.C. Cir. 2007). The Pentagon considered taking an option it was given by the D.C. Circuit to reconvene new hearings, as opposed to turning over the required information from the hundreds of hearings previously conducted. *See* William Glaberson, *New Detention Hearings May Be Considered*, N.Y. TIMES, Oct. 14, 2007, <http://www.nytimes.com/2007/10/14/us/14cnd-gitmo.html>. The government did not ultimately exercise that option.

84. Farah Stockman, *Some Cleared Guantanamo Inmates Stay in Custody—Lawyers call U.S. System of Hearings a Sham*, BOSTON GLOBE, Nov. 19, 2007, at A1 (“About a quarter of detainees who were cleared to leave Guantanamo Bay prison after hearings in 2005 and 2006 remain in custody . . .”). One well-known case involved seventeen Uighur detainees from China, whom the government acknowledged pose no national security threat. *See infra* notes 89–95 and accompanying text.

best a crude proxy for causation, it is worth noting that during the five-month period following the D.C. Circuit's *Bismullah* decision, eighty-four detainees were released.⁸⁵

The government fought tooth and nail to overturn *Bismullah*,⁸⁶ and it indirectly accomplished that mission roughly eighteen months later by persuading the D.C. Circuit to relinquish jurisdiction over all DTA petitions and to require the detainees to initiate habeas petitions in light of the jurisdiction restored by *Boumediene*.⁸⁷ Within habeas, the government re-litigated the discovery issues and greatly reduced its production burdens.⁸⁸ Even though *Bismullah* no longer formally governs the discovery obligations at Guantánamo, it is a significant example of how the courts employed procedural decisions to precipitate out-of-court resolutions in individual cases. These procedural holdings,

85. See *The Guantánamo Docket, Timeline*, N.Y. TIMES, <http://projects.nytimes.com/guantanamo/timeline>. *Bismullah* was decided on July 20, 2007. The figures cited above represent the number of releases from August 1, 2007 through December 31, 2007.

86. The government sought rehearing (and rehearing en banc) of the panel ruling. Rehearing was denied, *Bismullah*, 503 F.3d at 140, and the full court denied rehearing en banc, *Bismullah v. Gates*, 514 F.3d 1291, 1293 (2008). Next, the government tried for a stay of the decision while it petitioned for certiorari. The panel stayed the government's discovery obligation to produce additional record material while the case was on appeal. *Bismullah v. Gates*, No. 06-1197, Order at 3-4 (D.C. Cir. Feb. 13, 2008). It reinstated its decision establishing procedures for DTA review after *Boumediene*. *Bismullah v. Gates*, 551 F.3d 1068, 1070 (D.C. Cir. 2009).

87. The government successfully argued that the D.C. Circuit's limited jurisdictional mandate under the DTA did not survive *Boumediene*, and the court held that detainees could proceed thereafter only through habeas. *Bismullah*, 551 F.3d at 1072-73, 1075. By convincing the D.C. Circuit to nullify jurisdiction over the DTA in its entirety, the government obtained a pass from *Bismullah*'s discovery obligation, something it had been unable to accomplish through a direct challenge of the discovery ruling itself.

88. By all accounts, the government has fared significantly better in habeas than it had under the DTA, prevailing on most of the key procedural matters governing those proceedings (involving 113 cases and more than 200 detainees). The procedural motions for the cases have been coordinated before Senior District Judge Thomas F. Hogan. Judge Hogan's November 6, 2008 Case Management Order sets forth a framework for district judges conducting habeas trials after *Boumediene* (though they are not obligated to follow it), and the Order's discovery obligations are fewer than *Bismullah*'s. See *In re Guantanamo Bay Detainee Litig.*, No. 08-0442, Case Management Order at 3 (D.D.C. Nov. 6, 2008). Under the Case Management Order, "[i]f requested by the petitioner, the government shall disclose to the petitioner: (1) any documents or objects in its possession that are referenced in the factual return; (2) all statements, in whatever form, made or adopted by the petitioner that relate to the information contained in the factual return; and (3) information about the circumstances in which such statements of the petitioner were made or adopted." *Id.* The government also has to provide the "petitioner all reasonably available evidence in its possession that tends materially to undermine the information presented to support the government's justification for detaining the petitioner." *Id.* at 2. This discovery obligation is narrower and less burdensome than what *Bismullah* required.

while less likely to provoke criticism of outright judicial supremacy, placed a condition on the DTA that prevented the government from using it as a bulwark against meaningful judicial review.

2. *Courts Have Resolved the Merits by Applying Baseline Evidentiary Requirements*

In *Parhat v. Gates*,⁸⁹ the D.C. Circuit invalidated an enemy combatant designation, a decision that applied to sixteen similarly situated detainees.⁹⁰ *Parhat* focused on the underlying reliability of the government's evidence, which the court refused to credit, even under a relatively light standard of review.⁹¹ The court left undecided a number of substantive questions, including whether the Executive had the authority under the Authorization for Use of Military Force (AUMF)⁹² to detain individuals such as Parhat, who was held based on supposed "affiliations" with an ethnic Uighur independence organization believed to have al-Qaida and Taliban "associations."⁹³ The court found it unnecessary to reach the government's statutory and constitutional arguments because of its deeper concern with the CSRT panel's reliance on statements lacking source information or other indicia of reliability.⁹⁴ The court held:

89. 532 F.3d 834 (D.C. Cir. 2008).

90. *Id.* at 850. After the government lost the *Parhat* litigation, it filed a motion proposing to treat sixteen similarly situated detainees in exactly the same way, essentially conceding that it had no case against them (or, at least, that it did not want to litigate those cases any further). *In re Guantanamo Bay Detainee Litig.*, No. 08-CV-442, Notice of Status (D.D.C. Sept. 30, 2008). The detainees moved for an order compelling their release into the United States. The District Court granted the motion. *In re Guantanamo Bay Detainee Litig.*, 581 F. Supp. 2d 33, 43 (D.D.C. 2008). The D.C. Circuit reversed. *Kiyemba v. Obama*, 555 F.3d 1022, 1032 (D.C. Cir. 2009). The D.C. Circuit held that district courts cannot order the release of Guantánamo Bay detainees into the United States. *See infra* notes 236–38 and accompanying text. The Supreme Court granted certiorari on October 20, 2009. *Kiyemba v. Obama*, 555 F.3d 1022 (D.C. Cir. 2009), *cert. granted*, 77 U.S.L.W. 3577 (U.S. Oct. 20, 2009) (No. 08-1234).

91. The panel applied the DTA's standard requiring that a CSRT determination be based on "a preponderance of the evidence." DTA § 1005(e)(2)(C)(i), 10 U.S.C. § 801 note (2006).

92. Pub. L. 107-40 §§ 1–2, 115 Stat. 224 (2001) (allowing President George Bush "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.").

93. *Parhat*, 532 F.3d at 844, 848. The court also sidestepped whether the President could lawfully detain Parhat under his commander-in-chief powers. *Id.* at 842.

94. *Id.* at 844–50.

The [government’s] documents make assertions—often *in haec verba*—about activities undertaken by [the ethnic Uighur independence organization with which Parhat was believed to be associated], and about that organization’s relationship to al Qaida and the Taliban. The documents repeatedly describe those activities and relationships as having “reportedly” occurred, as being “said to” or “reported to” have happened, and as things that “may” be true or are “suspected of” having taken place. But in virtually every instance, the documents do not say who “reported” or “said” or “suspected” those things. Nor do they provide any of the underlying reporting upon which the documents’ bottom-line assertions are founded, nor any assessment of the reliability of that reporting. Because of those omissions, the Tribunal could not and this court cannot assess the reliability of the assertions in the documents. And because of this deficiency, those bare assertions cannot sustain the determination that Parhat is an enemy combatant.⁹⁵

At least one federal district court conducting habeas review has used *Parhat*-style analysis to rule on the propriety or impropriety of detention in a number of cases. District Judge Richard J. Leon has resolved a number of the *Boumediene* petitions on remand by analyzing the transparency and external verifiability of the government’s evidence.⁹⁶ Although Judge Leon had ruled previously that the detainees lacked any cognizable rights under statutory habeas⁹⁷—suggesting dim prospects for the detainees’ claims—he resolved the underlying merits of the petitions before him, determining that detention was improper in five of the cases, and proper in the sixth.⁹⁸

The government alleged that all six petitioners had planned a trip to Afghanistan in late 2001 to take up arms against U.S. and allied forces, and it supported that claim with one piece of evidence: “a classified

95. *Id.* at 846–47 (footnotes omitted).

96. *See Boumediene v. Bush*, 579 F. Supp. 2d 191 (D.D.C. 2008). Six of Judge Leon’s cases were consolidated with the petitions in the *In re Guantánamo Detainee Cases* before the D.C. Circuit in *Boumediene*, and reversed on appeal by the Supreme Court.

97. Judge Leon concluded that the detainees lacked any cognizable constitutional rights that could be vindicated through habeas. *See Khalid v. Bush*, 355 F. Supp. 2d 311, 314 (D.D.C. 2005) (Leon, J.). Another judge held by contrast that the detainees enjoyed Fifth Amendment due process protections. *See In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 464 (D.D.C. 2005) (Green, J.).

98. *Boumediene*, 579 F. Supp. 2d at 198.

document from an unnamed source” lacking in “information to adequately evaluate the credibility and reliability of this source’s information.”⁹⁹ The government provided no indication of “the circumstances under which the source obtained the information as to each petitioner’s alleged knowledge and intentions.”¹⁰⁰ Under such circumstances, Judge Leon held that the government could not sustain its relatively low burden to justify holding the five men for whom the alleged trip to Afghanistan constituted the exclusive basis for their detention:

Because I cannot, on the record before me, adequately assess the credibility and reliability of the *sole* source information relied upon, for five of the petitioners, to prove an alleged plan by them to travel to Afghanistan to engage U.S. and coalition forces, the Government has failed to carry its burden with respect to these petitioners To allow enemy combatancy to rest on so *thin* a reed would be inconsistent with this Court’s obligation under the Supreme Court’s decision in *Hamdi* to protect petitioners from the risk of erroneous detention.¹⁰¹

Judge Leon explicitly declined to address the meaning of “directly support[ing] hostilities in aid of enemy armed forces”¹⁰² (the basis of the men’s classification as enemy combatants at Guantánamo despite their lack of direct membership in al-Qaida or the Taliban); the substantive question whether a mere plan unaccompanied by concrete acts to travel to Afghanistan to take up arms is, as a matter of law, “supporting” al-Qaida under the operative definition of “enemy combatant”; or the scope of the detainees’ constitutional and procedural protections.¹⁰³ Upon resolving the definition of “enemy combatant,”¹⁰⁴ he applied the light preponderance standard to the facts placed in evidence, resolving the merits of each case.¹⁰⁵

99. *Id.* at 197.

100. *Id.*

101. *Id.* (internal citation omitted).

102. *Id.* at 196 (citing *Boumediene v. Bush*, 583 F. Supp. 2d 133, 135 (D.D.C. 2008)).

103. *Id.* at 197.

104. *See Boumediene*, 583 F. Supp. 2d at 135.

105. *Boumediene*, 579 F. Supp. 2d at 195–96. Emily Calhoun has argued that the government should be placed under heavy burdens of proof. *See Calhoun, supra* note 70, at 79, 81, 91; *see also* Benjamin J. Priester, *Return of the Great Writ: Judicial Review, Due Process, and the Detention of Alleged Terrorists as Enemy Combatants*, 37 RUTGERS L. J. 39, 91–92 (2005) (arguing that the language of the federal habeas corpus statute puts the burden of proof on the government to justify

These cases were by no means simple, involving substantial briefing on a variety of questions and often requiring extensive hearings.¹⁰⁶ But Judge Leon reached the merits of the six cases before him—invalidating enemy combatant designations and ordering release in five of them—by insisting on a standard of thoroughness and transparency that the government was unable or unwilling to meet.¹⁰⁷ This approach, which has been applied by other habeas judges,¹⁰⁸ could prove useful in resolving the remaining habeas cases, which, in the wake of *Boumediene*, involved more than 200 detainees.¹⁰⁹

3. *Courts Have Used Procedural Rules to Protect Detainees from Torture Overseas*

In *Belbacha v. Bush*,¹¹⁰ the D.C. Circuit held that district courts could grant preliminary injunctions blocking the transfer of detainees to countries where they faced a risk of torture upon repatriation.¹¹¹ This decision had seemed unlikely, if not impossible, because when *Belbacha* was under consideration, the law of the D.C. Circuit rejected any basis of federal jurisdiction over Guantánamo.¹¹² At that point, its ruling had

detention).

