NEW YORK LAW SCHOOL

NYLS Law Review
Vols. 22-63 (1976-2019)

Volume 56
Issue 1 *Civil Liberties 10 Years After 9/11*

Article 6

January 2012

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VOLUME 56 | 2011/12

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I. INTRODUCTION

It is of high importance to the peace of America that she observe the laws of nations towards all these powers, and to me it appears evident that this will be more perfectly and punctually done by one national government . . . .

. . . .

[U]nder the national government, treaties and articles of treaties, as well as the law of nations, will always be expounded in one sense and executed in the same manner . . . . The wisdom of the convention in committing such questions to the jurisdiction and judgment of courts appointed by and responsible only to one national government cannot be too much commended.[1]

Sometimes the most popular persons and ideas in their day are the ones that are least remembered in ours. So it has gone for John Jay. When he agreed to join with James Madison and Alexander Hamilton to contribute to what are now known as *The Federalist Papers*, he was by far the most prominent of the three.[2] Jay had already served as the president of the Continental Congress, devoted a year as minister to Spain, helped negotiate the Treaty of Paris that ended the Revolution, and was concluding his tenure as secretary of foreign affairs. He would, among other things, go on to become the first Chief Justice of the U.S. Supreme Court while at the same time continuing his role as the nation's foremost diplomat, negotiating the controversial treaty that bore his name.[3] Before he was sidelined by illness, Jay was to be the senior partner among the three who constituted "Publius."[4] Today he is barely remembered for having taken part at all.

Things have gone the same way with the ideas that Jay, and his coauthors, thought central to the *Federalist* project. Jay wrote four of the first five essays to appear in the series, and each of these addressed the proposed Constitution's likely benefits in foreign relations. Adding Hamilton's initial contributions, the first nine essays reference foreign affairs in some significant way. The initial point that Publius sought to convey was that the Constitution would strengthen the national government in ways that were essential for the nation's "security for the preservation of peace and tranquility, as well as against dangers from *foreign arms and influence*, as from dangers of the *like kind* arising from domestic causes."[5] For Jay and Hamilton especially, a crucial component for the maintenance of national security would be an independent

1. The Federalist No. 3, at 43 (John Jay) (Clinton Rossiter ed., 1961).

2. Walter Stahr, John Jay: Founding Father, at xiii (2005).

3. For a recent biography, see Stahr, *supra* note 2. For a classic account of the negotiations for the Treaty of Paris ending the Revolution, see Richard B. Morris, The Peacemakers: The Great Powers and American Independence (1965).

4. The others, more famous today, were of course Alexander Hamilton and James Madison. "Publius" was the name chosen by Madison, Hamilton, and Jay as the authors of all *Federalist Papers* published between 1787 and 1788. The name honors a Roman Consul named Publius Valerius Publicola, who was one of the founders of the Roman Republic. *See* The Federalist (Publius) (J. & A. McLean 1788).

5. The Federalist No. 3, *supra* note 1, at 42.

federal judiciary. Hamilton, among other things, argued not just that the federal courts properly should resolve cases under treaties and the law of nations, but even domestic law cases involving foreigners.[6] For his part, Jay rested his position on his experience as among the most distinguished diplomats among the Founders.

Two hundred years later, the Founders' vision has become even more compelling. Modern developments in international relations yield a whole new set of reasons for the courts to play a prominent and independent role in foreign affairs matters. As leading scholarship agrees, a commonplace result of globalization in its various forms is an erosion of traditional national sovereignty.[7] This phenomenon in part results from subunits of governments interacting with one another, as various regulators or judges of a given nation team up with their foreign counterparts.[8] Less well considered is which parts of a government benefit from this process relative to others. But by any reckoning, the net winner is far and away the executive.[9] So clear is the executive's comparative advantage that it puts still more pressure on the idea of separated, balanced government branches, which the Founders assumed would be a core feature of the government they were establishing. In this way, the domestic effects of globalization merely work to further augment the steady growth in presidential power relative to Congress and the courts over the past two centuries. Even sixty years ago, this escalation had already prompted Justice Jackson to declare that even though executive power might eclipse balanced, democratic institutions, "it is the duty of the Court to be the last, not first, to give them up."[10] Together, a renewed appreciation for the Founding along with the most current insights of international relations analysis should make the Justice's alarm, if anything, more ominous than the wartime setting in which he made it.

Yet what should be consensus on the courts' foreign affairs role has never faced greater challenge. Instead, a dubious wisdom extolling judicial deference threatens to become conventional. In a variety of contexts, less cosmopolitan successors of the first Chief Justice have called for the judiciary to refrain from "say[ing] what the law is"[11] when doing so would implicate the foreign policy goals of the other branches. First occasionally, then with greater consistency, various federal judges have argued for judicial deference to Congress and above all to the President on a range of issues, including the interpretation of treaties, statutes, and the Constitution; the use of international and comparative law to constrain government actors; and the determination of whether a case is justiciable in the first place. Judge Brett Kavanaugh of the D.C. Circuit captured the spirit of this growing line of thinking in declaring that "[I]n our constitutional system of separated powers, it is for Congress and the

6. The Federalist No. 80, at 476–77 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

7. *See, e.g.*, Anne-Marie Slaughter, A New World Order (2004); Robert O. Keohane & Joseph S. Nye, *Transgovernmental Relations and International Organizations*, 27 World Pol. 39 (1974).

8. *See* Slaughter, *supra* note 7.

9. *See infra* Part II.

10. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634, 655 (1952) (Jackson, J., concurring).

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

President—not the courts—to determine in the first instance whether and how the United States will meet its international obligations."[12] Yet even this expression of judicial isolationism pales next to its academic counterpart. Various academics have for years advocated that so far as foreign relations go, the courts that adjudicate least adjudicate best.[13] The most insistent voice for this position far and away has been the tireless John Yoo.[14] As he puts it, courts limiting the President's ability to take urgent national security measures constitutes an "Imperial Judiciary at War," not with the nation's enemies but with the Constitution's ostensible command to permit the executive branch to respond to foreign threats unchecked by the courts.[15]

For a time the forces of judicial isolationism appeared to have gained traction and may yet carry the day. It is all the more surprising, then, that the Supreme Court reasserted the judiciary's traditional foreign affairs role in the areas in which its opponents assert deference is most urgent—national security, terrorism, and war. Yet so far, in every major case arising out of 9/11, the Court has rejected the position staked out by the executive branch, even when supported by Congress. At critical points, moreover, each of these rejections involved the Court reclaiming its primacy in legal interpretation, an area in which advocates of judicial deference have appeared to make substantial progress. The Court nonetheless rejected deference in statutory construction in *Rasul v. Bush*.[16] It took the same tack with regard to treaties in *Hamdan v. Rumsfeld*.[17] It further rejected deference in constitutional interpretation in both *Hamdi v. Rumsfeld*[18] and *Boumediene v. Bush*.[19] Together, these cases represent a stunning reassertion of the judiciary's proper role in foreign relations. Whether reassertion will mean restoration, however, still remains to be seen.

This essay sketches the foundations for assuring that restoration, an undertaking that offers a firmer basis for the Court's 9/11 jurisprudence. Part II will consider the doctrine of judicial deference, which threatens, partly successfully and partly not, to remove the judiciary from its proper role in foreign relations. Part III begins a critique of the deference doctrine by returning to separation of powers fundamentals, especially as understood at the Founding. As John Jay suggests, the Founders generally believed that the judiciary should be a full player in the separation of powers

12. Al-Bihani v. Obama, 619 F.3d 1, 12 (2010) (Kavanaugh, J., concurring in denial of rehearing en banc).

13. *Id*. at 11–12 (Kavanaugh, J., concurring in denial of rehearing en banc).

14. Professor Yoo has collected his ideas in a de facto trilogy. John Yoo, The Powers of War and Peace: The Constitution and Foreign Affairs After 9/11 (2005); John Yoo, War by Other Means: An Insider's Account of the War on Terror (2006); John Yoo, Crisis and Command: The History of Executive Power from George Washington to George W. Bush (2009).

15. *See generally* John Yoo, *An Imperial Judiciary at War:* Hamdan v. Rumsfeld, 2005–2006 CATO Sup. Ct. Rev. 83.

16. 542 U.S. 466, 480 (2004).

17. 548 U.S. 557, 577–78 (2006).

18. 542 U.S. 507, 532–33 (2004).

19. 553 U.S. 723, 797–98 (2008).

framework, including foreign relations.[20] Among other things, this expectation meant the courts should interpret the law—including international law—without deference to the President or Congress, even when the nation's foreign policy was at stake. Part IV demonstrates that current developments in international relations make the Founding design more vital, not less. Globalization, along with typical responses to global terror, represent new forces accelerating the comparative growth of executive authority throughout the world, not least in the United States. The resulting imbalance of power makes the need for an independent judicial check, if anything, more critical now than it was originally, above all in foreign relations. Part V builds upon these foundations to supplement the rationales that the Court offered in its principal 9/11 decisions. In particular, this section argues that the Court rightly afforded the President zero deference when interpreting statutes, treaties, and constitutional provisions. This essay concludes that the Court should draw upon both original understanding and international relations to solidify its recent reassertion of its proper role in foreign relations cases.

II. JUDICIAL DEFERENCE TO THE EXECUTIVE IN FOREIGN RELATIONS

A. Hamdan *versus* Sanchez-Llamas

The Supreme Court's recent foreign relations cases suggest the apparent growing judicial deference toward the executive in foreign relations has reached a stalemate, or at least a muddle. *Sanchez-Llamas v. Oregon*, [21] for example, indicates the doctrine of judicial deference is alive and well. There the Court agreed with the President that the Vienna Consular Convention did not require an exclusionary rule to safeguard the treaty's right of an arrested foreign national to consult with the consular officials of his or her nation.[22] Among other things, the majority based its decision on the contention that the executive's own interpretation of the Convention was owed "great weight."[23] Even Justice Breyer in dissent made clear his agreement with the "great weight" formulation.[24]

By contrast, in 9/11 cases such as *Hamdan,* deference was conspicuous by its near total absence. *Hamdan* required the Court to interpret Common Article 3 of the Geneva Conventions of 1949 as incorporated by Congress[25] in the Uniform Code of Military Justice (UCMJ).[26] On this point the administration vigorously put forward the novel and radical argument that Common Article 3 could not apply to alleged

20. *See* The Federalist No. 3, *supra* note 1.

21. 548 U.S. 331 (2006).

22. *Id.* at 355–56.

23. *Id.* at 355.

24. *Id.* at 378 (Breyer, J., dissenting).

25. 548 U.S. 557, 567. For an assessment of the case, see Martin S. Flaherty, *More Real than Apparent: Separation of Powers, the Rule of Law, and Comparative Executive "Creativity," in* Hamdan v. Rumsfeld, 2005–2006 Cato Sup. Ct. Rev. 51.

26. 10 U.S.C. §§ 801–950 (2006).

members of al-Qaeda because the "Global War on Terror" was by definition international, whereas the treaty provision applied only to "'armed conflict not of an international character . . . .'"[27] Justice Stevens's opinion of the Court made short work of this contention, properly holding that the treaties' text, structure, and history all indicate that the protections of Common Article 3 apply as the baseline in any armed conflict.[28] The opinion rejects the President's position, moreover, without any indication that it is doing so notwithstanding a presumption that the executive's interpretation is owed substantial weight. The Court's failure to mention this presumption, even if overcome in this case, becomes all the more striking given Justice Thomas's reliance on the doctrine in dissent.[29]

The opinions and citations in these cases nonetheless make several matters clear. First, foreign relations deference is of relatively recent vintage, a fact that tends to undermine several conventional justifications. Second, the doctrine remains effectively contested. Finally, the doctrine appears in numerous contexts. Directly (*Sanchez-Llamas*) and indirectly (*Hamdan*), the cases and their accompanying citations center on deference in treaty interpretation. But similar possibilities for deference to the executive appear in a range of foreign relations areas. These include interpretation of federal statutes implicating foreign affairs;[30] interpretation and application of customary international law;[31] recognition of foreign governments;[32] state secrets;[33] and use of the political question doctrine,[34] among others. The following analysis will focus on treaty interpretation as a window into the current state of the deference doctrine more generally.

A glance at the citations in *Sanchez-Llamas* and *Hamdan* suggests that the doctrine has a surprisingly recent pedigree. Recent work by professor David Sloss confirms that the foreign relations deference was neither present at the creation of the republic, nor evident for a long period thereafter.[35] In the nation's first fifty years under the Constitution, the Supreme Court applied nothing less than a "zero

27. *See* Brief for Respondents at 48, Hamdan v. Rumsfeld, 548 U.S. 557 (2006) (No. 05-184), 2006 U.S. S. Ct. Briefs LEXIS 292, at **88 (emphasis omitted) (quoting Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316).

28. *See Hamdan*, 548 U.S. at 630–32.

29. *Compare id.* at 635 (stating assumptions made by the majority, of which deference to the executive is not included), *with id.* at 678–80 (Thomas, J., dissenting) (affirming a "well-established duty" to defer to executive interpretations in reference to the military and foreign affairs).

30. *See, e.g.*, Jama v. Immigration & Customs Enforcement, 543 U.S. 335, 348 (2005).

31. *See, e.g.*, Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964).

32. *See, e.g.*, Mingtai Fire & Marine Ins. Co. v. United Parcel Serv., 177 F.3d 1142, 1144–45 (9th Cir. 1999).

33. *See, e.g.*, Arar v. Ashcroft, 585 F.3d 559, 563 (2d Cir. 2009), *cert. denied*, 130 S. Ct. 3409 (2010); David Rudenstine, The Day the Presses Stopped: A History of the Pentagon Papers Case (1996).

34. *See, e.g.*, Goldwater v. Carter, 444 U.S. 996, 1002 (1979) (Rehnquist, J., concurring).

35. David Sloss, *Judicial Deference to Executive Branch Treaty Interpretations: A Historical Perspective*, 62 N.Y.U. Ann. Surv. Am. L. 497, 498–99 (2007).

deference" approach to the executive when interpreting treaties.[36] At points, the Court even enunciated a duty *not* to defer.[37] For that matter, the executive concurred. In response to French entreaties that he intervene on behalf of France, then secretary of state Edmund Randolph replied:

> The courts of justice exercise the sovereignty of this country in judiciary matters, are supreme in these, and liable neither to control nor opposition from any other branch of the Government . . . . For, if the President were even to decide that a prize ought not to be prosecuted in our courts, the decision would be treated as an intrusion by those courts, and the judicial proceedings would go on notwithstanding. So speak the constitution and the law.[38]

For its part, the Court guarded the Constitution and the law jealously. Justice Johnson, though dissenting, expressed the Justices' common view, declaring, "[T]he views of the administration, are wholly out of the question in this Court. What is the just construction of a treaty is the only question here. And whether it chime in with the views of the Government or not, this individual is entitled to the benefit of construction."[39] As professor Sloss shows, of nineteen cases during this period in which the U.S. government was a party, the government lost fourteen and won only three, with two effectively split.[40] In fact, the first signs of an obligation to defer do not appear until the late nineteenth century.[41] Even then, those signs remained few and far between for almost a century thereafter. It remains the case that no more than a handful of decisions actually mention a requirement to defer, and most of these do little more than allude to the idea in passing.[42] For all the attention deference receives, its actual application remains surprisingly meager.

