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CLEAR STATEMENT RULES AND EXECUTIVE WAR POWERS

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The scope of the President's independent war powers is notoriously unclear, and courts are understandably reluctant to issue constitutional rulings that might deprive the federal government as a whole of the flexibility needed to respond to crises. As a result, courts often look for signs that Congress has either supported or opposed the President's actions and rest their decisions on statutory grounds. This is essentially the approach outlined by Justice Jackson in his concurrence in *Youngstown*.¹

For the most part, the Supreme Court has also followed this approach in deciding executive power issues relating to the war on terror. In *Hamdi v. Rumsfeld*, for example, Justice O'Connor based her plurality decision, which allowed for military detention of a U.S. citizen captured in Afghanistan, on Congress's September 18, 2001, Authorization for Use of Military Force (AUMF).² Similarly, in *Hamdan v. Rumsfeld*, the Court grounded its disallowance of the Bush Administration's military commission system on what it found to be congressionally imposed restrictions.³

The Court's decision in *Boumediene v. Bush*⁴ might seem an aberration in this regard, but it is not. Although the Court in *Boumediene* did rely on the Constitution in holding that the detainees at Guantanamo have a right to seek habeas corpus review in U.S. courts, it did not impose any specific restrictions on the executive's detention, treatment, or trial of the detain-

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1. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-37 (1952) (Jackson, J., concurring).

2. See 542 U.S. 507, 517 (2004) (plurality); Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 (2006)).

3. See 548 U.S. 557, 622-25, 627 (2006).

4. 128 S. Ct. 2229 (2008).

ees.⁵ In other words, *Boumediene* was more about preserving a role for the courts than about prohibiting the executive from exercising statutorily conferred authority.

Statutory authority was also a central issue in the much-discussed *Al-Marri* case in the Fourth Circuit.⁶ Although the Supreme Court vacated the Fourth Circuit's decision as moot, the decision still provides an instructive example. *Al-Marri* involved a Qatari citizen, Ali Saleh Kahlah al-Marri, who came to the United States on September 10, 2001, and was later arrested and charged with various counts of fraud.⁷ Shortly before al-Marri's trial, President Bush designated him an enemy combatant, and he was moved to military custody.⁸ As justification for this action, the Bush Administration alleged that al-Marri was an al Qaeda sleeper agent who had come to the United States to await instructions to carry out further attacks after September 11.⁹

In a closely divided en banc ruling, the Fourth Circuit held that the executive had the authority to detain al-Marri but that it needed to provide him with additional process by which he could challenge his designation as an enemy combatant.¹⁰ The Supreme Court granted review of the decision in December 2008.¹¹ When briefing the case for the Court, al-Marri focused primarily on statutory arguments, saving a fallback constitutional argument for the end of his brief.¹²

At the core of al-Marri's argument was the contention that, to find congressional authorization for the military detention, courts should insist on a clear statement that Congress supported the executive's action.¹³ Although the Bush Administration argued that the AUMF gave it statutory authority to detain al-Marri, the AUMF does not mention detention, let alone deten-

5. See *id.* at 2277 ("It bears repeating that our opinion does not address the content of the law that governs petitioners' detention.").

6. *Al-Marri v. Pucciarelli*, 534 F.3d 213 (4th Cir. 2008) (en banc), *vacated as moot sub nom.* *Al-Marri v. Spagone*, 129 S. Ct. 1545 (2009).

7. *Al-Marri*, 534 F.3d at 219 (Motz, J., concurring).

8. *Id.*

9. *Id.* at 220.

10. See *id.* at 216 (per curiam).

11. *Al-Marri v. Pucciarelli*, 129 S. Ct. 680 (2008).

12. See Brief for Petitioner, *Al-Marri v. Spagone*, 129 S. Ct. 1545 (2009) (No. 08-368), available at http://brennan.3cdn.net/b550c7e58f8f54a929_xum6iitq49.pdf.

13. See *id.* at 15.

tion of someone apprehended in the United States.¹⁴ As a result, al-Marri argued that the requisite clear statement was lacking.