106. The government's factual return in one case contained roughly 650 pages of exhibits and a 53-page narrative setting forth the basis upon which the government justified holding six Guantánamo detainees. *Boumediene*, 579 F. Supp. 2d at 195. The petitioners' traverse contained approximately 1,650 pages of exhibits and a 200-page narrative. *Id.* A hearing on the proper definition of "enemy combatant" took nearly four-and-one-half hours. *Id.* at 193.

107. Judge Leon has moved more quickly on his cases, in part because he refused to allow them to be coordinated with more than 200 other habeas cases for resolution of administrative and procedural matters (discussed *supra* note 88). See *Rules Set for 113 Detainee Cases*, SCOTUSBLOG.COM, Nov. 6, 2008, <http://www.scotusblog.com/wp/rules-set-for-113-detainee-cases/> (noting that "Judge Leon is one of two judges who have refused to send their cases to [Judge] Hogan for coordination"). District Judge Emmet G. Sullivan also chose to process his own cases. See *Analysis: Core of the Habeas Dispute*, SCOTUSBLOG.COM, Aug. 2, 2008, <http://www.scotusblog.com/wp/analysis-core-of-the-habeas-dispute/>.

108. In many of the cases, judges have resolved the merits of detainee challenges by using an approach similar to that of Judge Leon. See cases cited *supra* note 65.

109. See *Sweeping Challenge to Detainee Process*, SCOTUSBLOG.COM, Nov. 18, 2008, <http://www.scotusblog.com/wp/sweeping-challenge-to-detainee-process/> (noting "113 cases involving some 200 prisoners [yet] to go forward . . . in District Court").

110. 520 F.3d 452 (D.C. Cir. 2008).

111. *Id.* at 458–59.

112. *Boumediene v. Bush*, 476 F.3d 981, 994 (D.C. Cir. 2007), *rev'd*, 553 U.S. ___, 128 S. Ct. 2229, 2277 (2008).

yet to be reversed by the Supreme Court in *Boumediene*. But that jurisdictional bar did not prevent the *Belbacha* panel majority from exercising jurisdiction and temporarily halting the transfer of a detainee who alleged he would be tortured upon return to his native Algeria.¹¹³ The court reasoned that while the issue of constitutional habeas jurisdiction was pending before the Supreme Court, the All Writs Act¹¹⁴ provided a basis for retaining jurisdiction,¹¹⁵ allowing the court to issue a writ to prevent any transfer until the constitutional questions raised in the *Boumediene* appeal were resolved.¹¹⁶

Belbacha did not explicitly mention concerns with the reliability or thoroughness of the government's repatriation process, though *Belbacha*'s counsel did argue that the diplomatic assurances offered by the Algerian government were unreliable given its history of reneging on promises to treat other groups of detainees humanely upon their return.¹¹⁷ At oral argument, the government was questioned about its intentions to transfer *Belbacha* but refused to comment whether it was even considering transferring him, much less where it might send him.¹¹⁸ In its opinion, the D.C. Circuit raised "the seriousness of the harm [*Belbacha*] claims to face, namely, torture at the hands of a foreign state and of a terrorist organization," a factor the district court on remand would have to weigh in its overall assessment of the merits of *Belbacha*'s request for a preliminary injunction.¹¹⁹ Although the district

113. *Belbacha*, 520 F.3d at 454, 456. The case remains in litigation. See *infra* note 125 and accompanying text.

114. 28 U.S.C. § 1651 (2006).

115. The All Writs Act, initially codified in the Judiciary Act of 1789, provides: "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." *Id.* § 1651(a) (2006). Under the Act, a court can "avail itself of all auxiliary writs as aids in the performance of its duties, when the use of such historic aids is calculated in its sound judgment to achieve the ends of justice entrusted to it." *United States v. N.Y. Tel. Co.*, 434 U.S. 159, 172–73 (1977).

116. The D.C. Circuit determined that "when the Supreme Court grants certiorari to review this court's determination that the district court lacks jurisdiction, a court can, pursuant to the All Writs Act . . . and during the pendency of the Supreme Court's review, act to preserve the status quo in other cases raising the same jurisdictional issue if a party satisfies the criteria for issuing a preliminary injunction." *Belbacha*, 520 F.3d at 457.

117. Brief for Appellant at 16–18, *Belbacha*, 520 F.3d 452 (No. 07-5258).

118. Transcript of Oral Argument at 25–27, *Belbacha*, 520 F.3d 452 (No. 07-5258). In a related case, the D.C. Circuit raised questions during oral argument surrounding the quality of the diplomatic assurance process. See *infra* note 242.

119. *Belbacha*, 520 F.3d at 459.

court had initially denied relief,¹²⁰ it issued the injunction when the case returned on remand from the D.C. Circuit.¹²¹

The decision temporarily halting Belbacha's return to Algeria sheds light on a larger humanitarian problem involving men who could not safely be returned to their home countries,¹²² and while *Belbacha* has yet to receive much scholarly attention, it speaks to the judiciary's power to slow down the return of detainees when core protections against torture are placed into doubt.¹²³ Implicitly, *Belbacha* raises the possibility of a judicial check on the quality of executive branch commitments under international law not to return individuals to countries where they face a serious risk of torture.¹²⁴ Although the All Writs Act theoretically

120. *Belbacha v. Bush*, No. 05-2349, 2007 WL 2422031, at *2 (D.D.C. July 27, 2007).

121. *Bacha v. Bush*, No. 05-2349, Order (June 13, 2008) (enjoining the government from transferring Belbacha pending resolution of additional legal issues presented by *Boumediene*).

122. See, e.g., William Glaberson, *Hurdles Frustrate Effort to Shrink Guantánamo*, N.Y. TIMES, Aug. 9, 2007, at A1.

123. In a similar group of cases, courts required that the government provide thirty days' notice prior to transferring a detainee from Guantánamo. See *infra* note 196 and accompanying text. These "transfer abeyance" orders allowed for a similar, torture-based challenge should that become necessary. However, in 2009 the D.C. Circuit ruled in *Kiyemba v. Obama (Kiyemba II)*, 561 F.3d 509, 515 (D.C. Cir. 2009), that courts could no longer grant these transfer abeyance orders, as doing so would interfere on matters of executive prerogative. See *infra* notes 194–99, 240–42 and accompanying text.

124. The U. N. Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6223, 189 U.N.T.S. 150 [hereinafter Refugee Convention], provides an example of such an executive commitment. The United States acceded to the Refugee Convention in 1968. See Protocol Relating to the Status of Refugees, Nov. 1, 1968, 19 U.S.T. 6223. At the core of its protection, Article 3 of the Refugee Convention establishes that "[n]o contracting state shall expel or return ('refouler') a refugee in any manner whatsoever" to a country where his "life or freedom would be threatened on account of his race, religion, nationality, [or] membership of a particular social group," an obligation that the United States satisfies by providing a form of relief known as withholding of removal. 189 U.N.T.S. at 176. The U.N. Convention Against Torture, which the United States signed in 1988, prohibits its signatories from sending people to countries where they could face torture. U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85, 114. Implementing legislation makes it a matter of U.S. policy "not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture." The Foreign Affairs Reform and Restructuring Act of 1998 (FARRA), Pub. L. No. 105-277, § 2242, 112 Stat. 2681 (codified at 8 U.S.C. § 1231 (2006)). Regulations promulgated under FARRA provide that in the context of removal proceedings, the United States is prohibited from sending individuals to countries where they are "more likely than not to be tortured." 8 C.F.R. § 208.16(c)(4) (2008). However, the statute expressly disclaims any private right of action. See FARRA § 2242(a), § 2242(d) (stating that this "policy" shall not be "construed as providing any court jurisdiction to consider or review claims raised under the Convention [Against Torture] or this section . . . except as part of the review of a

provides only a temporary solution, Belbacha's efforts have prevented his return to Algeria to this day.¹²⁵

4. *Courts Have Endorsed Litigants' Efforts to Invoke Supplemental Procedural Devices*

Procedure's muscularity is equally apparent when one considers litigation strategies employing other procedural devices. Detainees were able to acquire additional, critical guarantees and safeguards from their larger victories: *Rasul*, for example, not only secured statutory habeas rights for Guantánamo detainees but also paved the way for attorney-client visits,¹²⁶ a system of legal mail, procedures governing classified information (including the granting of security clearances to counsel), and other entitlements.¹²⁷ In addition, detainees benefitted from additional procedural mechanisms such as the Freedom of Information Act (FOIA)¹²⁸ to secure Guantánamo files that the Department of Defense attempted to shield from public light.¹²⁹ Owing to a number of FOIA requests lodged by the Associated Press in 2004 and 2005, the Department of Defense released transcripts of the tribunal proceedings

final order of removal pursuant to section 242 of the Immigration and Nationality Act"). It has been interpreted to create no binding rights for protection from torture outside the limited context of removal proceedings in immigration law. *See, e.g.,* *Cornejo-Barreto v. Siefert*, 379 F.3d 1075, 1086 (9th Cir. 2004) ("The FARR Act on its face clearly states that it does not create jurisdiction for a court to review the . . . application of Article 3 of the Torture Convention."), *vacated as moot*, 389 F.3d 1307 (9th Cir. 2004) (en banc).

125. The issue remains in litigation. *See, e.g.,* Reply to Government's Opposition to Motion to Govern Further Proceedings, *Belbacha v. Obama*, 08-5350 (D.C. Cir. Sept. 28, 2009).

126. *See* David Luban, *Lawfare and Legal Ethics in Guantánamo*, 60 STAN. L. REV. 1981, 1988 (2008).

127. *See In re Guantánamo Bay Detainee Cases*, 344 F. Supp. 2d 174 (D.D.C. 2004) (setting forth procedures for counsel access to detainees).

128. Pub. L. No. 89-487, 80 Stat. 250 (codified as amended 5 U.S.C. § 552 (2006)).

129. *See, e.g.,* Seth F. Kreimer, *Rays of Sunlight in a Shadow "War": FOIA, the Abuses of Anti-Terrorism, and the Strategy of Transparency*, 11 LEWIS & CLARK L. REV. 1141, 1165 (2007) (noting that the success of FOIA litigation "is worthy of remark, given the prior efforts to shield Guantánamo from public review" and that "[t]he thousands of pages of transcripts [produced in the wake of the litigation] paved the way for analyses casting doubt on the claim that Guantánamo housed the 'worst of the worst,' even on the government's evidence"); Gillian E. Metzger, *Ordinary Administrative Law as Constitutional Common Law*, 110 COLUM. L. REV. (forthcoming March 2010) (manuscript at 68-69, on file with author) ("Statutes like the Freedom of Information Act (FOIA) and government in the sunshine requirements embodied new political demands for open government that may have catalyzed judicial procedural developments.").

as well as other documentation detailing detainee conditions of confinement and related information.¹³⁰

The Guantánamo transcripts secured through FOIA often provided important exculpatory evidence, as in *Parhat*, where counsel brought to the court's attention conflicting evidence from another detainee's CSRT panel on a dispositive point upon which Parhat's tribunal had relied.¹³¹ That evidence also has value in litigation in other countries, even after habeas petitions are conclusively resolved, and even if the Guantánamo detention facility is formally retired.¹³² Many detainees already face prosecution overseas once they are transferred into the custody of foreign governments.¹³³ Although detainees might not be permitted to seek discovery for their foreign criminal cases through their habeas actions, given that release from Guantánamo appears to moot those cases,¹³⁴ FOIA and other procedural devices could allow them to obtain discovery in aid of their respective defenses.¹³⁵

130. See Scott Shane, *A.C.L.U. Lawyers Mine Documents for Truth*, N.Y. TIMES, Aug. 29, 2009, at A4 (noting that efforts through a FOIA detention document request and a subsequent lawsuit produced 130,000 pages of previously secret documents over a six-year period). The release of this information has made possible empirical studies of hundreds of CSRT proceedings, including the work of Mark Denbeaux and Joshua W. Denbeaux, cited *infra* at note 137, which culled through the transcripts made available by FOIA to demonstrate the lack of evidence upon which many of the detainees have been held at Guantánamo.

131. See *Parhat v. Gates*, 532 F.3d 834, 845 (D.C. Cir. 2008).

132. For a discussion of the obstacles standing in the way of President Obama's promise to close Guantánamo, see Joseph Landau, *Indefinite Detention Center*, NEW REPUBLIC, Nov. 13, 2008, <http://www.tnr.com/article/politics/indefinite-detention-center>.

