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## Brief Remarks on the Supreme Court's Role after 9/11: Continuing the Legal Conversation in the War on Terror

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# BRIEF REMARKS ON THE SUPREME COURT'S ROLE AFTER 9/11: CONTINUING THE LEGAL CONVERSATION IN THE WAR ON TERROR

*Anthony J. Colangelo\**

## INTRODUCTION

IN thinking about what I might say on the topic of civil liberties after 9/11, an idea that occurred to me was to give a snapshot of the Supreme Court's role in the perceived tug-of-war between national security and individual rights,<sup>1</sup> arising out of the "war on terror."<sup>2</sup> How has the Court responded to the government's positions? And in what ways has it attempted to strike the proper balance under the Constitution?

The Supreme Court decisions are long and, at points, exceedingly technical. But I think there are a couple of themes we can pull out, and in doing so, frame a discussion about how best to manage this apparent tension between government's duty to make this country safe on the one hand, and its obligation to keep this country as free as possible on the other.

Before we get to how the Court has grappled with the individual rights/national security question,<sup>3</sup> however, it is important to appreciate its con-

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1. There has been criticism of framing the issue this way. See, e.g., Ronald Dworkin, *Terror & the Attack on Civil Liberties*, N.Y. REV. OF BOOKS, Nov. 7, 2003, at 37.

2. I use this term as a convenience without entering the debate on whether "war," in either the constitutional or international legal sense, is an accurate legal description of the struggle against transnational terrorist groups generally. For an excellent critique of the terms "war on terror" and "war on terrorism," see Robert D. Sloane, *Prologue to a Voluntary War Convention*, 106 MICH. L. REV. 443, 446-48 & nn.19-22 (2007).

3. See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507, 529 (2004) ("It is beyond question that substantial interests lie on both sides of the scale in this case."); *id.* at 545 (Souter, J., concurring) ("For reasons of inescapable human nature, the branch of the Government asked to counter a serious threat is not the branch on which to rest the Nation's entire reliance in striking the balance between the will to win and the cost in liberty on the way to victory; the responsibility for security will naturally amplify the claim that security legitimately raises. A reasonable balance is more likely to be reached on the judgment of a

stitutional dimensions. The question is not simply a free-floating policy determination about what is the best balance to strike here, but also asks *to whom*—which branch, or branches, of government—does the Constitution entrust to strike it? The national security/individual rights question, in other words, exists against a background of separation of powers among the different branches of government to whom the Constitution entrusts different responsibilities: to the political branches the power to wage war to protect the nation, and to the judiciary the power to guarantee individual rights against government overreaching.

Two themes that I think emerge from the Supreme Court decisions are that: (i) the Court has rejected the broad powers the government claimed for itself to draw bright-line categories or labels that purport to cut off individual rights—what I would call “legal conversation-stoppers”; and (ii) the Court, in trying to resolve apparent tensions between individual rights and national security, has sought not to create clear, categorical substantive rules. Instead, it has adopted *methodologies* by which the national security/individual rights balance can be carefully weighed based on the particular circumstances of a particular case—methodologies that are essentially balancing tests in themselves—or what I would call “legal conversation-starters.”

## I. THE GOVERNMENT'S LEGAL CONVERSATION-STOPPERS

On this first point, what do I mean by “legal conversation-stoppers”? I mean that the government, in supporting its policies in the war on terror, has attempted to interpose some concept or label that, the government claims, is both uniquely political (as opposed to judicial) in nature and basically stops the legal conversation about constitutional rights.

Let's take *Hamdi* first. Hamdi was captured by the Northern Alliance after the U.S. invasion of Afghanistan following 9/11 and turned over to U.S. forces.<sup>4</sup> Because of his U.S. citizenship, he was eventually transferred to a military prison in the United States.<sup>5</sup> He challenged his detention through the writ of habeas corpus in the courts.<sup>6</sup> The government's argument was that it could detain Hamdi without formal charges or proceedings because it had determined he was an “enemy combatant.”<sup>7</sup> Here the label “enemy combatant” was the legal conversation-stopper. The government's position was: we alone have the power to determine who is and is not an enemy combatant, and that determination cannot be “second-guessed” by the courts.<sup>8</sup> The Supreme Court rejected this position.<sup>9</sup>

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different branch. . . .”); *id.* at 578 (Scalia, J., dissenting) (“The Founders well understood the difficult tradeoff between safety and freedom.”).

