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The Supreme Court's Post-9/11 War-on-Terror Jurisprudence: Special Considerations, Threshold Determinations, and Anticipatory Review

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NOTES

The Supreme Court's Post-9/11 War-on-Terror Jurisprudence

SPECIAL CONSIDERATIONS, THRESHOLD DETERMINATIONS, AND ANTICIPATORY REVIEW

INTRODUCTION

Should a federal court ever overlook traditional jurisdictional requirements in determining whether to review on the merits a federal habeas challenge waged by an alleged enemy combatant detained in the midst of the so-called war on terror? What if extraordinary, exceptional, or unique circumstances surround such a detainee challenge?[1] What if the challenge epitomizes a profound debate between personal liberty and national security or otherwise invokes a significant public interest?[2] What if an executive actor has overseen the military detention of an alleged combatant (perhaps an American citizen) to an unprecedented extent and has even caused the removal of this person from the civilian justice system?[3] What if this detainee denied all wrongdoing but has been held without access to counsel or meaningful judicial access for two years?[4] Three years? Four years? What if the detainee has been held not in the United States itself, but in a territory controlled by the United States for all practical

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[1] *See infra* Part I.A-B. Within this Note, the term "detainee challenge" refers generally to a petition for a writ of habeas corpus raised by or on behalf of a person or group of persons detained militarily by the federal government.

[2] *See infra* Part I.A-B; *see also infra* Part I.D.

[3] *See infra* Part I.A.

[4] *See infra* Part I.B; *see also infra* Part I.D.

purposes?[5] Are any of these scenarios special enough to justify immediate review of the corresponding claims?

A closely related issue is whether a court should review on the merits a detainee challenge, or elements therein, that is based on reasonably foreseeable but only partially developed circumstances.[6] One possible future scenario is perpetual (that is, effectively lifelong) detention given that the war on terror has no foreseeable endpoint and could potentially span multiple generations.[7] Another, more immediate, prospect relates to the trial of detainees by Executive-established military commissions that may implement illegal procedures or that are minimally subject to judicial review by Article III (that is, civilian) courts.[8] The question thus becomes whether courts should expedite review to accommodate these hypothetical (though anticipatable) controversies due to the major personal liberties and constitutional issues at stake.[9] Or, should courts instead take more of a wait-and-see approach to delay addressing arguably novel legal issues or unprecedented factual scenarios until they are concretely presented?[10]

This Note will examine these two groups of questions as they pertain to the four war-on-terror detainee challenges heard by the U.S. Supreme Court in the five years following September 11, 2001. These cases are *Rumsfeld v. Padilla*,[11] *Rasul v. Bush*,[12] *Hamdi v. Rumsfeld*,[13] and *Hamdan v. Rumsfeld*.[14] *Padilla* (in particular) and *Hamdi* (to a more

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[5] *See infra* Part I.B.

[6] *See infra* Part I.C-D.

[7] *See infra* Part I.C; *infra* note 195 and accompanying text.

[8] *See infra* Part I.D.

[9] *See infra* Part I.D; *see also infra* Part I.A, C.

[10] *See infra* Part I.C-D.

[11] 542 U.S. 426 (2004).

[12] 542 U.S. 466 (2004).

[13] 542 U.S. 507 (2004). Note that *Padilla*, *Rasul*, and *Hamdi* were all decided on June 28, 2004. In light of this, it may be appropriate to refer to them as sister cases, even if they often do not see eye to eye. This Note will chronologically order and refer to them per their placements in the Supreme Court Reporter. This is mostly a matter of convenience, for there does not appear to be a necessary, definitive ordering of these cases for purposes of the Supreme Court's post-9/11, war-on-terror jurisprudence. But the fact that these cases were decided on the same day underscores their inconsistencies as a group in that these inconsistencies cannot be explained away by virtue of being decided at different times.

[14] 126 S. Ct. 2749 (2006). It appears that *Boumediene v. Bush* will be the fifth case in this line. *See infra* note 104. Oral arguments have started in this case, but a decision may not be handed down for some time. *See id.*

This Note acknowledges from the outset that there are far too many issues related to these cases (and, more generally, the legal implications of the war on terror)

qualified extent) advocate for judicial restraint in response to questions such as those posed above, thereby supporting resolution of threshold issues in accordance with narrow, readily accessible criteria.[15] By contrast, *Rasul* and *Hamdan*, at least implicitly, prove more willing to consider less tangible factors, including the relative equities of a habeas challenge, in determining whether to review such cases on their merits.[16] This Note will seek to show that these discrepancies contribute to an unreliable and unstable line of precedent in the Court's post-9/11 war-on-terror jurisprudence and that this effect exacerbates the political and judicial contention already consuming the subject.

This Note will further criticize the Court's emerging tendency,[17] as evidenced by *Rasul* and *Hamdan*, to incorporate indirectly the merits of a detainee challenge, including any arguably unusual underlying or surrounding circumstances, within a jurisdictional or other threshold determination.[18] More specifically, in these cases, the Court invoked the purportedly extraordinary nature of the respective detainee challenges in order to reinforce, justify, or defend purportedly strict, formal threshold determinations prerequisite to a review on the merits.[19] The merits of these cases, as such, appeared to creep into preliminary determinations of whether to review these very same merits, but without any clear or meaningful delineation. In addition to this conflation of substantive attributes and threshold determinations, the structure and content of these opinions makes it difficult to determine whether certain, seemingly merits-based conclusions functioned only as dicta (that is, additional non-binding points) or were effectively collapsed into the primary threshold

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for this Note to discuss in depth or even address at all. Not surprisingly, there already is a substantial body of "war-on-terror" scholarship, entailing a wide variety of approaches and opinions. Alas, due to practical constraints, this Note will only be able to cite a small slice of this literature.

[15] *See infra* Parts II.A, III.A. For an explanation of the parenthetical qualification regarding *Hamdi*, see *infra* note 74 and accompanying text.

[16] *See infra* Parts II.B.2-3, III.B.2.a-b.

[17] But, at the same time, this Note still recognizes the overall instability of these detainee cases as a group.

[18] *See infra* Parts II.B, III.B.

[19] *See infra* Parts II.B, III.B. In a related manner, *Hamdan* also exemplifies an inclination to apply a relatively expansive temporal vantage point to resolving detainee challenges when the treatment of detainees implicates substantial liberty interests or raises far-reaching legal questions. *See infra* Part III.B.

analyses.[20] These overlapping characteristics may be identified respectively as *merits-creep* and *dicta-creep*.[21]

Part I of this Note will provide an overview of the four detainee challenges heard by the Supreme Court since 9/11.[22] Part II will discuss in detail *Padilla* and *Rasul* regarding whether (or to what extent) a federal court should consider the merits or exceptional features of a detainee challenge in assessing jurisdiction. Part II will also compare these cases to *Hamdi* and *Hamdan* in relation to how narrowly or expansively threshold issues should be reviewed. Part III, which will elaborate more on *Hamdi* and *Hamdan*, will examine whether federal courts should review claims premised on circumstances that are still forming but are reasonably

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[20] *See infra* Parts II.B.2-3, III.B.2.a-b. For an expanded discussion on dicta, see Hon. Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249 (2006). According to Judge Leval:

> [D]icta often serve extremely valuable purposes. They can help clarify a complicated subject. They can assist future courts to reach sensible, well-reasoned results. They can help lawyers and society to predict the future course of the court's rulings. They can guide future courts to adopt fair and efficient procedures. What is problematic is not the utterance of dicta, but the failure to distinguish between holding and dictum.

Id. at 1253. Leval, in short, advocates for the "*careful* use of dictum in judicial opinions." *Id.* (emphasis added). For an example of a federal case taking to heart Leval's "dicta about dicta," by clearly delineating between holding and dictum, see Fox TV Stations, Inc. v. FCC, 489 F.3d 444, 462 n.12. (2d Cir. 2007) ("We recognize that what follows is dicta . . . .") (discussing potential constitutional challenges to the FCC indecency regime after invalidating it on administrative grounds). Interestingly, Leval wrote a dissenting opinion in this case in which he "express[ed] neither agreement nor disagreement with [the court's] added discussion," and noted that "the respect accorded to dictum depends on its persuasive force and not on the fact that it appears in a court opinion." *Id.* at 474 n.19 (Leval, J., dissenting).

[21] These terms are used to describe trends in the war-on-terror jurisprudence that are otherwise difficult to articulate concisely; perhaps they should not be regarded as having independent significance. The author is unaware of other instances where these exact terms have been used.

Newt Gingrich, former Speaker of the U.S. House of Representatives, explored the notion of "creep" in a very different sense, but also within the context of national security and the war on terror. *See* Newt Gingrich, *The Policies of War; Refocus the Mission*, S.F. CHRON., Nov. 18, 2003, *available at* http://www.newt.org/backpage.asp?art=993 ("Congress must act now to rein in the Patriot Act, limit its use to national security concerns and prevent it from developing '*mission creep*' into areas outside of national security." (referring to Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 ("USA PATRIOT Act"), Pub. L. No. 107-56, 115 Stat. 272 (2001)) (emphasis added)). Mission creep is defined by one dictionary as "the gradual process by which a campaign or mission's objectives change over time, esp. with undesirable consequences." *See* Webster's New Millennium Dictionary of English, Preview Edition (v 0.9.7 2008), *available at* http://dictionary.reference.com/browse/Mission%20creep (last visited Oct. 10, 2007).

[22] *See supra* notes 11-14 and accompanying text.

likely to come to pass in the future.[23] Part IV will conclude that the Court should reverse the overreaching course set by *Rasul* and *Hamdan* due to the difficulties intrinsic to determining what constitutes special circumstances, let alone whether such circumstances are special enough to justify departure from basic threshold rules.

I. THE POST-9/11 DETAINEE CHALLENGES: FACTS AND HOLDINGS

Since 9/11, the Supreme Court has heard four federal habeas petitions raised by alleged enemy combatants detained outside of the civilian criminal system in the context of the war on terror.[24] These cases entail various factual scenarios: an American citizen captured on U.S. soil and detained in the United States;[25] an American citizen captured in Afghanistan following the American invasion there in October 2001 and subsequently detained in the United States;[26] and non-citizens captured in Afghanistan and detained at the Guantanamo Bay Naval Brig.[27] The detainees in these cases challenged either the circumstances of their confinement or the nature of the judicial process they received or were set to receive.[28] From these four cases emerged an inconsistent line of precedent with regard to the appropriate connection between the substantive attributes of a detainee challenge and threshold determinations as well as the scope of review warranted under the various circumstances of these cases.

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[23] Part III will link to Part II to the extent that the decision to prospectively analyze a detainee challenge turns on the merits of that case or the personal liberties at stake.

[24] *See supra* notes 11-14 and accompanying text.

[25] *Padilla*, 542 U.S. at 430-31.

[26] *Hamdi*, 542 U.S. at 510.

[27] *Hamdan*, 126 S. Ct. at 2759; *Rasul*, 542 U.S. at 470-71.

[28] The Court, however, directly reviewed the merits of only two of these challenges: *Hamdi v. Rumsfeld* and *Hamdan v. Rumsfeld*. *See infra* Part I.C & I.D. By contrast, *Padilla v. Rumsfeld* dealt exclusively with jurisdictional issues, *see infra* Part I.A, as did *Rasul v. Bush*, at least as a formal matter. *See infra* Part I.B.

A. Rumsfeld v. Padilla: *The First Post-9/11 Detainee Challenge*

In *Rumsfeld v. Padilla*[29] (unlike in *Rasul v. Bush*[30] or *Hamdan v. Rumsfeld*[31]), the Court explicitly declined to consider the special circumstances surrounding a detainee challenge in determining whether the detainee had satisfied threshold requirements necessary to its review of the merits.[32] Stated differently, the Court refused to overlook traditional jurisdictional requirements to address the profound debate between national security and personal liberties (potentially) presented by this challenge.[33] Instead, the Court proceeded to review threshold issues on a narrow level and to assign the greatest legal relevance to readily accessible facts and circumstances.[34]

1. The Facts of *Rumsfeld v. Padilla*

Jose Padilla, an American citizen, allegedly conspired with al Qaeda in Afghanistan to execute terrorist attacks against the United States.[35] In May 2002, federal agents detained Padilla at Chicago O'Hare International Airport after he flew in from Pakistan.[36] Padilla initially was held in federal criminal custody in the Southern District of New York.[37] Subsequently, pursuant to a presidential order stating that Padilla was an enemy combatant,[38] he was taken into custody by the Department of Defense and relocated to a naval brig in

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[29] 542 U.S. 426 (2004).

[30] *See infra* Part I.B.

[31] *See infra* Part I.C.

[32] *See Padilla*, 542 U.S. at 447-51.

[33] *See id.* at 450-51.

[34] *See infra* Part II.A.

[35] *Padilla*, 542 U.S. at 430-31.

[36] *Id.* at 430.

[37] *Id.* at 431.

[38] Presidential Order to The Secretary of Defense (June 9, 2002). In making this order, the President relied in part on the Authorization for Use of Military Force Joint Resolution ("AUMF"). *See id.* (referring to Pub. L. 107-40, 115 Stat. 224 (authorizing the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States . . . .")).