133. Detainees can face prosecution under local laws that, unlike U.S. laws, prohibit terrorism regardless of where the alleged wrongdoing actually occurred or what nation was allegedly targeted. For example, detainees returned to Algeria could face prosecution under Article 87 of the Algerian Penal Code, which outlaws membership or association with terrorist associations. See PERMANENT MISSION OF ALGERIA TO THE U.N., REPORT SUBMITTED BY ALGERIA TO THE SECURITY COUNCIL COMMITTEE ESTABLISHED PURSUANT TO RESOLUTION 1373 (2001), available at <http://www.algeria-un.org/default.asp?doc=1427> (referencing "Article 1 of Decree No. 93-03, reproduced in article 87 bis of Ordinance No. 95.11 of 25 February 1995 amending and supplementing Ordinance No. 66.156 of 8 June 1966 enacting the Penal Code" in a discussion of the definition of terrorist acts, and noting that such acts include participation or enrollment in terrorist organizations even while outside of Algeria). Because a decision ordering release in habeas is not necessarily exoneration, see *supra* note 64, it may be necessary for detainees prosecuted overseas to seek exculpatory information regardless of what ensues in their respective habeas cases.

134. At least one district court within the D.C. Circuit has explicitly refused to continue to exercise habeas jurisdiction over a petitioner no longer in custody, despite the possibility of a foreign prosecution arising out of incarceration at Guantánamo. See *Al Joudi v. Bush*, No. 05-CV-0301, 2008 WL 821884, at *1 (D.D.C. Mar. 26, 2008) (dismissing as "speculative" the claim of a detainee transferred to Saudi Arabia who did not face immediate prosecution but who claimed to

B. How Procedural Rules Check Insufficient Coordinate Branch Decision-Making

In addition to bringing cases to effective resolution, procedural rulings have placed important checks on coordinate branch decision-making lacking in integrity or professionalism. Courts have conditioned deference by requiring a more thorough and searching coordinate branch process in the Executive's interpretations of vague authorizing

face "potential future monitoring by the Saudi Government, travel restrictions, and/or future prosecution"); *see also* *Idema v. Rice*, 478 F. Supp. 2d 47, 52 (D.D.C. 2007) (noting that the court is "keenly aware of case law suggesting that it does not have jurisdiction over a habeas petition stemming from a foreign conviction and sentence" except where a habeas petitioner alleges "U.S. control over petitioners' arrest, conviction, appeal, and confinement"). Relatedly, in *Qassim v. Bush*, 466 F.3d 1073, 1077 (D.C. Cir. 2006), the court held that the voluntary release of two ethnic Uighurs to Albania mooted their habeas claim for lack of any collateral consequence flowing out of their incarceration at Guantánamo. That court took the approach that the only form of post-relief habeas remedy it could recognize is an action for money damages; claims at equity, by contrast, do not "survive release from incarceration." *Id.*

135. One little-known procedural device that could be especially useful for obtaining exculpatory evidence is 28 U.S.C. § 1782, a statute commonly used in international commercial litigation. Detainees could try to invoke Section 1782 to subpoena documents from U.S. personnel who would be otherwise immune from suit under U.S. or foreign substantive law, and immune from discovery under the law of the foreign forum. Under the statute, "the district court of the district in which a person resides or is found may order him to give his testimony or a statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal. The order may be made . . . upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court." 28 U.S.C. § 1782(a) (2006). Litigants invoke this statute most frequently in foreign commercial litigation, where a party in need of discovery and unable to acquire it under the laws of the foreign forum instead seeks U.S. discovery against a person or corporation found within the United States. *See, e.g.,* *Euromepa, S.A. v. R. Esmerian, Inc.*, 154 F.3d 24 (2d Cir. 1998). Parties in overseas criminal litigation have successfully invoked Section 1782 as well. *See, e.g., In re Request for Judicial Assistance from the Seoul District Criminal Court, Seoul, Korea*, 555 F.2d 720 (9th Cir. 1977).

Should detainees released from Guantánamo become subject to prosecution overseas, discovery orders obtained through Section 1782 could be instrumental in securing exculpatory evidence that the U.S. government might otherwise be unwilling to provide. Of course, there are limitations to the discovery that can be sought through this vehicle. In *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004), the Supreme Court articulated a series of comity factors guiding a district court's decision to grant discovery under Section 1782. It also noted that the statute expressly shields privileged material. *Id.* at 260. The government would certainly attempt to quash a subpoena on grounds of privilege, though there is no reason why its motion to quash would be granted on that basis alone; after all, the government is already being required to provide massive discovery to detainees, as evidenced by *Bismullah*, *see supra* Part II.A.1, as well as in the post-*Boumediene* habeas cases (though generally less in those cases than what had been ordered in *Bismullah*), *see supra* note 88.

legislation and in its implementation of a congressional delegation. Similarly, courts have required that Congress oversee executive branch decision-making through clear legislation. These decisions respect the expertise of the political branches on substantive policy questions while asserting judicial authority over the types of procedural matters where courts have a comparative advantage in expertise.

1. *Curbing Executive Branch Overreach*

The Court's decisions from *Rasul* through *Boumediene* reject a type of executive overreach that a classic doctrinal procedural approach could easily obscure. As a basic matter, the *Hamdi* Court acknowledged that "our Constitution recognizes that core strategic matters of waramaking belong in the hands of those who are best positioned and most politically accountable for making them,"¹³⁶ while rejecting the government's effort to "condense power into a single branch of government."¹³⁷ Yet the

136. *Hamdi v. Rumsfeld*, 542 U.S. 507, 531 (2004). Similar statements of deference are found throughout prior Supreme Court decisions. *See id.* at 579–99 (Thomas, J., dissenting) (citing cases); *Dep't of Navy v. Egan*, 484 U.S. 518, 530 (1988) (expressing a reluctance "to intrude upon the authority of the Executive in military and national security affairs"); *Rostker v. Goldberg*, 453 U.S. 57, 64–65 (1981) ("[P]erhaps in no other area has the Court accorded Congress greater deference [than in military affairs and national defense]."); *see also Dames & Moore v. Regan*, 453 U.S. 654, 668–74 (1981) (holding that despite the lack of explicit congressional authorization for presidential action, congressional silence was tantamount to authorization for the purposes of evaluating that action under *Youngstown's* most deferential standard); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952) (acknowledging "broad powers in military commanders engaged in day-to-day fighting in a theater of war").

137. *Hamdi*, 542 U.S. at 536 (emphasis omitted). Six Justices concluded that even if the Executive had the authority to detain U.S. citizens as enemy combatants, the Constitution imposed constraints on that authority, rejecting "the Government's most extreme . . . argument [that] '[r]espect for separation of powers and the limited institutional capabilities of courts in matters of military decision-making in connection with an ongoing conflict' ought to eliminate entirely any individual process, restricting the courts to investigating only whether legal authorization exists for the broader detention scheme." *Id.* at 527 (quoting Brief for Respondents at 26, *Hamdi*, 542 U.S. 507 (No. 03-6696)). *Hamdi* was consistent with the Court's other decisions rejecting efforts by the Bush Administration to consolidate all national security decision-making within the executive branch. In *Rasul*, for instance, the government argued that "[t]he 'enemy' status of aliens captured and detained during war is a quintessential political question on which the courts respect the actions of the political branches," and that with respect to these matters, "courts have . . . no judicially-manageable standards . . . to evaluate or second-guess the conduct of the President or the military." Brief for the Respondent at 35, 37 n.19, *Rasul v. Bush*, 542 U.S. 466 (2004) (Nos. 03-334, 03-343), 2004 WL 425739; *see also id.* at 43 ("[E]xercising jurisdiction . . . would thrust the federal courts into the extraordinary role of reviewing the military's conduct of hostilities overseas . . ."); Waxman, *supra* note 47, at 7 (noting that prior to the Court's decision in *Hamdi*, the government argued that "the Executive should have unreviewable discretion to decide if an individual falls

Court went beyond simply applying standard due process analysis to the question of executive detention.

At first blush, *Hamdi* seems to have merely applied the seminal (and highly deferential) balancing test of *Mathews v. Eldridge*,¹³⁸ allowing the Executive to determine the content of the procedures it would use to vet its own enemy-combatant determinations.¹³⁹ But the Court went much further by rejecting the government's attempt to supply evidence lacking in basic indicia of reliability. The Court refused to credit the government's proffered two-page declaration containing generic references and hearsay testimony to support Hamdi's detention, which, the Court held, lacked a sufficient foundation on which to accord deference to the Executive.¹⁴⁰ In the Court's words, "[a]ny process in which the Executive's factual assertions go wholly unchallenged or are simply presumed correct without any opportunity for the alleged combatant to demonstrate otherwise falls constitutionally short."¹⁴¹ For the conditions of deference to obtain, the Executive would have to satisfy a judicially imposed standard of procedural regularity.¹⁴²

within the definition of enemy combatant, and that it should have unreviewable discretion to determine the scope of the definition itself"); MARK DENBEAUX & JOSHUA DENBEAUX, NO-HEARINGS HEARINGS: CRST: THE MODERN HABEAS CORPUS? AN ANALYSIS OF THE PROCEEDINGS OF THE GOVERNMENT'S COMBATANT STATUS REVIEW TRIBUNALS AT GUANTÁNAMO 4 (2006), http://law.shu.edu/publications/guantanamoReports/final_no_hearing_hearings_report.pdf ("As soon as most of the CSRT hearings were completed, the Government informed the District Court in which the habeas proceedings were pending that, despite the Supreme Court's ruling, no further judicial action was necessary because the detainees had been given CSRT review.").

138. 424 U.S. 319 (1976). In his *Hamdi* dissent, Justice Scalia chided the plurality for resolving the question by resort to *Mathews v. Eldridge*, a case he mockingly described as "involving . . . the withdrawal of disability benefits!" *Hamdi*, 542 U.S. at 575 (Scalia, J., dissenting).

139. *Hamdi*, 542 U.S. at 529–33. Justice O'Connor's plurality opinion left it to the executive branch to determine those procedures, noting that the "ongoing military conflict" might require vastly curtailed procedural rights. *Id.* at 533–34 ("Hearsay, for example, may need to be accepted as the most reliable available evidence from the Government in such a proceeding. Likewise, the Constitution would not be offended by a presumption in favor of the Government's evidence, so long as that presumption remained a rebuttable one and fair opportunity for rebuttal were provided."). The government would also be permitted to use military tribunals in lieu of standard civilian courts. *See id.* at 538.

140. *Id.* at 537–38.

141. *Id.* at 537.

142. *Boumediene* also noted that, throughout history, "it has been possible to leave the outer boundaries of war powers undefined," *Boumediene v. Bush*, 553 U.S. ___, 128 S. Ct. 2229, 2277 (2008), but the Court imposed limits on executive detention by subjecting executive branch determinations to habeas corpus review in light of shortcomings within the Executive's process. *Hamdan* also rejected the government's effort to usurp the judicial role in interpreting statutory and

Parhat followed the same approach, conditioning judicial deference on a “*meaningful* review of the record”¹⁴³ and rejecting efforts by the government to furnish the court with materials that failed its baseline test for reliability and accuracy, refusing merely to “rubber-stamp the government’s charges.”¹⁴⁴ While the court sought “neither [to] prescribe nor proscribe possible ways in which the government may demonstrate the reliability of its evidence,” it “reject[ed] the government’s contention that it can prevail by submitting documents that read as if they were indictments or civil complaints, and that simply assert as facts the elements required to prove that a detainee falls within the definition of enemy combatant.”¹⁴⁵ The government’s effort to proceed otherwise came “perilously close to suggesting that whatever the government says must be treated as true, thus rendering superfluous both the role of the [CSRT] and the role that Congress assigned to this court.”¹⁴⁶ Anything less would merely “place a judicial imprimatur on an act of essentially unreviewable executive discretion.”¹⁴⁷ The district court in *Boumediene* similarly rejected the government’s reliance on an uncorroborated intelligence report as conclusive evidence supporting indefinite detention. While such information was “sufficient for the intelligence purposes for which it was prepared, it is *not* sufficient for the purposes for which a habeas court must now evaluate it.”¹⁴⁸

Hamdi also placed a further check on executive overreach by narrowly interpreting executive authority under the AUMF. The Court

treaty law by virtually eliminating federal court second-guessing of executive branch interpretations. See Neal Kumar Katyal, *Hamdan v. Rumsfeld: The Legal Academy Goes to Practice*, 120 HARV. L. REV. 65, 97 (2006) [hereinafter Katyal, *Legal Academy*] (“[T]he government argued that the President’s interpretations of statutory and treaty law were entitled to extreme deference.”).