This paucity in turn suggests that the constitutional bases for the idea are likewise modest. Deference hardly seems compelled by text. To the contrary, the Supremacy Clause's conversion of treaties into federal law points to a zero deference approach. Nor does original understanding offer any support. Instead, early U.S. sources point in just the opposite direction. As will be seen, structural analysis might offer justifications for deference given the President's institutional advantages in conducting foreign affairs. Yet the Article III values, articulated by Randolph and Johnson, cut just the other way and have carried the day for much of the nation's history. In terms of conventional interpretation, the best possible remaining basis for deference is

36. *See id.* at 499.

37. *See* The Amiable Isabella, 19 U.S. (6 Wheat.) 1, 68 (1821); *see also id.* at 92 (Johnson, J., dissenting).

38. Letter from Edmund Randolph, U.S. Sec'y of State, to Joseph Fauchet, Minister Plenipotentiary of the French Republic (June 13, 1795), *in* 1 American State Papers: Foreign Relations 618 (Walter Lowrie & Matthew St. Clair Clarke eds., 1833).

39. *The Amiable Isabella*, 19 U.S. (6 Wheat.) at 92 (Johnson, J., dissenting).

40. Sloss, *supra* note 35, at 506.

41. *Id.*

42. *See generally* Robert M. Chesney, *Disaggregating Deference: The Judicial Power and Executive Treaty Interpretations*, 92 Iowa L. Rev. 1723 (2007).

evolving constitutional custom. And while a previously non-existent deference doctrine has emerged, it is hardly as entrenched in precedent as such other late-blooming mechanisms as state sovereign immunity.[43]

However novel, deference's repeated appearance in recent case law illustrates the second preliminary point, namely, that it has gained a toehold in modern jurisprudence anyway and is further positioned for real gains. Several developments support this assessment. First, the doctrine appears somewhat more frequently as an express judicial trope. In this, *Sanchez-Llamas* follows *El Al Israel Airlines, Ltd. v. Tseng*;[44] *Sumitomo Shoji America, Inc. v. Avagliano*;[45] *United States v. Stuart*;[46] and *Kolovrat v. Oregon*.[47] Second, as professor David Bederman first demonstrated, from the 1950s through the early 1990s, the executive's interpretation of statutes and treaties has been the best predictor of at least the Supreme Court's own interpretation.[48] Subsequent work by professor Robert Chesney for the federal courts generally demonstrates that the executive's success may not be as pronounced as Bederman's initial work suggests.[49] Nonetheless, the modern executive prevails in treaty cases almost in inverse proportion to the frequency the executive lost in the early republic. Third, explicit articulations of deference have accounted for some of the most recent, high-profile lower court opinions. Of note here is *United States v. Lindh*,[50] the "American Taliban" case, in which the district court adopted a deference model based upon *Chevron U.S.A. Inc. v. NRDC*[51] and accordingly held that John Walker Lindh was not entitled to POW status under the Third Geneva Convention.[52] Similarly, in *Hamdan* itself, the D.C. Circuit cited its obligation to defer in adopting the executive's radical interpretation that Common Article 3 of the Geneva Conventions did not extend to armed conflict that crossed international borders.[53]

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43. *Cf.* Martin S. Flaherty, *Are We to Be a Nation?*, 70 U. Colo. L. Rev. 1277, 1282–85 (1999) (discussing the Supreme Court's handling of state law intrusion into federal constitutional realms and vice versa); Martin S. Flaherty, *More Apparent than Real: The Revolutionary Commitment to Constitutional Federalism*, 45 U. Kan. L. Rev. 993, 993 (1997) (discussing federalism protections for state governments and identifying this doctrine as sovereignty federalism).

44. 525 U.S. 155 (1999). In contrast to its predecessors, however, *El Al* expressly softens the degree of deference to be accorded executive interpretations from "great weight" to "[r]espect is ordinarily due the reasonable views of the Executive Branch concerning the meaning of an international treaty." *Id.* at 168. *See infra* notes 54, 79, 80 and accompanying text.

45. 457 U.S. 176 (1982).

46. 489 U.S. 353 (1989).

47. 366 U.S. 187 (1961).

48. *See* David J. Bederman, *Revivalist Canons and Treaty Interpretation*, 41 UCLA L. Rev. 953, 961–62, 1015–16 (1994).

49. Chesney, *supra* note 42, at 1741–58.

50. 212 F. Supp. 2d 541 (E.D. Va. 2002).

51. 467 U.S. 837 (1984).

52. *Id.* at 556.

53. Hamdan v. Rumsfeld, 415 F.3d 33, 41 (D.C. Cir. 2005).

The *Sanchez-Llamas/Hamdan* pairing in the Supreme Court reflects the ongoing confusion. On one hand, the doctrine has rhetorically shifted the burden onto parties who cling to the historic idea that courts interpreting laws or treaties that touch upon foreign affairs owe an obligation to nothing other than their own sound interpretation. Yet as *Hamdan* shows, the ostensible obligation can disappear without a trace and in cases that are among the highest profile cases as well.

B. "Weight"

At least the Supreme Court's failure to justify deference may have something to do with its actual status in current jurisprudence, *Sanchez-Llamas* included. Much like a blimp, the doctrine appears ponderous but in reality has little weight. The leading cases almost always repeat the formula that the executive's treaty interpretations are due "much weight,"[54] "great weight,"[55] "duty to respect,"[56] or, at the very least, due consideration in the form of "[r]espect . . . due [to] the reasonable views of the Executive Branch."[57] Even a cursory review of the cases, however, demonstrates that the impressive-sounding formula does no actual work.

Start not with *In re Ross*[58] but *Charlton v. Kelly*,[59] the first case ostensibly to articulate a deference standard.[60] In holding that an extradition treaty made no exception for U.S. citizens to be delivered up to Italy, the Court famously deployed this statement: "A construction of a treaty by the political department of the [g]overnment, while not conclusive upon a court called upon to construe such a treaty . . . is nevertheless of much weight."[61] That declaration, however, came only after the Court had resolved the matter already. With typical early twentieth-century economy, Justice Lurton came to the conclusion based first on the plain meaning of the treaty's term "persons," next on "accepted principles of public international law" as traced through a brief history of the exemption from the eighteenth century, on a reference to a treatise on extradition by John Bassett, and on a survey of U.S. treaties' contrasting agreements in which the exception is and is not clearly specified. Only then does the "much weight" statement appear with reference to the executive's interpretation of the treaty at hand, and then only in light of the United States' consistent practice with extradition treaties generally. Even then, the Court returns

54. Charlton v. Kelly, 229 U.S. 447, 468 (1913).

55. Kolovrat v. Oregon, 366 U.S. 187, 194 (1961).

56. Hamdan v. Rumsfeld, 548 U.S. 557, 678 (2006) (Thomas, J., dissenting).

57. El Al Israel Airlines, Ltd. v. Tseng, 525 U.S. 155, 168 (1999).

58. 140 U.S. 453 (1891). *Ross*, ostensibly the first deference case, did not actually articulate a standard. Moreover, the Court's analysis relied not simply on the executive's interpretation of the relevant treaty, but on the consistent practice of both treaty-making parties and only after close consideration of the treaty's text. *See id.* at 466–69.

59. 229 U.S. 447, 468 (1913).

60. *Id.*

61. *Id.*

to John Basset Moore, who himself argues the plain meaning, the existence of treaties with and without express exceptions, and the apparently joint practice of the United States and United Kingdom following the plain meaning of their own 1842 extradition treaty.[62]

The canon has generally done even less work ever since. In *Sullivan v. Kidd*, the Court for the first time recycles the "much weight" standard, but again only after a careful review of the treaty provisions at hand, the general principles of public international law, and the extreme consequences that would result from the opposing interpretation, which would have effectively allowed subjects throughout the British empire to inherit land in the United States.[63] The pattern continued in more recent times with *Kolovrat v. Oregon*,[64] where the Court ratcheted up the apparent deference standard to "great weight," for the interpretations "by the departments of government particularly charged with [a treaty's] negotiation and enforcement."[65] Notwithstanding this language, the Court turned first to the treaty's text, its general purpose, the canon that treaties conveying rights are to be construed liberally, other similar treaties to which the United States was a party, and even the "hope[s]" and "desire[s]" of the nationals of each country for whom the treaty was intended to benefit.[66] Even when Justice Black gets to the practice with regard to the treaty under consideration, he refers to the mutual application of the treaty by both the contracting parties.[67] Much the same pattern applies in *Sumitomo*, another "great weight" case, where Chief Justice Burger considers the executive's interpretation only after pages of textual analysis, and even then only in conjunction with the parallel interpretation followed by Japan.[68] At the risk of monotony, the same holds for *Stuart*, where the agency's interpretation of a treaty as a source of deference gets one sentence amidst paragraphs of more conventional interpretive analysis.[69]

For that matter, the same pattern holds in *Sanchez-Llamas*. For all that *Sanchez-Llamas* may be taken as a reaffirmation of deference, the canon plays an exceptionally modest role. It simply does not figure at all in the Court's consideration of the case's first issue: whether the Vienna Convention on Consular Relation's (VCCR) "full effect" language requires the application of an exclusionary rule.[70] To address this, Chief Justice Roberts relied exclusively on an analysis of treaty text in the context of

62. *See id.* at 466–69.

63. 254 U.S. 433, 435–43 (1921).

64. 366 U.S. 187 (1961).

65. *Id.* at 194.

66. *Id.* at 194, 195–97.

67. *Id.* at 191–95.

68. Sumitomo Shoji Am., Inc. v. Avagliano, 457 U.S. 176, 180–85 (1982).

69. 489 U.S. 353, 369 (1989).

70. *See* Sanchez-Llamas v. Oregon, 548 U.S. 331, 337–39 (2006); Vienna Convention on Consular Relations art. 36, ¶ 2, Apr. 24, 1963, 21 U.S.T. 77, 100–101.

"constitutional common law"[71] remedies for similar domestic rights.[72] Citation to *Kolovrat*'s version of the "great weight" standard does appear with regard to the issue of whether the International Court of Justice's (ICJ) interpretation of the VCCR, or the treaty itself, requires the setting aside of state procedural default rules on habeas,[73] especially in light of the ICJ's contrary rulings.[74] The *Kolovrat* citation, however, comes only after consideration of the Supreme Court's own precedent on this point in *Breard v. Greene*,[75] which itself did not rely on deference of the statute of the ICJ, nor, ironically for a deference case, of *Marbury*'s proposition that the federal courts in our constitutional system have the duty "to say what the law is."[76] After then devoting a single sentence to the executive's interpretation of the VCCR, the Chief Justice proceeds to a close and substantive critique of the ICJ's analysis as it applies to the domestic constitutional system of the United States.[77]

Perhaps even more ironically, the only case to have produced an opinion in which deference actually drives the analysis is *Hamdan*. The irony diminishes, however, upon noting that the opinion comes from Justice Thomas in dissent. As on many other points, the Thomas dissent parts company with the majority with regard to whether Common Article 3 of the Geneva Conventions applies to the "conflict with al Qaeda."[78] Before attempting any independent analysis, Justice Thomas finds the argument that the provision does apply to be "meritless" based on the Court's "duty to defer" to the conclusion of the Justice (not State) Department as accepted by the President as Commander in Chief and Chief Executive.[79] Only after this does Justice Thomas adopt the argument that the provision's language applying its protections to "conflicts not of any international character" cannot apply since the struggle with al-Qaeda occurs "in various nations around the globe."[80] The dissent does concede that the majority's position, which follows the treaty's text, history, structure, and near consensus interpretation, is "plausible."[81] Yet "where, as here, an ambiguous treaty provision . . . is susceptible of two plausible, and reasonable, interpretations,

71. *See generally* Henry P. Monaghan, *Foreword: Constitutional Common Law*, 89 Harv. L. Rev. 1 (1975).

72. *Sanchez-Llamas*, 548 U.S. at 355.

73. *Id.* at 355–66.

74. *See* Avéna and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12, 56, 112, 128 (Mar. 31), http://www.icj-cij.org/docket/files/128/8188.pdf; LaGrand Case (Ger. v. U.S.), 2001 I.C.J. 466, 477–78, 495, 556–57 (June 27), http://www.icj-cij.org/docket/files/104/4663.pdf.

75. 523 U.S. 371 (1998).

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

77. *See Sanchez-Llamas*, 548 U.S. at 350–60.

78. Hamdan v. Rumsfeld, 548 U.S. 557, 718–19 (2006) (Thomas, J., dissenting).

79. *Id.*

80. *Id.* at 719 (quoting Geneva Convention Relative to the Treatment Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316).

81. *Id.*

our precedents *require* us to defer to the Executive's interpretation."[82] Here, at last, is real deference. The only trouble is, it is not actually compelled by the case law to which it alludes.

That case law instead shows that deference in this setting is essentially an add-on. Invariably, it appears as little more than a passing reference to conclusions that have already been reached on the basis of significant textual, structural, purposive, comparative, or general international legal analysis. To the extent the cases diverge from this pattern, they show that deference to executive interpretation is not on the table. At times, the Court instead has considered early practice as evidence of the treaty-making parties' intent. At other times, it has relied on the longstanding practice of all state parties to a treaty as probative of mutual understanding and perhaps reliance. Of course, it could be that deference to the executive is really what is driving the case outcomes, notwithstanding what the Court actually says. But were this so, and were this proposition somehow provable, the Court's duty to offer reasoned arguments requires it to say so. And if not, the Court should make *that* stance plain. As it is, the halfway stance of announcing a standard that does no real work serves neither the standard's advocates, the detractors, nor the public.

Nor, it should be pointed out, has the Court made out the nominal standard as consistently as is sometimes claimed. Prior to *Sanchez-Llamas*, the Court's previous articulation of the deference standard came in more muted form in *El Al*.[83] Writing for the majority, Justice Ginsburg demoted the "great weight" standard to the mere "[r]espect [that] is ordinarily due the reasonable views of the Executive Branch concerning the meaning of an international treaty."[84] Flipping the usual pattern, she then concludes that "the Government's construction . . . is most faithful to the [treaty's] text, purpose, and overall structure," devoting the rest of the opinion to demonstrating just that.[85] In this she follows Justice Stone, who himself demoted "great weight" to mere "weight"[86] or "recourse,"[87] and then only to negotiating history or diplomatic correspondence by the treaty-making parties rather than executive interpretation more generally.