The Bush Administration responded to this argument with the following syllogism: Because the plurality in *Hamdi* construed the AUMF to authorize the military detention of enemy forces as a fundamental incident of waging war, and because al-Marri was alleged to be an agent of al Qaeda, which was one of the enemy groups encompassed by the AUMF, the AUMF authorized al-Marri's detention.¹⁵ Based on this reasoning, the Administration contended that no clearer statement of authorization was needed.¹⁶

Although the Obama Administration rendered this case moot by deciding to try al-Marri in a regular criminal court,¹⁷ the clear statement issue posed by the case is a recurring one and thus worth considering. Indeed, it has already come up in other areas in the war on terror—for example, with respect to whether the AUMF authorizes warrantless electronic surveillance of communications, going into and out of the United States, with alleged members of al Qaeda.¹⁸ Moreover, to an even greater extent than the Bush Administration, the Obama Administration has grounded its authority in the war on terror on purported statutory authorization.¹⁹

There have been both liberal and conservative claims about the potential role of a clear statement requirement in the context of executive war powers. On the liberal side, some com-

14. Compare Brief for the Respondent in Opposition at 27–28, *Al-Marri*, 129 S. Ct. 680 (No. 08-368), available at <http://www.usdoj.gov/osg/briefs/2008/0responses/2008-0368.resp.pdf>, with Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 (2006)).

15. See Brief for the Respondent in Opposition, *supra* note 14, at 27–29.

16. See *id.* at 26–27 (distinguishing cases that applied a clear statement rule).

17. See *U.S. Supreme Court rejects terror detainee's challenge*, N.Y. TIMES, Mar. 6, 2009, <http://www.nytimes.com/2009/03/06/world/americas/06iht-06detain.20657950.html>.

18. See CURTIS A. BRADLEY & JACK L. GOLDSMITH, FOREIGN RELATIONS LAW: CASES AND MATERIALS 373–80 (3d ed. 2009) (excerpting arguments for and against the executive's legal authority to engage in warrantless electronic surveillance).

19. See, e.g., Respondents' Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantanamo Bay, *In re Guantanamo Bay Detainee Litigation*, Misc. No. 08-442 (D.D.C. Mar. 13, 2009), available at <http://www.usdoj.gov/opa/documents/memo-re-det-auth.pdf>.

mentators such as Cass Sunstein²⁰ and judges such as Justice Souter have contended, in effect, that a clear statement is necessary for congressional authorization of executive wartime action whenever liberty interests are at stake.²¹ There are several problems with this approach.

As an initial matter, executive wartime actions inherently affect liberty. People are bombed and shot and captured. These actions necessarily have substantial effects on liberty, and yet there is often no expectation, by either the courts or the political branches, that specific congressional authorization is required. A clear statement approach premised merely on liberty interests would therefore be unduly broad. While one could attempt to avoid this problem by referring only to “constitutionally significant liberty interests,” this approach simply raises the difficult constitutional issues that a statutory clear statement approach seeks to avoid.

In any event, even if some liberty interests do seem to support a clear statement requirement, considerations of executive authority might well push in the opposite direction, in favor of a broad construction of congressional delegations. Indeed, a number of Supreme Court decisions suggest that even when liberty interests are at stake, congressional delegations of authority to the executive are construed broadly when relating to areas of independent executive authority, including the Commander-in-Chief power.²² A liberty approach offers little guidance for resolving these competing constitutional claims.

A general liberty approach also does not line up well with wartime precedent and practice. In its 1942 decision *Ex parte Quirin*, which involved Nazi saboteurs tried by a military commission, the Supreme Court did not require a clear statement of congressional authorization.²³ The Court made this determination even though the saboteurs were deprived of liberty, and

20. Cass R. Sunstein, *Administrative Law Goes to War*, 118 HARV. L. REV. 2663, 2669–71 (2005); Cass R. Sunstein, *Clear Statement Principles and National Security: Hamdan and Beyond*, 2006 SUP. CT. REV. 1, 46.

21. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 543–45 (2004) (Souter, J., concurring in part, dissenting in part, and concurring in the judgment).