143. *Parhat v. Gates*, 532 F.3d 834, 850 (D.C. Cir. 2008) (citing *Bismullah v. Gates*, 501 F.3d 178, 180 (D.C. Cir. 2007)).

144. *Id.*

145. *Id.* at 850.

146. *Id.* at 849.

147. *Id.* at 836. The government also tried to control the public disclosure of unclassified information by requiring counsel for the detainees to file certain unclassified information under seal, with minimal explanation why information previously deemed unclassified should be kept from public disclosure. *Id.* at 852–53. In *Bismullah* and *Parhat*, the D.C. Circuit rejected that effort as an attempt to usurp the judicial role by “permitting the government unilaterally to determine whether information is ‘protected.’” *Id.* at 852 (citing *Bismullah*, 501 F.3d at 188) (internal quotation marks omitted).

148. *Boumediene v. Bush*, 579 F. Supp. 2d 191, 197 (D.D.C. 2008).

noted repeatedly that its holding permitting executive detention applied only to “the limited category [of detainees] we are considering,”¹⁴⁹ not the far broader category of individuals being detained at Guantánamo.¹⁵⁰ This caveat indicated potential problems with the Executive’s attempt to use the AUMF as a source of broad detention authority that would bring under its ambit individuals with no clear or direct ties to al-Qaida or the Taliban.¹⁵¹ As Derek Jinks and Neal Katyal have pointed out, cases such as *Hamdi*, by imposing limits on executive authority under the AUMF, “reassured Congress that it can pass something like the AUMF and not have it interpreted in ludicrous ways by the executive.”¹⁵²

149. *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004); *see also id.* at 516 (“We therefore answer only the narrow question before us: whether the detention of citizens falling within [the government’s narrow] definition is authorized.”). The AUMF was a broad and general endorsement for force, not a specific authorization legitimizing indefinite detention, especially in light of the countervailing Non-Detention Act, 18 U.S.C. § 4001(a) (2006), which, as noted by two of the Justices, requires direct and specific congressional authorization to detain U.S. citizens like Hamdi. *See id.* at 542–46 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment).

150. The government defined an “enemy combatant” in *Hamdi* as an individual 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.” *See id.* at 516 (quoting Brief for Respondents at 3, *Hamdi*, 542 U.S. 507 (No. 03-6696)). This double requirement effectively made battlefield capture a prerequisite to executive detention as an enemy combatant. After *Hamdi*, the government severed the two requirements it had made part of its definition to persuade the Court in that case, defining “enemy combatant” 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,” including “any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.” Memorandum from Paul Wolfowitz, Deputy Sec’y of Def., for the Sec’y of the Navy, at 1 (July 7, 2004), available at <http://www.defenselink.mil/news/Jul2004/d20040707review.pdf> (emphasis added). Severing the two conditions permitted the Executive to detain persons with far more attenuated connections to al-Qaida or the Taliban. *See In re Guantánamo Detainee Cases*, 355 F. Supp. 2d 443, 475 (D.D.C. 2005) (“[C]ounsel for the respondents argued that the Executive has the authority to detain the following individuals until the conclusion of the war on terrorism: ‘[a] little old lady in Switzerland who writes checks to what she thinks is a charity that helps orphans in Afghanistan but [what] really is a front to finance al-Qaeda activities,’ a person who teaches English to the son of an al Qaeda member and a journalist who knows the location of Osama Bin Laden but refuses to disclose it to protect her source.” (internal citations omitted)).

151. *See supra* note 150.

152. Derek Jinks & Neal Kumar Katyal, *Disregarding Foreign Relations Law*, 116 YALE L.J. 1230, 1276, 1276 n.172 (2007) (citing *Hamdi*’s reading of the AUMF in light of “longstanding law-of-war principles,” including the Geneva Conventions); *see Hamdi*, 542 U.S. at 519–21. Although the *Boumediene* Court gestured toward the AUMF as the basis for the confinement of enemy combatants at Guantánamo, it sidestepped any inquiry into whether the AUMF was expansive enough to cover that far broader definition of “enemy combatant,” declining to “address the content of the law that governs petitioners’ detention.” *Boumediene v. Bush*, 553 U.S. ___, 128 S. Ct. 2229, 2271–72, 2277 (2008). Instead, the Court credited for the sake of argument the government’s

This judicial check on executive overreach occurred within a broader context of executive unilateralism in surveillance and detention policy. *Rasul* and *Hamdi* were preceded by the April 24, 2004 revelations about the abuse of prisoners at Abu Ghraib.¹⁵³ Similarly, before the *Hamdan* merits briefs were filed, *The New York Times* reported that President Bush had authorized the National Security Agency to monitor Americans in seeming violation of the Foreign Intelligence Surveillance Act of 1978.¹⁵⁴ Meanwhile, numerous executive branch personnel began to express opposition to executive branch policies regarding detention, surveillance, and torture.¹⁵⁵ This atmosphere sharpened the need for a heightened judicial attentiveness to executive branch overreach in implementing security-related policy.

2. *Managing Intra-Branch Deliberation*

Courts have also conditioned their deference on a requisite level of intra-branch deliberation, including procedural rigor in the implementation of security-related policy by various administrative arms of the executive branch. Both *Boumediene* and *Bismullah* place a

position that the CSRT procedures, and the definition of “enemy combatant” that it employed to adjudge enemy combatant determinations, complied with *Hamdi*. *Id.* at 2241 (“The Government maintains these procedures were designed to comply with the due process requirements identified by the plurality in *Hamdi*.”).

153. See Katyal, *Legal Academy*, *supra* note 142, at 92.

154. *Id.*

155. Examples abound. In one well-known case, Navy Lieutenant Commander Matthew Diaz, infuriated at the treatment of the detainees after a six-month tour of duty as a Guantánamo legal adviser, anonymously mailed computer printouts containing the detainees’ identities to the Center for Constitutional Rights. See Brooks Egerton, *Losing a Fight for Detainees*, DALLAS MORNING NEWS, May 18, 2007, at 18A. Diaz was convicted, sentenced to six months’ imprisonment, and dishonorably discharged. See Tim Golden, *Naming Names at Gitmo*, N.Y. TIMES MAGAZINE, Oct. 21, 2007, at 83. Colonel Morris Davis, the former chief prosecutor of the Guantánamo Bay military commissions, resigned out of protest over command interference in the commission process and the use of evidence obtained by torture. See, e.g., William Glaberson, *Ex-Guantanamo Prosecutor to Testify for Detainee*, N.Y. TIMES, Feb. 28, 2008, at A18. Susan Crawford, the top military judge overseeing the Guantánamo military tribunals, admitted to Bob Woodward that detainee Mohammed al-Qahtani had been tortured. William Glaberson, *Detainee Was Tortured, a Bush Official Confirms*, N.Y. TIMES, Jan. 14, 2009, at A22; see also JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* (2007) (discussing, inter alia, the debate within the Justice Department over the legality of surveillance and interrogation policies). For a broader inquiry into the role of government lawyers in resisting the improper influence of politics in the content of law, see W. Bradley Wendel, *Government Lawyers, Democracy, and the Rule of Law*, 77 FORDHAM L. REV. 1333 (2009).

judicial check on the managerial competence of the Guantánamo tribunals by asserting a role for the courts in curing bureaucratic error. The cases were decided after high-ranking personnel disclosed numerous administrative mistakes in the implementation of the rules governing CSRT tribunals,¹⁵⁶ including failures in evidence-gathering and the presence of command influence in the decision-making process.¹⁵⁷ *Bismullah*'s requirement that the government embark upon a broad and far-reaching search for discovery documentation was one way to cure the executive branch's acknowledgment that "it ha[d] not utilized the procedure for compiling the CSRT record that the Department of Defense specified in its publicly-announced procedures for conducting CSRTs."¹⁵⁸ *Bismullah* invoked the rules of discovery to provide oversight where the executive branch inadequately managed its own review process.

Boumediene takes the point about administrative incompetence even further by wresting oversight of enemy combatant determinations from the executive branch (through its CSRT process) and restoring a collateral review mechanism within Article III habeas courts. When the Supreme Court initially denied certiorari, Justice Stevens (joined by Justice Kennedy) wrote a statement supporting the decision to allow the administrative process of the DTA to run its course before providing collateral review.¹⁵⁹ The Court reversed itself, however, after the parties submitted declarations attesting to the executive branch's inadequate implementation of its own standards and procedures. *Boumediene* thus restored collateral review for a procedurally defective DTA process within the more trusted institution of federal habeas courts.¹⁶⁰

156. *See supra* note 78.

157. *See supra* note 81 and accompanying text; *see also* Decl. of Stephen Abraham, Lieutenant Colonel, U.S. Army Reserve, ¶¶ 5–24, *Bismullah v. Gates*, 501 F.3d 178 (D.C. Cir. June 15, 2007) (No. 06-1197); Decl. of James M. McGarrah, Rear Admiral (Ret.), U.S. Navy, ¶¶ 4–6, 10–13, *Bismullah*, 501 F.3d 178 (D.C. Cir. May 31, 2007) (No. 06-1197).

158. *Bismullah*, 501 F.3d at 193 (Rogers, J., concurring).

159. The two Justices reasoned that, given the Court's "practice of requiring the exhaustion of available remedies as a precondition to accepting jurisdiction over applications for the writ of habeas corpus," the detainees would have to first exhaust their administrative remedy. *Boumediene v. Bush*, 549 U.S. 1328, 1329 (2007) (mem.) (Stevens, J., concurring), *vacated*, 551 U.S. 1160 (2007).

160. To the extent that Guantánamo detainees had a choice between the DTA and habeas, post-*Boumediene* decisions eliminated that option, and detainees now must proceed exclusively through habeas. *See Bismullah v. Gates*, 551 F.3d 1068, 1072–75 (D.C. Cir. 2009); *see also supra* note 87 and accompanying text.

Parhat also raises the issue of intra-branch deliberation, specifically the outward disagreement among various arms of the executive branch over the question of Parhat's dangerousness and the need to hold him in detention. The court cited a 2003 recommendation by a military officer of the Department of Defense recommending Parhat's release, as well as a statement made by the government during Parhat's CSRT hearing that he "does represent an attractive candidate for release."¹⁶¹ The court also observed that although the government had in its possession exculpatory evidence that contradicted a point upon which Parhat's tribunal had relied, it never provided that evidence to the tribunal, undermining the court's confidence that the tribunals had followed their own standards and procedures.¹⁶² Such inadequacies in bureaucratic competency made it necessary for the courts to exercise heightened judicial scrutiny of the executive branch's adherence to its own standards and procedures.

Hamdan illustrates a similar judicial concern with intra-branch deliberation and accountability. As Neil Katyal points out, one can read *Hamdan* as rejecting executive decision-making that did not conform to reasoned interpretation by seasoned veterans within the relevant arms of the executive branch. For example, the Court rejected the President's interpretation that Common Article 3 of the Geneva Conventions did not apply to the conflict with al-Qaida,¹⁶³ a point of conflict between the President and longtime agency experts, including the Judge Advocates General and the Department of State.¹⁶⁴ More generally, the President's military commission system rejected in *Hamdan* lacked the support of the Secretary of State, the National Security Advisor, and top military officials.¹⁶⁵ *Hamdan* did not explicitly raise the issue of deviations between the President's position and the view held by veterans in the field, but its holding can be understood in part as a rejection of

161. *Parhat v. Gates*, 532 F.3d 834, 838 (D.C. Cir. 2008).

162. *Id.* at 845–46 (citation omitted).

163. *Hamdan v. Rumsfeld*, 548 U.S. 557, 631–32 (2006).

164. *See* Katyal, *Legal Academy*, *supra* note 142, at 105.

165. *See id.* at 109–10 ("The Administration, when it designed the commissions, ignored Secretary of State Colin Powell and National Security Adviser Condoleezza Rice and their staffs. It was also well known that the commission plan was pushed through over the disagreement of members of the military's top brass. The informality of many of the determinations concerned the *Hamdan* majority. It dismissed the Administration's arguments that press statements by cabinet members were valid 'determinations' entitling the President to deference . . . [T]he Court wanted to see rigorous support, or any support, rather than incomplete conjecture.").