Then again, blimps sometimes fly. For now, the actual clout of the deference doctrine may be more apparent than real. But mere appearances often presage reality. *United States Reports* is filled with doctrines that began as novelties, became plausible, and are now entrenched. State sovereign immunity is one.[88] The assault on customary international law is on the way.[89] Judicial deference to the executive in foreign

82. *Id.* (emphasis added).

83. El Al Israel Airlines, Ltd. v. Tseng, 525 U.S. 155, 168 (1999).

84. *Id.* at 168.

85. *Id.* at 168–77.

86. Factor v. Laubenheimer, 290 U.S. 276, 295 (1933).

87. Nielsen v. Johnson, 279 U.S. 47, 52 (1929); Metcalf & Eddy v. Mitchell, 269 U.S. 514, 523 (1926).

88. *See Are We to be a Nation?*, *supra* note 44, at 1283–86.

89. *See* Sosa v. Alvarez-Machain, 542 U.S.692, 735–38 (2004).

relations is already far more pronounced than at the Founding. Numerous advocates and commentators strongly press for the doctrine in articles and briefs. Whether they say they are doing it or not, courts today generally follow the executive's lead. Justice Thomas's dissent may be a first step for the Court in both proclaiming and actually following an obligation to defer. Deference, in short, may attain the status its advocates seek, and sooner than may be supposed. All this confirms the paradox of taking a feeble doctrine very seriously.

C. Justifications

Just as deference's status and weight remain muddled, so too do the judicial arguments made on the doctrine's behalf. For its part, the Supreme Court has never articulated a justification, a failure that suggests either that the doctrine is so well entrenched that a defense would be superfluous or that the doctrine has crept into the case law with little or no thought. Lower courts, commentators, and advocates have therefore had to fill the breach. At the risk of some oversimplification, two sets of defenses are prominent: institutional expertise and democratic accountability. In treaty interpretation as in other settings, far and away the most frequently voiced defenses sound in the purported institutional superiority of the "political," especially the executive, branches to guide U.S. foreign relations. As it happens, such foreign affairs expertise resides in the very branches that are directly accountable to the American electorate, especially the one office elected nationwide. So perfunctory, however, is the Supreme Court's general treatment of the deference doctrine that its own explanations for the obligation provide only the most conclusory defenses. For more extensive articulations, one must look to either the lower federal courts or commentators.

Perhaps the most familiar justification for foreign affairs deference lays in the political branches'—above all the executive's—comparative institutional advantages in the conduct of foreign affairs. Among other things, these advantages are most commonly said to arise from the executive's access to information, its comparative decisiveness, and its consequent position as the branch best suited to speak on behalf of the nation with one voice.[90]

To these direct assertions of institutional superiority comes an indirect counterpart that arises when the executive has engaged in longstanding practice. Starting with *In re Ross*, the Supreme Court has usually, though not always, linked a presumption to defer to treaty interpretations that the executive has "consistently upheld," especially in different settings and circumstances.[91] Emphasis on executive consistency does not necessarily reflect comparative institutional advantage. On the analogy of treaty to

90. *See* John Yoo, *Politics as Law?: The Anti-Ballistic Missile Treaty, the Separation of Powers, and Treaty Interpretation*, 89 Calif. L. Rev. 851, 873–77 (2001) (reviewing Frances Fitzgerald, Way Out There in the Blue: Reagan, Star Wars and the End of the Cold War (2000)).

91. Charlton v. Kelly, 229 U.S. 447, 468 (1913); *cf. In re* Ross, 140 U.S. 453, 468 (1891) (quoting a communication made in 1881 by the U.S. minister for Japan to the secretary of state: "The President and the department have always construed the treaty of 1858" in a certain manner).

contract law, longstanding practice may reflect a species of reliance interest, especially when other states that have acceded to an agreement have followed the same interpretation.[92] Especially, early consistent interpretation may be probative of the treaty-making parties' controlling intent,[93] much the same way the Supreme Court privileges the actions of early Congresses as plausible reflections of the original understandings of the Constitution's ratifiers.[94] Yet deference keyed to consistency may also reflect institutional competence nonetheless. A longstanding and unbroken interpretation of a treaty, or provisions in a particular type of treaty, plausibly reflects all the executive's advantages in foreign affairs on the theory that superior knowledge, decisiveness, and special position as the primary voice of the United States in foreign affairs all pointed to a particular interpretation early on. And these interpretations have served to confirm such a reading of the treaty or particular treaty provisions ever since, apart from the vagaries of changes in administration or the need to adopt litigation positions in particular cases.

To these values of expertise may be added an overlapping set of justifications founded on democratic accountability. The strong version of these claims tends to follow back to Hamilton's observation that, although treaties may presumptively be "the supreme Law of the Land," and as such the province of the judicial department, they nonetheless remain contracts between states, thereby making them instruments of foreign policy and in turn the job of the political branches—above all, the executive branch.[95] This division comports with democratic accountability in at least three ways. First, it follows the original assignment of tasks by "We the People" as a matter of higher constitutional lawmaking. Second, the assignment places the conduct of foreign policy in the hands of representatives accountable to the people during normal times through periodic elections. Third, and with special regard for the President, deference to the executive in part reflects the necessity of designating a primary voice to speak

92. *See Charlton*, 229 U.S. at 472–74.

93. *See, e.g.*, *Ross*, 140 U.S. at 475–76; *Charlton,* 229 U.S. at 467–68; *see also* Chesney, *supra* note 42, at 1741–43 (distinguishing executive interpretive authority and executive practice as evidence of intent).

94. *See, e.g.*, Eldred v. Ashcroft, 537 U.S. 186, 222 (2003) (rejecting a challenge to the extension of copyright terms with heavy reliance on the actions of the first Congress); Utah v. Evans, 536 U.S. 452, 455, 457 (2002) (rejecting Utah's challenge to a census method undertaken by North Carolina based in part on the meaning of the phrase "actual enumeration" in the first Congress); Marsh v. Chambers, 463 U.S. 783, 783, 790–91 (1983) (finding the legislative chaplaincy does not violate the Establishment Clause in part because the first Congress made use of such a chaplaincy:

> Standing alone, historical patterns cannot justify contemporary violations of constitutional guarantees, but there is far more here than simply historical patterns. In this context, historical evidence sheds light not only on what the draftsmen intended the *Establishment Clause* to mean, but also on how they thought that Clause applied to the practice authorized by the First Congress—their actions reveal their intent.

(emphasis added)); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 316, 401–02 (1819) (relying on the actions of the first Congress in part to uphold the establishment of the national bank); *see also* Michael Bhargava, *The First Congress Canon and the Supreme Court's Use of History*, 94 Calif. L. Rev. 1745, 1746–47 (2006).

95. *See* The Federalist No. 75, at 449–54 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

on behalf of the United States in foreign relations combined with the propriety of designating the one policymaker who is elected on a national basis.

A more modest, though influential, democratic argument comes from professor Curtis Bradley.[96] Bradley contends that the judiciary does and should defer to executive interpretation of treaties in much the same way it bows to executive, especially agency, interpretations of statutes under *Chevron*.[97] To a significant extent, he bases the analogy upon considerations of "fit."[98] As under *Chevron*, courts interpreting treaties will not resort to deference when the relevant text is unambiguous. Yet, as also under *Chevron*, where ambiguity exists, or where the treaty simply fails to address the issue, courts will generally follow the executive's interpretation unless it is unreasonable.[99]

Though *Chevron* deference has much to do with administrative expertise, professor Bradley acknowledges that its ultimate justification rests upon the inference that Congress has delegated authority to resolve ambiguities or fill gaps to the agency assigned with administering a given statute.[100] It follows that for the *Chevron* analogy to work, the theory must be that the President plus two-thirds of the senators present must be presumed to delegate similar authority to either the State Department as a general matter or to specific agencies that a particular treaty designates for implementation.

As critics have pointed out, the *Chevron* analogy is not without problems. The Court has made clear that full *Chevron* deference is most appropriate when an agency has offered an interpretation of a statute based upon the type of deliberation that comes from providing interested parties with notice and a hearing or some form of adjudication. Less thorough deliberation ordinarily triggers no more than *Skidmore v. Swift & Co.*[101] consideration, and mere agency litigation positions do not command even that.[102] It is far from clear how the treaty setting will produce deliberative opportunities to the same extent as domestic statutes, especially in the case of human rights treaties. Professor Michael Van Alstine has rightly pointed out, moreover, that it is even less clear how a general treaty is like an organic statute that regulates a particular field and creates an agency to administer the policies that the statute sets out.[103] As will be seen, neither the problems with the *Chevron* analogy, nor with the justifications for deference in general, end here.

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96. Curtis A. Bradley, *Chevron Deference and Foreign Affairs*, 86 Va. L. Rev. 649 (2000).

97. *Id.* at 651–53 (referring to the reasoning of, and the deference granted by the Supreme Court, in *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984)).

98. Bradley, *supra* note 96, at 703–04.

99. *Id.* at 669.

100. *Id.* at 670–71. That said, professor Bradley rightly notes that in reality, considerations of executive expertise and, at least on the surface, democratic accountability are prevalent. *Id.* at 669–70.

101. 323 U.S. 134 (1944).

102. Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 212 (1988); *see also* Evan Criddle, Scholarship Comment, *Chevron Deference and Treaty Interpretation*, 112 Yale L.J. 1927, 1934 (2003).

103. Here the leading analysis is provided in Michael P. Van Alstine, *The Death of Good Faith in Treaty Jurisprudence and a Call for Resurrection*, 93 Geo. L.J. 1885, 1897–1902 (2006).

III. SOMETHING OLD: SEPARATION OF POWERS, DOMESTIC AND FOREIGN

A. First Principles

Judicial foreign affairs deference has not been without numerous critics from numerous angles. Most, however, share a common reliance on separation of powers in general and a heavy dependence on *Marbury* in particular. As the Court ironically reiterated in *Sanchez-Llamas,* it is emphatically the province of the judiciary to declare what the law is.[104] It follows that treaties, both as international law and the "supreme Law of the Land," are in the first instance to be interpreted as such, a tenet that includes any theory of interpretive delegation, which would have to come through the law itself. This form of argument is fine as far as it goes. But the formal *Marbury* argument falls short nonetheless. In particular, it fails to engage with the larger, functional separation of powers assumptions that its defenders put forward, above all the argument from executive expertise and efficiency.

Engaging these assumptions instead requires a more general review of separation of powers' first principles. The exercise may not break new ground. Yet the review remains worth the effort for at least two reasons. First, the general functions of American separation of powers remain oddly underappreciated even in domestic constitutional theory, in part due to a misplaced reliance on more formalist approaches.[105] Second, even though foreign relations law entails separation of powers, the application of the latter to the former remains oddly narrow and workman-like compared to domestic analysis.

As I have sought to demonstrate elsewhere, conventional sources of constitutional text, structure, and, above all, history provide substantial yet frustratingly insufficient guidance in resolving modern separation of powers controversies. Absent specific text, and even then rarely, these sources do not deliver precise answers to the types of questions that generally wind up in the courts. A classic case in this regard is the removal power, which has bedeviled American constitutional law ever since the question first arose with regard to the First Congress's attempt to limit the President's ability to fire whoever would occupy the newly established office of Secretary of State.[106] And as is widely noted, the lack of precise guidance only grows in the foreign relations context. Not for nothing did Edward Corwin declare that the Constitution extended to the Congress and the President in particular an "invitation to struggle" in foreign affairs.[107] Conversely, lack of precision does not mean there is no guidance whatsoever. As set out in the Constitution, separation of powers is a sketch partially inked in at the top to be worked out more fully over time,[108] consistent with several functions that become especially clear by reference to the history of the Founding.

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104. Sanchez-Llamas v. Oregon, 548 U.S. 331, 354 (2006).

105. *See* Martin S. Flaherty, *The Most Dangerous Branch*, 105 Yale L.J. 1725, 1738–45 (1996).

106. *See* Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 Mich. L. Rev. 545, 641–44 (2004).

107. Edward S. Corwin, The President: Office and Powers 1787–1984, at 201 (5th ed. 1984).

108. Flaherty, *supra* note 105, at 1777–78.

Of these functions, by far the most salient is balance. Perhaps the single most important factor that led the founding generation to reconsider and rethink separation of powers was the concentration of too much power in the state legislatures at the expense of the other branches of government, an imbalance that in turn led to the counterintuitive discovery of "democratic despotism."[109] Benjamin Rush, for example, condemned the 1776 Pennsylvania Constitution in part because "the supreme, absolute, and uncontrolled power of the State is lodged in the hands of *one body* of men."[110] Thomas Jefferson made the same point more eloquently, lamenting Virginia's Constitution of 1777, writing:

> All the powers of the government, legislative, executive, and judiciary, result to the legislative body. The concentrating [of] these [powers] in the same hands is precisely the definition of despotic government. It will be no alleviation that these powers will be exercised by a plurality of hands, and not by a single one. 173 despots would surely be as oppressive as one. . . . [G]overnment . . . should not only be founded on free principles, but . . . the powers of government should be so divided and balanced among several bodies of magistracy, as that no one could transcend their legal limits, without being effectively checked and restrained by the others.[111]

With few exceptions, at no time during the Founding period did any advocates of separation of powers argue for a complete, rigid, or formal separation. Rather, the Founders embraced the doctrine above all else for its general promise that no branch of government would ever again become as powerful, or tyrannical, as the original state legislatures.[112]

Separation of powers further addressed the problem of democratic despotism by reconceptualizing the idea of accountability. Straightforward representation, in the sense of replicating the populace as much as possible in the halls of the legislature, had proven unworkable and dangerous. In the eyes of many Founders, services such as annual elections, a relatively broad franchise, term limits, and rotation in office had paradoxically rendered the state legislatures *less* representative, or at least less representative of the people's more deliberative selves, by promoting factions and demagoguery. The solution eventually came in the form of giving all the branches of government a more representative foundation. This strategy, in the words of Massachusetts's reform constitution of 1780, would ensure that "[a]ll power residing originally in the people, and being derived from them, the several magistrates and officers of government, vested with authority, whether legislature, executive, or judicial, are their substitutes and agents, and are at all times accountable to them."[113]

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109. *See* Gordon S. Wood, The Creation of the American Republic, 1776–1787, at 404 (1998) (quoting John Adams).