South Carolina under the oversight of Commander Melanie Marr.[39]

Two days after Padilla was relocated, Padilla's counsel filed a federal habeas petition on his behalf in the Southern District of New York, naming as custodians Secretary of State Donald Rumsfeld, Commander Marr, and President George W. Bush.[40] The petition alleged that Padilla's detention violated several constitutional provisions, including the Sixth Amendment and the Suspension Clause.[41]

2. The Holdings of the *Padilla* Court

Reversing the lower courts, a majority of the *Padilla* Court held that, in accordance with traditional habeas jurisdictional requirements, Padilla's (proper) immediate custodian was Commander Marr, not Secretary Rumsfeld, and the Southern District of New York did not have jurisdiction over Marr.[42] As a result, the Southern District lacked

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[39] *Padilla*, 542 U.S. at 431-32.

[40] *Id.* at 432. Early in the litigation, the District Court, Southern District of New York, dismissed President Bush as a respondent. *See* Padilla *ex rel.* Newman v. Bush, 233 F. Supp. 2d 564, 582 (S.D.N.Y. 2002) ("[T]he President should be dismissed as a party [because] Padilla does not seem to be seeking relief from the President" and because "the question of whether the President can be sued in this case raises issues this court should avoid if at all possible, and it is certainly possible to avoid them here."). It does not appear that this ruling was challenged by any party to this case.

[41] *Padilla*, 542 U.S. at 432. The district court had held that Secretary Rumsfeld, but not Commander Marr, was the proper respondent, *Padilla*, F. Supp. 2d at 578, and that the court had jurisdiction over Rumsfeld via New York's long-arm statute. *Id.* at 587. But on the merits the court held that the President had authority to detain as enemy combatants American citizens captured in the United States. *Id.* at 587-89. The Court of Appeals, Second Circuit affirmed the jurisdictional holdings of the district court, Padilla v. Rumsfeld, 352 F.3d 695, 724 (2d Cir. 2003), but ruled that the President was not authorized to detain Padilla militarily on either a statutory or constitutional basis. *Id.*

[42] The Court identified a pair of jurisdictional requirements that it deemed controlling in this case: the "immediate custodian" and "district of confinement" rules. *Id.* at 435-36, 442; *see also infra* note 45. The immediate custodian rule requires that a habeas petitioner name as his custodian the "warden of the facility where the prisoner is being held, not the Attorney General or some other remote supervisory official." *Padilla*, 542 U.S. at 434-35 (citing Wales v. Whitney, 114 U.S. 564, 574 (1885) (interpreting 28 U.S.C. § 2242(a) (stating that "the person who has custody" over the petitioner is the proper respondent))). Notwithstanding any personal involvement Secretary of State Rumsfeld may have had in the removal of Padilla from the civilian criminal system and relocation to a military facility, Rumsfeld did not qualify as the immediate custodian. *Id.* at 441-42. Commander Marr, not Rumsfeld, directly oversaw the military brig where Padilla was detained and therefore was the proper respondent in this case. *Id.* at 436.

The district of confinement rule, the second jurisdictional requirement, simply requires that the petitioner file his habeas challenge in the district where he was confined at the time of filing. *Id.* at 442 (citing Carbo v. United States, 364 U.S.

jurisdiction over Padilla's habeas challenge.[43] The Court therefore declined to review the merits of the case and remanded for dismissal, but without prejudice.[44]

611, 617 (1961) (interpreting the phase "within their respective jurisdictions" to mean that habeas relief may only be granted in the district in which the petitioner is confined (citing 28 U.S.C. § 2241(a)))). Padilla's petition did not satisfy this rule, because it had been filed in the Southern District after, not before, the removal of Padilla from this district. *See id.* at 432, 445. Although the Court had previously interpreted the habeas statute as requiring "nothing more than that the court issuing the writ have jurisdiction over the custodian," *id.* at 442 (citing Braden v. 30th Judicial Circuit Court of Ky., 410 U.S. 484, 495 (1973)), in core habeas cases such as this, *see infra* notes 45-48 and accompanying text, "the district of confinement [was] *synonymous* with the district court that ha[d] territorial jurisdiction over the proper respondent." *Padilla*, 542 U.S. at 444. Padilla, in other words, should have filed in South Carolina, where both he and his immediate custodian (the proper respondent) were located. *See id.* at 446.

[43] *Padilla*, 542 U.S. at 451.

[44] *Id.* at 430, 451. Justice Stevens dissented, *see infra* note 145, and Justice Kennedy, in a relatively brief concurrence, explained why the Court should have focused on "personal jurisdiction or venue" in resolving the dispute. *Padilla*, 542 U.S. at 451-52 (Kennedy, J., concurring).

Subsequent to this decision, Padilla filed a habeas petition in the District Court, District of South Carolina. Padilla v. Hanft, 389 F. Supp. 2d 678 (D. S.C. 2005), *rev'd*, 423 F.3d 386 (4th Cir. 2005), *cert. denied*, 547 U.S. 1062 (2006). The district court granted the petition on February 28, 2005, *id.* at 692, but the Court of Appeals for the Fourth Circuit reversed, Padilla v. Hanft 423 F.3d 386, 389 (4th Cir. 2005), *cert. denied*, 547 U.S. 1062 (2006), holding that the government could indefinitely detain Padilla militarily as an enemy combatant pursuant to the AUMF. *Id.* at 389, 392 (Padilla's "military detention as an enemy combatant by the President is unquestionably authorized by the AUMF as a fundamental incident to the President's prosecution of the war against al Qaeda in Afghanistan," considering that Padilla "took up arms on behalf of [al Qaeda] and against our country . . . *and* . . . thereafter traveled to the United States for the avowed purpose of further prosecuting that war on American soil . . . ."); *see also* Ronald D. Rotunda, *The Detainee Cases of 2004 and 2006 and Their Aftermath*, 57 SYRACUSE L. REV. 1, 21-28 (2006) (discussing hypothetically how the Supreme Court would have approached the merits of *Padilla* in light of the plurality opinion in *Hamdi*).

On November 22, 2005, the federal government finally brought charges against Padilla—including conspiracy to murder—and transferred him from military to civilian custody. CNN-Law Center, *Terror Suspect Padilla charged*, CNN.com, Nov. 22, 2005, http://www.cnn.com/2005/LAW/11/22/padilla.case/index.html. *See* Robert M. Chesney, *Beyond Conspiracy? Anticipatory Prosecution and the Challenge of Unaffiliated Terrorism*, 80 S. CAL. L. REV. 425, 470-71 (2007) (discussing how allegations of Padilla in civilian context lacked the "dramatic" edge of those raised during Padilla's military confinement); *see also* Neal Kumar Katyal, *Hamdan v. Rumsfeld*: *the Legal Academy Goes to Practice*, 120 HARV. L. REV. 65, 92 (2006) (noting that the indictment against Padilla was viewed as an affront against federal courts); Fred Barbash, *Padilla's Lawyers Suggest Indictment Helps Government Avoid Court Fight*, WASH. POST, Nov. 22, 2005, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2005/11/22/AR2005112201061.html (discussing the judicial avoidance strategy of the government, considering that the timing of the indictment was just days before the government was scheduled to reply to Padilla's Supreme Court appeal); *supra* note 39. Previously, Padilla had petitioned for writ of certiorari to the Supreme Court to challenge the ruling of the Fourth Circuit, *see Padilla*, 423 F.3d at 389, but the Court denied his petition in light of the intervening events described above. *See* Padilla v. Hanft, 547 U.S. 1062, 1063-64 (2006). Padilla's claims, in short,

In arriving at this holding, the Court emphasized that the immediate custodian and district of confinement rules were defaults applicable to typical habeas petitions like Padilla's, which challenged present physical custody within the United States.[45] The Court focused on whether basic jurisdictional rules applied based on the presence of "core" circumstances, especially present physical confinement, as opposed to the absence of any arguably unusual circumstances.[46] It therefore found that the core nature of Padilla's petition remained intact despite any unique characteristics of Padilla's confinement.[47] In sum, at least for threshold jurisdictional purposes, a habeas petition involving an American citizen detained militarily as part of the war on terror could be described as "typical."[48]

B. Rasul v. Bush: *The Second Post-9/11 Detainee Challenge*

In *Rasul v. Bush*, the Supreme Court diverged from the principle espoused in *Rumsfeld v. Padilla* that special circumstances should not affect the jurisdictional standing of habeas petitioners, even those alleged to be enemy combatants.[49] In a manner somewhat comparable to the majority in *Hamdan v. Rumsfeld*,[50] the *Rasul* Court appeared to condone invoking the merits of a detainee challenge to reinforce and justify formal threshold conclusions.[51] *Rasul* thus

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rested on a presently hypothetical state of affairs. *See infra* note 186. A federal jury trial commenced in May 2007, MiamiHerald.com, *Timeline: The Jose Padilla Case*, http://www.miamiherald.com/multimedia/news/padilla/ (follow "2007" hyperlink) (last visited Oct. 5, 2007), and on August 16, 2007, Padilla was convicted of terrorism-related conspiracy charges "after little more than a day of [jury] deliberation." Abby Goodnough & Scott Shane, *Padilla Is Guilty on All Charges in Terror Trial*, N.Y. TIMES, Aug. 17, 2007, *available at* http://www.nytimes.com/2007/08/17/us/17padilla.html. Padilla is scheduled to be sentenced in January 2008. Jay Weaver, *Padilla Sentencing Hearing Postponed*, MIAMI HERALD, Dec. 4, 2007.

[45] *See Padilla*, 542 U.S. at 446-47; *see also supra* note 42 and accompanying text. The immediate custodian and district of confinement rules, according to the Court, together "compose[d] a simple rule" that "[w]henever a § 2241 habeas petitioner [even one held in military detention] seeks to challenge his present physical custody within the United States, he should name his warden as respondent and file the petition in the district of confinement." *Padilla*, 542 U.S. at 447 (referring to 28 U.S.C. § 2241).

[46] *Padilla*, 542 U.S. at 449-50.

[47] *Id.* at 441-42.

[48] *See id.* at 451.

[49] *See supra* notes 45-48.

[50] *See infra* Part III.B.2.a-b.

[51] *See infra* Part II.B.

introduced confusion to the Court's post-9/11 war-on-terror jurisprudence regarding the appropriate degree of separation between threshold determinations and the substantive attributes of a detainee challenge.

1. The Facts of *Rasul v. Bush*

Rasul involved the consolidated claims of two Australian and twelve Kuwaiti citizens who allegedly fought alongside the Taliban following the U.S. invasion of Afghanistan in October 2001 and who were captured during related hostilities.[52] From early 2002, the U.S. military held these fourteen persons at the Guantanamo Bay naval base, along with over 600 other non-Americans captured abroad.[53]

The *Rasul* detainees, all of whom denied any connection to the Taliban or involvement in terrorist activity, were not charged with any crimes or provided with access to counsel.[54] They filed habeas petitions in the United States District Court for the District of Columbia, seeking various forms of relief ranging from release from custody to access to the judicial process.[55] The district court dismissed these claims for want of jurisdiction,[56] and the Court of Appeals for the District of Columbia Circuit affirmed.[57]

2. The Holding of the *Rasul* Court

The Supreme Court reversed the lower courts, holding that federal district courts have jurisdiction over habeas petitions raised by non-citizens captured abroad and detained at Guantanamo Bay[58] per the applicable federal habeas

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[52] Rasul v. Bush, 542 U.S. 466, 470-71 (2004).

[53] *Id.* at 471.

[54] *Id.* at 471-72.

[55] *Id.* at 472-73.

[56] Rasul v. Bush, 215 F. Supp. 2d 55, 68 (D.D.C. 2002) ("aliens detained outside the sovereign territory of the United States" may not "petition for a writ of habeas corpus" (referring to Johnson v. Eisentrager, 339 U.S. 763 (1950))).

[57] Al Odah v. U.S., 321 F.3d 1134, 1144 (D.C. Cir. 2003) (Under *Eisentrager*, "'the privilege of litigation' does not extend to aliens in military custody who have no presence in 'any territory over which the United States is sovereign.'" (citing Johnson v. Eisentrager, 339 U.S. 763, 777-78 (1950))).

[58] *Rasul*, 542 U.S. at 483-84. This decision has been riddled with controversy with regards to proper interpretation and scope of application. The text accompanying this footnote presents one, but not the only, plausible reading of the majority opinion of *Rasul*. *See supra* Part II.B. As described in one article, the *Rasul* Court "failed to make clear whether its rationale was limited to Guantanamo Bay or instead implied that

statute[59] and in light of relevant Supreme Court precedent interpreting this statute.[60] The Court remanded the case to the district court for review on the merits.[61]

In its analysis, the Court first noted that the circumstances of confinement in this case were distinguishable "in important respects" from those in *Johnson v. Eisentrager*, a

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federal habeas jurisdiction existed to review the detention of noncitizens held by the United States anywhere in the world." Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 HARV. L. REV. 2029, 2058 (2007); *see also* John Yoo, *Courts at War*, 91 CORNELL L. REV. 573, 589 (2006) ("*Rasul* leaves unclear . . . whether judicial review would apply beyond Cuba" to the likes of "Saddam Hussein" and "Osama bin Laden."). Justice Kennedy, in his concurrence, assumed the more expansive application, *see supra* note 168, as did Justice Scalia in his dissent. *See Rasul*, 542 U.S. at 499 (Scalia, J., dissenting) ("federal courts will entertain petitions from these prisoners . . . around the world, challenging actions and events far away . . . ."); *see also* Joseph R. Pope, *The Lasting Viability of* Rasul *in the Wake of the Detainee Treatment Act of 2005*, 27 N. ILL. U. L. REV. 21, 27 (2006) (agreeing with Scalia's dissent, considering that American jurisdiction and control "necessarily" extends to territories where the military detains persons).