“executive action taken without the prior involvement of experts.”¹⁶⁶ Under the circumstances, “[b]razenly advocating for a different executive branch process could potentially undermine the legitimacy of the Court Any second-guessing of the Executive could take place, if at all, only between the lines of a judicial opinion, for fear of treading on executive ground.”¹⁶⁷ In this respect, *Hamdan* also suggests a judicial response to flawed internal workings of the Executive’s administrative bureaucracies.¹⁶⁸

3. *Responding to Congressional Abdication*

Another function of muscular procedure is to provide a backstop where Congress neglects its duty to enact policy, or does so without reasoned deliberation. Here, too, the judiciary refuses to accede to a process marked by congressional abdication. After passing the AUMF and the USA PATRIOT Act shortly after the 9/11 attacks, Congress did relatively little for several years.¹⁶⁹ As Katyal notes, “It did not affirm or regulate President Bush’s decision to use military commissions to try unlawful belligerents. It stood silent when President Bush accepted thinly reasoned legal views of the Geneva Conventions.”¹⁷⁰ When

166. *Id.* at 109; see also Neal Kumar Katyal, *Internal Separation of Powers: Checking Today’s Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2340 (2006) [hereinafter Katyal, *Internal Separation of Powers*] (“The Bush Administration’s chief argument in federal court against, for example, the applicability of the Geneva Conventions to detainees at Guantánamo has been that OLC and the President have determined that the Conventions do not apply. Had a neutral adjudicator prepared a full ‘lower court’ opinion for final presidential decision, the case for judicial deference to the President would have been stronger.”).

167. Katyal, *Legal Academy*, *supra* note 142, at 112.

168. The government’s last-minute, mid-litigation policy changes further support the idea that poor bureaucratic decisions may have contributed to the government’s losses in court. The government created a review procedure for Guantánamo detainees the same day that it filed its *Rasul* merits briefs in the Supreme Court. See Katyal, *Legal Academy*, *supra* note 142, at 90. In the *Padilla* case, the government, after years of denying Padilla an attorney, allowed him to meet with a lawyer just before its Supreme Court briefs were due. *Id.* The government also changed the rules on military commission strategies after the certiorari petition was filed in *Hamdan*. *Id.* These about-face maneuverings may have deepened the judiciary’s lack of confidence in the executive branch’s deliberative process, even where its actions were technically authorized by Congress.

169. Congress passed the AUMF one week after 9/11, Pub. L. No. 107-40, §§ 1–2, 115 Stat. 224 (Sept. 18, 2001), and the USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (Oct. 26, 2001), within two months of 9/11.

170. Katyal, *Internal Separation of Powers*, *supra* note 166, at 2319; *id.* at 2316 (“Publius’s view of separation of powers presumes three branches with equivalent ambitions of maximizing their powers, yet [after 9/11] legislative abdication is the reigning modus operandi. It is often remarked

Congress did get around to passing the DTA after *Rasul* and the MCA after *Hamdan*,¹⁷¹ it proceeded through a “quick and inevitably messy quilting bee” that left unresolved a mounting series of issues surrounding the confinement of Guantánamo detainees.¹⁷² Where Congress left a gap, *Rasul* and *Hamdan* required a clear legislative statement to ensure that executive detention policies would be based on more than unilateral interpretations of statutory and constitutional law.

The compromised state of the MCA was further evident within statements by individual members of Congress who, even while voting in favor of the statute, openly declared their belief in its unconstitutionality.¹⁷³ In response, *Boumediene* struck down portions of the legislation that “Congress . . . wanted to see judicially invalidated, or at least substantially altered, by the courts.”¹⁷⁴ According to District

that ‘9/11 changed everything’; particularly so in the war on terror, in which Congress has been absent or content to pass vague, open-ended statutes. The result is an executive that subsumes much of the tripartite structure of government.”); *see also* Jinks & Katyal, *supra* note 152, at 1277 (noting “the abdication of Congress for the five years after the September 11, 2001, attacks in many of the key decisions [involving national security]”); James Robertson, *Quo Vadis, Habeas Corpus?*, 55 *BUFF. L. REV.* 1063, 1064 (2008) ([“A]fter *Hamdan v. Rumsfeld*,] Congress not only authorized the Executive to conduct trials by military commission at Guantánamo Bay, but, *en passant*, it also stripped the federal courts of their statutory jurisdiction to hear habeas corpus petitions or any other actions filed by aliens who are detained as enemy combatants or who are even awaiting a determination of whether or not they are enemy combatants. So much for what I had thought was the fecklessness of the legislature!”); *infra* note 172 and accompanying text.

171. Section 7 of the MCA replaced the DTA’s jurisdiction-stripping provision with clearer language stripping statutory habeas jurisdiction for all habeas claims, including cases that were pending at the time of its enactment. *See* Pub. L. No. 109-366, § 7(b), 120 Stat. 2600, 2636 (2006) (codified at 28 U.S.C. § 2241 note (2006)) (applying the jurisdictional bar in “all cases, without exception, pending on or after the date of the enactment of this Act which relate to any aspect of the detention . . . of an alien detained by the United States since September 11, 2001”); *see also* *Boumediene v. Bush*, 553 U.S. ___, 128 S. Ct. 2229, 2243 (2008) (“[W]e cannot ignore that the MCA was a direct response to *Hamdan*’s holding that the DTA’s jurisdiction-stripping provision had no application to pending cases.”). The MCA left intact the limited review mechanism under the DTA for federal review in the D.C. Circuit.

172. *See* Katyal, *Legal Academy*, *supra* note 142, at 106; *see also id.* at 104 n.158 (noting that “the MCA was rushed through Congress with no deliberation”); *id.* at 115 (“Instead of engaging in a sober debate about the meaning of constitutional text, history, and precedent, Congress rushed the MCA through without much thought to the constitutional consequences.”). *But cf. Boumediene*, 128 S. Ct. at 2279 (Roberts, C.J., dissenting) (“The political branches crafted these procedures amidst an ongoing military conflict, after much careful investigation and thorough debate.”).

173. *See, e.g.*, Charles Babington & Jonathan Weisman, *Senate Approves Detainee Bill Backed by Bush*, *WASH. POST*, Sept. 29, 2006, at A13 (reporting that Sen. Specter voted for the MCA after telling reporters the bill was “patently unconstitutional”).

174. Paul A. Diller, *When Congress Passes an Intentionally Unconstitutional Law: The Military Commissions Act of 2006*, 61 *SMU L. REV.* 281, 282 (2008).

Judge James Robertson, who oversaw the *Hamdan* litigation in district court, “it may be that Congress was stampeded into thinking that unscrupulous lawyers and activist judges would just gum things up at Guantánamo. If that is what Congress thought, it had faulty intelligence.”¹⁷⁵ Given the lack of serious consideration by Congress or the Executive, the judiciary, “the only other structural actor with a long-term perspective” on the democratic process,¹⁷⁶ provided a vital stopgap measure requiring the political branches to engage in a more thorough, deliberative process.¹⁷⁷

III. PUTTING MUSCULAR PROCEDURE IN CONTEXT

A. *Muscular Procedure and Civil Libertarianism*

Because so much of the post-9/11 literature focuses on the ways that judicial decisions have been insufficiently substantive, it tends to overlook how procedural decisions have been muscular. While civil libertarians claim that procedural decisions conceal a surreptitious advancement of a substantive agenda through opportunistic commitment to procedural principles,¹⁷⁸ the force of this observation, which has

175. See Robertson, *supra* note 170, at 1084–85.

176. Katyal, *Legal Academy*, *supra* note 142, at 105; see also Jinks & Katyal, *supra* note 152, at 1264.

177. For an exceptionally vibrant depiction of the general type of problem described above, see Guido Calabresi, *The Supreme Court, 1990 Term—Foreword: Antidiscrimination and Constitutional Accountability (What the Bork-Brennan Debate Ignores)*, 105 HARV. L. REV. 80, 103–04 (1991):

Legislatures often act hastily or thoughtlessly with respect to fundamental rights because of panic or crises or because, more often, they are simply pressed for time. At other times, they hide infringements of rights through vague language or give no thought to the reach of the language they have used. At still other times, they delegate to bureaucrats who are not accountable to the people and who therefore cannot be trusted with the protection of rights. Legislatures also often shirk responsibility by failing to repeal old laws that have come—either through growth in rights or through change in the effect of the old laws—to violate entitlements that would be deemed fundamental if the issue were truly addressed today. All the above cases are instances of a breakdown of accountability that affects fundamental rights, and thus could be called failures of “constitutional accountability.” The two most general categories of such breakdown are “haste or thoughtlessness” and “hiding.”

The Bickellian approach to judicial review is based on the notion that, even if majoritarian legislatures are generally more trustworthy and less dangerous than courts as the definers and bulwarks of fundamental rights, when there is haste or hiding we cannot rely only on legislators to protect such rights. When there is hiding, neither the people nor their representatives are genuinely speaking; when there is haste, they may be speaking, but without the attention required for the protection of rights.

178. Civil libertarians also have critiqued legal process approaches as lacking any real theoretical explanation for why procedure should be valued in its own right. As Larry Tribe has noted, purely

relevance in many contexts, may have less traction in national security. Martinez appeals to that idea by arguing that “[t]he danger of Legal Process . . . is that its seeming neutrality often obscures value judgments about the underlying substantive policies.”¹⁷⁹ Accordingly, “[t]o the extent that seemingly fair procedures distract people from unfair substantive outcomes, these uses of procedure may be dangerous [T]he legitimizing role that procedure plays in perceptions of justice may be part of the problem, not the solution.”¹⁸⁰ But while modern interpretations of standing doctrine,¹⁸¹ statutes of limitations,¹⁸² pleading standards,¹⁸³ immunity doctrines,¹⁸⁴ and privilege

process-based theories of law must be based within a theory of the intrinsic worthiness of process itself; if not, a true theoretical commitment to process breaks down. See Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1070–71 (1980).

179. Martinez, *supra* note 1, at 1025. Martinez notes that even though “we may choose to vest certain decisions in Congress because we believe that body’s deliberative nature is likely to lead to better policy choices,” *id.* at 1061, procedural decisions “cannot provide a total escape from hard substantive choices; when the main benefit of procedure is that it hides those substantive choices, we ought to be concerned,” *id.* at 1092.

180. *Id.* at 1087.

181. Specifically, the Supreme Court elevated the requirements of causation and redressability, two criteria generally considered part of a court’s merits inquiry, into two of the three elements necessary to establish standing. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). See generally Richard J. Pierce, Jr., *Lujan v. Defenders of Wildlife: Standing as a Judicially Imposed Limit on Legislative Power*, 42 DUKE L.J. 1170, 1200 (1993) (arguing that *Lujan* will result in fewer lawsuits, permitting agencies to ignore legislative commands). Justice Brennan echoed the civil libertarian concern when he referred to certain procedural doctrines as “no more than a poor disguise for the Court’s view of the merits of the underlying claims.” *Allen v. Wright*, 468 U.S. 737, 782 (1984) (Brennan, J., dissenting); see also Abram Chayes, *The Supreme Court, 1981 Term—Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 23 (1982) (“This ritual recitation [of the components of standing doctrine] having been performed, the Court then chooses up sides and decides the case.”); Gene R. Nichol, Jr., *Causation as a Standing Requirement: The Unprincipled Use of Judicial Restraint*, 69 KY. L.J. 185, 185 (1980–1981) (“One of the most controversial methods employed by the Burger Court to temper the expansion of standing under the broad injury-in-fact test has been the development of an autonomous doctrine of causation.”); Jack B. Weinstein, *The Role of Judges in a Government Of, By, and For the People: Notes for the Fifty-Eighth Cardozo Lecture*, 30 CARDOZO L. REV. 1, 72 (2008) (“[T]he causation doctrine . . . embroils the threshold standing determination too heavily in the merits and works to undermine the Court’s role in protecting individuals from harm resulting from illegal government activity.”) (quoting Mark V. Tushnet, *The New Law of Standing: A Plea for Abandonment*, 62 CORNELL L. REV. 663, 664 (1977)).

182. See, e.g., *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 641 (2007) (denying remedy to plaintiff challenging unlawful sex discrimination on grounds that her initial complaint was filed after the expiration of the 180-day statutory maximum after her first instance of discrimination); see also *Wallace v. Kato*, 549 U.S. 384, 397 (2007).

law¹⁸⁵ have at times placed procedure in the way of efforts to vigorously enforce statutes requiring the executive branch to fulfill its responsibilities,¹⁸⁶ the post-9/11 context has unfolded quite differently. While civil libertarians correctly note that deferring on substantive decisions can prolong injustice, not least the mistreatment of detainees during their extended periods of unlawful confinement,¹⁸⁷ procedural rulings in this context have generally not been a mechanism for “hid[ing] . . . substantive choices.”¹⁸⁸ Rather, courts have been clear about the underlying normative basis for asserting values of transparency and deliberation, “mak[ing] explicit their substance-oriented justifications for procedural steps”¹⁸⁹ and usefully calling the political branches to account for failing to make apparent their own substantive commitments or faithfully following through on their own procedural commitments. The result has been a dialogue in the service of prompting substantive reform where the political branches already appear to have agreed on an untenable course of action.