110. Wood, *supra* note 109, at 441 (1998) (quoting Benjamin Rush).

111. Thomas Jefferson, *Notes on the State of Virginia*, *in* Thomas Jefferson: Writings 123, 245 (Merrill D. Peterson ed., 1984).

112. Flaherty, *supra* note 105, at 1763–64, 1766.

113. Mass. Const. pt. I, art. V.

Before the development of this new conception of "joint accountability," executives and judiciaries were generally chosen and controlled by the legislatures. Following the lead of Massachusetts, the federal Constitution embraced the new strategy through innovations that are today taken for granted. The new President was to be less or more directly elected. The judiciary was to be chosen by that directly elected official in conjunction with the upper house of Congress. In these ways joint accountability clearly enhanced the independence and authority of each of the branches against the others, particularly the newly strengthened executive and judiciary. But they also, and critically, ensured that no branch of government could lay claim to the mandate of the people to pursue policies not widely supported.[114]

After, but only after, this comes a further functional promise of efficiency, at least in terms of historical frequency, tone, and emphasis. A concern with effectiveness in turn arose out of at least two considerations. One was the general weakness of republican forms of government. Shays's Rebellion, during which farmers in western Massachusetts rioted against state authority in 1786, provided perhaps the most spectacular manifestation of this problem.[115] The other concern was weaknesses specific to the Articles of Confederation, especially in the conduct of foreign relations. Perhaps most notoriously here, lack of national power enabled the states to frustrate U.S. treaty commitments, which provided the United Kingdom in particular a pretext to keep troops stationed in the nation's northwestern territory.[116] These considerations primarily, though not exclusively,[117] militated toward an increasing emphasis on the independence and authority of the executive.[118] This emphasis helped confirm the principle of a new federal executive branch headed by a single person (the original meaning of "unitary executive"), selection independent of the legislature, and specific grants of power beyond merely implementing the laws, including the authority to command the armed forces, make treaties, and recognize foreign governments through the power to receive ambassadors. There is, however, virtually no evidence of any general grant of foreign affairs power.[119] Nor is there any

114. *See* Flaherty, *sup*ra note 105, at 1766–89; *see also* Martin S. Flaherty, *Relearning Founding Lessons: The Removal Power and Joint Accountability*, 47 Case W. Res. L. Rev. 1563, 1566–67, 1582–85 (1997).

115. *See* Wood, *supra* note 109, at 412.

116. *See* Richard B. Morris, The American Revolution Reconsidered 152–57 (1967); Frederick W. Marks III, Independence on Trial: Foreign Affairs and the Making of the Constitution, at x–xv (1973); Felix Gilbert, To the Farewell Address: Ideas of Early American Foreign Policy 66–75 (1961); Edward S. Corwin, National Supremacy: Treaty Power vs. State Power 21–30 (1913); Jack N. Rakove, *Solving a Constitutional Puzzle: The Treatymaking Clause as a Case Study*, 1 Persp. Am. Hist. 233, 267–69 (1984).

117. For example, the Constitution dealt with the problem of state treaty violations primarily through making treaties "the supreme Law of the Land," which is to say, enhancing *judicial* power. *See* U.S. Const. art. VI, § 2; Martin S. Flaherty, *History Right?: Historical Scholarship, Original Understanding, and Treaties as "Supreme Law of the Land,"* 99 Colum. L. Rev. 2095, 2122–23, 2125 (1999).

118. *See* Charles C. Thach, Jr., The Creation of the Presidency, 1775–1789: A Study in Constitutional History 51–52 (1922).

119. *See* Bradley & Flaherty, *supra* note 106, at 644.

specific evidence of special authority to interpret treaties to any greater extent than the Constitution or federal statutes.

Among other things, the more general, functional approach to separation of powers that conventional sources sustain better reveals the true potency of the *Marbury* argument against deference. The point is not simply that it is the formal job of the courts, rather than the executive, to interpret the law in a judicial setting. The larger point, rather, is twofold. First, and implicit in the judicial function, remains the courts' role in providing a neutral forum for the vindication of individual claims, particularly with regard to fundamental rights and particularly against the government. Second, and no less potent, the courts' insistence on this traditional role serves the core function of preserving balance among the branches to ensure that individual excesses do not become systemic.

B. Restoring Balance, Step One

None of this should appear novel. To the contrary, this analysis merely unpacks Hamilton's dictum that, "[t]he truth is, after all the declamations we have heard, that the Constitution is itself, in every rational sense, and to every useful purpose, A BILL OF RIGHTS."[120] This return to a more complete account of first principles nonetheless results in two contemporary claims.

First, the competing functional goals central to separation of powers badly need to be restored to modern separation of powers analysis in foreign affairs in such newly contested areas as deference. Too often, such values as balance and the Founders' conception of accountability get lost in the face of the executive's ostensible expertise and efficiency in foreign affairs, other core values near and dear to Hamilton's heart. No less than Hamilton himself, however, each of the core purposes that a conventional account of separation of powers restores requires reference and consideration. Shorthand judicial references to *Marbury* simply do not suffice.

Second, separation of powers in its more completely restored, functional version reaffirms the wisdom of the founding practice of zero deference. Consider simply the core value of balance. Arguably the *primus inter pares* of all separation of powers functions, concern about accretion of power in any one set of hands, two hundred years into our history must focus on the executive as "the most dangerous branch," based simply on the growth of the President's domestic authority during that time.[121] This development, the executive's practical increase in foreign affairs authority, *and* the apparent founding practice against deference in treaty interpretation at a minimum shift the burden onto those who would assert that changed circumstances now cut in favor of augmenting presidential power.

Similar analysis holds true for the more complex, joint conception of accountability. Recall here that the idea helps justify multi-branch involvement in an issue not simply on the ground of formal governmental role, but further on the basis of ensuring a more widespread and thorough conception of representativeness before particularly

120. The Federalist No. 84, at 515 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

121. *See* Flaherty, *supra* note 105, at 1816–19.

bold initiatives can go forward. With regard to treaties, the conception of joint accountability actually works to validate the practice of Senate reservations, understandings, and declarations. Yet it also works against deference. Working through this argument for present purposes would require an overlong detour into admittedly contested thickets of constitutional theory. Suffice it to stipulate that courts derive at least some measure of legitimacy from popular appointment and reference to the nation's evolving fundamental commitments as evidenced in constitutional custom and practice.[122] To the extent this is true, it affords an additional reason for judges not to cede authority to either the President (or for that matter, the Senate) in the implementation of treaties lest a more insulated, deliberative, yet nonetheless democratic, form of consideration be eliminated from the process.

In addition, a fully restored approach to separation of powers does more than counter certain sets of functional considerations against others. The particular functional considerations, which a more thorough consideration of text, history, and structure reveal, speak to more specific arguments for deference. Take, for example, the ostensible analogy to *Chevron*. As noted, that analogy doctrinally rests on the fiction of legislative delegation of interpretative and regulatory authority to the executive through statutory ambiguity. The functional purposes of balance and joint accountability bolster the arguments that this fiction be given credence narrowly, and then only where executive processes mimic legislative deliberation, especially in the area of foreign affairs where the executive is nowhere more potent. Likewise, balance and accountability also put pressure on the *Chevron* analogy to the extent it bases deference on the executive's expertise outright. In this instance, the direct confrontation of functions merely replay themselves, with balance in particular directly countering expertise—a stalemate that at worst would preserve the Founding's zero deference approach, absent some compelling argument to the contrary.

IV. SOMETHING NEW: GLOBAL SEPARATION OF POWERS IN A GLOBALIZED WORLD

That "old-time" separation of powers should be enough to turn back any trend toward deference. The balance of this essay, however, offers one more interpretation, which is at once more original and potentially the most powerful. Call this separation of powers in a global context—or "global separation of powers" for short. The premise is straightforward. It assumes, first, that globalization generally has resulted in a net gain in power not for judiciaries, but for the "political" branches—and above all, for executives—*within* domestic legal systems. In other words, the growth of globalized transnational government networks has yielded an imbalance among the three (to four) major branches of government in terms of separation of powers. Such an imbalance, among other things, poses a significant and growing threat for the protection of individual rights by domestic courts, whether on the basis of international *or* national norms.

122. For a recent and sophisticated attempt to elucidate the democratic basis of the judiciary's role, see Christopher L. Eisgruber, Constitutional Self-Government (2001). For a sympathetic rejoinder, see Martin S. Flaherty, *The Better Angels of Self-Government*, 71 Fordham L. Rev. 1773, 1775 (2003).

Yet if separation of powers analysis helps identify the problem, it also suggests the solution. If globalization has comparatively empowered executives in particular, it follows that fostering, rather than prohibiting, judicial globalization provides a parallel approach to help restore the balance. In this way, judicial separation of powers justifies judicial borrowing on both non-democratic and democratic grounds. From a non democratic perspective, transnational judicial dialogue with reference to international law and parallel comparative questions gives national judiciaries a unique expertise on aspects of foreign affairs, and so is a further exception to the usual presumption that the judiciary is the least qualified branch of government for the purposes of foreign affairs. More importantly, from a democratic point of view, restoring the balance that separation of powers seeks has the effect of promoting self-government to the extent that separation of powers is itself seen as a predicate for any well-ordered form of democratic self-government.

A. Globalization and Imbalance

Globalization, and the corollary erosion of sovereignty, may not yet be clichés, but they are hardly news. As any human rights lawyer would be quick to point out, the post–World War II emergence of international human rights law represents one of the most profound assaults on the notion that state sovereigns are the irreducible, impermeable building blocks of foreign affairs.[123] But the nation-state model has been eroding no less profoundly in less formal ways. Central, here, is the insight that governments today no longer simply interact state to state, through heads of state, foreign ministers, ambassadors, and consuls. Increasingly, if not already predominantly, there is interaction through global networks in which subunits of governments deal directly with one another. In separation of powers terms, executive branches at all levels interact less as the sole representative of the nation, than as partners in education ministries, intelligence agencies, or health and education initiatives. Likewise, though lagging, legislators and committees from different jurisdictions meet to share approaches and discuss common ways forward. Last, and least powerful if not least dangerous, judges from different nations share approaches in conference, teaching abroad programs, and of course, formally citing to one another in their opinions. Only recently has pioneering work by Anne-Marie Slaughter, among others, given a comprehensive picture of this facet of globalization.[124] That work, in turn, suggests that among the results of this process has been a net shift of domestic power in any given state toward the executive and away from the judiciary and the protection of fundamental rights.

123. *Cf.* Harold Hongju Koh, *Complementarity on Human Rights Organizations in International Human Rights/The Rise of Transnational Networks as the "Third Globalization*," 21 H.R.L.J. 307 (2000).

124. *See* Slaughter, *supra* note 7 (further developing her previous writings on this subject).

1. Executive Globalization

Where international human rights lawyers seek to directly pierce the veil of state sovereignty, international relations experts have chronicled the no less significant desegregation of state sovereignty through the emergence of sub-governmental networks. Nowhere has this process been more greatly marked than with regard to the interaction of various levels of regulators within the executive branches—in parliamentary systems, the "governments"[125]—of individual nations. Starting with pioneering work by Robert Koehane and Joseph Nye,[126] and more recently enhanced and consolidated by Slaughter, current scholarship offers a multifaceted picture of what may be termed "executive globalization." That said, much work remains to be done on how the "Global War on Terror" post-9/11 has accelerated this process with regard to security agencies. Nor, on a more general level, has significant work been done as to what the net effects of executive networking have been in separation of powers terms. The following reviews what has been done and suggests the likely answers to the questions that arise.

Slaughter, somewhat consciously overstating, terms government regulators who associate with their counterparts abroad "the new diplomats."[127] This characterization immediately raises the question of who they are and in what contexts they operate. Perhaps ironically, desegregation begins at the top when presidents, prime ministers, and heads of state gather in settings such as the G-8, not only as the representatives of their states but as chief executives with common problems, which may include dealing with other branches of their respective governments. Moving down the ladder come an array of different specialists who meet across borders with one another both formally and informally: central bankers, finance ministers, environmental regulators, health officials, government educators, prosecutors, and—today perhaps most importantly—military, security, and intelligence officials. The frameworks in which these horizontal groups associate are various. One type of setting might be transnational organizations under the aegis of the United Nations, the European Union, NATO, or the WTO. Another framework can be networks that meet within the structure of executive agreements, such as the Transatlantic Economic Partnership of 1998. Other groups meet outside governmental frameworks, at least to begin with, with examples ranging from the Basel Committee to the Financial Crime Enforcement Network.[128]

As important as which executive officials currently cross borders is what they actually do. The activities that make up executive transgovernmentalism may be sliced in various ways.[129] One breakdown divides the phenomenon into: (a)

125. Here, I note the perhaps telling convention that the executive in a parliamentary system is referred to as the "government" rather than the "administration," as in the United States.

126. *See, e.g.*, Keohane & Nye, *supra* note 7.

127. Slaughter, *supra* note 7, at 36.

128. Slaughter, *supra* note 7, at 36–64.

129. *See, e.g.*, Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 Va. J. Int'l L. 1 (2002).

information networks; (b) harmonization networks; and (c) enforcement networks.[130] An obvious yet vital activity, many government regulatory networks interact simply to exchange relevant information and expertise. Such exchanges include brainstorming on common problems, sharing information on identified challenges, banding together to collect new information, and reviewing how one another's agencies perform.[131] Harmonization networks, which usually arise in settings such as the European Union or the North American Free Trade Agreement (NAFTA), entail relevant administrators working together to fulfill the mandate of common regulations pursuant to the relevant international instrument.[132]

For present purposes, however, enforcement networks most greatly implicate separation of powers concerns precisely because they involve police and security agencies sharing intelligence in specific cases, and, more generally, in capacity building and training. In the context of Northern Ireland, the Royal Ulster Constabulary (RUC) maintained "numerous links with other police services, particularly with those in Britain, but also with North American agencies and others elsewhere in the world . . . [including] the Federal Bureau of Investigation . . . ."[133] In a relatively benign vein, the Independent Police Commission charged with reforming the RUC recommended further international contact, in part because "the globalisation of crime requires police services around the world to collaborate with each other more effectively and also because the exchange of best practice ideas between police services will help the effectiveness of domestic policing."[134]

It is exactly at this point, moreover, that 9/11-era concerns render the enforcement aspect of executive globalization ever more salient, and often more ominous. To take one example, consider the shadowy practice of "extraordinary renditions," that is, when the security forces of one country capture a person and send him or her to another country where rough interrogation practices are likely to take place—all outside the usual mechanisms of extradition.[135] To this extent, transnational executive cooperation moves from general, mutual bolstering to the expansion of one another's jurisdiction in the most direct and concrete fashion possible.