4. *Id.* at 510.

5. *Id.*

6. *Id.* at 511.

7. Brief for the Respondents at 9-10, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (No. 03-6696).

8. *Id.* at 12.

9. *Hamdi*, 542 U.S. at 532.

Instead of deferring to the government's position, the Court weighed in and held that Hamdi had some procedural right, under the Fifth Amendment's Due Process Clause, to challenge the government's classification of him as an enemy combatant and, thus, his detention based on that classification.<sup>10</sup>

The government also attempted to block the legal conversation in the recent *Boumediene* case, which involved the constitutional reach of the writ of habeas corpus to non-citizens detained at Guantánamo Bay, Cuba.<sup>11</sup> Here the legal conversation-stopper was the concept of "sovereignty." The government argued that because the United States does not have sovereignty over Guantánamo, habeas corpus does not constitutionally extend there for non-citizens.<sup>12</sup> And how, you may ask, do we tell when U.S. sovereignty exists? Well, the government said, it exists when we say it does.

In fact, the government argued that the question of sovereignty is what's called a "political question"—that is to say, a question to be answered completely by the political branches, and their answer is not subject to judicial review.<sup>13</sup> In turn, "sovereignty" has no legal content other than political-branch fiat. And because a political branch instrument—the lease between the United States and Cuba relating to Guantánamo—says very clearly that while the United States has complete jurisdiction and control over the territory, "Cuba has . . . sovereignty,"<sup>14</sup> that, in itself, ends the legal conversation about the geographic scope of habeas corpus. As in *Hamdi*, the Court in *Boumediene* rejected the conversation-stopper, weighed directly in on the question of individual rights in the war on terror, and announced a set of judicially-enforceable criteria—namely, a "functional approach" to the extraterritorial scope of the writ—that brought within its coverage the petitioners in *Boumediene*.<sup>15</sup>

## II. THE COURT'S LEGAL CONVERSATION-STARTERS

Yet in these two cases the Court really only just began the relevant legal conversations. The Court's solution in both *Hamdi* and *Boumediene* to the question of how best to strike the national security/individual rights balance was not to give a firm substantive rule of decision but rather to propose a *methodology* for courts to use in resolving the particular cases before them. The methodology would then guide lower courts to fashion decisions on a case-by-case basis and promote rulings narrowly tailored to the specific facts of the case at hand. As Cass Sunstein has explained,

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10. *Id.* at 528-29.

11. See *Boumediene v. Bush*, 128 S. Ct. 2229, 2247 (2008).

12. Brief for the Respondents at 33-36, *Boumediene*, 128 S. Ct. 2229 (Nos. 06-1195, 06-1196).

13. *Id.* at 35 (citing *Jones v. United States*, 137 U.S. 202, 212 (1890) ("Who is the sovereign, *de jure* or *de facto*, of a territory, is not a judicial, but a political question.")).

14. Lease of Lands for Coaling and Naval Stations, U.S.-Cuba, art. III, Feb. 23, 1903, T.S. No. 418.

15. *Boumediene*, 128 S. Ct. at 2258.

such “minimalist,” narrow, fact-specific rulings have been prominent during wartime, and are no less so in the contemporary war on terror.<sup>16</sup>

In *Hamdi*, while a plurality of the Court held that Hamdi had a procedural due process right to challenge his classification as an enemy combatant,<sup>17</sup> the contours of that right depended on the particular factual circumstances of his case. The plurality used the *Mathews* balancing test, which balances the private interest affected by government action against the government’s interest, including the function involved and the burdens the government would face in providing greater process, and then takes these and evaluates them in light of the risk of error in existing procedures plus the probable value of additional procedures.<sup>18</sup> As the mere articulation of this test reveals, it is going to be an extremely fact-sensitive inquiry. And indeed, based on the facts of *Hamdi*, the plurality opinion observed that while he had *some* due process right, that right did not guarantee the full-blown procedures that attend ordinary criminal trials but something less, such that the government might be able to introduce hearsay evidence against him and might even have a presumption in its favor.<sup>19</sup>

In *Boumediene*, the Court similarly used a very fact-sensitive test to measure the geographic scope of habeas corpus. Just as it did not accept the government’s bright-line sovereignty test, it did not say that habeas extends to all persons in U.S. custody around the globe.<sup>20</sup> Rather, the majority set forth a “functional approach” to the scope of the writ which evaluates the status of the persons detained; the process through which that status determination was made; the nature of the locations where apprehension and detention occur; and practical obstacles to extending the writ there.<sup>21</sup> This too allows for fact-sensitive evaluation of the particular circumstances in a particular case to resolve national security/individual rights tensions.