183. See, e.g., *Ashcroft v. Iqbal*, 556 U.S. ___, 129 S. Ct. 1937, 1954 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 563 n.8 (2007). *Twombly* retired the interpretation of FED. R. CIV. P. 8 articulated within *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957), according to which motions to dismiss would not be granted “unless it appears beyond doubt that the plaintiff can prove no set of facts . . . which would entitle him to relief.” *Twombly*, 570 U.S. at 561, appearing to replace that rule with a “plausibility standard” that would require plaintiffs to “nudge[] their claims across the line from conceivable to plausible” to survive a motion to dismiss, *id.* at 570.

184. This includes sovereign immunity, as expanded under recent Eleventh Amendment jurisprudence, as well as qualified immunity doctrines. See, e.g., Weinstein, *supra* note 181, at 97–104.

185. See *id.* at 92 (“Government privileges have expanded—particularly the state secrets and executive privilege doctrines—unnecessarily keeping information about the people’s government from themselves. The interest in accurate judicial fact-finding and our ability to scrutinize the government’s decision-making process are important reasons to limit this growth of secrecy.”).

186. See, e.g., Cass R. Sunstein, *What’s Standing After Lujan? Of Citizen Suits, “Injuries,” and Article III*, 91 MICH. L. REV. 163, 194 (1992); see also Andrew M. Siegel, *Notes Towards an Alternate Vision of the Judicial Role*, 32 SEATTLE U. L. REV. 511–13 (2009).

187. See *supra* note 63 and accompanying text.

188. Martinez, *supra* note 1, at 1092.

189. See Robert M. Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718, 736 (1975). Robert Cover emphasized the flexibility of procedural rules, noting that procedural mechanisms could be used as a device to resolve cases where the substantive law offers no solution for a just outcome. But he abhorred the deployment of procedure, for however a noble purpose, that was unhinged from a larger substantive purpose, for such decisions failed to reduce uncertainty, treated litigants unequally, and failed to advance a rule of procedure that could apply to all cases. See *id.* at 726–28.

In this regard, Stephen Vladeck observes that recent decisions are “characterized by narrow holdings and implicit guidance to the political branches on how to avoid more serious confrontations.”¹⁹⁰ Within those decisions, “a conversation between the [Supreme] Court and the political branches [takes place] in several acts.”¹⁹¹ Anthony Colangelo argues, similarly, that “the Court . . . has sought not to create clear, categorical substantive rules,” but has instead “adopted methodologies by which the national security/individual rights balance can be carefully weighed based on the particular circumstances of a particular case[.]” what he calls “legal conversation-starters.”¹⁹² The decisions integrate procedural requirements into legal contexts where, doctrinally, courts generally recognize coordinate branch expertise on substantive policy questions.¹⁹³ Still, the judiciary puts procedural tools to muscular effect, reinforcing its concern about deeper rule-of-law considerations by ruling on matters about which it has a comparative advantage in expertise.

In cases where courts have rejected a muscular procedural approach—as, for instance, where they ground their decisions in a standard of pure deference—they have done damage to the causes that civil libertarians champion. In these cases of pure deference, courts have blocked efforts to enforce executive branch obligations under domestic and treaty law, including commitments to protect detainees from torture overseas. For example, in *Kiyemba v. Obama (Kiyemba II)*,¹⁹⁴ the D.C. Circuit handed detainees a very unfavorable ruling on the issue of repatriations to countries where they fear torture.¹⁹⁵ *Kiyemba II* invalidated more than one hundred transfer-abeyance motions, which district courts granted both before and after *Boumediene*, requiring the government to provide counsel for a detainee thirty days’ notice prior to effecting a transfer from Guantánamo.¹⁹⁶ On the question of federal jurisdiction, the court

190. Stephen I. Vladeck, *The Long War, the Federal Courts, and the Necessity/Legality Paradox*, 43 U. Rich. L. Rev. 893, 897 (2009).

191. *Id.* at 910.

192. Anthony J. Colangelo, *Brief Remarks on the Supreme Court’s Role After 9/11: Continuing the Legal Conversation in the War on Terror*, 62 SMU L. REV. 17, 18 (2009) (emphases omitted); see also *id.* at 21–22 (“[B]y guarding the constitutional dimensions of the war on terror from political conversation-stoppers, the Court actually facilitates ongoing public deliberation over the national security/individual rights balance.”).

193. See *supra* notes 59–60 and accompanying text.

194. 561 F.3d 509 (D.C. Cir. 2009).

195. *Id.* at 516.

196. *The Supreme Court, 2007 Term—Leading Cases, Jurisdiction Over Americans Held*

resolved an issue, apparently left open by *Boumediene*, whether detainees could invoke habeas as a vehicle for challenging matters collateral to detention, such as conditions of confinement, transfer and release.¹⁹⁷ But on the broader question of detainee transfers, *Kiyemba II* ruled flatly that courts cannot second-guess executive branch expertise on the human rights practices of foreign countries, regardless of the detainees' claims that they would be harmed upon return. In the words of the D.C. Circuit, district courts simply "may not question the Government's determination that a potential recipient country is not likely to torture a detainee . . . [and] a detainee cannot prevail on the merits of a claim seeking to bar his transfer based upon the likelihood of his being tortured in the recipient country."¹⁹⁸ The court's reliance on

Overseas, 122 HARV. L. REV. 415, 421 (2008). Prior to *Kiyemba II*, the thirty-day notice motions were generally granted. See Robert M. Chesney, *Leaving Guantánamo: The Law of International Detainee Transfers*, 40 U. RICH. L. REV. 657, 667 (2006) ("[B]y the end of June 2005, judges had decided thirty-four of the GTMO transfer motions, with twenty-seven pro-detainee decisions imposing the requested notice requirement and six pro-government decisions denying that relief (one split decision granted relief to one petitioner but denied it to two others)."); see also *Ameziane v. Bush*, No. 05-0392, 2005 WL 839542 (D.D.C. Apr. 12, 2005) (requiring notice pursuant to All Writs Act, 28 U.S.C. § 1651(a)); *Al-Joudi v. Bush*, No. 05-301, 2005 WL 774847 (D.D.C. Apr. 4, 2005) (order granting request for preliminary injunction); *Abdah v. Bush*, No. 04-1254, 2005 WL 711814 (D.D.C. Mar. 29, 2005) (same). But see *Al-Anazi v. Bush*, 370 F. Supp. 2d 188, 189 (D.D.C. 2005) (denying preliminary injunction for thirty-day notice order); *Almurbati v. Bush*, 366 F. Supp. 2d 72, 73 (D.D.C. 2005) (same).

197. See *Kiyemba II*, 561 F.3d at 512–13. Section 7 of the MCA amended the federal habeas statute to preclude not only habeas corpus petitions by Guantánamo detainees, MCA § 7(a), 28 U.S.C. § 2241(e)(1) (2006), but also "any other action against the United States . . . relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement" of a detained alien determined to be an enemy combatant. MCA § 7(b), 28 U.S.C. § 2241(e)(2). *Boumediene* did not clearly invalidate all of section 7 of the MCA, leaving open the argument that the Court struck down only section 7(a). See *Boumediene v. Bush*, 553 U.S. ___, 128 S. Ct. 2229, 2274 (2008) ("MCA § 7 thus effects an unconstitutional suspension of the writ. In view of our holding we need not discuss the reach of the writ with respect to claims of unlawful conditions of treatment or confinement.") (emphasis added). District courts within the District of Columbia held, prior to *Kiyemba II*, that *Boumediene*'s failure to invalidate MCA section 7(b) meant that detainees could not challenge the conditions of their confinement at Guantánamo. See, e.g., *Al-Adahi v. Obama*, 596 F.Supp.2d 111, 117–19 (D.D.C. 2009); *Khadr v. Bush*, 587 F. Supp. 2d 225, 236 (D.D.C. 2008); *In re Guantánamo Bay Detainee Litig.*, 577 F. Supp. 2d 312, 313 (D.D.C. 2008); *In re Guantánamo Bay Detainee Litig.*, 570 F. Supp. 2d 13, 17–19 (D.D.C. 2008). However, after *Kiyemba II*, it is clear that the MCA does not pose an obstacle to a conditions-of-confinement claim: detainees can challenge abusive treatment or lack of medical care through the vehicle of habeas. How, exactly, the expanded habeas jurisdiction of *Kiyemba II* can be squared with the declaration in *Kiyemba I* that Guantánamo detainees lack all due process rights, see *infra* notes 236–37 and accompanying text, remains to be seen.

198. *Kiyemba II*, 561 F.3d at 514.

broad standards of deference to the Executive in matters of foreign affairs prevented the possibility of any judicial oversight, even where detainees challenged the underlying quality of the Executive's process for ensuring the safe treatment of repatriated detainees. Unless the Supreme Court intervenes, *Kiyemba II* prevents detainees from using litigation to halt transfers where, owing to conditions overseas, the best practice is to remain at Guantánamo.¹⁹⁹

199. The rationale of *Kiyemba II* is based largely upon the Supreme Court's decision in *Munaf v. Geren*, 553 U.S. ___, 128 S. Ct. 2207 (2008), decided the same day as *Boumediene*. In *Munaf*, two U.S. citizens who committed crimes in Iraq after 9/11 brought habeas corpus petitions challenging their transfer from U.S. to Iraqi custody for prosecution before an Iraqi court. 128 S. Ct. at 2214–16. (One of the two petitioners, Muhammed Munaf, was tried and sentenced to death by an Iraqi court for helping organize a kidnapping, but his conviction was overturned by the Iraqi Court of Cassation in February 2009. *Id.* at 2215.) A unanimous Supreme Court held that U.S. citizens located off U.S. shores could invoke the writ but denied the petition on the merits. *Id.* at 2213. Although one of the petitioners claimed that his transfer “to Iraqi custody [was] likely to result in torture,” the Court held that this “matter of serious concern” needed to “be addressed by the political branches, not the judiciary.” *Id.* at 2225. However, the Court noted distinct procedural safeguards inspiring greater confidence in the overseas tribunal. Unlike *Kiyemba II*, *Munaf* was situated within a criminal-law context in which the Court was satisfied with the procedural safeguards of the foreign tribunal. Habeas relief “would interfere with Iraq’s sovereign right to ‘punish offenses against its laws committed within its borders,’” *Munaf*, 128 S. Ct. at 2220 (quoting *Wilson v. Girard*, 354 U.S. 524, 529 (1957)), and the Court cautioned against the invocation of the writ as “a means of compelling the United States to harbor fugitives from the criminal justice system of a sovereign with undoubted authority to prosecute them,” *id.* at 2223. Moreover, the petitioners were held by U.S. forces, “an integral part of the Iraqi system of criminal justice,” as they awaited trial by the Iraqi criminal courts. *Id.* at 2214–15, 2223–24. Justice Souter’s concurrence also noted that the petitioners voluntarily traveled to Iraq, a U.S. ally, which was prosecuting them for crimes committed on its soil; the prison and detention facilities in which the men would be held were determined by the U.S. State Department to have generally met internationally accepted standards for basic prisoner needs; and, on the specific topic of torture, the case left open the possibility of a different outcome “in which the probability of torture is well documented, even if the Executive fails to acknowledge it.” *Id.* at 2228 (Souter, J., concurring). *Kiyemba II*, by contrast, did not present the same safeguards noted by the Court in *Munaf*: the petitioners were not accused of wrongdoing and were deemed by the U.S. government to be at risk of torture upon return to their home country. *See Kiyemba II*, 561 F.3d at 519 n.5 (“[T]he United States will not send these Uighur detainees back to their home country of China, apparently because the Executive has concluded there is a likelihood of torture by China.”). Unlike *Kiyemba II*, *Munaf* is an illustration of muscular procedure that affirms an executive branch determination, as opposed to the many cases discussed previously that reject an executive determination through muscular procedural review. *See also infra* note 238 (discussing *Johnson v. Eisentrager*, 339 U.S. 763 (1950), as a decision employing muscular procedure to affirm an executive branch decision).