All this, in turn, suggests a profound shift in power to the executives in any given nation state. At least in the United States, the conventional wisdom holds that the executive branch has grown in power relative to Congress or the courts, not even

130. *Id.* at 10–27.

131. *Id.* at 28.

132. *See* Sydney A. Shapiro, *International Trade Agreements, Regulatory Protection, and Public Accountability*, 54 Admin. L. Rev. 435, 436–46 (2002).

133. The Indep. Comm'n for Policing in N. Ir., A New Beginning: Policing in Northern Ireland 101 (1999), http://cain.ulst.ac.uk/issues/police/patten/patten99.pdf.

134. *Id.*

135. For a discussion of the practice with regard to international human rights law, see Comm. on Int'l Human Rights, N.Y.C. Bar Ass'n & The Ctr. for Human Rights and Global Justice, NYU Sch. of Law, *Torture by Proxy: International and Domestic Law Applicable to "Extraordinary Renditions*," 60 Record. 13 (2005).

counting the rise of administrative and regulatory agencies, even in purely domestic terms.[136] Add to the specter of enlarged executives worldwide who are enhancing one another's power, through information and enforcement networks in particular, and the conclusion becomes presumptive. Add further the cooperation of executives in light of 9/11, and the pro-executive implications of government globalization become more troubling still.

2. Legislative Globalization

This pro-executive conclusion becomes even harder to resist given the slowness with which national legislators have been interacting with their counterparts. Several factors account for the slower pace of legislative globalization. Membership in a legislature almost by definition entails not just representation but representation keyed to national and subnational units. The turnover among legislators typically outpaces either executive officials or, for that matter, judges. In further contrast to legislators, regulators need to be specialists, and specialization facilitates cross-border interaction if only because it is easier to identify counterparts and focus upon common challenges.[137]

Transnational legislative networks exist nonetheless and are growing. To take one example, national legislators have begun to work with one another in the context of such international organizations as NATO, the Organization for Security and Co-operation in Europe (OSCE), and the Association of Southeast Asian Nations (ASEAN). To take another example, independent legislative networks have begun to emerge, such as the Inter-Parliamentary Union and Parliamentarians for Global Action. [138]

Yet even were national legislators to "catch up" to their executive counterparts in any meaningful way, the result would not necessarily be more robust or adequate protection of fundamental rights in times of perceived danger or the protection of minority rights at any time. Human rights organizations around the world are all too familiar with the democratic pathology of draconian statutes hastily enacted in response to actual attacks or perceived threats, including the Prevention of Terrorism Act in the United Kingdom, the USA PATRIOT Act in the United States, and the Internal Security Act in Malaysia.[139] It is for this reason that the essential player in the matter of rights protection must remain the courts.

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136. *See* Flaherty, *supra* note 105, at 1727–28.

137. Slaughter, *supra* note 7, at 104–06.

138. *See id.* at 104–30.

139. Prevention of Terrorism Act, 2005, c. 2 (U.K.), *available at* http://www.legislation.gov.uk/ukpga/2005/2/contents; USA Patriot Act, Pub. L. No. 107–56, 115 Stat. 272 (2001); Internal Security Act 1960 (Act No. 82) (Malay.), http://www.agc.gov.my/Akta/Vol.%202/Act%2082.pdf.

3. Judicial Globalization

Several years ago, still Justice O'Connor visited Queen's University Belfast to participate in a summer academic program that also involved schools from the Republic of Ireland and the United States. During the course of her visit, she was able to meet with local leaders of the bench and bar and exchange experiences, compare notes, and talk shop with her U.K. and Irish counterparts.[140]

This is but one facet of what Slaughter calls the "constructi[on of] a global legal system" through both formal and informal transnational judicial networks.[141] Such judicial globalization, broadly conceived, occurs in several ways. The most mundane yet potentially transformative ways are the increasing number of face-to-face meetings through teaching, conferences, and more formal exchanges. Next, and directly tied to classic economic globalization, courts of different nations have transformed the idea of simple comity to coordination in tackling complex multi-national commercial litigation. Of immense regional importance, the dialogue between the European Court of Justice and national courts constitutes a more formal, horizontal aspect of direct interaction among judiciaries.[142]

For the purposes of present analysis, however, by far the most important aspects of judicial globalization involve national courts' use of comparative materials and international law—above all international human rights law. Ostensibly new and controversial in the United States, this aspect of globalization is familiar in most other jurisdictions. As noted, national, supreme, and appellate courts have with apparent frequency cited to comparable case law in other jurisdictions as at least persuasive authority to resolve domestic constitutional issues.[143] Likewise, such courts also cite with increasing frequency the human rights jurisprudence of such transnational tribunals as the European Court of Human Rights and its Inter-American counterpart.[144] In spectacular fashion, the House of Lords has recently been doing both.[145] Likewise, the still-recent South African Constitution famously requires judges interpreting its Bill of Rights to consult international law while expressly allowing

140. *See* Press Release, Queen's Univ. Belfast, American Law School Visit to Queen's (June 19, 2007), *available at* http://www.qub.ac.uk/home/TheUniversity/GeneralServices/News/ArchivesPressReleases-CampusNews/2007PressReleases/06-2007PressReleases/#d.en.72245.

141. Slaughter, *supra* note 7, at 65. Slaughter has earlier written about this phenomenon extensively. *See* Anne-Marie Slaughter, *Judicial Globalization*, 40 Va. J. Int'l L. 1103 (1999); Anne-Marie Slaughter, *Court to Court*, 92 Am. J. Int'l L. 708 (1998).

142. Slaughter, *supra* note 7, at 82–99.

143. *See, e.g.*, Catholic Comm'n for Justice and Peace in Zimb. v. Att'y Gen. of Zimb., 14 H.R.L.J. 323 (1993) (surveying comparative and international law in interpreting the Zimbabwean Constitution regarding delay in application of the death penalty).

144. *See, e.g.*, HKSAR v. Ng Kung Siu, [1999] 2 H.K.C. 10 (C.F.I.) (opinion of the Court of Appeal of Hong Kong).

145. *See, e.g.*, A v. Sec'y of State for the Home Dep't, [2005] UKHL 71, [2006] 2 A.C. 221 (H.L.) (conjoined appeals) (Eng.).

them to consult "foreign," i.e., comparative, law.[146] So marked is the phenomenon that several comparative constitutional law casebooks that highlight such borrowing have carved out a significant market niche, even in the United States.[147]

It follows that in all these ways the global interaction of judges strengthens their hands within their respective countries. In both theory and in the substance of these interactions, the bolstering of judiciaries generally works toward a greater protection of individual and minority rights. But while leading authorities view judicial globalization as outpacing its legislative counterpart, so too do they describe a world in which executive and regulatory interaction outpaces them all.

To this extent, judicial globalization helps identify a problem, yet also suggests a solution. The problem, simply, is that transgovernmental globalization taken as a whole draws power to national executive branches and away from rights-protecting judiciaries. Against this problem, the solution is to foster the judicial side of the phenomenon, particularly with regard to the use of comparative and international materials.

B. Restoring Balance Redux

The true potency of global separation of powers analysis, however, lies elsewhere. To its proponents, deference follows from the executive branch's ostensibly greater expertise in foreign relations at a time when foreign relations is becoming ever more important. Yet global separation of powers suggests that this school of jurisprudential thought has it exactly backward. The substantial recent international relations scholarship describes the emergence of transgovermental networks on a global scale.[148] This work suggests, though has yet to explore, the comparative institutional results in any given state. The overwhelming evidence nonetheless suggests that the primary comparative beneficiary of the modern disaggregated state has been the executive.

Given this development, transgovernmental globalization violates the core tenets of separation of powers doctrine in any given country. These tenets have long made separation of powers in some form a predicate for properly functioning democratic self-government. First and foremost, separation of powers theory promises balance among the major branches of government to prevent a tyrannical accretion of power in any one. In the United States, the founding generation prized this facet of the doctrine above all else. And though they viewed the "most dangerous" branch as the legislature, subsequent history has clearly established the executive as the greatest threat to the type of balance that separation of powers presupposes.[149] Beyond this, the American Founders also believed that separation of powers could facilitate

146. S. Afr. Const. § 39(1)(b)–(c) 1996.

147. *See, e.g.*, Victoria C. Jackson & Mark V. Tushnet, Comparative Constitutional Law (2d ed. 2006); Norman Dorsen & Michel Rosenfeld et al., Comparative Constitutionalism (2003).

148. *See supra* text accompanying footnotes 123–41.

149. *See* The Federalist No. 48, at 309 (James Madison) (Clinton Rossiter ed., 1961); Flaherty, *supra* note 105, at 1810–39.

democracy not simply by preserving liberty, but by widely dispersing democratic accountability.[150] For this reason they ensured that all three branches of government had a direct or indirect democratic provenance: the House of Representatives through direct elections; the Senate initially through election by the state legislatures; the President through the Electoral College; and not least, the judiciary through presidential appointment and senatorial approval.[151] Of course not all liberal democracies, especially in the parliamentary mode, follow the U.S. model in these and other specifics. At a more general and no less relevant level, they nonetheless do follow the idea that an independent judiciary, itself at least indirectly accountable, serves as a check on behalf of individual rights against too great concentrations of power in the legislature and executive in the service of energetic government. Not only is this idea commonly evident in democratic constitutions, it also is expressed in various international human rights instruments.[152]

Whether reversing the present trend toward foreign affairs deference will suffice to redress the imbalance may be an open question. But to paraphrase Justice Jackson in *Youngstown Sheet & Tube Co. v. Sawyer*, courts concerned with separation of powers should be the last, not the first, to bow to the increasingly powerful executive that globalization promotes.[153]

V. JUDICIAL FOREIGN AFFAIRS AUTHORITY AND THE 9/11 CASES

The 9/11 cases demonstrate that the Court can still stand up to the President in foreign relations when directed by law. Striking enough were the defeats handed the executive in a time of threat, fear, and panic. Notable as well were the rejections of foreign relations deference across the board, whether involving statutes in *Rasul*, treaties in *Hamdan*, or the Constitution in *Hamdi* and *Boumediene*. The Court reasserted itself, moreover, fully aware of the stakes. In each case the executive called upon the Court to defer to its foreign relations authority, marshalling the various arguments that have gained increasing currency over the past century. Each time the Court reverted to its historic form and offered zero deference.

Yet on closer review, a certain "nuance"[154] tempers the Court's boldness. As many commentators have noted, the Court's post-9/11 decisions reflected deep divisions

150. *See* Flaherty, *supra* note 105, at 1767–68, 1821–26; Peter M. Shane, *Political Accountability in a System of Checks and Balances: The Case of Presidential Review of Rulemaking*, 48 Ark. L. Rev. 161, 212 (1994).

151. *See* U.S. Const. art. I, § 2, cl. 1, art. I, § 3, cl. 1, art. II, § 1, cl. 2, art. II, § 2, cl. 2.

152. *See, e.g.*, Universal Declaration of Human Rights, G.A. Res. 217 (III) A, art. 21, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

153. 343 U.S. 579, 655 (1952) (Jackson, J., concurring). Justice Jackson famously declared:

> With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the [rule of] law, and that the law be made by parliamentary deliberations. Such institutions may be destined to pass away. But it is the duty of the Court to be last, not first, to give them up.

Id. (internal quotations omitted).

154. Gerald L. Neuman, *The Abiding Significance of Law in Foreign Relations*, 2004 Sup. Ct. Rev. 111, 111.

among the Justices.[155] As others have pointed out, the judgments did not actually result in concrete relief for the detainees challenging the government's policies.[156] More to the point, the Court may not have deferred to the executive's interpretations, but neither did it expressly reject deference per se. In some cases, the majority simply ignored the doctrine altogether, leaving it to the dissenting Justices to rail about its de facto rejection. In other decisions, the majority followed *Youngstown* and partly rested its determination on Congress's failure to authorize the executive's actions.

These bases are fine as far as they go, but they do not go far enough either to afford the 9/11 judgments the security they need to prevent a rollback and still less to permit the judiciary to assume its intended role in a globalized age. As an initial matter, the Court should face deference head on. And when it does, it should draw upon precisely the arguments sketched out in this essay. This means first referring back to the Founders' conception of the Court's foreign relations role. Yet it should also mean looking to current and ongoing developments in international relations that challenge the balance among the branches that separation of powers demands. What follows suggests how the 9/11 cases did not do this but could have.

A. Statutes: Rasul

The first 9/11 case to reach the Supreme Court pitted judicial authority against judicial deference with regard to statutory interpretation. *Rasul* involved the claims of fourteen persons captured during the war in Afghanistan and detained at the U.S. Naval base at Guantánamo Bay.[157] The detainees all sought relief under, among other provisions, the federal habeas corpus statute.[158] As all sides made clear, the sole question came to be whether that statute extended beyond the sovereign territory of the United States to Guantánamo.[159]

The executive argued a strenuous "no." The solicitor general primarily based this on the Court's decision in *Johnson v. Eisentrager*,[160] which declined to extend habeas jurisdiction to German nationals captured in China during World War II, tried by military commission, and held by the U.S. military at a base in Germany.[161] Reliance on *Eisentrager*, among other things, would have required the Court to overlook the

155. *See* Flaherty, *supra* note 25, at 51.

156. *See* John Yoo, *Courts at War*, 91 Cornell L. Rev. 573, 575, 579–81 (2006); Mark A. Drumbl, *Guantánamo,* Rasul*, and the Twilight of Law*, 53 Drake L. Rev. 897, 903–04 (2005).

157. *See* Rasul v. Bush, 542 U.S. 466, 470–71 (2004).

158. 28 U.S.C. §§ 2241–2243 (2006).

159. *See* Transcript of Oral Argument at 5, Rasul v. Bush, 542 U.S. 466 (2004) (Nos. 03-334, 03-343), 2004 WL 943637, at *4, http://www.supremecourt.gov/oral_arguments/argument_transcripts/03-334.pdf ("Question: . . . We are here debating the jurisdiction under the Habeas Statute, is that right? [Answer]: That's correct . . . ."); *cf. Rasul*, 542 U.S. at 489 (2004) (Scalia, J., dissenting).

160. 339 U.S. 763 (1950).

161. *See* Brief for Respondents, Rasul v. Bush, 542 U.S. 466 (2004) (Nos. 03-334, 03-343), 2004 WL 425739, at *14–50, http://www.jenner.com/files/tbl_s69NewsDocumentOrder/FileUpload500/170/respondent_brief.pdf.

factual differences between the case and the Guantánamo detentions, as well as the subsequent interpretations of the habeas statute, arguably keying less on the physical location of the petitioner.