[59] *See* 28 U.S.C. § 2241 (2000).

[60] *See infra* notes 66-68 and accompanying text.

[61] *Rasul*, 542 U.S. at 485. Justice Scalia scathingly dissented, *see infra* note 58; *see also infra* note 168, and Justice Kennedy concurred, offering an alternative approach, *see infra* note 168.

In response to the majority holding, Congress passed, and the President signed into law on December 30, 2005, the Detainee Treatment Act of 2005 ("DTA"), Pub. L. 109-148, 119 Stat. 2739 (2005) (codified as amended at 10 U.S.C. § 801 and 28 U.S.C. § 2241). The DTA effectively precluded federal review of habeas challenges "by alien[s] detained . . . at Guantanamo Bay." *See* DTA, § 1005(e)(1) ("Except as provided in section 1005 of the [DTA], no court, justice, or judge shall have jurisdiction to hear or consider[] (1) an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba; or (2) any other action against the United States or its agents relating to any aspect of the detention by the Department of Defense of an alien at Guantanamo Bay, Cuba, who[] (A) is currently in military custody; or (B) has been determined by the United States Court of Appeals for the District of Columbia Circuit in accordance with the procedures set forth in section 1005(e) of the [DTA] to have been properly detained as an enemy combatant."); *see also* Pope, *supra* note 58, at 27 (discussing history and implications of DTA). This can be viewed as a significant retrenchment of federal judicial power in favor of the Executive branch. *See* Elizabeth Starrs, *Protect Habeas Corpus*, DENVER POST, April 29, 2007, at E-O1 (explaining that "Congress tried to circumvent [*Rasul*] by passing the [DTA]," but noting that "[l]egislation designed to reinstate the right of habeas corpus for Guantanamo Bay detainees is currently" under consideration.). "However," as emphasized by Pope, the DTA "failed to address the broader implications of *Rasul*, which would allow federal courts to entertain habeas petitions brought by detainees held in other theaters of the conflict." Pope, *supra* note 58, at 24, 33-34 (opining that "*Rasul*'s imperfect holding opened a Pandora's box Congress has failed to close, leaving a great deal of uncertainty in an area where certainty is needed" and suggesting that Congress "act quickly . . . . [to] draft legislation stripping the federal courts of habeas jurisdiction over all detainees captured and held in territories outside the United States," so as "to more fully remediate the infirmities caused by *Rasul*."). Also, Congress failed to explicitly apply the jurisdiction-stripping provisions of the DTA retroactively to pending cases (such as *Hamdan v. Rumsfeld*). *See supra* note 104 and accompanying text. But this shortcoming has apparently been fixed through subsequent legislation. *See id.*

case arising during World War II.[62] The *Rasul* detainees, unlike the *Eisentrager* detainees, had been detained for over two years in territory subject to the United States' exclusive control and jurisdiction, without receiving access to counsel and without having been charged with any crime.[63] Nonetheless, the *Rasul* Court emphasized that the outcome determinative facts (relating to confinement) in *Eisentrager*[64] only bore on the issue of whether the detainees were constitutionally (as opposed to statutorily) entitled to seek habeas relief.[65]

More essential to the resolution of the current dispute was *Braden v. Circuit Court of Kentucky*, which postdated *Eisentrager*.[66] Since *Braden*, "the prisoner's presence within the territorial jurisdiction of the district court [had] not [been] 'an invariable prerequisite' to the exercise of district court jurisdiction under the federal habeas statute."[67] Satisfying the

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[62] *Eisentrager*, 339 U.S. at 765-66. According to the *Rasul* Court, the *Eisentrager* Court considered the following facts critical to its conclusion that the detainees in that case were not "constitutionally entitled" to pursue habeas relief: that each detainee was

> (a) . . . an enemy alien; (b) ha[d] never been . . . in the United States; (c) was captured outside of [United States] territory and there held in military custody as a prisoner of war; (d) was tried and convicted by a Military Commission sitting outside the United States[] (e) for offenses against laws of war committed outside the United States; (f) and [was] at all times imprisoned outside the United States.

Rasul, 542 U.S. at 475-76 (quoting *Eisentrager*, 339 U.S. at 777).

[63] *Id.* at 476. The Court also noted that the *Rasul* detainees were "not nationals of countries at war with the United States, and they den[ied] that they ha[d] engaged in or plotted acts of aggression against the United States . . . ." *Id.*

[64] *See supra* note 62.

[65] *Rasul*, 542 U.S. at 476 (citing *Eisentrager*, 339 U.S at 777); *see also* Pope, *supra* note 58, at 26 ("[T]he Court characterized *Eisentrager* as a case considering the constitutional parameters of habeas corpus and not the statutory question that was presented in *Rasul*.") (footnote omitted). *Eisentrager* concluded, however, that the detainees did not have a statutory right to pursue habeas relief because the habeas statute, as that Court had interpreted it, required that the district court reviewing the habeas petition have jurisdiction over the petitioners. *Eisentrager*, 339 U.S at 777-78. Yet the *Rasul* Court concluded that the current case was controlled not by *Eisentrager*, but by the more recent case, Braden v. 30th Judicial Circuit Court of Ky., 410 U.S. 484, 495 (1973), which had effectively "overruled the statutory predicate to *Eisentrager*'s holding." *Rasul*, 542 U.S. at 478-79.

[66] *See Rasul*, 542 U.S. at 478-79; *Braden*, 410 U.S. at 495.

[67] *Rasul*, 542 U.S. at 478 (quoting *Braden*, 410 U.S. at 495); *see also* Fallon & Meltzer, *supra* note 58, at 2051 (describing *Braden* as an example of the application by the Supreme Court of the common law, as opposed to agency, approach to habeas jurisdiction, whereby a relatively dynamic statutory interpretation was afforded "not only to avoid constitutional difficulties, but also simply to achieve sensible results in circumstances that Congress might not have foreseen").

habeas statute instead depended on whether the district court could reach petitioners' custodians by service of process.[68]

In the current case, no party contended that the petitioners' custodians were not subject to the jurisdiction of the District Court for the District of Columbia.[69] Pleading requirements, moreover, had been satisfied.[70] The federal habeas statute, as the Court interpreted it, required "nothing more" before a district court could entertain this case.[71]

C. Hamdi v. Rumsfeld: *The Third Post-9/11 Detainee Challenge*

Hamdi v. Rumsfeld addressed not a jurisdictional issue, as did *Padilla v. Rumsfeld*[72] and *Rasul v. Bush*,[73] but the legality of a detainee's confinement under the Authorization for Use of Military Force ("AUMF").[74] In addressing the merits of the habeas challenge, a plurality of the Court supported an approach whereby legal determinations turned on the circumstances of confinement as of the time of judicial review and not on speculations, even if fairly reasonable, about future conditions.[75] This relatively limited temporal vantage point

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[68] *Rasul*, 542 U.S. at 478-79.

[69] *Id.* at 483.

[70] *Id. See infra* note 162 and accompanying text.

[71] *Rasul*, 542 U.S. at 483-84. The Court further held that the principle that a statute should be presumed to not have extraterritorial application did not apply to an area over which the United States exercised complete and exclusive (though not necessarily sovereign) control. *Id.* at 480 (citing Foley Bros., Inc. v. Filardo, 336 U.S. 281, 285 (1949)). Moreover, according to the Court, the habeas statute did not make any distinctions based on citizenship or lack thereof. *Id.* at 481.

[72] *See supra* Part I.A.

[73] *See supra* Part I.B.

[74] Hamdi v. Rumsfeld, 542 U.S. 507, 516-24 (2004). The legality of Hamdi's detention under the AUMF is not a threshold issue in the same way that the issues described in the other three post-9/11, war-on-terror detainee challenges are. (In *Padilla*, *Rasul*, and *Hamdan*, the respective threshold issues had to be resolved in a particular manner—namely, in a manner favorable for the detainee—in order for review on the merits to proceed). In terms of resolution, this legality issue logically preceded that of the judicial access owed to Hamdi (since this latter issue seemingly would not be reached if Hamdi could not be lawfully detained in the first place), but really was a merits-based determination in its own right. Yet inextricably linked to this determination of the legality of the AUMF were determinations of the proper temporal vantage point from which to assess this issue and, more simply, the extent to which to consider the merits of this challenge. Thus, at least to some extent, it may be appropriate (beyond merely convenient) to describe these underlying determinations as *threshold considerations*.

[75] Put another way, prospects, even if unprecedented in nature and even if likely to occur, generally should not be considered justiciable if they have not yet been substantially developed or realized. *See infra* Part III.A.

resembled in certain ways the winnowing-down method endorsed by *Padilla v. Rumsfeld* (though with regard to jurisdictional requirements),[76] but differed substantively from the more expansive analytical framework employed later in *Hamdan v. Rumsfeld*.[77]

1. The Facts of *Hamdi v. Rumsfeld*

In *Hamdi*, the Court reviewed the claims of Yaser Esam Hamdi, an American citizen accused of fighting alongside the Taliban following the U.S. invasion of Afghanistan in late 2001.[78] Hamdi was captured by the Northern Alliance soon after the United States invaded.[79] He was eventually turned over to the U.S. military and transferred to the Guantanamo Bay naval base.[80] In April 2002, after learning that Hamdi was an American citizen, the government relocated him to a naval brig in Virginia.[81]

In June 2002, Hamdi's father filed a habeas petition on behalf of his son, alleging that Hamdi had been held without access to any meaningful judicial process and had not been charged with any crime, in violation of the Fifth and Fourteenth Amendments to the Constitution.[82] The various forms of relief sought included release from custody, access to counsel, and permission to challenge Hamdi's designation as an enemy combatant.[83]

2. The Holdings of the *Hamdi* Court

The *Hamdi* Court did not produce a majority; Justice O'Connor authored the plurality opinion.[84] The plurality held

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[76] *See infra* Part II.A.

[77] *See infra* Part III.B.

[78] Hamdi v. Rumsfeld, 542 U.S. 507, 510 (2004).

[79] *Id.*

[80] *Id.*

[81] *Id.* By the time the Supreme Court heard this case, Hamdi had been transferred to a military brig in South Carolina. *Id.*

[82] *Id.* at 511. In other documents, Hamdi's father claimed that his son had traveled to Afghanistan to do relief work and had only been there for two months prior to 9/11, but became trapped there during hostilities following 9/11 due to his youthful inexperience. (He was only twenty at the time.) *Id.* at 511-12.

[83] *Id.* at 511. For a summary of the complicated procedural history of *Hamdi*, see James B. Anderson, *Hamdi v. Rumsfeld: Judicious Balancing at the Intersection of the Executive's Power to Detain and the Citizen-Detainee's Right to Due Process*, 95 J. CRIM. L. & CRIMINOLOGY 689, 695-97 (2005).

[84] *Hamdi*, 542 U.S. at 508.

that Congress, through the AUMF, had authorized the detention of American citizens held in the United States whom the government had designated as enemy combatants.[85] But the plurality also held that such citizen-detainees, in accordance with constitutional due process, must be provided with a meaningful opportunity, beyond the "some evidence" standard, to challenge the factual basis of their designation as enemy combatants before a neutral adjudicator.[86] The Court remanded the case for further proceedings.[87]

The latter holding, though vague, had significant consequences for detainees,[88] but this Note will only focus on

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[85] *Id.* at 518. This conclusion technically constituted a holding of the Court, since Thomas, notwithstanding that he dissented, "agree[d] with the plurality that . . . Congress [through the AUMF] ha[d] authorized the President" to "detain those arrayed against our troops . . . ." *Id.* at 587 (Thomas, J., dissenting); *see also* Rotunda, *supra* note 44, at 15, 28 (explaining how under the circumstances "it [made] sense to treat O'Connor's resolution as a workable holding of the Court"). Additionally, in *Hamdan v. Rumsfeld* (the subsequent detainee challenge arising from the war on terror), the Court assumed, citing *Hamdi*, "that the AUMF activated the President's war powers, and that those powers include the authority to convene military commissions in appropriate circumstances." 126 S. Ct. 2749, 2775 (2006) (citations omitted) (referring to *Hamdi*, 542 U.S. at 518). *But see infra* notes 109-114 and accompanying text.

[86] *Hamdi*, 542 U.S. at 533, 537 (O'Connor, J., plurality opinion). As two other members of the Court concurred with the plurality on this point, it constituted a holding of the Court. *Id.* at 553 (Souter, J., concurring in part). But the concurrence disagreed with the plurality's conclusion that the due process required under the circumstances was significantly less than that required in the context of the civilian criminal justice system. *Id.* at 553-54 (referring to *id.* at 534-35 (O'Connor, J., plurality opinion)). The plurality concluded, for example, that a federal court could abide by a rebuttable presumption that favored evidence presented by the government. *Id.* at 534. Hearsay evidence, moreover, could be deemed admissible. *Id.*; *see also id.* at 538 (noting the "possibility that the standards we [the plurality] articulated could be met by an appropriately authorized and properly constituted military tribunal").