Now neither of these methodologies necessarily precludes the government’s arguments that there might be cases unqualified for further judicial monitoring<sup>22</sup>—cases where the conversation might reach a very quick end because the Court defers to the political branches. *Hamdi* and *Boumediene* certainly appear to leave open the possibility of the Court accepting a conversation-stopper in some circumstances when striking the national security/individual rights balance. But such acceptance would occur only *after* the judiciary has evaluated those circumstances under the relevant legal standards and has itself deemed the conversation at an end.

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16. See Cass R. Sunstein, *National Security, Liberty, and the D.C. Circuit*, 73 GEO. WASH. L. REV. 693, 693 (2005); Cass R. Sunstein, *Minimalism at War*, 2004 SUP. CT. REV. 47, 51 [hereinafter Sunstein, *Minimalism at War*].

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

18. *Id.* at 529 (2004) (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

19. *Id.* at 533-34.

20. *Boumediene*, 128 S. Ct. at 2262.

21. *Id.* at 2259 (citing *Johnson v. Eisentrager*, 339 U.S. 763, 777 (1950)).

22. I am indebted to Jeff Kahn for pointing this out.

What makes the conversations in such cases legal, rather than political, may simply boil down to opportunity for judicial participation.

For instance, *Hamdi* left open the possibility that the procedures it suggested could lead to a judicial stamp of approval on the government's "enemy combatant" label in a given case, effectively ending further conversation about the status, and the ability to challenge that status, of those detained.<sup>23</sup> Similarly, as Justice Scalia pointed out in his dissent in *Boumediene*, there invariably will be some situations of extraterritorial detention that don't meet the criteria necessary for constitutional access to the writ of habeas corpus under the *Boumediene* majority's functional approach.<sup>24</sup> To be sure, according to the *Boumediene* majority, the functional approach is consistent with *Johnson v. Eisentrager*, a World War II-era precedent where the Court denied constitutional habeas rights to German soldiers detained in Allied-occupied Germany.<sup>25</sup> Of course, once the judiciary concludes that a situation of extraterritorial detention falls outside the constitutional scope of the writ, that conclusion can be tantamount to ending further legal conversation about the rights of those detained. Hence, the result may well be the same as that prescribed by the government's conversation-stopper argument. The difference is that the judiciary participates in making that call, not just the political branches. Courts would apply the relevant legal criteria and conclude that the circumstances warrant a degree of deference to the political branches so large that further judicial monitoring would be inappropriate.

Perhaps this looks like a variation on the political question doctrine, under which the judiciary abstains altogether if it determines the question at issue is political.<sup>26</sup> Though here the initial determination appears more rigorous and fact-intensive, and seems subject to broader, more searching judicially-enforceable criteria. Put another way, even when the judiciary ultimately defers to the political branches, an initial conversation must take place between the political branches and the courts—as opposed to, for instance, the executive just talking into the mirror.

Finally, it may be worth noting that while it's surely conceivable that the Court could defer completely to the government's positions under the methodologies discussed above, it has not. That is, it has not yet opted to stop the conversation. In fact, the Court has gone out of its way to keep the conversation going. The irony here is that judicial review is itself often criticized for being a sort of conversation-stopper. By constitutionalizing what would otherwise be political judgments, the Court arguably stops the political conversation over controversial subjects. Yet here, we can see the opposite dynamic occurring: by guarding the constitutional dimensions of the war on terror from political conversation-stoppers, the

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23. *Hamdi*, 542 U.S. at 538-39.

24. *Boumediene*, 128 S. Ct. at 2302 (Scalia, J., dissenting).

25. *Id.* at 2258 (citing *Johnson v. Eisentrager*, 339 U.S. 763 (1950)).

26. *See Baker v. Carr*, 369 U.S. 186, 217 (1962) (noting that the political question doctrine is "essentially a function of the separation of powers" and providing guidance for determining nonjusticiability).