Yet the President's lawyers did not stop at the merits, or at least the specific merits, of the habeas statute. They also sought refuge not just in judicial deference, but judicial self-abnegation. In this regard the government first made the ritual prefatory contention that "[t]he conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—'the political'—Departments."[162] It continued that during armed hostilities, the Commander-in-Chief Clause made the commitment to the executive in particular that much stronger. It followed, therefore, that what the Constitution gives to the executive, it takes away from the courts. "Exercising jurisdiction over habeas actions filed on behalf of Guantanamo detainees would directly interfere with the Executive's conduct of the military campaign against al-Qaeda and its supporters."[163] From here the consequences of judicial intervention grew more dire. Entertaining claims from Guantánamo would extend jurisdiction of U.S. courts to habeas petitions filed on behalf of aliens captured or detained on the battlefield in Afghanistan, or anywhere in the world. Simple review of Guantánamo claims would be enough to "thrust the federal courts into the extraordinary role of . . . superintending the Executive's conduct of an armed conflict . . . ."[164]

Three Justices agreed. Writing for Chief Justice Rehnquist and Justice Thomas, Justice Scalia wrote a dissent that devoted even more comparative attention than the solicitor general to *Eisentrager* and arguments that it controlled. The dissent's coda nonetheless made clear that doubts about the courts' fitness to meddle in foreign affairs resonated. The majority's analysis, Scalia declared, "ought to be unthinkable when . . . [it] . . . has a potentially harmful effect upon the Nation's conduct of a war."[165] As if that were not plain enough, he concluded, "[f]or this Court to create such a monstrous scheme in time of war, and in frustration of our military commanders' reliance upon clearly stated prior law, is judicial adventurism of the worst sort."[166]

Establishing a pattern for all the 9/11 cases, the majority rejected deference, yet did so almost passively. Justice Stevens devoted most of his opinion to the specific merits of habeas. Mainly he noted that "[p]etitioners in these cases differ from the *Eisentrager* detainees in important respects."[167] Specifically,

> [t]hey are not nationals of countries at war with the United States, and they deny that they have engaged in or plotted acts of aggression against the

162. *Id.* at *41 (quoting Oetjen v. Central Leather Co., 246 U.S. 297, 302 (1918)).

163. *Id.* at *42.

164. *Id.* at *43.

165. *Rasul*, 542 U.S. at 506 (Scalia, J., dissenting).

166. *Id.*

167. *Id.* at 476.

> United States; they have never been afforded access to any tribunal, much less charged with and convicted of wrongdoing; and for more than two years they have been imprisoned in territory over which the United States exercises exclusive jurisdiction and control.[168]

Freed from *Eisentrager*, the Court affirmatively asserted that later habeas decisions held "that the prisoner's presence within the territorial jurisdiction of the district court is not 'an invariable prerequisite' to the exercise of district court jurisdiction under the federal habeas statute."[169] Instead,

> because "the writ of habeas corpus does not act upon the prisoner who seeks relief, but upon the person who holds him in what is alleged to be unlawful custody," a district court acts "within [its] respective jurisdiction" within the meaning of § 2241 as long as "the custodian can be reached by service of process.[170]

What the Court did *not* do was acknowledge, much less address, the arguments against the courts asserting their authority to interpret statutes that bear a significant impact on foreign affairs.

Yet the Court could have done exactly this. Rather than sidestep the issue, the majority first might have reiterated the historical foundations for its intervention. Any historical case would have to begin with more than just half the story behind separation of powers, let alone the lesser half. At a general, functional level, the Founding generation did agree that a key function of dividing government authority was the type of efficiency borne of specialization. It followed that the President and Congress would be best suited to set policy across the board, including foreign relations. It even followed further that the executive would enjoy a comparative institutional advantage in responding to national security emergencies. Efficiency, however, was not the only nor the primary function envisioned for the doctrine. If any one purpose had primacy, it was the prevention of tyranny by preventing too great a concentration of power into "the impetuous vortex"[171] of any branch of government. The executive's greater decisiveness and flexibility justifies, among other things, its grant of Commander-in-Chief authority, power to recognize governments, and further powers that may be implied for these express authorizations. But in just the same way, the judiciary, in explicating the law where it has jurisdiction and more generally in its role as a neutral arbiter of rights, vests within itself an exclusive power to adjudicate the scope of a remedial statute free and clear from any special concern for the executive's views.

Nor did the Founders tailor these fundamentals for cases involving foreign affairs. Instead, they envisaged the courts as key players in the new nation's quest for

168. *Id.*

169. *Id.* at 478 (quoting Braden v. 30th Judicial Circuit Court of Ky., 410 U.S. 484, 495 (1973)).

170. *Id.* at 478–79 (quoting *Braden*, 410 U. S. at 494–95).

171. The Federalist No. 48, *supra* note 149, at 309.

international respect. In this regard, the well-known case of *Little v. Barreme*[172] reflects earlier Founding views with specific reference to statutes. In *Little*, the Court considered a capture of a suspected American merchant ship named the *Flying Fish* by the frigate USS *Boston* during the so-called "quasi-war" with France. An Act of Congress authorized the President to instruct naval commanders to inspect and seize any suspected vessel sailing to a French port.[173] President Adams, however, construed the Act to empower him to have American ships seized whether they were going to or coming from French ports. Following these orders, the *Boston* seized the *Flying Fish,* even though it was coming from a French island. Writing for the Court, Chief Justice Marshall had no difficulty holding that the capture was not authorized, despite a "construction of the act of congress made by the department to which its execution was assigned"—a construction, moreover, "much better calculated to give it effect."[174] Where Marshall paused at all, it was to consider whether the *Boston's* captain might have some sort of immunity from damages for following a presidential interpretation, but he declined even to do this.[175] Consistent with the Founding, in short, the Chief Justice gave zero deference to a federal statute authorizing military action and applied during a period of armed hostilities.

Looking forward, the *Little* Court might also have predicted out that the bases for its foreign affairs role would grow stronger, not weaker. Even under George Washington, the eighteenth-century executive was infinitely weaker in relation to the other branches than its modern counterpart.[176] Even then, this comparative weakness did not mean that the Court would grant the President any special leeway when it determined that a matter fell within the judicial power. As *Little* indicates, the judiciary instead would accord the executive zero deference in statutory interpretation, even when the statute dealt with what was then the nation's only real instrument of national defense, the U.S. Navy, in an armed naval conflict.

Today the executive's comparative power has increased exponentially, making the prima facie case for a strong judicial check correspondingly stronger. Many of the domestic sources for increased presidential power mentioned as long ago as *Youngstown* continue to flourish, including the concentration of authority in a single head, access to media, and the role of the President as head of his or her party.[177] Add to this the further effects of foreign relations. Globalization today works to comparatively enhance executive authority throughout the world, including the United States. This equation gains a multiplier effect once national security becomes the occasion for executives around the world to cooperate. The facts of *Rasul* itself provide a telling

172. 6 U.S. (2 Cranch) 170 (1804).

173. An Act Further to Suspend the Commercial Intercourse Between the United States and France, and the Dependencies Thereof, 1 Stat. 578 (expired), *available at* http://memory.loc.gov/cgi-bin/ampage?collId=llsl&fileName=001/llsl001.db&recNum=701.

174. *Little*, 6 U.S. (2 Cranch) at 178.

175. *Id.* at 179.

176. *See* Flaherty, *supra* note 105, at 1810–28.

177. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 653–54 (1952).

illustration. There, the armed forces of the United States, in the course of a war given only the most general authorization by Congress, teamed up with irregular insurgent forces within Afghanistan to detain hundreds of enemy combatants where the likelihood of misidentification was substantial.[178] This assertion of joint executive authority provides all the more reason for the judiciary to assert its checking function against the concentration of too much power in any single branch. The conclusion follows with that much greater force when the specific check is the judiciary's core role of interpreting statutes that set forth remedies for the violation of fundamental rights. Otherwise, the central purpose underlying separation of powers would survive merely at the sufferance of the President's claims in foreign affairs.

B. Treaties: Hamdan

Hamdan repeated the story told in *Rasul*, only this time with regard to treaties. In particular, the contest between judicial and executive interpretation turned on the Third Geneva Convention as incorporated into domestic law by the UCMJ. This issue arose in light of President George W. Bush's decision to try certain Guantánamo detainees in special military commissions rather than in civilian courts or courts-martial. Among the first slated to go on trial was Salim Ahmed Hamdan, who was seized in Afghanistan, turned over to the U.S. military, and ultimately charged with "conspiracy 'to commit offenses . . . triable by military commission,'" namely "attacking civilians; attacking civilian objects; murder by an unprivileged belligerent; and terrorism."[179] Thanks to *Rasul*, Hamdan countered with a habeas petition that among other things claimed that the commissions violated basic procedural protections as set forth in Common Article 3 of the Geneva Conventions.

The executive disagreed, strongly. The first argument asserted that any treaty claim that Hamdan might have was not justiciable. On the executive's view, the Geneva Conventions did not create judicially enforceable remedies. Relying in part on *Eisentrager*, the President's lawyers contended that the Conventions were properly read as leaving enforcement to diplomatic representations between governments instead of by domestic courts.[180] On this point the Court in *Hamdan* was bound, not just because of its own ostensible precedent in *Eisentrager*, but because of the deference it owed the executive in treaty interpretation:

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178. Seton Hall Law School's Center for Policy and Research has done extensive research and analysis concerning the detainees held in Guantánamo based upon evidence presented at proceedings before the Combat Status Review Tribunals, which are the bodies set up to establish that those individuals held in detention qualify as "unlawful enemy combatants." The reports that the center has issued have indicated that the evidence for this designation is meager or non existent in the vast majority of instances. *See* Mark Denbeaux et al., Seton Hall Law Ctr. for Policy and Research, The Meaning of "Battlefield": An Analysis of the Government's Representations of "Battlefield" Capture and "Recidivism" of the Guantánamo Detainees 2 (Dec. 10, 2007), http://law.shu.edu/publications/guantanamoReports/meaning_of_battlefield_final_121007.pdf.

179. Hamdan v. Rumsfeld, 548 U.S. 557, 566, 605 (2006) (quoting Appendix to Brief for Petitioner at 65a, Hamdan v. Rumsfeld, 548 U.S. 557 (2006) (No. 05-184)).

180. Brief for Respondents, *supra* note 27, at 30–34.

> As this Court noted in *Eisentrager*, a contrary construction of the Geneva Convention would severely encumber the President's authority as Commander in Chief. Indeed, petitioner's argument suggests that the hundreds of thousands of POWs held by the United States in this country during World War II were entitled to enforce the 1929 version of the Convention through private legal actions in our courts. The Executive Branch's construction of the Convention avoids such absurd consequences and is entitled to "great weight."[181]

With the Court's reading of the treaty established, the President argued further that no domestic enactment rendered Geneva Convention rights judicially enforceable, including the UCMJ and the Habeas Act.[182]

Next, the President argued that "[e]ven if the Geneva Convention were judicially enforceable, it is inapplicable to the ongoing conflict with al Qaeda."[183] This result followed thanks to a Catch-22 created by his interpretation of the Convention. On one hand, "[t]he President has determined that the Geneva Convention does not 'apply to our conflict with al Qaeda in Afghanistan or elsewhere throughout the world because, among other reasons, al Qaeda is not a High Contracting Party to [the Convention].'"[184] Since al-Qaeda was a terrorist organization, rather than a sovereign state capable of signing and ratifying the treaty, the President further determined that neither al-Qaeda nor its members could claim the protections the treaty provided. Yet on the other hand, the provision that appeared to address conflicts involving non-state actors did not do so either. Or so the President determined. As the solicitor general also noted:

> "Pursuant to [his] authority as Commander in Chief and Chief Executive of the United States," the President has "accept[ed] the legal conclusion of the Department of Justice . . . that common Article 3 of Geneva does not apply to . . . al Qaeda . . . detainees, because, among other reasons, the relevant conflicts are international in scope and common Article 3 applies only to 'armed conflict not of an international character.'"[185]

These particular executive interpretations, if anything, demanded even greater deference. The executive's initial claim was that they were beyond the judicial review at all. This somewhat bold contention rested variously on the President's war powers, on general foreign affairs authority, and on analogies to executive authority to recognize governments and determine when governments have ratified treaties.[186] Less bold, but still sweeping, the President contended that even if courts could review

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181. *Id.* at 34 (citation omitted); *see* United States v. Stuart, 489 U.S. 353, 369 (1989); Sumitomo Shoji Am., Inc. v. Avagliano, 457 U.S. 176, 184–85 (1982).

182. *Hamdan*, 548 U.S. at 716–17.

183. Brief for Respondents, *supra* note 27, at 37.

184. Brief for Respondents, *supra* note 27, at 38.

185. *Hamdan*, 548 U.S. at 718 (citation omitted).

186. Brief for Respondents, *supra* note 27, at 37–38.

these determinations, "the standard of review would surely be extraordinarily deferential to the President."[187]

As in *Rasul*, arguments for self-abnegation registered among certain Justices in dissent. Justice Thomas, writing for Justices Scalia and Alito, agreed on the merits that *Eisentrager* settled whether the Geneva Conventions provided for domestic judicial remedies.[188] He also agreed that even if the Court's precedent hadn't settled the matter, a fresh review of the treaty would lead to the same conclusion.[189] Finally, the dissent accepted the government's argument that the UCMJ did not render the Convention's provisions judicially enforceable.[190] Justice Thomas recorded even stronger agreement with the executive on deference. As he put it:

> Under this Court's precedents, "the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight." *Our duty to defer to the President's understanding of the provision at issue here is only heightened by the fact that he is acting pursuant to his constitutional authority as Commander in Chief* and by the fact that the subject matter of Common Article 3 calls for a judgment about the nature and character of an armed conflict.[191]

Once again, the majority rejected the executive's views, though, once more, not as such. In a lengthy opinion, Justice Stevens, among other things, made clear that the President's military tribunals violated Hamdan's rights under Common Article 3 as incorporated by the UCMJ. To get to this conclusion, the majority first rejected the argument that *Eisentrager* controlled and, in particular, *Eisentrager*'s observation that the Geneva Conventions did not confer a right to enforce its provisions in domestic courts. The Court nonetheless assumed without deciding that the Conventions did not act as an independent source of domestic law binding the government and conferring enforceable rights.[192] The rights that the Conventions set forth, however, were part of the customary international laws of war, and the Court interpreted the UCMJ as conditioning the authority to create military commissions on compliance with that body of law.[193]

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187. *Id.* at 38.

188. *Hamdan,* 548 U.S. at 716–17 (Thomas, J., dissenting); Rasul v. Bush, 542 U.S. 466, 488–89 (2004) (Scalia, J., dissenting).