[87] *Id.* at 539. For a discussion of the concurring and dissenting opinions (of which the most interesting is that of Justice Scalia, joined by Justice Stevens), see Jared Perkins, Note and Comment, *Habeas Corpus in the War Against Terrorism: Hamdi v. Rumsfeld and Citizen Enemy Combatant*, 19 BYU J. PUB. L. 437, 451-55 (2005).

In October 2004, the government, rather than face further judicial proceedings, released Hamdi from custody and deported him to Saudi Arabia upon the stipulation that Hamdi renounce his citizenship and agree to several other conditions. CNN-World, *Hamdi Voices Innocence, Joy About Reunion*, CNN.com, Oct. 14, 2004, http://www.cnn.com/2004/WORLD/meast/10/14/hamdi/.

[88] In response to *Hamdi* (*see supra* note 86 and accompanying text), the government convened Combatant Status Review Tribunals ("CSRTs") to determine whether persons detained at Guantanamo Bay were enemy combatants. *See* Deputy Secretary of Defense, Order Establishing Combatant Status Review Tribunals, July 7, 2004, http://www.dod.gov/news/Jul2004/d20040707review.pdf; David B. Rivkin Jr. & Lee A. Casey, *How the System Works; Fact and Fiction on Enemy Combatants*, WASH. TIMES, Sept. 8, 2005, at A21; *see also* Robert A. Peal, Special Project Note, *Combatant Status Review Tribunals and the Unique Nature of the War on Terror*, 58 VAND. L. REV. 1629, 1650-54 (2005) (discussing CSRT procedures). These tribunals have faced considerable criticism. *See*, *e.g.*, Neil A. Lewis, *Guantánamo Prisoners Getting Their*

the first holding. The plurality basically concluded that, consistent with the traditional law of war, the "necessary and appropriate force" authorized by the AUMF included the detention of enemy combatants.[89] Because hostilities were ongoing in Afghanistan,[90] Hamdi's continued detention could be justified even if his detention had no foreseeable endpoint and feasibly could last for the rest of his life.[91]

D. Hamdan v. Rumsfeld: *The Fourth Post-9/11 Detainee Challenge*

Hamdan v. Rumsfeld, the fourth detainee challenge heard by the Supreme Court following 9/11, ended on more than one note of inconsistency with respect to the preceding jurisprudence.[92] Unlike the plurality in *Hamdi v. Rumsfeld*, the *Hamdan* Court did not refrain from reviewing the legality of circumstances that were fairly anticipated but that had not yet occurred.[93] Similarly, contrary to the logic of *Rumsfeld v. Padilla*[94] but in part reflecting that of *Rasul v. Bush*,[95] the Court seemed to collapse its perception of the strong merits of the case (as well as its public importance) into threshold determinations prerequisite to review on the merits.[96]

Day, But Hardly in Court, N.Y. TIMES, Nov. 8, 2004, at A1 ("Critics have complained that the tribunals are fatally flawed, not only because the detainees do not have lawyers but because they are generally hampered in disputing any charges because they are not allowed to see most of the evidence against them because it is classified."); Joseph Blocher, Comment, *Combatant Status Review Tribunals: Flawed Answers to the Wrong Question*, 116 YALE L.J. 667, 670 (2006) (CSRTs are not in compliance with Geneva Conventions, because they do not determine POW status of detainees); *see also* Mark Huband, *Dock of the Bay*, FINANCIAL TIMES, Dec. 11, 2004, at 16 (account of journalist permitted to attend tribunal hearing). *But see* Rivkin & Casey, *supra* (arguing that the "current [CSRT] system offers a solid basis for processing enemy combatants," but advocating congressional codification of the system so as to reduce political pressure and "judicial second-guessing").

[89] *See Hamdi*, 542 U.S. at 518-19 (quoting AUMF, *supra* note 38) (internal quotation marks omitted).

[90] *See infra* notes 200-202 and accompanying text.

[91] *See Hamdi*, 542 U.S. at 521. This aspect of the decision will be discussed in detail in the analysis section of this Note. *See infra* Part III.A.

[92] Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006).

[93] *See infra* Part III.

[94] *See infra* Part II.A.

[95] *See infra* Part II.B.

[96] *See infra* Part III.B.

1. The Facts of *Hamdan v. Rumsfeld*

Salim Ahmed Hamdan, a Yemeni national, was captured by Afghan militias in November 2001 during hostilities between the United States and the Taliban.[97] The U.S. military subsequently obtained custody of Hamdan and, in June 2002, relocated him to the American prison in Guantanamo Bay.[98] In July 2004, pursuant to a 2001 presidential order authorizing the Secretary of Defense to establish military commissions to try suspected terrorists,[99] the government charged Hamdan with conspiracy to "commit . . . offenses triable by military commission."[100]

On July 13, 2004, Hamdan filed a habeas petition "to challenge the government's intended means of prosecuting this charge."[101] According to Hamdan, the commission "violate[d] the most basic tenets of military and international law, including the principle that a defendant must be permitted to see and hear the evidence against him."[102]

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[97] *Hamdan*, 126 S. Ct. 2749, 2759 (2006).

[98] *Id.*

[99] Executive Order, 66 Fed. Reg. 57,833 (Nov. 13, 2001) ("Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism").

[100] *Hamdan*, 126 S. Ct. at 2759 (alteration in original) (internal quotation marks omitted). The charging instrument alleged that from February 1996 to November 24, 2001, Hamdan "willfully and knowingly joined an enterprise of persons who shared a common criminal purpose and conspired and agreed with [named members of al Qaeda] to commit the following offenses triable by military commission: attacking civilians; attacking civilian objects; murder by an unprivileged belligerent; and terrorism." *Id* at 2761 (alteration in original) (internal quotation marks omitted).

[101] *Id.* at 2759. Hamdan originally filed this petition in the United States District Court for the Western District of Washington, but this court transferred the petition to the United States District Court for the District of Columbia after the government formally charged Hamdan. *Id.* at 2761. In the meantime, a CSRT (see *supra* note 88) "convened pursuant to a military order issued on July 7, 2004, decided that Hamdan's continued detention at Guantanamo Bay was warranted because he was an enemy combatant." *Hamdan*, 126 S. Ct. at 2761 (internal quotation marks omitted); *see also infra* note 114. At the same time, the military commission set to try Hamdan commenced proceedings. *Hamdan*, 126 S. Ct. at 2761.

[102] *Hamdan*, 126 S. Ct. at 2759. Hamdan also argued that the conspiracy charge had no basis in either federal statutory law or the common law of war. *Id.*; *see also infra* note 114. For thorough summaries of the lower court decisions and underlying facts in this case, see Larissa Eustice, Case Summary, *International Decision:* Hamdan v. Rumsfeld, *415 F.3d 33 (D.C. Cir. 2005)*, 39 CORNELL INT'L L.J. 457, 457-75 (2006).

2. The Holdings of the *Hamdan* Court

The Supreme Court first held that the recently enacted Detainee Treatment Act ("DTA")[103] did not preclude the Court's jurisdiction over this claim. Although the Act strips federal courts of jurisdiction to hear habeas challenges filed by non-citizens detained at Guantanamo Bay (except for the Court of Appeals for the District of Columbia Circuit in limited circumstances), it did not apply to cases pending at the time of its enactment.[104]

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[103] DTA, *supra* note 61.

[104] *Hamdan*, 126 S. Ct. at 2769 (finding "nothing absurd about a scheme under which pending habeas actions—particularly those . . . that challenge the very legitimacy of the tribunals whose judgments Congress would like to have reviewed—are preserved, and more routine challenges to final decisions rendered by those tribunals are carefully channeled to a particular court and through a particular lens of review"). While this is a very significant jurisdictional holding, this Note will focus on other threshold determinations made by the Court. For more information on this holding, see Julia Y. Capozzi, Note, Hamdan v. Rumsfeld: *A Short-Lived Decision?*, 28 WHITTIER L. REV. 1303, 1307-08, 1321-23 (2007) (stating that the holding was "well-founded" given that the DTA lacks explicit language indicating that the DTA applies "to pending cases arising out of [CSRTs] and military commissions decisions" with respect to habeas petitions, and, "[t]hus, the Court was reasonable in holding that where Congress omits language from a portion of a statute it means that Congress intended to omit that language") (citations omitted); Michael Greenberger, *You Ain't Seen Nothin' Yet: The Inevitable Post-*Hamdan *Conflict Between the Supreme Court and the Political Branches*, 66 MD. L. REV. 805, 809 (noting that habeas bar authors "certainly" thought that DTA "clearly applied to cases pending at the time of" its passage); Jana Singer, Hamdan *as an Assertion of Judicial Power*, 66 MD. L. REV. 759, 761-63 (2007) (stating that the holding "was far from self-evident," considering competing canons and precedents, but noting that the Court avoided complicated constitutional analysis). The practical effect of this holding, as noted by a dissenting Justice Scalia, would be "to keep the [federal] courts busy for years to come." *See Hamdan*, 126 S. Ct. at 2817-18 (Scalia, J., dissenting); *see also* Burt Neuborne, *Spheres of Justice: Who Decides?* 74 GEO. WASH. L. REV. 1090, 1099 (2006) ("[T]he majority's decision preserve[d] the jurisdiction of the lower federal courts over some six hundred habeas corpus petitions from Guantanamo detainees pending on the day the jurisdiction-stripping provision became effective.").

Much as Congress responded to *Rasul* by passing the DTA, *see supra* note 61, Congress responded to *Hamdan* by passing the Military Commissions Act of 2006 ("MCA"), Pub. L. No. 109-366, 120 Stat. 2600 (Oct. 17, 2006), which apparently supersedes the jurisdictional holding of *Hamdan* by suspending *statutory* habeas corpus for alien-detainees. *See* MCA, § 7 ("No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination."). It is beyond the scope of this Note to explore in depth the effect of the MCA on habeas jurisdiction and the attendant constitutional implications; numerous articles have undertaken such comprehensive examinations. *See, e.g.*, Daniel Michael, *The Military Commissions Act of 2006*, 44 HARV. J. ON LEGIS. 473, 473, 477 (2006) (concluding that the MCA "jurisdiction-stripping provision . . . is inconsistent with the reach of constitutional guarantees as they have been defined in cases arising from the war on terror," but noting that the "MCA makes substantial improvements in other areas"); Michael C. Dorf, *The Orwellian Military Commissions Act of 2006*, 5 J.

The Court next rejected the government's contention that, even if the Court had jurisdiction to review Hamdan's procedural challenge to the military commission, the Court should refrain from doing so in advance of a final outcome of pending military proceedings in accordance with a judge-made rule espoused in *Schlesinger v. Councilman*.[105] Rather, the Court found that immediate review of Hamdan's procedural challenge by a civilian court was warranted in light of the

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INT'L CRIM. JUST. 10, 13, 15 (2007) (arguing that the jurisdiction-stripping provision is unconstitutional "[a]bsent a valid suspension" of habeas corpus "to the extent that it authorizes the government to . . . detain a permanent resident alien residing in [for example] New York City, without ever permitting the alien to file a habeas petition"). Dorf further states that the MCA presents "a veritable cornucopia of law school examination questions," such as "[u]nder what circumstances, if any, does an alien not present in the territory of the United States but held by US authorities have a *constitutional right*" to seek habeas relief in a federal court? *Id.* (emphasis added); *see also* Michael C. Dorf, *Why The Military Commissions Act Is No Moderate Compromise*, FINDLAW, Oct. 11, 2006, http://writ.news.findlaw.com/dorf/20061011.html (criticizing the act for "all but eliminat[ing] access to civilian courts for non-citizens . . . that the government, in its nearly unreviewable discretion, determines to be unlawful enemy combatants."); Karen DeYoung, *Court Told It Lacks Power in Detainee Cases*, WASH. POST, Oct. 20, 2006, at A18 (discussing how the statute has been criticized by some U.S. Senators because it effectively suspends habeas corpus).

Litigation challenging the MCA (some of which involves Hamdan, *see infra* note 114) has been underway since its passage, as would be expected given the momentous implications of the Act. On December 5, the Supreme Court began to hear oral arguments in *Boumediene v. Bush*, *See* The Oyez Project, *Boumediene v. Bush*: Oral Argument, *transcript available at* http://www.oyez.org/cases/2000-2009/2007/2007_06_1195/argument/; Patti Waldmeir, *Detainee Cases Split US Justices*, FINANCIAL TIMES (London), Dec. 6, 2007, at 8, after reversing its initial denial of certiorari to hear this case. *See* Boumediene v. Bush, 127 S. Ct. 3078 (2007) (vacating Boumediene v. Bush, 127 S. Ct. 1478 (2007) (denying certiorari)). This challenge stems from a ruling by the Court of Appeals, District of Columbia, denying the consolidated habeas petitions of aliens detained at the Guantanamo Bay naval base. Boumediene v. Bush, 476 F.3d 981 (D.C. Cir. 2007). That court held that federal courts lacked jurisdiction in these cases because the jurisdiction-stripping provision of the MCA applied to pending cases, *id.* at 986-88, and because this provision did not amount to an unconstitutional suspension of habeas corpus. *Id.* at 988-94. *But see* Hamdan v. Rumsfeld, 464 F. Supp. 2d 9, 16 (D.D.C. 2006) ("If and to the extent that the MCA operates to make the writ unavailable to a person who is constitutionally entitled to it, it must be unconstitutional."). For more background on this decision, see Linda Greenhouse, *Legal Battle Resuming on Guantanamo Detainees*, N.Y. TIMES, Sept. 2 2007, *available at* http://www.nytimes.com/2007/09/02/washington/02scotus.html?pagewanted=1&_r=1 (discussing the political and judicial contexts surrounding this case); *see also* Michael, *supra*, at 481-92 (2007) (referencing the Court of Appeals decision in a discussion of the constitutionality of the MCA jurisdiction-stripping provision).