B. Muscular Procedure and Bilateral Endorsement

The unique post-9/11 context also raises questions about the descriptive accuracy and normative attractiveness of a pure, unalloyed bilateral endorsement approach. *Boumediene* “declared unconstitutional a law enacted by Congress and signed by the president on an issue of military policy in a time of armed conflict,”²⁰⁰ which would have passed muster under the bilateral endorsement approach. Moreover, *Hamdi* placed restrictions on the detention of enemy combatants even though Congress appeared to authorize those detentions through passage of the AUMF.²⁰¹ *Hamdi* and *Boumediene*, while leaving open questions about the scope of executive authority under the AUMF, contradict the premise that legislative endorsement is always a sufficient basis for legitimating executive action.

Moreover, the political reality after 9/11 raises questions about the normative attractiveness of bilateral endorsement, particularly the reliance its adherents have placed on a “dynamic political process between legislature and executive”²⁰² during times when liberty and security come into conflict. That dynamism has been generally nonexistent during the past several years,²⁰³ during which time Congress has defined itself more by abdication than by oversight of executive action.²⁰⁴

In any event, mere agreement between two branches in no way assures a commitment to the rule of law. As scholars have noted,

200. Cole, *supra* note 1, at 48.

201. See *supra* notes 149–52 and accompanying text.

202. See Issacharoff & Pildes, *supra* note 2, at 11; see also Posner & Sunstein, *supra* note 58, at 1199–2000 (“[I]f the national legislature distrusts the President, it has every reason to legislate clearly, so as to reduce his room to maneuver. A future Congress, for example, might issue a more detailed AUMF, one that more carefully described the entities against which force could be used and the limits under which the President might operate, rather than leaving those issues to a President it did not trust or to courts that had no expertise in the area. In this respect, our approach might well revitalize Congress’s own role, precisely by encouraging greater specificity.”). For a critique of the Posner and Sunstein position that reorients the discussion around the question of a sufficient deliberative process within the executive branch, see Jinks & Katyal, *supra* note 152, at 1247–48.

203. See *supra* Part II.B.3.

204. As Benjamin Wittes observes, “The absence of the national legislature from some of the most significant policy discussions of our time has brought about deleterious consequences at a number of levels.” BENJAMIN WITTES, LAW AND THE LONG WAR: THE FUTURE OF JUSTICE IN THE AGE OF TERROR 10 (2008).

bilateral endorsement “runs the risk of inviting Congress and the executive to collude in the violation of individual rights.”²⁰⁵ It also may overlook built-in constraints to the law-making process²⁰⁶ as well as the incentives for members of Congress to avoid any rigorous oversight role of the executive branch.²⁰⁷ Muscular procedure has provided a critical check by conditioning judicial deference on an integrity within coordinate branch decision-making that bilateral endorsement takes on faith.

Decisions of muscular procedure can also help to stimulate the dynamic process upon which the bilateral endorsement model is based. Where the President asserts conclusions based on an incomplete record²⁰⁸ or evidence lacking minimal indicia of reliability,²⁰⁹ the judiciary raises a procedural obligation requiring greater transparency or deliberation. Similarly, where the government asserts a sphere of control at the outer reaches of vague authorizing legislation,²¹⁰ inadequately fulfills a mandate under a congressional delegation,²¹¹ or leaves a legislative void,²¹² muscular procedure reorients coordinate branch decision-making toward the judiciary’s own standard of procedural regularity. *Hamdi*, *Boumediene*, and *Bismullah* suggest perhaps a first-cut preference for bilateral endorsement, followed by a critical procedural stopgap when the coordinate branches fail to engage in an adequately considered and deliberative decision-making process. Courts continue to “defer[] to decisions of political branches on how to resolve

205. Cleveland, *supra* note 60, at 1135. Cleveland states that “[i]f both Congress and the President explicitly embrace a wartime policy that infringes on civil liberties, other than ensuring that basic procedural requirements are respected, there appears little under Jackson’s approach that courts would do to stop them.” *Id.*; see also Katyal, *Internal Separation of Powers*, *supra* note 166, at 2348 (“[B]ecause many foreign-policy decisions are made in secret, political accountability will not be as much of a constraint as in the domestic context.”); cf. Issacharoff & Pildes, *supra* note 2, at 19 (“The risk of an entire nation, and its elected representatives, succumbing to wartime hysteria is ever present.”).

206. See, e.g., Jinks & Katyal, *supra* note 152, at 1255.

207. See, e.g., Sidney A. Shapiro & Rena I. Steinzor, *The People’s Agent: Executive Branch Secrecy and Accountability in an Age of Terrorism*, 68 LAW & CONTEMP. PROBS. 99, 112 (Summer 2006) (noting various agency costs of overseeing the Executive).

208. See *supra* Part II.A.1.

209. See *supra* Part II.A.2; *supra* notes 138–48 and accompanying text.

210. See *supra* Part II.B.1.

211. See *supra* Part II.B.2.

212. See *supra* Part II.B.3.

constitutional issues, so long as those decisions bear the earmarks of deliberation and care.”²¹³

IV. MUSCULAR PROCEDURE’S DOCTRINAL IMPACT

Muscular procedure is not a cure-all for the vast, intractable problems that arise within the national security context. However, it is an effective midway point between deferring wholesale to the coordinate branches on the one hand and dictating substantive outcomes on the other. It combines the idea of deference to the coordinate branches with an examination of the procedures those branches adopt in implementing policy—spanning both the legislative process and the Executive’s implementation of delegated authority. These procedural demands are generally consistent with the deference courts must accord the political branches, while still requiring them to employ a modicum of transparency or deliberation when implementing a given policy. By requiring adherence to these procedural standards in contexts where one might find pure deference, the judiciary articulates a basis for more muscular judicial review and a normative reinforcement for its involvement in areas generally committed to the plenary power of one or both of the political branches.²¹⁴

A. *Muscular Procedure’s Normative Basis*

Endorsing muscular procedure need not require the conclusion that courts are always ill-equipped to decide substantive questions such as the content of constitutional liberty or the scope of executive power in times of crisis. However, there are distinct benefits to resolving national security cases, when possible, through decisions of procedural law. Procedural decisions allow courts to resolve cases, even in the highly contested area of national security, while still claiming to confine themselves to an area of judicial expertise and legitimacy.

As an initial matter, procedure is generally seen as the province of the judiciary and an area in which it has a comparative advantage in

213. Dan T. Coenen, *A Constitution of Collaboration: Protecting Fundamental Values with Second-Look Rules of Interbranch Dialogue*, 42 WM. & MARY L. REV. 1575, 1583 (2001).

214. For general background on the plenary power doctrine, see Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power Over Foreign Affairs*, 81 TEX. L. REV. 1 (2002).

expertise.²¹⁵ As undeniable experts on process, courts can more sensibly claim to be better qualified and situated to make procedural decisions than political officials.²¹⁶ The judiciary is both uniquely charged with resolving procedural disputes and responsible for doing so. Certainly, its failure to resolve pressing procedural questions poses unique harms for the rule of law.²¹⁷ Procedural decisions are especially valuable in the national security context because they can resolve complex cases without dragging the courts into partisan debates over contested issues of great social consequence, which can be far more contentious, take much longer to resolve, and expose the judiciary to claims that it is improperly taking sides in political matters.

Procedural decisions have instrumental value as well. They avoid the risk of placing a judicial imprimatur on more heavily freighted, and fractious, questions of policy. The strong norms of judicial deference that apply within the national security context can cause confusion; a court's decision to uphold executive action on substantive grounds could be taken as signaling deep normative endorsement, even when a decision merely applies standard doctrinal deference norms. Procedural decisions can avoid these types of unintentional legitimizing effects, instead placing "conditions on the effectual exercise of legislative"²¹⁸ and executive power without dictating the positive terms of any particular legislative initiative. The decisions focus on the *means* of coordinate branch decision-making, allowing the political branches to design the *ends*, provided they do so with a transparency expected by any legitimately constituted body, whether political or judicial.

Muscular procedural decisions, while not strictly constitutional in nature, "draw[] their inspiration and authority from . . . various constitutional provisions"²¹⁹ and find their justification in a form of legal process that has developed over the course of the past half-century. More

215. See, e.g., LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 10–12, at 711 (2d ed. 1988) (noting Supreme Court decisions that "rest[] on a notion of the special relevance of judicial expertise, and the comparative irrelevance of legislative competence, in making process-oriented decisions").

216. For the classic articulation of this view, see JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 102–04 (1980).

217. See *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 225 (Jackson, J., dissenting) (noting the "lasting stains on a system of justice" wrought by procedural defects).

218. Hart & Sacks, *supra* note 18, at 1376.

219. Henry P. Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 3 (1975).

than fifty years ago, Alexander Bickel and Harry Wellington identified aspects of that process when they observed:

Congress cannot normally be expected also to be aware that some of the means chosen to achieve immediate ends impinge in not easily apparent fashion on values of permanent significance. Were this not so the Constitution, which embodies such values (and not least among them principles of the recognition of institutional capabilities), could be left to the care of Congress alone. But the Supreme Court also guards it and draws from it what is enduring. We contend that, by the same token, other values not enshrined in the Constitution but existing in its penumbra and akin to constitutional ones (and like them not to be judged in terms of the choice of temporal policies that is for Congress alone to make) are also entrusted to the guardianship of the Court. They are no doubt somewhat lower on the scale of timeless importance and the Court therefore does not have the power to decree without recourse that they must be vindicated at all costs or even to define their content with finality. But it is for the Court to bring them to the fore so that they may receive their due weight in Congress as they are otherwise most unlikely to do.²²⁰

By emphasizing the importance of transparency and deliberation within coordinate branch decision-making, muscular procedure reinforces a judicial process that “serve[s] to implement constitutional demands” without undermining “a role for the political branches in specifying the shape that these requirements take.”²²¹ This procedural review avoids “closing off any policy options for either the executive branch or the legislature in the short term.”²²² Yet it has prohibited either branch from shrouding decision-making within unnecessary and inappropriate levels of opacity in ways that would detract from a more enduring judicial commitment to clear and intelligible process.

220. Alexander M. Bickel & Harry H. Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1, 27–28 (1957).

221. Metzger, *supra* note 129, at 71.

222. Wittes, *supra* note 204, at 104.

B. Identifying Muscular Procedure Beyond National Security—The Immigration Context

The marshalling of procedure by courts as a response to inadequate deliberation by a co-equal branch has relevance not only within national security cases, but in the plenary power context more generally. Procedural law already has a special function in immigration-related cases. For example, Hiroshi Motomura has pointed out multiple decisions in the immigration context in which courts use procedure as a surrogate for resolving substantive constitutional problems—specifically, problems of equal protection—that the plenary power doctrine expressly precludes.²²³ Although courts generally are unable to strike down immigration laws entirely on constitutional grounds, they can use procedural surrogates to channel their commitment to a constitutional value “by first construing the constitutional challenge as ‘procedural,’ and then invalidating the decision on procedural due process grounds.”²²⁴ This allows courts to use due process to remedy the differential treatment of various groups within immigration law, in effect translating equal protection values through the Due Process Clause’s liberty component.²²⁵ “Because of the anomalous structure that the plenary power doctrine imposes on constitutional immigration law,” Motomura explains, “procedural decisions are often the only vehicle for taking substantive constitutional rights seriously”²²⁶ These procedural surrogates for constitutional decision-making thus provide a

223. Motomura, *supra* note 5, at 1659 (arguing that procedural decisions have become a “surrogate[] for the substantive constitutional claims that the plenary power doctrine would seem to bar”); *id.* at 1627–28 (noting how courts “created an important exception to the plenary power doctrine by hearing constitutional claims sounding in ‘procedural due process’”). The judicially created plenary power doctrine requires courts to defer to legislative and executive decision-making in immigration-related matters. The doctrine emerged from a sense “that immigration law and policy touched on the most vital and sensitive concerns of national sovereignty, self-definition, and self-preservation.” *Id.* at 1648. Examples are legion. *See, e.g.,* *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (underscoring “the limited scope of judicial inquiry into immigration legislation”); *Kleindienst v. Mandel*, 408 U.S. 753, 755–60, 769–70 (1972) (holding that the Attorney General’s decision to deny a temporary nonimmigrant visa to a Belgian journalist espousing Marxist views could not be challenged under the First Amendment); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953) (“[I]t is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government.”).

224. Motomura, *supra* note 5, at 1628.

225. *See id.* at 1656–79.