22. See, e.g., *Loving v. United States*, 517 U.S. 748, 772 (1996); *Haig v. Agee*, 453 U.S. 280, 291–92 (1981).

23. See *Ex parte Quirin*, 317 U.S. 1 (1942).

even though at least one of them was a U.S. citizen.²⁴ Similarly, in *Hamdi*, the Court did not require that the AUMF specifically mention a power to detain, even though liberty interests were again obviously at stake.²⁵ Indeed, dozens of U.S. citizens were held uncontroversially in the United States as POWs during World War II after being captured fighting for Germany and Italy. There was no clear statement of authorization for their detention, just a general declaration of war and authorization of force.²⁶ And of course, non-U.S. citizens often have been held as prisoners in this way, both inside and outside the United States, despite the absence of specific detention legislation.

On the conservative side of the debate, some commentators such as Professors Eric Posner and Adrian Vermeule and judges such as Justice Thomas have argued that courts should simply defer to executive determinations that the benefits of wartime action outweigh the costs to liberty, at least absent a clear indication of congressional disapproval.²⁷ In addition to allowing for fewer checks and balances than many people believe are necessary in this context, this deferential approach also does not fit the precedent well. It is difficult for advocates of the deferential approach to distinguish, for example, the *Youngstown* decision during the Korean War,²⁸ the Pentagon Papers decision during the Vietnam War,²⁹ and the *Hamdan* decision during the war on terror,³⁰ none of which deferred to the executive's balancing.

In sum, the clear statement issue is more complicated than either the liberal or conservative approaches suggest. Liberty interests by themselves are not dispositive, but neither is deference to the executive. Precedent and practice suggest instead

24. *Id.* at 20–22, 29–31.

25. *Hamdi*, 542 U.S. at 518 (plurality).

26. See Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2106–07 n.271 (2005); see also *In re Territo*, 156 F.2d 142, 144 (9th Cir. 1946) (“[I]t is immaterial to the legality of petitioner’s detention as a prisoner of war by American military authorities whether petitioner is or is not a citizen of the United States of America.”).

27. See *Hamdi*, 542 U.S. at 580–84 (Thomas, J., dissenting); ERIC A. POSNER & ADRIAN VERMEULE, *TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS* 15–18 (2007).

28. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

29. *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971).

30. *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

that courts discern congressional approval or disapproval based on a number of contextual considerations. These considerations include whether Congress has attempted to regulate in the area, the consistency of the executive action with historical practice, the extent to which the executive action relates to independent executive authority, and the degree to which unilateral executive action appears to be functionally necessary.

A variety of historical episodes illustrate the relevance of these contextual factors. For example, the Supreme Court held during the Civil War that President Lincoln acted lawfully in ordering a naval blockade of Southern ports after the onset of hostilities.³¹ In that case, Congress had not attempted to regulate this issue prior to Lincoln's action and later approved the action retroactively, a naval blockade was part of what was historically done in wartime, Lincoln's action was a strategic military decision and thus related to the Commander-in-Chief power, and unilateral executive action seemed functionally necessary given that the threat to the Union was so significant.³² Similarly, it seems unlikely anyone would claim that President Roosevelt needed a clear statement of authorization to detain hundreds of thousands of POWs during WWII, even though doing so affected their liberty. As in the case of Lincoln's naval blockade, Congress had not attempted to regulate the specific issue, the detention was consistent with historical practice in wartime, it involved interactions with the enemy, and it seemed functionally necessary.

In essence, the same reasoning applies to the decision in *Hamdi v. Rumsfeld* for individuals who, like Hamdi, were captured during fighting in Afghanistan. Importantly, the plurality in *Hamdi* made clear that its decision rested on the contextual factors of the case.³³ In particular, the plurality noted that the government was seeking to detain "an individual who, it alleges, was 'part of or supporting forces hostile to the United States or coalition partners' in Afghanistan and who 'engaged in an armed conflict against the United States' there," and the plurality made clear that it was answering "only the narrow

31. *The Prize Cases*, 67 U.S. (2 Black) 635, 662–65 (1863).