[105] *Hamdan*, 126 S. Ct. at 2771 (discussing Schlesinger v. Councilman, 420 U.S. 738 (1975)). According to the *Hamdan* Court, the dual comity considerations underlying the *Councilman* doctrine—military discipline and respect for the congressionally established integrated military court system—were not present here. *Id.* Hamdan was not a member of the armed forces and the military commission set to try him was not part of this integrated court system. *Id.*

structural deficiencies of the Executive-established review mechanism for the commission decision.[106]

Additionally, according to the Court, there were grounds for presuming the illegality of the procedures governing the military commission.[107] In particular, under the commission rules, Hamdan could be excluded from participating in his own trial.[108]

Moving to the merits,[109] the Court held that that the military commission was not explicitly authorized by the AUMF, DTA, or Uniform Code of Military Justice ("UCMJ").[110] These congressional enactments, even when read together, at most recognize the government's general right to convene military commissions, but they did not apply under the particular circumstances.[111] In the absence of explicit congressional authority, the UCMJ permits trial by military commission only if the commission complies with the "Constitution and laws, including the law of war."[112] The Court held that the military commission in question did not comply with the laws of war, including the UCMJ itself, because the major deviations from court-martial procedures[113] were not justified by military necessity.[114]

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[106] *Id.* at 2771-72 (expedited review warranted in "view of the public importance of the questions raised . . . and of the duty which rests on the courts, in time of war as well as in time of peace, to preserve unimpaired the constitutional safeguards of civil liberty" (citing *Ex parte* Quirin, 317 U.S. 1, 19 (1942))). Put another way, under the circumstances there should *not* have been any avoidable delay. *See id.*; *see also infra* Part III.B.2.a.

[107] *Hamdan*, 126 S. Ct. at 2788.

[108] *Id.* at 2786. Furthermore, admissible evidence encompassed basically anything with probative value, including hearsay and unsworn statements. *Id.* at 2786-87. These and other reasons for not abstaining will be discussed in greater detail *infra* Part III.B.

[109] This Note assesses the Court's holdings on the merits only insofar as they influenced or effectively interacted with the threshold determinations regarding whether the Court should review on the merits Hamdan's procedural challenge.

[110] *Hamdan*, 126 S. Ct. at 2774-75 (referring to the AUMF, *supra* note 38; DTA, *supra* note 61; and UCMJ, 10 U.S.C. § 821 (2000)).

[111] *Hamdan*, 126 S. Ct. at 2775.

[112] *Id.* at 2775 (internal quotation marks omitted); *see also* UCMJ, 10 U.S.C. § 821 (2000) ("The provisions of this code conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions . . . of concurrent jurisdiction in respect of offenders or offenses that *by statute* or *by the law of war* may be tried by such military commissions, provost courts, or other military tribunals." (emphasis added)).

[113] *See infra* Part III.B.2.a.

[114] *Hamdan*, 126 S. Ct. at 2792-93; *see also infra* Part III.B.2.b. For similar reasons, the commission did not qualify as a "regularly constituted" court and thus violated Common Article 3 of the Geneva Conventions. *Hamdan*, 126 S. Ct. at 2793, 2796-97 (referring to Geneva Convention Relative to the Treatment of Prisoners of War

art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention POW Treatment]. The Article provides, "In the case of armed conflict not of an international character . . . the following acts . . . remain prohibited . . . the passing of sentences . . . without previous judgment pronounced by a regularly constituted court . . . ." *Id.*, art. 3. This provision is typically referred to as "Common Article 3" as it is found in all four of the Geneva Conventions, but for the sake of brevity, the Court only cited the third Convention. *See id.* at 2795 n.59.

A plurality of the Court also held that the law of war did not recognize conspiracy as a crime. *Id.* at 2777-78 (Stevens, J., plurality opinion). For a discussion of the several concurring and dissenting opinions (five in all), see Julia Y. Capozzi, *supra* note 104, at 1315-21; Cass R. Sunstein, *Clear Statement Principles and National Security*: *Hamdan and Beyond*, 2006 SUP. CT. REV. 1, 17-22 (2006). Sunstein even "nominate[s] *Hamdan* as the all-time champion" of divisive Supreme Court opinions. *Id.* at 4.

On remand from the Supreme Court, the District Court for the District of Columbia confronted the case in the context of the newly enacted MCA. *See* Hamdan v. Rumsfeld, 464 F. Supp. 2d 9 (D.D.C. 2006); *see also supra* note 104. The court held that Hamdan, now deprived of a statutory basis for seeking habeas relief, *Hamdan*, 464 F. Supp. 2d at 12 (finding "unsuccessful" the argument that the MCA retroactivity provision did not apply to the jurisdiction-stripping provision), was not constitutionally entitled to the great writ of habeas corpus given his status as an extraterritorially located alien-detainee. *Hamdan*, 464 F. Supp. 2d at 12, 18. For further discussion of this decision, see Neil A. Lewis, *Judge Sets Back Guantanamo Detainees*, N.Y. TIMES, Dec. 13, 2007, at A32; Greenberger, *supra* note 104, at 810 n.31; Jordan J. Paust, *Above the Law: Unlawful Executive Authorizations Regarding Detainee Treatment, Secret Renditions, Domestic Spying, and Claims to Unchecked Executive Power*, 2007 UTAH L. REV. 345, 416 n.208 (2007) (disagreeing with aspects of the court's analysis). In a later proceeding, the Supreme Court declined to hear the "unusual" petition for certiorari of Hamdan and fellow detainee, Omar Khadr. Hamdan v. Gates, 476 F.3d 981 (D.C. Cir. 2007), *cert. denied*, 127 S. Ct. 2133 (2007); Brief for the Respondents at 1, Hamdan v. Gates, 127 S. Ct. 2133 (2007), 2007 WL 965445; *see also* Bruce Zagaris, *U.S. Supreme Court Denies Certiorari for Guantanamo Petitions*, 23 INT'L ENFORCEMENT L. REP. 7 (2007) (discussing the petitioners' circumstances).

In June 2007, a military judge dismissed all military commission (i.e., war crimes) charges against Hamdan due to the failure of the CSRT system to classify him as an "unlawful" enemy combatant (as opposed to just an "enemy combatant"). Editorial, *Stuck in Guantanamo*, WASH. POST, June 7, 2007, at A26, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2007/06/06/AR2007060602302.html. Consequently, per the Geneva Conventions, Hamdan was entitled to prisoner of war status. *See id*; *see also* William Glaberson, *Tribunal Complicates Policy on Detainees; Guantanamo Judges Dismiss Charges in 2 War-Crimes Cases*, INT'L HERALD TRIB., June 6, 2007, at 7 ("[Senator Arlen Specter] said it was 'dead wrong' for anyone to assert that Congress intended to permit prosecution of detainees who had not been declared unlawful enemy combatants."). This ruling highlighted systemic problems with the post-9/11 system of detaining and prosecuting suspected terrorists. *See id.* (chief military defense lawyer describing the decision as emphasizing a lack of "international legitimacy and legal authority" of the military commission process); *see also Stuck in Guantanamo*, *supra* (describing possibilities for congressional reform of tribunal process and mechanisms of judicial review).

The procedural deficiency that prompted this dismissal of charges, however, is evidently curable by a determination of unlawful enemy combatant status at the military commission level itself. *See* Josh White, *Court Reverses Ruling on Detainee*, WASH. POST, Sep. 25 2007, at A04, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2007/09/24/AR2007092401848.html. In a related detainee challenge, a military commission review panel ruled "that [commission] trial judges can hear evidence on a detainee's combatant status and therefore can proceed with the trials." *Id.* (finding that the trial judge hearing the case incorrectly "believed he could not make such a determination of 'unlawful' status.").

II. SPECIAL CIRCUMSTANCES AND JURISDICTION

One question permeating the Supreme Court's post-9/11 war-on-terror jurisprudence is the extent to which federal courts should afford special treatment to detainee challenges when assessing jurisdictional or other threshold issues. This section will address a specific subset of this issue: whether the merits of a detainee challenge or exceptional surrounding circumstances should be considered in determining whether the petitioner has satisfied jurisdictional requirements prerequisite to review on these merits. The considerations underlying this inquiry relate to those underlying the general issue of the proper scope of review for detainee challenges, as well as the more specific issue (addressed in Part III) of the appropriate temporal vantage point to apply.

Returning to the focus of this section, a circumspect examination might suggest that even challenges to military detention by alleged enemy combatants deserve the same treatment as other challenges to physical custody, as seen in *Rumsfeld v. Padilla*.[115] Bending, twisting, or overriding jurisdictional rules to accommodate the resolution of the profound substantive issues raised by these challenges could lead to rampant forum shopping and thereby diminish judicial efficiency.[116] Arguably, considerations of judicial economy alone do not militate against a more flexible jurisdictional treatment when major personal liberties or even human rights are on the line. Still, allowing ad hoc exceptions based on the importance of a case could turn federal courts into arbiters of a largely normative set of criteria—in short, the public interest.[117]

In *Rasul v. Bush*,[118] the Court, perhaps searching for some middle ground, heeded this notion in a technical sense. But, essentially in defiance of the principle of judicial restraint (at least as understood by the *Padilla* Court), the *Rasul* Court

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Pursuant to this authority, in December 2007, a military judge in the Hamdan case held that Hamdan is an unlawful enemy combatant and is thereby subject to trial by military commission. United States v. Hamdan, On Reconsideration: Ruling on Motion to Dismiss for Lack of Jurisdiction (Military Comm'n, Dec. 19, 2007) (Allred, J.), *available at* http://www.defenselink.mil/news/Dec2007/Hamdan-Jurisdiction%20After%20Reconsideration%20Ruling.pdf; Reuters, *NYT Bin Laden's Driver Is Not POW, Judge Says*, Dec. 20, 2007, *available at* http://www.nytimes.com/reuters/news/news-guantanamo-hamdan.html.

[115] *See infra* Part II.A.

[116] *See infra* note 147.

[117] *See infra* notes 144-147 and accompanying text.

[118] 542 U.S. 466 (2004).

appeared to justify its far-reaching jurisdictional conclusion by invoking its perceptions of the substantive worth and momentous implications of the underlying detainee challenge.[119] It is to a more specific discussion of these cases that this Note will now turn.

A. Rumsfeld v. Padilla: *Sticking to the Core*

1. The General Approach of the *Padilla* Court

Rumsfeld v. Padilla firmly stands for the proposition that federal courts generally should not consider special or extraordinary circumstances surrounding a federal habeas challenge when determining jurisdictional standing, even of alleged enemy combatants detained outside the civilian criminal system.[120] The general approach that the *Padilla* Court advocated instead may be described as follows: whenever possible (as opposed to when subjectively preferable), a reviewing court should analyze a habeas challenge in accordance with rigid jurisdictional rules derived from the relevant habeas statute.[121] To elaborate, if the dispute at the most reduced factual level, without regard to the equities of the case, admits to reasonable interpretation within the traditional habeas analysis, then its resolution should proceed accordingly. The presence of amenable circumstances, rather than the absence of any unusual factors, thus determines the outcome.[122] Departures from this established framework should occur only in response to factual incompatibilities between present circumstances and the core assumptions—particularly, present physical custody in the United States—that informed the development of the old rules.[123]

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[119] *See infra* Part II.B.

[120] Rumsfeld v. Padilla, 542 U.S. 426, 447-50 (2004).

[121] *See id.*

[122] *See id.* at 449-50.

[123] *See id.* at 435-36. Exceptions to traditional jurisdictional requirements potentially could be warranted where the habeas petitioner challenged something other than present physical custody, such as reservist status in the armed forces, *id.* at 438-39, 449-50, or a term of imprisonment that had not yet commenced, *id.* at 438-39, or where the petitioner, assuming that he was a citizen, was held outside of the United States. *Id.* at 435 n.8, 447 n.16. Deviations likewise could be supported where the location of the detainee or the identity of his custodian was unknown, *id.* at 450 n.18, or where the government relocated a detainee following a proper filing of his petition. *Id.* at 440-41. Perhaps even government impropriety, under certain circumstances, could justify a departure from the strict jurisdictional rules. *See id.* at 449 n.17; *see also infra* note 137 and accompanying text. The Court stressed, however, that the existence

2. Application of the Traditional Habeas Paradigm to the facts of *Padilla*

Applying the foregoing logic to the specific dispute, the *Padilla* Court declined to make exceptions to strict, statutorily derived jurisdictional rules due to any "undeniably unique" circumstances surrounding Padilla's military detention.[124] These circumstances generally pertained to the war-on-terror context in which Padilla's detention arose.[125] The Court similarly refused to overlook traditional threshold requirements in order to accommodate the profound security-versus-liberty debate embodied by this detainee challenge.[126] As the Court reasoned, the outcome of the jurisdictional dispute should be controlled not by the relative equities, but by more objectively grounded criteria.[127]

Directing the jurisdictional inquiry accordingly, the dispute found immediate disposition within the traditional habeas framework.[128] This conclusion obtained despite the rapid and ex parte nature of Padilla's removal from the civilian criminal system and despite the arguably unprecedented personal involvement of the Secretary of Defense in relocating an American citizen from civilian to military confinement.[129] Padilla had challenged his present physical confinement, the location of which was known and was obviously within the United States.[130] The identity of Padilla's immediate custodian, Commander Marr, the person who exercised actual day-to-day control over Padilla, likewise had been revealed.[131] Moreover, the relocation of Padilla to a military facility, although government-induced, occurred prior to, not following, the filing of the habeas petition.[132] Thus, despite the presence of atypical

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of certain jurisprudential exceptions to strict, statutorily derived jurisdictional rules did not detract from the otherwise applicability of these rules to core challenges like Padilla's, where none of the above potential reasons for departure were present. *See Padilla*, 542 U.S. at 446-47; *see also infra* notes 128-133 and accompanying text.