Court actually facilitates ongoing public deliberation over the national security/individual rights balance.<sup>27</sup>

### III. IMPLICATIONS AND QUESTIONS

The conversations the Court began about the contours of individual rights in the war on terror remain anchored in separation-of-powers concerns. As a result, they still must be sketched out in more detail, and given color and texture, by arguments about institutional competence and appropriate deference to coordinate branches of government.<sup>28</sup> Yet all of this raises important predicate questions about where and how those competence arguments are made and resolved. In short, before we can get to the second-order questions of what precisely habeas procedures for non-citizens abroad in the war on terror should look like, or what precisely constitutes a location where habeas constitutionally extends in favor of such persons, we must confront first-order questions about who should be making those calls. And here, the Supreme Court has done something quite interesting, perhaps unsettling, and, just maybe, wise. It has delegated the task to the lower courts.

Giving lower courts fact-specific methodologies to iron out and apply on a case-by-case basis raises a host of intriguing separation of powers issues. Is the Court abdicating its role by refusing to give more guidance? Is it leaving space to encourage Congress and the President to act within established limits? Or is it taking more power for the courts, giving lower courts the wide-ranging task of making assessments over liberty/security balances?<sup>29</sup>

Whatever else it may be doing, the Court certainly seems to have hit upon a way to keep the conversation going. Announcing a set of firm substantive rules from on high could prove both troublingly under- and over-inclusive.<sup>30</sup> Instead of having to craft a rule that could distinguish and prescribe cleanly on its own the procedures appropriate for the “enemy combatant” captured in the field of battle firing at U.S. soldiers, and the “enemy combatant” geographically distant from any battlefield and turned over to U.S. forces by his local law enforcement agency for a bounty, the Court can simply let lower courts hash out the appropriate procedures based on the facts of particular cases. The same goes for figur-

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27. I am indebted to Evan Criddle for this insight.

28. Indeed, the Court has also been keen to insist upon congressional participation when deprivations of liberty are at stake in the war on terror. *See Hamdan v. Rumsfeld*, 548 U.S. 557, 636 (2006) (Breyer, J., concurring) (“Congress has denied the President the legislative authority to create military commissions of the kind at issue here. Nothing prevents the President from returning to Congress to seek the authority he believes necessary.”).

29. I am indebted to Harlan Cohen for raising these questions.

30. *See also* Sunstein, *Minimalism at War*, *supra* note 16, at 106 (“[S]uppose that the law is not clear and that a deep or wide ruling might be confounded by unanticipated circumstances. If so, there is every reason for federal judges to issue shallow and narrow opinions, refusing to freeze the future and allowing decisions to turn on particular circumstances.”).

ing out when habeas applies abroad: let the lower courts juggle myriad considerations like status, location of capture and detention, and vague practical obstacles to extending the writ to a particular location, and then reach appropriate results on the peculiar combination of facts presented. Perhaps at some point the rulings and rationales of the various cases will organically congeal into a workable, coherent, and sufficiently predictable framework for confronting the essential question of individual rights in the war on terror. But for the time being, the Court may be asking that we satisfy ourselves with flexible methodologies designed to help achieve just results in particular cases.

There are, however, costs. For individuals, this jurisprudential approach has led to a highly objectionable delay of meaningful judicial review on the merits. And for the government, it has led to shifting and unpredictable constitutional parameters within which to wage a serious fight against a dangerous enemy.

### CONCLUSION

The lesson, to my mind, in the Court's allergy to clear substantive rules of decision and its embrace, instead, of multi-variant balancing tests capable of responding to the largely unprecedented and ever-changing factual reality that defines the current fight against transnational terrorism, is that many of the bright-line assumptions undergirding our traditional substantive rules have deteriorated. It would be nothing new to say that traditional concepts of war, territoriality and sovereignty have become fuzzier and more fluid. Consequently, traditional substantive rules built on those concepts have also become fuzzier and more fluid.

There has been heated talk about whether the war against terror is better conceptualized as straight warfare, to be dealt with under a military paradigm,<sup>31</sup> or whether it is better conceptualized as a criminal law enforcement problem—albeit of far more expansive scope than traditional initiatives—but nonetheless to be dealt with primarily under a criminal law paradigm.<sup>32</sup> Others have called for a “new paradigm,” fitted to the new challenges we face.<sup>33</sup> What we may be seeing from the Court is a push in that direction: not the minting of a ready-made new paradigm setting out a clean and definite *ex ante* framework of substantive rules; but rather the messier, yet certainly more responsive, analytical apparatus with which to begin the project—to start the legal conversation.

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31. For a helpful discussion of this debate and its implications, see Sloane, *supra* note 2, at 446-50.

32. *See id.*

33. *See id.*





# Articles