32. *See id.*

33. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 516 (2004) (plurality).

question before us: whether the detention of citizens falling within that definition is authorized.”³⁴

One could argue that Congress had in fact regulated the issue in *Hamdi* with the 1971 Non-Detention Act, a one-sentence statute that provides: “No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.”³⁵ But it is far from clear that the statute applies to military detention of enemy combatants, and its legislative history suggests that it was instead designed to avoid roundups of civilians as had occurred with the internment of Japanese-Americans in World War II.³⁶ As noted above, a number of U.S. citizens were held as POWs in the United States during World War II after having fought for Germany or Italy, and this practice was uncontroversial, so it seems unlikely that Congress was *sub silentio* outlawing it in the 1971 Non-Detention Act. In any event, Congress certainly had not regulated this issue in any detail, but had simply indicated that a statute was needed, a requirement the AUMF arguably satisfied.

The situation in *Hamdan*, the military commissions case, was more difficult for the executive. Although it involved interaction with the enemy, Congress had regulated in the area, or at least so thought the Supreme Court.³⁷ More importantly, the Administration was attempting to use a military trial process for nontraditional combatants, so the historical practice was less solid. The case for functional necessity was also relatively weak because no one had actually been tried in the commissions by the time of the case and others in similar circumstances were being tried in regular courts.

The warrantless surveillance issue is similarly problematic for the executive, because Congress had extensively regulated in the area with the 1978 Foreign Intelligence Surveillance Act (FISA) and had expressly envisioned in that statute the situation of wartime. The functional necessity was also unclear, given that the FISA court almost always grants requested warrants, and the Administration had already sought and obtained

34. See *id.*

35. 18 U.S.C. § 4001(a) (2006).

36. See Bradley & Goldsmith, *supra* note 26, at 2106–07 n.271; Curtis A. Bradley & Jack L. Goldsmith, *The War on Terrorism: International Law, Clear Statement Requirements, and Constitutional Design*, 118 HARV. L. REV. 2683, 2696 (2005).

37. See *Hamdan v. Rumsfeld*, 548 U.S. 557, 579–80 (2006).

changes to FISA after September 11 that made the warrant process even less restrictive.³⁸

What do these considerations suggest about *Al-Marri*, assuming it had been decided by the Supreme Court? Although a close call, the imposition of a clear statement requirement appears to be justified in that context, though not precisely for the reasons advanced by the petitioner.

The petitioner's brief and an amicus brief filed in support of the petitioner argued for a clear statement requirement for any military detention of someone who is a lawful resident in the United States.³⁹ They framed the requirement this way to avoid the *Quirin* and *Hamdi* precedents, which did not involve residents of the United States, while at the same time going beyond the famous Civil War-era decision *Ex parte Milligan*,⁴⁰ which, while limiting the military's detention and trial authority, involved only U.S. citizens. This framing, however, is rather artificial. It is not clear why the treatment of enemy agents must vary depending on whether they sneak into the United States, as in *Quirin*, or come here under false pretext, as is alleged for al-Marri. Indeed, the petitioner's argument would mean there would have been no power to detain militarily the September 11 hijackers themselves, if one of them had survived, because they were residents of the United States. Nor is it clear why the liberty interests are higher in the *Al-Marri* case than in *Hamdi*, which involved the detention of a U.S. citizen. In addition, some of the clear statement precedent that al-Marri relied upon, such as *Ex parte Endo*,⁴¹ involved concededly loyal residents, not alleged enemy agents. *Milligan* is closer to al-Marri's situation, but there Congress was found to have specifically regulated the detentions. It was also not clear that the petitioners in *Milligan* were really acting under the direction

38. See Curtis Bradley et al., *On NSA Spying: A Letter to Congress*, N.Y. REV. BOOKS, Feb. 9, 2006, at 42, available at <http://www.nybooks.com/articles/18650>.

39. See Brief for Petitioner, *supra* note 12, at 19; Brief of Constitutional Law Scholars in Support of Petitioner at 14, *Al-Marri v. Spagone*, 129 S. Ct. 1545 (2009) (No. 08-368), available at http://brennan.3cdn.net/bf07441f1a77dca0a3_vnm6bxtv2.pdf.

40. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866).

41. 323 U.S. 283, 294 (1944).

and control of the Confederacy,⁴² whereas it is alleged that al-Marri was acting as an agent of al Qaeda.⁴³

Nevertheless, the contextual considerations outlined above support a requirement of more express congressional authorization for the *Al-Marri* situation, for several reasons. First, historical practice is less helpful to the executive in the *Al-Marri* context than in *Hamdi*: When one moves away from individuals connected to the fighting in Afghanistan, one is moving towards something more like indefinite detention, not just detention during active combat. To then apply nontraditional detention authority to individuals residing in U.S. territory is an additional step that further suggests the desirability of multi-branch deliberation.

Second, considerations of functional necessity also seem low here: al-Marri was already going to be tried in civilian court, and he was a class of one in terms of so-called enemy combatants currently detained in the United States.⁴⁴ Moreover, this class has had a total of only three people during the war on terror, one of whom (Hamdi) was released and the other of whom (Padilla) was eventually tried in a regular civilian court. With these facts, it is far from clear that a domestic military detention authority was necessary in order to fight the war on terror effectively.

Third, there is also a reasonable argument that Congress had already attempted to regulate the al-Marri situation in the Patriot Act because the Act contains provisions that allow for detention of alien residents suspected of being connected with terrorism, while also disallowing indefinite detention.⁴⁵ Fourth, the amount of time that had elapsed since the enactment of the AUMF is also relevant, both because a variety of issues have arisen that probably were not anticipated by Congress and be-

42. See Curtis A. Bradley, *The Story of Ex parte Milligan: Military Trials, Enemy Combatants, and Congressional Authorization*, in *PRESIDENTIAL POWER STORIES* 93, 123–24 (Christopher H. Schroeder & Curtis A. Bradley eds., 2009).

43. See John Schwartz, *Accused Qaeda Sleeper Agent in Court*, *N.Y. TIMES*, Mar. 23, 2009, at A16.

44. See David Johnston & Neil A. Lewis, *U.S. Will Give Qaeda Suspect a Civilian Trial*, *N.Y. TIMES*, Feb. 27, 2009, at A1 (noting that, when he was moved to civilian custody, al-Marri was “the only enemy combatant to be held on American soil”).

45. See *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001*, Pub. L. No. 107-56, § 412(a), 115 Stat. 272, 351 (codified at 8 U.S.C. § 1226a (2006)).

cause the executive branch has had plenty of time to work with Congress to obtain more specific legislation.

Finally, although the executive could argue that the detention relates to a Commander-in-Chief power—interacting with the enemy—and that Congress had identified al Qaeda as the enemy, the enemy class is much more uncertain here than in traditional wars. The al Qaeda organization is a decentralized and amorphous collection of groups with no clear chain of command, and affiliation with that organization is both non-obvious and varies in extent from individual to individual.

Pushing this issue to Congress would likely produce more guidance for the courts about how to define the enemy class, a difficult issue once one moves beyond a traditional battlefield context. To put it differently, there is a good case here for a “democracy-forcing” construction of the AUMF, similar to what the Court did in *Hamdan*.⁴⁶

What this analysis ultimately suggests is that deciding issues of executive war powers requires contextual and pragmatic judgment rather than resort to abstract classifications, whether they are liberal or conservative in character, something that Justice Jackson recognized in his justifiably famous *Youngstown* concurrence. Jackson’s concurrence is now so celebrated that it is becoming almost *de rigueur* among legal academics to criticize it, and some aspects of his three-tiered framework are certainly vulnerable to criticism.⁴⁷ Nevertheless, as a starting point for the application of judicial review in cases involving challenges to executive war powers, it still has much to commend it.

46. See Curtis A. Bradley, *The Military Commissions Act, Habeas Corpus, and the Geneva Conventions*, 101 AM. J. INT’L L. 322, 322 (2007).

47. See, e.g., Edward T. Swaine, *The Political Economy of Youngstown*, 82 S. CAL. L. REV. (forthcoming 2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1474320.