[124] *See Padilla*, 542 U.S. 426, 441 (2004); *supra* notes 45-48 and accompanying text.

[125] *See Padilla*, 542 U.S. at 437-38, 441, 447-51.

[126] *See id.* at 450-51.

[127] *See id.* at 441.

[128] *Id.*

[129] *See id.* at 440 n.13, 448-49.

[130] *Id.* at 441, 446; *see also id.* at 450, n.18.

[131] *Id.* at 450 n.18.

[132] *Id.* at 431-32.

factors, the case ultimately broke down into the usual elements.[133]

The Court further reinforced the factual and subjective distinctions of the traditional habeas paradigm when addressing the issue of alleged government impropriety.[134] In his dissenting opinion, Justice Stevens suggested that the Court should proceed as if Padilla's counsel had filed the petition *before* the removal of Padilla from the Southern District of New York—especially when considering that the government had quietly, if not secretly, conducted the relocation process and had not provided Padilla's counsel with sufficient notice of its intentions.[135] But a majority of the Court chose not to "indulge" this equity-driven legal fiction, viewing it as incompatible with the facts-based traditional approach to which the Court instead subscribed.[136]

Still, the *Padilla* Court hinted, albeit in dictum in a footnote, that greater flexibility could have been accorded to the jurisdictional rules if the evidentiary record had clearly established that the government purposely "shrouded . . . in secrecy" the relocation process or intended to deceive Padilla's counsel about his client's whereabouts.[137] In any event, according to the Court, Padilla's counsel at the time of filing apparently knew, even if only from media sources, about Padilla's removal from the Southern District.[138] That the *Padilla* Court considered information obtained in this indirect manner and from a non-governmental source as sufficient notice exemplifies this Court's manner of disregarding normative viewpoints in arriving at threshold conclusions.[139] Much as the Court considered it more significant that Commander Marr exerted immediate control over Padilla than that Secretary Rumsfeld had exercised substantial control over the relocation process, the fact that Padilla's counsel knew about the relocation prior to filing the habeas petition carried

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[133] *See id.* at 441.

[134] *See id.* at 448-49.

[135] *See id.* at 458-59 (Stevens, J., dissenting).

[136] *See id.* at 448-49 (majority opinion). The relative insularity of the *Padilla* Court's approach bears some resemblance to the temporally restricted, present vantage point approach later advanced by a plurality in *Hamdi v. Rumsfeld*. *See infra* Part III.A. Yet it contrasts sharply with that in *Rasul v. Bush* and *Hamdan v. Rumsfeld*. *See infra* Part III.B.

[137] *See Padilla*, 542 U.S. at 449 n.17 (citing *Padilla*, 542 U.S. at 459 n.3 (Stevens, J., dissenting)).

[138] *See id.* at 449 n.17; *see also id.* at 459 n.3 (Stevens, J., dissenting).

[139] *See id.* at 449 n.17 (majority opinion).

greater legal relevance than the question of how counsel learned (or did not learn) about the relocation.

3. Rationales of the *Padilla* Court: Advocating a Position of Restraint

As demonstrated by the application of the traditional habeas framework to the specific question presented in *Padilla*, the *Padilla* Court called for a relatively strict separation between the jurisdictional and substantive elements of a habeas petition. The Court refused to deviate from the jurisdictional conventions of habeas corpus just because the merits of the case were extraordinary in nature.[140] Instead, to contain the sort of merits- or dicta-creep evident in the dissenting opinion,[141] the Court broadly defined core habeas challenges.[142] This definition includes any case that sensibly can be resolved in accordance with traditional threshold requirements. Even cases involving U.S. citizens subject to military detainment as part of the war against terror feasibly could be considered run of the mill, at least insofar as jurisdiction is concerned.[143] Thereby, in the majority of cases, the relative equities would not come into play until formal consideration of the merits.

A more liberal alternative, or a position of less judicial restraint, as espoused by the dissent,[144] would force district

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[140] *See id.* at 447-51.

[141] *See infra* note 144 and accompanying text. This dissent was a preview for the majority opinion to come in *Rasul v. Bush*. *See infra* Part II.B.

[142] *See Padilla*, 542 U.S. at 447-51.

[143] *See id.* at 450-51.

[144] The dissenting opinion, authored by Justice Stevens, resoundingly disagreed with the majority with respect to the role that the extraordinary circumstances surrounding this case should play in determining Padilla's jurisdictional standing. *See id.* at 465 (Stevens, J., dissenting). The dissent described, in particular, how the unprecedented personal involvement of the Secretary of Defense in overseeing the removal of Padilla from the civilian criminal system posed "a unique . . . threat to the freedom of every American citizen." *Id.* at 461. More generally, this case presented a profound debate between personal liberties and national securities. *Id.* at 465. The dissent further commented on the dangerous situation presented when a democracy resorts to major breaches of basic personal liberties in order to maintain national security. *See id.* Overcoming the "forces of tyranny" requires continual adherence by the government to the fundamental values represented by the American flag. *Id.* In light of the exceptionality of this case, the Court had an affirmative duty to review the case on the merits, regardless of the ultimate determination at this level. *Id.* at 465. "Special treatment," as opposed to strict adherence to formalistic rules, thus was warranted at least at the threshold jurisdictional level. *Id.* at 460; *see also* Padilla v. Hanft, 547 U.S. 1062, 1064 (2006) (Ginsburg, J., dissenting from denial of certiorari) (noting that the substantive question raised in *Rumsfeld v. Padilla*—whether the

courts to make "ad hoc determinations as to whether the circumstances of a given case are exceptional, special, or unusual enough to require departure from the jurisdictional rules [the] Court has consistently applied."[145] Bending these rules in order to facilitate discussion of the controversies engendered by this case would, if anything, cause further uncertainty regarding the war on terror, or so the majority seemed to imply.[146] In sum, prudential considerations prevailed over equitable considerations of jurisdiction for war-on-terror habeas challenges, where the jurisdictional issues could be feasibly resolved within the traditional paradigm.[147]

B. Rasul v. Bush: *Veiled Judicial Activism*

1. The General Approach of the *Rasul* Court

In *Rasul v. Bush*, the Court at least tacitly condoned appealing to the merits of a detainee challenge as a means of enhancing statutorily derived jurisdictional conclusions.[148] The *Rasul* Court, unlike the *Padilla* Court, effectively conflated the jurisdictional and substantive components of the habeas challenge with which it was presented.[149] But rather than disclaiming outright the sort of prudential considerations (and corresponding winnowing-down approach) advanced in

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"President ha[d] authority to imprison indefinitely a United States citizen arrested on United States soil distant from a zone of combat, based on an Executive declaration that the citizen was, at the time of his arrest, an enemy combatant . . . [was] a question the Court heard, and should have decided, two years ago"). *But see* Fallon & Meltzer, *supra* note 58, at 2052-53 (arguing that the jurisdictional factors in *Padilla* were "close to equipoise" when "taken in isolation"; considering this and that at least some of the Justices who joined the majority may have disagreed with the illegality of Padilla's detention, "postponing resolution" on the matter was not inconsistent with a sensible, "common law" approach to habeas jurisdiction).

[145] *See Padilla*, 542 U.S. at 450 (majority opinion) (internal quotations omitted).

[146] *See Padilla*, 542 U.S. at 450-51.

[147] The Court also emphasized that the traditional jurisdictional rules "serve[] the important purpose of preventing forum shopping by habeas petitioners." *Id.* at 447. In the absence of these rules, "a prisoner could name a high-level supervisory official as respondent and then sue that person wherever he is amenable to long-arm jurisdiction. The result would be rampant forum shopping, district courts with overlapping jurisdiction, and the very inconvenience, expense, and embarrassment Congress [had] sought to avoid" through its design of the federal habeas statute. *Id.* (referring to 28 U.S.C. § 2241).

[148] *See infra* Part II.B.2.

[149] Recall that *Padilla* strongly advised against such blending together, even with respect to challenges by suspected terrorists. *See supra* Part II.A.

Padilla,[150] the *Rasul* Court proceeded more obliquely. On the one hand, the *Rasul* Court proclaimed to subscribe to a strict mode of statutory construction, much as did the *Padilla* Court.[151] On the other hand, unlike in *Padilla*, the Court in several instances incorporated into its analysis (albeit indirectly) factors relating to the merits of the detainee challenge.[152] Due to these competing observations, it is difficult to discern from *Rasul*'s specific resolution any coherent message regarding special considerations and jurisdictional standing. If the Court's tortuous analysis could be broken down into distinct tiers, it could be said that, first, formal statutory conclusions were made and, second, these conclusions were defended via the substantive attributes of the case. The net result was a form of judicial activism that, despite its subtle implementation, had far-reaching consequences.[153]

2. Incorporating the Merits into the Specific Resolution of *Rasul*

The *Rasul* Court, notwithstanding its purportedly narrow approach,[154] supported its formal jurisdictional holding

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[150] *See supra* Part II.A.

[151] Rasul v. Bush, 542 U.S. 466, 478-79, 483-84 (2004).

[152] *See infra* Part II.B.2*; see also* Pope, *supra* note 58, at 26-27 (describing Justice Scalia's dissent in *Rasul*). As described by Pope:

> In a biting dissent, Justice Scalia argued that the *Rasul* majority had done great violence both to the habeas statute and to the *Eisentrager* decision . . . [which, in his view] did pass judgment on whether the habeas statute granted jurisdiction over the claims of foreign nationals held outside the United States. He asserted that the brevity of the *Eisentrager* court's analysis signified that it was nothing more than an axiomatic proposition that the statute failed to reach the *Eisentrager* detainees. Accordingly, in his view, *the [Rasul] Court had completely recast precedent in order to reach a more palatable result while at the same time appearing to give due deference to precedent.* This jurisprudence, he argued, was an example of "judicial adventurism of the worst sort."

Id. at 26-27 (emphasis added) (citing *Rasul*, 542 U.S. at 488, 490, 493, 506 (Scalia, J., dissenting)) (criticizing the majority's "clumsy, countertextual reinterpretation" of the habeas statute and attendant precedent as a wholesale "departure from . . . *stare decisis*").

[153] *See supra* notes 58, 61 and accompanying text. For a principled defense of *Rasul*, despite its "shortcomings in explanation," see generally Fallon & Meltzer, *supra* note 58. Fallon & Meltzer argue that the "specific outcome seems entirely plausible . . . within the Common Law Model [of habeas corpus jurisdiction], based on the special status of Guantánamo Bay," over which the United States exercises complete control pursuant to a lease agreement. *Id.* at 2059-60. Moreover, this "modest extension of jurisdiction avoided or at least postponed a welter of [constitutional] difficulties." *Id.*

[154] *See supra* note 151 and accompanying text.

by referencing the special circumstances that essentially formed the substantive basis of the petitioners' challenge. Factors affecting the merits of the case included that the *Rasul* petitioners (while denying the government's allegations) had been detained for over two years in territory subject to the exclusive control and jurisdiction of the United States without having received access to counsel and without having been charged with any crime.[155] The Court concluded, however, that the narrow and sole issue in this case—whether "United States courts lack jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at the Guantanamo Bay Naval Base"[156]—could be resolved readily and solely under the federal habeas statutory framework (that is, without resort to constitutional fundamentals),[157] and hence in a single tier of analysis. Nonetheless, the manner by which the Court referred to the merits of the case, and ascribed significance to them, suggests an additional tier of analysis going well beyond any clear-cut statutory considerations.

The Court first alluded to the circumstances surrounding the confinement of the *Rasul* detainees when distinguishing this case from *Johnson v. Eisentrager* on apparently constitutional grounds.[158] But the Court subsequently concluded that resolving the present dispute did not require making this merits-based distinction, given that it did not bear directly, or even indirectly, on the question of statutory habeas jurisdiction and given that *Eisentrager* did not bar review of the *Rasul* detainees' challenge under the federal habeas statute.[159] The prominent inclusion of this distinction begs the question of the Court's purpose; whatever relevance these circumstances had to this case, the Court failed to explain why it introduced them in that particular context and manner. If the Court had sought only to make an additional point apart from its specific legal conclusion, then surely it could have delineated this purpose more clearly. Instead, this statement tends to refute the Court's

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[155] *Rasul*, 542 U.S. at 483 n.15 (2004).

[156] *Id.* at 470. *But see infra* notes 166-168 and accompanying text.