189. *Hamdan,* 548 U.S. at 717–19 (Thomas, J., dissenting).

190. *See id.* at 678, 718–19.

191. *Id.* at 718–19 (emphasis added) (citation omitted); *see also* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936).

192. *Hamdan,* 548 U.S. at 628. Even here, however, the Court dropped a "but see" footnote referencing a brief submitted by the late Louis Henkin and other law professors noting that the International Committee of the Red Cross had early on indicated that "[i]t should be possible in States which are parties to the Convention . . . for the rules of the Convention . . . to be evoked before an appropriate national court by the protected person who has suffered a violation." *Id.* at 628 n.58.

193. *Id.* at 628.

This reasoning meant the Court had to face the Convention directly. Here the majority quickly passed by the President's argument that the Convention applied only to forces fighting for "High Contracting Parties" under Article 2 and that al-Qaeda did not qualify. "We need not decide the merits of this argument because there is at least one provision of the Geneva Conventions that applies here even if the relevant conflict is not one between signatories"—Common Article 3.[194] The Court made this determination by properly rejecting an argument accepted by the D.C. Circuit and maintained by the executive. That position read the Article's introductory wording, which states that it applies to "armed conflict not of an international character," as not covering conflict with al-Qaeda given that the global "War on Terrorism" clearly crosses national borders.[195] Justice Stevens rejected this reasoning on several bases. First, he noted that the structure of the Conventions was best understood as providing a high level of protection for combatants of classical state vs. state conflicts, yet in addition accorded minimum fundamental rights for participants in conflicts falling short of traditional wars.[196] Second, the majority noted that the use of the term "international" was a term of art literally applying to actions between nation states. It followed that conflict between the United States and a terrorist organization was not of an "international character" in this sense. [197] Finally, the Court relied on the International Committee of the Red Cross's Commentaries, which confirmed the Court's interpretation.[198]

Having concluded, contrary to the executive, that Common Article 3 applied, the Court found a violation, and Justice Stevens, writing for a plurality, found another. The majority held that the military commissions proposed by President Bush ran afoul of the provision's requirement that detainees receive sentences only from "a regularly constituted court."[199] The Court reasoned that the commissions were not regularly constituted on the strength of its conclusion that the UCMJ prohibited them on the record before it, which was also a discrete and independent basis for the Court's judgment. Under Article 36(b) of the UCMJ "all rules and regulations" that the President may prescribe for military courts "shall be uniform insofar as is practicable."[200] On the majority's view, this requirement meant that the procedures for courts martial and commissions had to be uniform unless the President

194. *Id*. at 629.

195. *Id*. at 718, 724 (quoting Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316).

196. *Id*. at 562.

197. *Id*.

198. *Id*. at 619–20.

199. *Id*. at 630, 631–33. As the Court points out, Article 3(1)(d) prohibits "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples." *Id*. at 630 (quoting Geneva Convention Relative to the Treatment of Prisoners of War art. 3, ¶ 1(d), Aug. 12, 1949, 6 U.S.T. 3316).

200. 10 U.S.C. § 836, art. 36(b) (2006).

made some showing that the substantial divergence between the two was objectively impracticable. Since the President did not, the commissions were unauthorized under the UCMJ.[201] The Court took this position, moreover, notwithstanding the President's strenuous statutory argument that Article 36(a) merely set out a subjective standard to be determined by the President, an argument to which the majority accorded deference.[202] Given its reading of the statute, it followed that unauthorized commissions could not be considered regularly constituted for the purposes of the Convention.[203]

Justice Stevens found one more violation of Common Article 3, but here he lost Justice Kennedy and thus the majority. Where they parted company turned on Common Article 3's additional requirement that even regularly constituted courts must afford "all the judicial guarantees which are recognized as indispensable by civilized peoples."[204] Stevens, now writing for only Justices Souter, Ginsburg, and Breyer, determined that the commissions lacked a number of indispensable procedures, including the right to be tried in one's presence and the right to be apprised of all incriminating evidence.[205] Justice Kennedy did not necessarily disagree at the first instance. He nonetheless expressed the belief that the appellate review

201. *Hamdan*, 548 U.S. at 620–25.

202. Brief for Respondents, *supra* note 27, at 44–45.

203. *Hamdan*, 548 U.S. at 632.

204. Common Article 3 reads, in full:

> In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply, as a minimum, the following provisions:
>
> 1. Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
>
>   (a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
>
>   (b) Taking of hostages;
>
>   (c) Outrages upon personal dignity, in particular, humiliating and degrading treatment;
>
>   (d) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.
>
> 2. The wounded and sick shall be collected and cared for. An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

Geneva Convention Relative to the Treatment of Prisoners of War, art. 3, ¶¶ 1–2, Aug. 12, 1949, 6 U.S.T. 3316.

205. *Hamdan*, 548 U.S. at 633, 634–35 (Stevens, J., plurality opinion).

provided for commission judgments would cure any problems created by the lack of essential procedural safeguards at the trial level.[206] Once more, both the Stevens plurality and the Kennedy opinion rejected a contrary reading of the treaty put forward by the executive.[207] Once again, however, they simply set out their legal reasoning rather than rejecting deference expressly.

Echoing *Rasul*, this lost opportunity counts against *Hamdan*, however laudable the decision is generally. Perhaps even more richly than with statutes, the Founding provides the Court with a compelling basis to justify its independent review of treaty provisions in the face of insistent constructions put forth by the President. More generally, the same functional commitments apply as fully with international agreements as they do statutes. Certainly, efficiency—or as Hamilton put it, "secrecy and dispatch"—applied to the making of treaties in particular. For this reason the Convention transferred the power to negotiate treaties from the Senate to the President, and the too-large House was to get out of the process altogether. Yet balance still remained a primary goal. To further this purpose, the Founders, among other things, included the requirement that two-thirds of the senators present approve before a treaty could go into effect. Despite what might be thought today, this supermajority proviso did not have much to do with addressing an ostensible "democratic deficit" left by excluding the House. Rather, it had nearly everything to do with the fear that the President could combine with a regional block of senators to undermine the rights and interests of a particular part of the country—in particular, the northeastern states' using their majority to protect their fishing rights in the Atlantic at the expense of giving away navigation rights on the Mississippi, which were essential to the prosperity of the growing Southwest. In these ways, the Founding commitment to separation of powers to prevent a tyrannical accretion of power in the government was both manifest and self-conscious in a core area of foreign affairs.[208]

The same concern applies more specifically to the role of the courts. One of the central problems leading to the Federal Convention was the failure of the U.S. government in maintaining its treaty commitments. In particular, the new nation could not enforce key undertakings in the 1783 Treaty of Paris with the United Kingdom that ended the Revolution. Of special concern were the American undertakings first to insure compensation for loyalists whose property had been confiscated during the war and, second, to prevent the states from impeding British creditors from making good on their valid claims. With no direct power to legislate, the national government had to rely on the states, many of which blithely ignored the obligation to pass any measures protecting such unpopular groups. The solution was the Supremacy Clause's provision making treaties "the supreme Law of the Land," or, in modern parlance, "self-executing."[209] The no less manifest corollary to this

206. *Id.* at 636, 653–55 (Kennedy, J., concurring).

207. Brief for Respondents, *supra* note 27, at 49–50.

208. *See* Flaherty, *supra* note 117, at 2118.

209. *Id.* at 2120–51.

decision was that it would fall to the courts, above all the federal courts, to make good on individuals' treaty claims when government officials would not. In the first instance, resistance came, as expected, from state officials leading to several landmark Supreme Court decisions.[210] As professor Sloss has shown, it also came from the federal executive, and when it did, the Justices gave no additional weight to the President's views anymore than it did to those of state officials.[211]

Looking forward, the effects of globalization also apply as fully with regard to treaties as statutes; perhaps more so. First, again as a general matter, the ties that executives around the world have been able to forge have outstripped those made by their legislative and judicial counterparts. This broad pattern would be reason enough for courts to maintain their authority *because* rather than *despite* particular cases having foreign relations implications. For this reason, judicial authority to interpret treaties becomes even more important insofar as this source of law usually deals with foreign relations matters more directly and more often than with statutes and because, in the international context, agreements frequently furnish the primary check on executive action. The stakes become only that much higher when national security and individual rights are implicated.

As with *Rasul*, *Hamdan* provides a telling illustration. There, executive officials from different states worked together outside the usual checks of domestic law to capture an individual who would be indefinitely detained and made subject to an attempted trial before an irregular court. Hamdan himself landed in Guantánamo after being captured by Afghan militia forces, who then turned him over to the U.S. military. The justification for deeming the resulting detention and trial outside the usual checks was that the capture took place in the course of a war. Yet it is exactly this claim that shows the dangers of globalization in the national security context. First, while the war in Afghanistan might end, captures in the new "War on Terror" may continue as long as the threat of terrorism exists, which is to say, without end. To face this threat, executives around the world will continue to cooperate to detain suspected terrorists and place them in specialized courts wherever and whenever they can find them. In this context, the primary source for the rule of law comes from treaties such as the Geneva Conventions. Given this role, it would come as no surprise that an executive such as that which existed in the Bush administration would interpret the resulting strictures either as not applicable or not meaningful. It should, however, be shocking for the courts to cede their authority to interpret treaties as any other body of law. To do so would be to take one of the quickest paths to undermine separation of powers given the realities of modern international relations.

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210. *See, e.g.*, Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796) (discussing a treaty between Great Britain and the United States regarding collection of debts on foreign soil and a state legislature's failure to collect a debt on behalf of Great Britain); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816) (establishing the Supreme Court's appellate jurisdiction over state supreme court decisions and adjudicating a land title dispute between the estate of a British citizen and a citizen of the State of Virginia).

211. Sloss, *supra* note 35, at 498–99.

C. Constitution: Hamdi

Hamdi v. Rumsfeld,[212] which was decided between *Rasul* and *Hamdan*, represents a culmination of all three cases by most directly addressing the Constitution. The case arose when Yaser Hamdi, an American citizen, was captured by members of the Northern Alliance in Afghanistan and turned over to the U.S. military.[213] Unlike Rasul, he was transferred from Guantánamo to a naval brig within the United States once the government discovered that he was a U.S. citizen. Like Rasul, however, Hamdi was designated an "enemy combatant" and so subject to indefinite detention. Hamdi's father filed a petition for a writ of habeas corpus claiming, among other things, that he had a right under the Fifth and Fourteenth Amendments to contest the factual basis for his detention through a hearing.[214] In the course of its response, the executive attached a declaration from Michael Mobbs, special advisor to the under secretary of defense for policy, which asserted that Hamdi had been affiliated with a Taliban military unit, had remained with it after the attacks of 9/11, and had been with the unit when it surrendered to the Northern Alliance, at which point he surrendered his Kalishnikov assault rifle.[215]

The Court granted certiorari on two potentially constitutional questions. The first dealt with Hamdi's challenge to the executive's authority to detain citizens as "enemy combatants." A majority held that the detention was authorized. Justice O'Connor's plurality opinion, however, relied on Authorization of the Use of Military Force (AUMF). For this reason, the plurality did not have to address the executive's argument "that no explicit congressional authorization is required, because the Executive possesses plenary authority to detain pursuant to Article II of the Constitution."[216] With detention established, there remained the second question: "What process is constitutionally due to a citizen who disputes his enemy-combatant status?"[217] Here the Court did grapple with the constitutional issue and, with it, the question of judicial deference.

As ever, the President's lawyers argued against the courts having any meaningful role. In *Rasul*, that meant reading a statute consistent with the executive's concerns given its constitutional role in foreign relations. In *Hamdan*, the argument went further to assert that the courts should bow to the President's interpretation of treaties given the President's greater ostensible expertise in dealing with this type of law. With *Hamdi*, the executive rang still another change. Here the White House argued that the Constitution itself acknowledged the President's greater institutional capacity in foreign affairs, especially in the context of national security. In the circumstances, two arguments followed. First, the President alone had ample authority to detain

212. 542 U.S. 507 (2004).

213. *Id.* at 510 (O'Connor, J., plurality opinion).

214. *Id.* at 510–11.

215. *Id.* at 512–13.

216. *Id.* at 516.

217. *Id.* at 524.

Hamdi and therefore anyone else he deemed in some way associated with the 9/11 attacks. Second, separation of powers principles meant that the courts had to accept the President's determination of who constituted an "enemy combatant."

The President's first claim came more at the expense of Congress than the courts. As the solicitor general put it, it was simply "incorrect" that Congress alone had the power to authorize the detention of captured enemy combatant who is an American citizen.[218] Rather, "[e]specially in the case of foreign attack, the President's authority to wage war is not dependent on 'any special legislative authority.'"[219] In fairness, the President's legal team was not so bold as to argue superior institutional capacity in interpreting the Constitution, which would have been a bold (though not unprecedented) argument in light of *Marbury*. In this sense, the executive's contention did not go as far as it did in *Hamdan* concerning treaties or arguably *Rasul* with regard to statutes. The President quickly went on to point out that Congress had affirmed his authority to detain in any case through the AUMF.[220] Even so, the argument for executive authority to detain free and clear of Congress had been asserted.

The second main claim took aim at the judiciary more directly and asserted that separation of powers principles compelled it to defer to the executive's factual determinations plain and simple. The solicitor general reminded the Court that it had observed that "'courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs,'" and further that "'[m]atters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention.'"[221] The basis for judicial restraint rested in institutional capacity, namely the military's "unmatched vantage point from which to learn about the enemy and make judgments as to whether those seized during a conflict are friend or foe."[222] The President's lawyers did make the apparent concession that while factual determinations muted judicial review, a habeas challenge would give the courts the opportunity to consider challenges concerning the executive's authority to act. As they put it, "[r]espect for separation of powers and the limited institutional capabilities of courts in matters of military decisionmaking in connection with an ongoing conflict may well limit courts to the consideration of legal attacks on the detention of captured enemy combatants . . . ."[223] Of course, in *Rasul* and *Hamdan* the executive went on to argue that the President's legal determinations also commanded deference.

Once more, the executive's arguments met with some support on the Court, though only in dissent and, in this instance, only in the lone effort of Justice Thomas. The opinion nonetheless sets out the case for judicial deference to the executive in

218. Brief for the Respondents at 19, Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (No. 03-6696).

219. *Id.* (quoting The Prize Cases, 67 U.S. (2 Black) 635, 668 (1862)).

220. *Id.* at 20.

221. *Id.* at 25 (citation omitted).