226. *Id.* at 1631.

crucial response to the harsh effects of the plenary power doctrine; they are, nevertheless, an incomplete response, for as Stephen Legomsky explains, “it is an exception that the Supreme Court has displayed little consistency in recognizing.”²²⁷

While procedural due process in immigration is often used as a mechanism for keeping pace with evolving equal protection norms, muscular procedural rules in immigration decisions place checks on executive unilateralism by preventing the potential abuse of discretion in the exercise of the Executive’s removal power and detention authority. The judicial concern in immigration cases, as in the Guantánamo context, is the adherence by a co-equal branch to a standard of transparency and deliberation set by the court.

Decisions such as *INS v. St. Cyr*²²⁸ and *Zadvydas v. Davis*²²⁹ apply clear statement principles and constitutional avoidance canons, respectively, to place a check upon the Executive’s potential (or actual) mishandling of detention and removal policy. Rather than signal a commitment to equal protection, the cases reject executive branch interpretations of statutes that would consolidate power exclusively within one branch.

St. Cyr applied the clear statement requirement to retain statutory habeas jurisdiction under the general federal habeas provision, even though explicit language in the Immigration and Nationality Act appeared to strip habeas review for certain types of immigration cases uniformly throughout all federal law.²³⁰ The Court’s jurisdictional holding rejected an interpretation that would have denied a broad class of immigration petitioners *any* review mechanism—an interpretation the Court refused to credit without a crystal clear statement of congressional

227. Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 298.

228. 533 U.S. 289 (2001).

229. 533 U.S. 678 (2001).

230. *St. Cyr*, 533 U.S. at 298–314 (holding that various provisions of the Antiterrorism and Effective Death Penalty Act of 1996 and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996—both of which contained comprehensive amendments to the Immigration and Nationality Act—did not strip federal courts of habeas corpus jurisdiction under 28 U.S.C. § 2241). Upon finding habeas jurisdiction, the Court held that a form of relief from removal that existed prior to the 1996 immigration reforms remained available to individuals who, like *St. Cyr*, were eligible for such relief at the time they pled guilty to certain crimes but were placed in removal proceedings after that form of relief was repealed. *Id.* at 326.

intent,²³¹ even in matters of immigration, where judicial deference runs high. Removing one branch (the judicial branch) entirely from having any input into the availability of relief from crime-related removal orders raised the possibility that no other body would step in to cure mistakes—including procedural error—in the agency’s implementation of deportation policy.²³²

Zadvydas invoked procedural concerns as well to reject the executive branch’s position that it enjoyed unlimited detention authority over removable aliens. The Court limited the executive detention power to “a period reasonably necessary to bring about that alien’s removal from the United States,”²³³ which it held to be six months “in light of the Constitution’s demands.”²³⁴ The Court avoided any express interpretation of the Constitution, pointing out instead that the presumptive six-month limit was predicated on the notion that “[t]he Constitution may well preclude granting an administrative body unreviewable authority to make determinations implicating fundamental rights.”²³⁵

While procedural surrogates in immigration filter a judicial commitment to equal protection through a procedural lens, muscular procedure conveys a concern about political branch abdication and the broader balance of power among the three branches. As in the Guantánamo context, judicial review increases when the coordinate branches create a vacuum of insufficient adherence to baseline procedural standards, which muscular procedure abhors. The more that executive action deviates from a rational implementation of a delegation or detracts from a plausible interpretation of even a vague congressional statute, the more the judiciary responds with muscular procedural review.

231. *Id.* at 312–13 (finding an absence of any provision that “speaks with sufficient clarity to bar jurisdiction pursuant to the general habeas statute”).

232. *See, e.g., id.* at 305 (“[A] serious Suspension Clause issue would be presented if we were to accept the INS’ submission that the 1996 statutes have withdrawn that power from federal judges and provided no adequate substitute for its exercise . . .”).

233. *Zadvydas*, 533 U.S. at 689.

234. *Id.*

235. *Id.* at 692 (internal quotation marks omitted).

C. *Muscular Procedure's Effect in Future Cases*

Whether the judiciary continues to issue decisions of muscular procedure will likely depend upon the deliberation the coordinate branches bring to future security-related decisions. The testing ground may emerge in a case the Supreme Court will consider in its current Term involving the repatriation of detainees whom the government has determined pose no threat to the United States, or possibly in another case in which detainees are seeking to block their return to countries where they fear torture. On the former question, the D.C. Circuit ruled in *Kiyemba v. Obama (Kiyemba I)*²³⁶ that detainees still stationed at Guantánamo, including those ordered released by habeas courts, have no due process rights and that, accordingly, district courts may not order their release into the United States.²³⁷ *Kiyemba I* places into doubt federal court authority to review the prolonged detention of individuals who have been cleared for release but cannot be relocated safely to a third country. The case provides occasion for the Supreme Court to clarify aspects of *Rasul* and *Boumediene* that appear to repudiate decisions upon which the *Kiyemba I* court relied—in particular, cases barring non-citizens from redressing action by U.S. officials outside the territorial United States.²³⁸ More deeply, the case raises questions about

236. 555 F.3d 1022 (D.C. Cir. 2009), *cert. granted*, 77 U.S.L.W. 3577 (U.S. Apr. 2, 2009) (No. 08-1234).

237. *Id.* at 1026.

238. *Kiyemba I* relied heavily on pre-*Boumediene* decisions drawing a sharp distinction between the protections available to aliens located inside the United States and the lack of such protections for similarly situated aliens located outside the United States. *See id.* at 1026 (“Decisions of the Supreme Court and of this court . . . hold that the due process clause does not apply to aliens without property or presence in the sovereign territory of the United States.”) (citing, *inter alia*, *United States v. Verdugo-Urquidez*, 494 U.S. 259, 269 (1990)). *Verdugo-Urquidez*, which involved the extraterritoriality of the Fourth Amendment’s protection against unreasonable searches and seizures to a non-U.S. citizen, required that a non-citizen have a “previous significant voluntary connection with the United States” to invoke constitutional rights. *Verdugo-Urquidez*, 494 U.S. at 271. The logic of *Verdugo-Urquidez* was based on an expansive interpretation of *Johnson v. Eisentrager*, 339 U.S. 763 (1950), in which the Supreme Court held that federal courts lacked jurisdiction to issue writs of habeas corpus to twenty-one German nationals who were captured in China by U.S. forces and convicted before an American military commission in Nanking. *Eisentrager*, 339 U.S. at 766. The *Eisentrager* Court held that non-U.S. citizens captured outside U.S. territory and tried before a military tribunal on foreign soil could not bring writs of habeas corpus in U.S. courts to challenge their convictions. *Id.* at 785. But there are important factual differences between cases such as *Eisentrager* and *Verdugo-Urquidez*, on which *Kiyemba I* relied, and the circumstances surrounding Guantánamo noted in *Boumediene*, which *Kiyemba I* generally overlooked. For instance, *Boumediene* recognized that the *Eisentrager* petitioners were afforded a

the government's overall accountability in resolving the crisis surrounding those detained individuals who remain virtually stateless at this time, especially now that President Obama has declared a wish to close the Guantánamo detention facility.²³⁹ A muscular procedural ruling in that case would look beyond the D.C. Circuit's purely deferential stance toward the Executive's repatriation process and consider the thoroughness of executive branch efforts to repatriate those detainees to third countries. Such a ruling would condition deference on the government's demonstration of its own accountability as opposed to simply assuming that a rigorous process is underway.

Kiyemba II takes an equally categorical position on the ability of federal courts to review executive branch decisions on repatriations.²⁴⁰ Yet neither *Kiyemba II* nor the Supreme Court's *Munaf* decision²⁴¹ upon which it relies considered a scenario where there was evidence undermining the government's assurance that detainees would not be harmed upon return. During oral argument in *Kiyemba II*, the panel questioned the government on the quality of those assurances but made no mention of that issue in its decision categorically deferring to

full adversarial process to challenge their detention, "entitled to representation by counsel, allowed to introduce evidence on their own behalf, and permitted to cross-examine the prosecution's witnesses." *Boumediene v. Bush*, 553 U.S. ___, 128 S.Ct. 2229, 2259–60 (2008). The Guantánamo detainees, by contrast, were provided with a limited CSRT process that "[f]ell well short of the procedures and adversarial mechanisms that would eliminate the need for habeas corpus review." *Id.* at 2260. *Boumediene* may therefore cabin *Verdugo-Urquidez*'s broad interpretation of *Eisentrager*, which "the executive branch has held in its back pocket for many years." Neal K. Katyal, *Executive and Judicial Overreaction in the Guantánamo Cases, 2004–2005 CATO SUP. CT. REV.* 49, 54–55; see *Neuman*, *supra* note 45, at 285 ("The *Boumediene* opinion makes clear that lacking presence or property in the United States does not make a foreign national a constitutional nonperson whose interests deserve no consideration."). The *Kiyemba I* court's reliance on arguments *Boumediene* appears to discredit suggests potential room for reversal by the Supreme Court when it considers the case later this Term.

The factual distinctions between *Boumediene* and *Eisentrager* illustrate ways that *Eisentrager*, like *Munaf*, 553 U.S. ___, 128 S. Ct. 2207 (2008), can be read as a decision of muscular procedure, for in *Eisentrager* the Supreme Court upheld executive branch decision-making in light of the satisfaction of critical procedural safeguards, obviating the need for greater judicial intervention. See also *supra* note 199 (discussing *Munaf* as a decision employing muscular procedure to affirm an executive branch decision).

239. See *supra* note 132.

240. *Kiyemba v. Obama (Kiyemba II)*, 561 F.3d 509, 514 (D.C. Cir. 2009). For a discussion of *Kiyemba II*, see *supra* notes 194–99 and accompanying text.

241. For a discussion of *Munaf v. Geren*, 553 U.S. ___, 128 S. Ct. 2207 (2008), see *supra* note 199.

executive expertise on repatriations.²⁴² The recent Third Circuit decision in *Khouzam v. Attorney General*²⁴³ took a far more skeptical approach toward diplomatic assurances by holding that a petitioner who was denied an opportunity to challenge diplomatic assurances in the context of removal was denied due process rights.²⁴⁴

Beyond Guantánamo, one lower court has already extended the *Boumediene* decision by interpreting the habeas corpus statute to apply at the Bagram Air Force Base in Afghanistan.²⁴⁵ The decision raises the prospect that prisoners might have legal rights to challenge their detention, no matter where in the world they are held, provided the United States has sufficient control of (and responsibility for) the detention facility. Significant to the decision was the court's observation that the process used to determine a detainee's status "at Bagram falls well short of what the Supreme Court found inadequate at Guantanamo,"²⁴⁶ suggesting, consistent with the decisions discussed previously, that the government is not entitled to unlimited discretion when holding individuals captured beyond the battlefield unless it can demonstrate through some meaningful process that the detainees are properly held. To the extent that the military is unable to adhere to these standards, the judiciary could conceivably issue additional decisions of muscular procedure as a corrective for those insufficiencies.

CONCLUSION

The post-9/11 executive detention cases provide occasion to consider how courts have conditioned deference upon transparency and deliberation in the crafting and implementation of security-related policy. By invoking procedural devices in this way, courts have brought large numbers of cases to effective resolution. Moreover, they have insisted that the coordinate branches engage in a more thorough and

242. The *Kiyemba II* panel pressed the government by asking whether it would accept "a holding that required a showing in each individual case" that the person being transferred would not be harmed upon return. The government's counsel equivocated on the filing of individualized determinations, stating, "I don't think that's a worthwhile endeavor," but conceded that "[i]f the court requires it, we would do that." Transcript of Oral Argument at 6-7, *Kiyemba II*, 561 F.3d 509 (No. 05-5487).

243. 549 F.3d 235 (3d Cir. 2008).

244. *Id.* at 257-59.

245. *Al Maqaleh v. Gates*, 604 F. Supp. 2d 205, 235 (D.D.C. 2009).

246. *Id.* at 227.

deliberative decision-making process. Courts have required Congress to oversee executive branch decision-making through clear legislation, and required the President to reasonably interpret authorizing legislation and properly implement congressional delegations of power. This muscular judicial review has generally focused on the means of coordinate branch decision-making, avoiding substantive policy determinations that are entrusted to the legislature and executive branches. Thus, while courts have yielded to the political branches in order to accommodate new challenges and a perceived emergency, they have required adherence to a standard of procedural regularity they themselves have set. In doing so, courts have reinforced their critical role in the broader tripartite framework, even within the highly freighted context of national security, by grounding decision-making within their own area of expertise.