[157] *See supra* note 151 and accompanying text.

[158] *See* Johnson v. Eisentrager 339 U.S. 763 (1950); *supra* notes 62-65 and accompanying text.

[159] *See supra* notes 62-65 and accompanying text.

proclamations of narrow judicial review devoid of any consideration of the merits.[160]

Later in the opinion, as the Court directly recited the seemingly ultimate conclusion of the case,[161] an accompanying footnote stated that the petitioners' allegations, if true, would "unquestionably" demonstrate the illegality of their confinement.[162] Indeed, this statement pertained to pleading requirements (as opposed to the question of the appropriate forum or court) and appeared outside of the main body of the opinion.[163] Still, the Court seemed to invoke the substance of the petitioners' challenge in order to reinforce its formal statutory conclusion, especially when viewing the footnote statement alongside the earlier treatment of the merits of the case vis-à-vis *Eisentrager*.[164] Further supporting this assertion is the statement's textual proximity to the formal statutory conclusion of the case. Pleading requirements, moreover, were not even at issue.[165]

The Court, in a last-ditch effort to infuse viability into its formal holding, restated the issue of the case in the final paragraph of the opinion as follows: "[w]hat is presently at stake is only whether the federal courts have jurisdiction to determine the legality of the Executive's *potentially indefinite detention of individuals who claim to be wholly innocent of wrongdoing*."[166] While not unreasonable to expect a bold dictum in the concluding paragraph of a high-profile, politically charged case such as this, the Court proceeded as if it were simply restating the exclusive issue.[167] But even assuming that the emphasized phrase in the Court's statement did validly

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[160] *See supra* note 151 and accompanying text.

[161] *See supra* notes 58-61 and accompanying text.

[162] *Rasul*, 542 U.S. at 483 n.15 (citing 28 U.S.C. § 2241(c)(3)) ("Petitioners' allegations—that, although they have engaged neither in combat nor in acts of terrorism against the United States, they have been held in executive detention for more than two years in territory subject to the long-term, exclusive jurisdiction and control of the United States, without access to counsel and without being charged with any wrongdoing—unquestionably describe 'custody in violation of the Constitution or laws or treaties of the United States.'").

[163] *See id.*

[164] *See supra* notes 62-63 and accompanying text.

[165] *See supra* note 70 and accompanying text.

[166] *Rasul*, 542 U.S. at 485 (emphasis added); s*ee also id.* at 475 ("The question now before us is whether the habeas statute confers a right to judicial review of the legality of Executive detention of aliens in a territory over which the United States exercises plenary and exclusive jurisdiction, but not ultimate sovereignty." (internal quotation marks omitted)).

[167] *See supra* note 156 and accompanying text.

relate to pleading requirements, this statement did not simply restate an issue dealing solely with statutorily conferred jurisdiction. To the contrary, the merits of the case crept into and served to justify the statutory findings.[168]

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[168] Contrast the *Rasul* Court's approach with that advanced by Justice Kennedy in his concurring opinion. *Rasul*, 542 U.S. at 485-88 (Kennedy, J., concurring). Unlike the majority opinion, Kennedy directly viewed the particular case "against the backdrop of the constitutional command of the separation of powers" in resolving the jurisdictional issue. *Id.* at 485-86. One special circumstance militating in favor of finding that district courts have jurisdiction to hear these claims was that the petitioners were being held in an area over which the United States exercised exclusive and plenary control. *Id.* at 487. Another critical factor was that the petitioners were being held in "indefinite pretrial detention" when it was not clear that such prolonged detention was justified by military exigency. *Id.* at 488.

Kennedy concluded that although "detention without proceedings or trial would be justified by military necessity for a matter of weeks," the rationale for prolonged detention due to military exigency loses strength "as the period of detention stretches from months to years." *Id.* A case-specific approach, according to Kennedy, would have avoided the dramatic effect of the majority opinion, which he interpreted as granting an automatic right to statutory habeas jurisdiction to persons detained outside of the United States. *Id.*

It is worth noting, in the context of judicial decision-making, the connection between the particular legal lens (constitutional, legislative, or even international) through which a detainee challenge is viewed and the perceived scope or consequences of the resolution. As Rotunda points out, "[c]onstitutional rulings cannot be overturned by mere legislation," but "Congress, if it chose to do so, could amend the [habeas] statute and go back to the world before the Supreme Court reinterpreted it." Rotunda, *supra* note 44, at 48. It thus may seem strange that Justice Kennedy lamented the tremendous effects of the *Rasul* majority's statutory-based conclusion, despite the ready possibility of congressional reaction and correction, and instead promoted a constitutionally oriented approach. Perhaps this can be reconciled on the basis that Kennedy's balancing test would be very fact specific and therefore avoid or delay creating immutable legal principles.

Kennedy, in any event, did seem to proceed in a more open and honest fashion than the *Rasul* majority, and his approach would produce, in at least one important respect, less drastic results than that adopted by the majority. Nonetheless, it is difficult to square the Kennedy approach with that of *Padilla*, which admonished against making ad hoc determinations about the exceptionality or uniqueness of a detainee challenge when resolving jurisdictional issues. *See supra* Part II.A.3; *see also Rasul*, 542 U.S. at 496 n.4 (Scalia, J., dissenting) (criticizing Kennedy's balancing test approach for "provid[ing] enticing law-school-exam imponderables in an area where certainty is called for"). Justice Scalia noted that under the ad hoc test espoused by Kennedy, "courts would *always* have authority to inquire into circumstances of confinement," when making jurisdictional determinations. *Id.* Among the questions reviewing courts would have to address are "When does definite detention become indefinite?" and "How much [judicial] process will suffice to stave off jurisdiction?" *Id.*

These criticisms in a more general sense could also describe the approach of the *Rasul* majority, which, as described in this subsection, appeared to commingle jurisdictional and substantive considerations.

3. *Rasul*'s Incompatibility with *Padilla*

As described above, the *Rasul* Court surreptitiously evaded a path of judicial restraint.[169] *Rasul*, however, did not explicitly redefine core habeas petitions, as they had been defined in *Padilla*, to categorically exclude detainee challenges characterized by extraordinary circumstances or great legal uncertainty.[170] Moreover, the oblique connection drawn between special circumstances and jurisdictional standing might seem to produce only indirect effects—serving, in other words, to strengthen or buttress the formal statutory holding. Yet, in light of *Rasul*'s mixed messages, it is difficult to assess the stand-alone power of the formal holding. More specifically, the merit-based considerations cannot easily be parsed from the purportedly strict determinations underlying the technical legal conclusions.[171] Overall, the zigzagging path of *Rasul* evades meaningful reconciliation with that of the more straightforward *Padilla*.

Rasul also deviated from the specific rationales underlying *Padilla*, including preventing case-by-case determinations by federal courts as to whether the circumstances surrounding a detainee challenge are sufficiently exceptional to warrant digressions from traditional jurisdictional rules.[172] A reviewing court indeed would avoid making such ad hoc conclusions in the first or primary tier of analysis (which, again, was the only level of analysis explicitly undertaken by the *Rasul* Court), assuming that this analysis entailed only strict statutory considerations. But the second or supplemental tier of analysis (which was effectively undertaken by the *Rasul* Court, its denials notwithstanding[173]) would essentially require assessing the merits of a habeas challenge to determine whether they are special enough, or bear on adequately important liberty interests, to justify the first-tier conclusions.

Yet in actual cases this two-tiered approach would not be applied as neatly as has been described here, considering that it was not directly enunciated but rather implied by *Rasul*'s obscure reasoning. In practice, the two levels of analysis cannot be meaningfully differentiated and

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

170 *See supra* Part II.A.

171 *See supra* notes 66-71 and accompanying text.

172 *See supra* Part II.A.3.

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

basically would occur simultaneously. Regardless of the exact description befitting the *Rasul* approach, the point remains that this approach may condone, at least tacitly, a level of complex judicial determination that transcends the rigid limits envisioned by *Padilla*, its more level-headed sister case.[174] Applying this convoluted style may decrease indeterminably the level of restraint exercised by a reviewing court because the extent of change will not be ascertainable amidst the fuzzy reasoning.

C. The Resultant Shaky Line of Precedent

Viewed together, *Rumsfeld v. Padilla* and *Rasul v. Bush* provide little coherent guidance on the subject of special circumstances and jurisdictional standing. Given their antagonisms, this pair of cases set the foundation soon after 9/11 for an unstable line of precedent. In *Padilla*, the Supreme Court applied strict statutory analysis to arrive at its formal jurisdictional conclusion.[175] By contrast, in *Rasul*, the Court only superficially refrained from considering the merits or the exceptional surrounding circumstances of its corresponding detainee challenge.[176] Consequently, *Rasul* added a layer of perplexity to the Supreme Court's post-9/11 war-on-terror jurisprudence and, in doing so, increased the general tension that already engulfed the topic.

The refusal by a plurality of the Court in *Hamdi v. Rumsfeld* to review an issue on the basis of a future prospect (despite its likelihood of occurrence)[177] perhaps to some extent mitigates the influence of *Rasul* and, alongside *Padilla*, reinforces a basic message of restraint. Still, *Hamdi* could not fully overshadow the more expansive analytical framework adopted in *Rasul* and, most recently, in *Hamdan v. Rumsfeld*.[178] Nor could *Hamdi* and *Padilla*, in combined force, mask the overall instability of the jurisprudence.

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[174] *See supra* Part II.A & B.2.
[175] *See supra* Part II.A.2.
[176] *See supra* Part II.B.2 & B.3.
[177] *See infra* Part III.A.
[178] *See infra* Part III.B.

III. SPECIAL CONSIDERATIONS AND ANTICIPATORY REVIEW

Another significant feature of the Supreme Court's post-9/11 war-on-terror jurisprudence has been the issue of whether federal courts should review detainee challenges that are based in substantial part on future prospects or anticipated events. The question, in other words, is whether such claims are ripe for review given the current factual and legal climates and in view of reasonably possible subsequent occurrences. Closely tied to this inquiry is whether an expedited form of review is warranted given the important, though still developing, substantive attributes of a detainee challenge. An affirmative answer may require courts to make ad hoc determinations about whether and what types of circumstances qualify as exceptional—a situation similar to that disfavored by *Rumsfeld v. Padilla* with respect to jurisdictional standing.[179] This same answer may also necessitate a certain degree of judicial guesswork in regard to expected factual as well as legal developments, which may be viewed as a lack of restraint, at least in a temporal sense.

This sort of prospective temporal vantage point, given its relative uncertainty, was viewed with caution by the plurality opinion in *Hamdi v. Rumsfeld*.[180] Legal constructs (at least in the context of detainee challenges), the plurality implied, should develop in tandem with, not in anticipation of, events and circumstances.[181] In *Hamdan v. Rumsfeld*, by contrast, the Court demonstrated a willingness to review the legality of government actions before they fully occurred, where there were sufficiently grounded reasons to presume the illegality of such actions and where major liberty interests or traditional judicial protections were at stake.[182] At a minimum, *Hamdan* suggested that the importance of a dispute, even when not finalized, may override considerations of deference to the executive branch.[183] This section will examine these cases individually as well as in contrast to each other and in relation to *Padilla* and *Rasul*.

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[179] *See supra* Part II.A.3.
[180] *See infra* Part III.A.
[181] *See infra* Part III.A.
[182] *See infra* Part III.B.
[183] *See infra* Part III.B.2.a.

A. Hamdi v. Rumsfeld: *"Temporal" Deference*

1. The General Approach of the *Hamdi* Plurality

In a manner comparable to the winnowing-down approach endorsed by *Padilla v. Rumsfeld*,[184] the plurality in *Hamdi v. Rumsfeld* perceived substantive issues related to the legality of detention (as distinct from the level of judicial process owed to detainees) from a narrow, temporally restricted vantage point.[185] The plurality supported the following approach: whenever practicable—as opposed to when normatively preferable—the resolution of the substantive issues of a detainee challenge should turn on the circumstances of confinement as they present themselves at the time of judicial review, and not on speculations, even if fairly reasonable, about future scenarios.[186] A dispute likewise should

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[184] *See supra* Part II.A.

[185] *See infra* Part III.A.2.

[186] Compare this approach to that employed by Justice Kennedy in Padilla v. Hanft, 547 U.S. 1062, 1062-64 (2006) (Kennedy, J., concurring in denial of certiorari), where the Supreme Court declined to grant certiorari to review the claims of the successor case to Rumsfeld v. Padilla, 542 U.S. 426 (2004). *See Padilla v. Hanft*, 547 U.S. at 1063. As described by Justice Kennedy, these claims were now premised on hypothetical scenarios. *See id.* (Kennedy, J., concurring in denial of certiorari). Regardless of whether Padilla's claims were mooted by the fact that he had received the principal relief that he had sought, "prudential considerations" militated against reviewing Padilla's claims when the relief sought would have no practical effect unless the government proceeded to remove him, once again, from the civilian criminal system. *See id.* Review thus was not justified where Padilla's return to military custody remained a possibility but was not an actual reality. *See id. But see* Rotunda, *supra* note 44, at 42 (arguing that "the issue [was] simply not moot" given that, among other reasons, Padilla could seek damages if he was "held unconstitutionally for the last several years").