222. *Id.*

223. *Id.* at 26.

almost its purest form. Thomas argued that, once authorized by the Constitution or Congress to take a particular action dealing with national security, the President may make the factual determinations necessary to take that action free and clear of any oversight by the courts—all on grounds of institutional capacity. As he made the point: "This detention falls squarely within the Federal Government's war powers, and we lack the expertise and capacity to second-guess that decision."[224] The dissent came to this conclusion by focusing entirely on the capabilities of the "unitary executive" in foreign affairs. Here Justice Thomas proceeded from the well-worn premise that the Constitution's structure aimed to create an energetic executive reflecting the "decision, activity, secrecy, and dispatch" that characterizes an individual rather than a group.[225] "These structural advantages are most important in the national-security and foreign-affairs contexts."[226] Congress, Thomas conceded, does have an important role in these realms. "But," he added, "it is crucial to recognize that *judicial* interference in these domains destroys the purpose of vesting primary responsibility in a unitary Executive."[227]

Bolstering this conclusion, according to Thomas, is the judiciary's own and abject lack of expertise in these areas. First, "courts simply lack the relevant information and expertise to second-guess determinations made by the President based on information properly withheld."[228] Second, determining what information may be safely made public is simply too "delicate [and] complex" a matter for courts.[229] Finally, the Court itself has ostensibly recognized the primacy of the political branches in foreign and national security affairs. Unconsidered in this analysis was any special capacities of the courts.[230] The dissent did not pause to consider the structural counterpoint that an independent judiciary served to check the political branches, especially when individual liberty was at stake. Nor did it discuss the Court's own expertise in making individual factual determinations concerning individual deprivation of liberty. Still less did it talk about the Court's capacity to make such determinations against different levels of proof as set out either by the Constitution or statute.

These tasks would mainly fall to Justice O'Connor's plurality opinion, announcing the judgment that the federal courts did have substantive oversight power over the decision to detain persons as "enemy combatants." Justice O'Connor came to the case with her well-known penchant to struggle with both sides of a question and split the

224. Hamdi v. Rumsfeld, 542 U.S. 507, 579 (2004) (Thomas, J., dissenting).

225. *Id.* at 581 (quoting The Federalist No. 70, at 471 (Alexander Hamilton) (Jacob E. Cooke ed., 1961)).

226. *Id.*

227. *Id.* at 582.

228. *Id.* at 583.

229. *Id.* (citation omitted).

230. *Id.*

difference with some form of balancing test.[231] It therefore came as no surprise that she did exactly that here. As she said at the outset of her analysis, "It is beyond question that substantial interests lie on both sides of the scale in this case."[232]

On one side, the O'Connor plurality does not ignore either the executive's interests or its institutional advantages. In particular, the opinion noted that "weighty and sensitive governmental interests in ensuring that those who have in fact fought with the enemy during a war do not return to battle against the United States."[233] It also took as a given the Constitution's assignment of military decisionmaking and policy to the President and Congress. "Without doubt," Justice O'Connor observed, "our Constitution recognizes that core strategic matters of war-making belong in the hands of those who are best positioned and most politically accountable for making them."[234] Article II concerns, and to some extent Article I considerations as well, had to be taken into account.

Yet in stark contrast to the Thomas dissent, the O'Connor opinion saw another side as well. Justice O'Connor bookended her discussion of the military perspective by looking at the constitutional claims of detainees and the role of the judiciary in safeguarding them. The claims rested squarely on Fifth Amendment Due Process. The plurality acknowledged that the right at stake "is the most elemental of liberty interests—the interest in being free from physical detention by one's own government."[235] Nor did the wartime setting change the reality that physical detention affected this interest.[236] To the contrary, on that point O'Connor noted a darker side to the institutional capacity of the executive. "History and common sense," she opined, "teach us that an unchecked system of detention carries the potential to become a means for oppression and abuse of others who do not present [a national security] threat."[237]

First and foremost the check against such potential abuse is "an impartial adjudicator."[238] And not just any impartial adjudicator, but in this instance the federal courts. As the plurality declared:

> [W]e necessarily reject the Government's assertion that separation of powers principles mandate a heavily circumscribed role for the courts . . . . Indeed, the position that the courts must forgo any examination of the individual case

231. Justice O'Connor, for example, long advocated an "undue burden" test that fell between strict scrutiny and rational relationship analysis for abortion cases. *See* Planned Parenthood v. Casey, 505 U.S. 833, 871–74 (1992). Likewise, in the affirmative action context, while she asserted a strict scrutiny standard, she was at pains to indicate that the test would not be as "fatal" to government measures as generally understood. Adarand v. Pena, 515 U.S. 200, 237 (1995).

232. *Hamdi*, 542 U.S. at 529 (O'Connor, J., plurality opinion).

233. *Id.* at 531.

234. *Id.*

235. *Id.* at 529.

236. *Id.* at 530.

237. *Id.*

238. *Id.* at 535.

> and focus exclusively on the legality of the broader detention scheme cannot be mandated by any reasonable view of separation of powers, as this approach serves only to *condense* power into a single branch of government.[239]

The conclusion followed further given the judiciary's role as guardian of fundamental rights. As O'Connor put it, "Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake."[240] Any other conclusion would "turn our system of checks and balances on its head."[241]

All that said, the plurality's specific cash-out of these principles might have done more to fit the reality to the rhetoric. Under the plurality's analysis, the balance between the Bill of Rights and Article III on the one hand, and Article II on the other, would be mediated by *Mathews v. Eldridge*,[242] a case usually associated with the denial of government entitlement benefits.[243] In this setting, a detainee could get notice of the factual basis for the detention; could have a hearing to rebut that factual basis; and at some point could have a lawyer. These specific safeguards may not quite match the plurality's high-flying analysis. That analysis, however, matters insofar as it repudiated judicial deference when constitutional liberties are at stake. It would fall to Justice Scalia in dissent to point to a better way forward. Joined by Justice Stevens, the dissent argued that the government had only two options to get around Hamdi's habeas petition: it could charge him with treason (or some other similarly grave crime), or it could seek to have Congress suspend the habeas option.[244] No less importantly, the grounds for Scalia's position rested squarely on Founding notions of separation of powers. The Justice's stance opposing the executive in favor of liberty might at first blush appear out of character,[245] doubly so in light of his odd pairing with Justice Stevens. The anomaly may not be that much more apparent than real, but the reality of Scalia's originalist approach does not lead to uniformly statist results. Even under his narrow approach to history, the Justice has been known to uphold individual rights against executive claims.[246] The *Hamdi* dissent fits in just this discrete area. To this extent, the Justice may rightfully claim adherence to

239. *Id.* at 535–36.

240. *Id.* at 536.

241. *See id.* at 536–37.

242. *Id.* at 529.

243. Mathews v. Eldridge, 424 U.S. 319 (1976).

244. *Hamdi*, 542 U.S. at 554 (Scalia, J., dissenting).

245. Notably, Justice Scalia voted to uphold the executive's actions. *See* Rasul v. Bush, 542 U.S. 466, 488–89 (2004) (Scalia, J., dissenting); *see also* Hamdan v. Rumsfeld, 548 U.S. 577, 669–70 (2006) (Scalia, J., dissenting).

246. Justice Scalia, for example, has applied this approach when interpreting the Sixth Amendment's guarantee of a person's right to confront witnesses against him or her. *See* Giles v. California, 554 U.S. 353, 359–61 (2008). He has taken much the same approach in the Fourth Amendment context. *See* Cnty. of Riverside v. McLaughlin, 500 U.S. 44, 60–61 (Scalia, J., dissenting).

principled interpretation that trumps political inclination. Of even greater import is that, more than the plurality, this dissent provides a foundation on which to build a better constitutional analysis in the post-9/11 context.

That foundation rests first on the dissent's result. The result limits the executive's options far more severely than the *Mathews* balancing test. At the end of the day, that test as applied to Hamdi himself yielded no more than the right to notice, a hearing, and at some point, counsel. For Scalia, the Constitution's concern for basic rights commands "that Hamdi is entitled to a habeas decree requiring his release unless (1) criminal proceedings [most obviously for treason] are promptly brought, or (2) Congress has suspended the writ of habeas corpus."[247] Since neither alternative had occurred, Hamdi should have been held no longer.

Of greater significance is Scalia's reasoning. More fully than the plurality, the dissent rehabilitates the Constitution's concern for individual liberty even in time of national danger. It resurrects this historic commitment, moreover, with a near complete reliance on history. *Hamdi* gives Scalia a classic opportunity to apply his theory that the Constitution's protection of rights was, for the most part, originally understood to incorporate those protections as manifested in the common law at the time of the Founding. This idea applies with special force when attached to a particular text and with greater force still to habeas corpus since that is "the only common-law writ to be explicitly mentioned [in the Constitution.]"[248] Most of the dissent, therefore, discusses the writ's history. It conducts a 250-year excursion through English history, demonstrating how habeas became the critical check on the English monarch's attempts to incarcerate individuals outside the law.[249] It provides liberal quotations from William Blackstone demonstrating the importance of habeas, both in itself and to the greater idea of due process, on the eve of the American Revolution.[250] It also notes the importance of Blackstone and the common law tradition to the Founders.[251] Nor does Scalia stop here. He further considers the possibility that criminal charges or legislative suspension of habeas may not have been the only possibilities during times of national crisis. Starting with seventeenth-century England and eighteenth-century America, he concludes no other alternative existed.[252] With respect to the United States, the dissent moves beyond the original understanding and demonstrates that post-ratification custom maintained these initial commitments.[253]

This is not to say that Scalia's history is beyond reproach. On one hand, it may be criticized as according habeas too broad an application. As a matter of eighteenth-

247. *Hamdi*, 542 U.S. at 573 (Scalia, J., dissenting).

248. *Id*. at 558.

249. *Id*. at 554–58.

250. *Id*. at 555, 561–62.

251. *Id*. at 555, 578–79.

252. *Id*. at 563–64.

253. *Id*. at 564–72.

century common law, it is less than clear that the writ ran to persons captured or held outside the territorial realm of Great Britain, Ireland, or the monarch's dominions. If so, the application of the right outside the United States would be problematic. On the other hand, the dissent may be subjected to even greater criticism for its narrowness. Like much of Scalia's constitutional history, the *Hamdi* dissent has a distinctly wooden, law-office quality.[254] It mainly pours over English and American precedent and commentary in painstaking detail in a quest to discern the precise contours of habeas and the treason doctrine. This rigor in itself is not a bad thing. It should not, however, be to the exclusion of the larger context in which habeas developed, the possibility that the Founders' reception of these doctrines may not have been precise, or that the American understanding may (or may not) have been even broader. That said, the dissent does end with a powerful coda suggesting that the Founders' purpose was not simply to replicate common law doctrine but to do so precisely because they understood the threat to fundamental rights that times of national crises entailed:

> The Founders well understood the difficult tradeoff between safety and freedom. "Safety from external danger," Hamilton declared, "is the most powerful director of national conduct. Even the ardent love of liberty will, after a time, give way to its dictates. The violent destruction of life and property incident to war; the continual effort and alarm attendant on a state of continual danger, will compel nations the most attached to liberty, to resort for repose and security to institutions which have a tendency to destroy their civil and political rights. To be more safe, they, at length, become willing to run the risk of being less free." The Founders warned us about the risk, and equipped us with a Constitution designed to deal with it. Many think it not only inevitable but entirely proper that liberty give way to security in times of national crisis—that, at the extremes of military exigency, inter arma silent leges. Whatever the general merits of the view that war silences law or modulates its voice, that view has no place in the interpretation and application of a Constitution designed precisely to confront war and, in a manner that accords with democratic principles, to accommodate it.[255]

This final flourish should serve as a double reminder. Whatever cavils one might have, it is Justice Scalia, more than any of his colleagues, who marshals our founding history in service of a proper framework for considering the roles of the executive and judiciary in light of 9/11. Any consideration of that history indicates that a concern for judicial protection of fundamental liberty is at a minimum as important as any solicitude for the executive and national security.

Even then, the dissent has it only half-right. As this article has sought to demonstrate, subsequent history has served merely to make these founding concerns

254. *Compare* Morrison v. Olson, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting) (arguing that the 1780 Massachusetts Constitution indicated a separation of legislative, executive, and judicial powers obvious to the modern observer), *with* Flaherty, *supra* note 105, at 1768–71 (arguing that outside core meanings of those powers, that constitution as well as others showed surprising disagreement about the details of separation of powers).

255. *Hamdi,* 542 U.S. at 578–79 (Scalia, J., dissenting) (citation omitted).

greater. The executive has become infinitely greater than anything the Founders could have envisioned, especially in light of the New Deal and the emergence of the modern national security state. Beyond all of this, however, is the more recent development of globalization, of which countering terrorism is part.[256] To fully play its assigned role, the courts should not just restore the founding concern for fundamental rights to their analysis, nor simply note that the modern executive has grown so powerful that it puts pressure on any original conception of a balance among the branches. Justices and judges should also make explicit that foreign relations in the twenty-first century does not merely reveal new threats to the nation's external security but furnishes the executive with even greater means to act as an institution that has a tendency to destroy [a nation's] civil and political rights.[257] To date, the Supreme Court has done a surprisingly good job of resisting calls for deference to the executive. With a deeper understanding of the past and the present, it could do better.

VI. CONCLUSION

Over two-hundred years ago, Thomas Jefferson anticipated concern about the relevance of a constitution that outlived the generation that created it.[258] His concern could only have grown that much greater at the prospect of an eighteenth-century framework in a twenty-first-century world. To judge from the many opinions and articles grappling with its implications, globalization highlights Jefferson's concerns about an antique constitution speaking to a far different era as perhaps no other modern development could.

Yet if deference is any indication, at least separation of powers demonstrates the Constitution's vitality, especially in foreign relations. Contrary to what some formalists aver, the Constitution's founders did not work through the concept so thoroughly or precisely as to effectively freeze their applications to the circumstances of the late 1700s. Yet neither is separation of powers so general that it is merely an invitation to struggle and nothing more. Rather, text, structure, and history yield a structural approach to a separation of powers that spoke to its own day but which remains no less germane to ours. At the Founding, considerations of efficiency led to an executive far more powerful than any American predecessor, yet also one severely constrained by the imperatives of balance and joint accountability. Today globalization in its transgovernmental form cuts against executive pretensions even further. At least with regard to treaty interpretation, the phenomenon does not particularly add to the executive's traditional claims based on expertise, claims which did not go especially far in the early republic. By contrast, globalization places enormous pressure on the value of balance in particular. It follows that there is even less reason for the courts to defer to the executive now than before—and nowhere less so than in foreign relations.

256. *See supra* Part IV.

257. *Hamdi,* 542 U.S. at 578 (quoting The Federalist No. 8, at 33 (Alexander Hamilton) (G. Carey & J. McClellan eds., 2001)).

258. *See* Jefferson, *supra* note 111, at 207–08.