Still, the perceived threat that his status or the circumstances of his confinement could be changed yet again by the government warranted an expedited review by the district court overseeing Padilla's case, in the event that such threat was realized. *See Padilla v. Hanft*, 547 U.S. at 1064. Because Padilla was receiving the relief he had sought and because he was not contesting the lawfulness of his civilian detention, resolving the current dispute (as presented by Padilla in his writ of certiorari) perhaps required nothing more than for the district court to remain alert and attuned to change. *See id.* By this reasoning, a federal court could *defensively* anticipate future governmental abuses when there is a reasonable prospect of their occurrence, but could not respond *preemptively*.

Contrast Justice Kennedy's reasoning here, *id.* at 1062-64, as well as that of the plurality in *Hamdi*, Hamdi v. Rumsfeld, 542 U.S. 507, 521 (2004) (O'Connor, J., plurality opinion), with the dissent of Justice Breyer in *Boumediene*, Boumediene v. Bush, 127 S. Ct. 1478, 1479-81 (April 2, 2007) (Breyer, J., dissenting from the denial of certiorari), *vacated*, 127 S. Ct. 3078 (June 29, 2007) (granting certiorari); *see also supra* note 104. Citing *Hamdan*, Breyer explained why the Court should not refrain from hearing a consolidated set of detainee challenges even if available remedies have not yet been exhausted:

be resolved in accordance with legal principles as conventionally understood, rather than how these principles might eventually change to adapt to new factual landscapes, such as major military or political developments spurred by the war on terror.[187] Disposition outside of this traditional law-of-war paradigm thus may be appropriate when (but not until) circumstances have altered such that they are incompatible with the expectations that informed the existing legal framework, in particular that a war will not endure perpetually.[188]

2. Application of the Restricted Temporal Vantage Point to the Facts of *Hamdi*

Applying the foregoing logic to the specific context in *Hamdi*, the plurality assessed from a present factual and legal perspective whether the AUMF had authorized the detention of an alleged enemy combatant held outside the civilian criminal system and who had not been charged with any crimes.[189] The plurality, accordingly, did not consider the possibility, though not "far-fetched," that Hamdi's detention might last perpetually (that is, for the detainee's entire life), rather than just indefinitely (that is, for an uncertain period of time).[190] The plurality similarly declined to adjudge the present dispute in accordance with some hypothetical legal rubric under which the law of war had evolved to accommodate the yet unrealized prospect of perpetual detention.[191] Invoking a sense of

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> Here, as in *Hamdan*, petitioners argue that the tribunals to which they have already been subjected were infirm (by, *inter alia*, denying Petitioners counsel and access to evidence). Here, as in *Hamdan*, petitioners assert that these procedural infirmities cannot be corrected by review under the DTA which provides for no augmentation of the record on appeal and, as noted above, will provide no remedy for any constitutional violation. Here, as in *Hamdan*, petitioners have a compelling interest in assuring in advance that the procedures to which they are subject are lawful.

Boumediene, 127 S. Ct. at 1481 (citations omitted). Finally, Breyer noted that "here, *unlike Hamdan*, the military tribunals in Guantanamo have completed their work . . . ." *Id.* (emphasis in original). With this last statement (especially when read in light of Part II of the concurrence), Breyer seems to imply that if expedited review were warranted in *Hamdan*, then, a fortiori, so too would it be here. *See id.*

187 *See infra* Part III.A.2.

188 *See* Hamdi v. Rumsfeld, 542 U.S. 507, 521 (2004) (O'Connor, J., plurality opinion).

189 *Hamdi*, 542 U.S. at 516-24 (O'Connor, J., plurality opinion).

190 *See id.* at 519-20.

191 *See id.* at 521; *infra* notes 203-204 and accompanying text.

uncertainty regarding both factual and legal developments, the plurality thus avoided reviewing the legality of a current situation in light of unknown future scenarios.

In considering whether the AUMF had authorized the detention of alleged enemy combatants who had been captured abroad during hostilities, the plurality distinguished, as a factual matter, between indefinite and perpetual detention.[192] The plurality recognized that longstanding law-of-war principles permit the detention of enemy combatants for the duration of hostilities but no longer.[193] Hence, although Hamdi's detention was indefinite, it was limited definitively by the happening of a particular occasion—the endpoint of hostilities.[194] But the plurality also realized that, due to the "unconventional" nature of the war on terror and the corresponding possibility that the constituent conflicts could last for multiple generations, there was a reasonable prospect of effectively permanent detention (which, in terms of duration, rose beyond the level of mere uncertainty).[195]

Nonetheless, the plurality did not deem this indefinite/perpetual distinction relevant to evaluating the legality of Hamdi's detention under matters as they currently stood. The "necessary and appropriate force" authorized by the AUMF, according to the plurality, fundamentally included the traditional law-of-war principle mentioned above.[196] Therefore, so long as active combat persisted in Afghanistan, as was the case when the Court reviewed Hamdi's habeas petition,[197] durational indefiniteness did not strip a detention of its legality.[198] By that same measure, the prospect of a detention

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[192] *Hamdi*, 542 U.S. at 521; *see also supra* note 190 and accompanying text.

[193] *Hamdi*, 542 U.S. at 518-20 (O'Connor, J., plurality opinion).

[194] *See id.* at 520; *see also* Rotunda, *supra* note 44, at 31 (noting that "history did not give the 'Thirty Years War' that label on year one, or even year 29" and that "the 'Seven Years War,' or the 'Seven Days War' are names that the historians gave to these wars after they ended, not when they started"). The foregoing assertion rests on the assumption that the government would actually comply with the law of war.

[195] *Hamdi*, 542 U.S. at 519-20 (2004) (O'Connor, J., plurality opinion); *see also* Fallon & Meltzer, *supra* note 57, at 2077 (arguing that the notion of executive aggrandizement "acquires enhanced resonance when one imagines that an extraordinary, emergency-based validation of executive detentions might endure throughout a *metaphorical war with no currently imaginable end*") (emphasis added).

[196] *See Hamdi*, 542 U.S. at 518-19 ("Because detention to prevent a combatant's return to the battlefield is a fundamental incident of waging war . . ., Congress has clearly and unmistakably authorized detention in the narrow circumstances considered here.").

[197] *See infra* note 200 and accompanying text.

[198] *See Hamdi*, 542 U.S. at 521 (O'Connor, J., plurality opinion).

enduring in perpetuity did not fall outside the scope of authorization provided by the AUMF.[199]

Regardless of the probability that Hamdi's detention would last decades or beyond, the fact is that over 13,000 U.S. troops remained in Afghanistan at the time of the Court's review.[200] This substantial, active military presence easily satisfies the definition of hostilities under the traditional law of war.[201] It follows that Hamdi's detention, within the proper scope of the AUMF, could be directly linked to the ongoing state of conflict.[202] In sum, even a detention characterized as perpetual could be resolved by reference to present circumstances and in accordance with longstanding law-of-war principles.

The plurality, however, did suggest that a federal court might have occasion to reconsider the legal significance of perpetual and even indefinite detention if the war on terror proved radically different from the "practical circumstances" on which traditional law-of-war principles (and, in turn, the "necessary and appropriate force" provision in the AUMF) were based.[203] But rather than explicitly defining an unprecedented conflict, the plurality referred to such a conflict by negative example (that is, in terms of what it was not), using the current conflict in Afghanistan as an illustration.[204]

Again, despite the unconventionality of the conflict in Afghanistan and despite the likelihood of the lifelong confinement of at least some of the persons detained, the plurality firmly held that this conflict should be categorized within the conventional law-of-war framework.[205] This conflict seemed traditional not only inasmuch as that the United States

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[199] *See id.*

[200] *See id.* (noting reports of over 13,000, and perhaps as many as 20,000, U.S. troops in Afghanistan (citing Pamela Constable, *U.S. Launches New Operation in Afghanistan*, WASH. POST, Mar. 14, 2004, at A22; General John Abizaid Central Command Operations Update Briefing, Dept. of Defense, (Apr. 30, 2004), *available at* http://www.defenselink.mil/transcripts/2004/tr20040430-1402.html)); *see also* Rotunda, *supra* note 44, at 32 (noting that while it is not clear "when the Afghanistan hostilities . . . will end," it is "certain that they have not yet ended" given the continual military activity).

[201] *See Hamdi*, 542 U.S. at 521 (O'Connor, J., plurality opinion).

[202] *See id.*

[203] *See id.* ("If the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding may unravel. But that is not the situation we face as of this date.").

[204] *See id.*

[205] *See supra* notes 200-202 and accompanying text.

maintained a significant troop presence in Afghanistan,[206] but also in that only a relatively short time had elapsed (less than three years) since the American invasion commenced.[207] As implied by the plurality, this period was insufficient for the law of war to have begun to "unravel."[208] It may also be reasonably surmised from this opinion that the troop level and time period considerations, when taken together, militated against application of a modified law-of-war framework, even if either consideration alone might not.[209]

B. Hamdan v. Rumsfeld: *Anticipatory Review*

1. The General Approach of the *Hamdan* Court

Unlike the plurality in *Hamdi v. Rumsfeld*, the Court in *Hamdan v. Rumsfeld* reviewed the merits of a detainee challenge notwithstanding that the circumstances at issue had not yet fully occurred or developed.[210] The *Hamdan* Court followed an approach less temporally prescribed than that in *Hamdi*, whereby the evident strength of the merits of a habeas petition, or extraordinary surrounding circumstances, could warrant a "peremptory" review on the merits. If there were a reasonable basis to presume that the government would not afford to an alleged enemy combatant traditional legal and judicial protections, the reviewing federal court could take preemptive action in the name of the public interest.[211] According to the *Hamdan* Court, the weighty legal questions presented by the claims at issue justified the extension of an equitable-like jurisdiction over these claims—or, in a sense, infused them with ripeness.[212] The Court, however, did not always clearly differentiate between formal threshold

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[206] *See supra* note 200 and accompanying text.

[207] *Hamdi* was decided in June 2004, *Hamdi*, 542 U.S. at 507, whereas the United States invasion of Afghanistan commenced in October 2001, President George W. Bush, Presidential Address to Announce Attacks on Afghanistan (television broadcast Oct. 7, 2001) (transcript *available at* http://www.australianpolitics.com/news/2001/01-10-07.shtml).

[208] *See Hamdi*, 542 U.S. at 521 (O'Connor, J., plurality opinion).

[209] But, as John Yoo notes, the plurality did not actually give "any reason why [even] after two generations it may be necessary to reconsider the laws of war," so long as "American troops remain engaged in combat." Yoo, *supra* note 58, at 583.

[210] *See supra* Part III.A.

[211] *See infra* Part III.B.2 Contrast this approach with that employed in *Padilla v. Hanft*, 547 U.S. 1062 (2006); *see also supra* note 186.

[212] *See supra* note 106 and accompanying text.

conclusions and additional non-binding rationales, or between the former and ultimate substantive conclusions (that is, on the merits). Instead, as with *Rasul*, the *Hamdan* Court seemed to inject merits and dicta into its preliminary analysis.[213]

2. Anticipatory Review as Applied to the Specific Dispute in *Hamdan*

Applying the approach described above, the *Hamdan* Court declined to abstain from reviewing Hamdan's procedural challenge to the military commission set to try him in advance of a final decision by the commission.[214] In rebutting the government's contention that the Court should decline to address Hamdan's procedural challenge even if the Court had statutory jurisdiction over this challenge, the Court cited several structural and procedural differences between trial by military commission and trial by court-martial (and civilian court, by extension).[215] The Court's conclusion that this challenge was essentially ripe for review on the merits in part attested to the substantial likelihood that the commission procedures would violate the law.[216] In other part, the Court appealed to a sense of uncertainty regarding the fate of Hamdan and future actions by the commission and executive branch.[217] Plausible grounds existed, in short, for presuming that Hamdan would be denied traditional legal and judicial protections. The profound liberty interests ostensibly at stake supported the extension of jurisdiction over a dispute involving only partially developed circumstances.[218]

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[213] *See supra* Parts I.D., II.B.

[214] *See supra* notes 105-106 and accompanying text.

[215] *See infra* Part III.B.2.a-b.

[216] *See infra* Part III.B.2.b.

[217] *See infra* Part III.B.2

[218] *See supra* note 106 and accompanying text. For a discussion of a different type of "anticipatory" response in the war-on-terror context, see Robert M. Chesney, *Beyond Conspiracy? Anticipatory Prosecution and the Challenge of Unaffiliated Terrorism*, 80 S. CAL. L. REV. 425, 427 (2007) (discussing policy implications of recent trend of "early stage anticipatory [criminal] prosecution" of suspected terrorists by federal government). Chesney notes that "military" alternatives to traditional prosecutorial approaches have become less attractive in light of persistent legal uncertainty regarding the legality of military detention, related political pressure, and the Supreme Court's decision in *Hamdan*. *Id.* at 432-33, 433 n.24. The subsequent passage of the MCA, however, may mitigate the negative influence of that decision. *See supra* note 104.

a. Structural Deficiencies

In rejecting the argument that abstention was warranted in light of comity considerations, the *Hamdan* Court emphasized the significant structural dissimilarities between the military commission, a creature of the executive branch, and court-martial, a congressional creation.[219] In particular, the appeals mechanism of convictions by the commission rests not with the civilian judges of the U.S. Court of Appeals for the Armed Forces, as it does with courts-martial, but with a panel of "military officers designated by the Secretary of Defense," review of which panel's decision can "be had only to the Secretary of Defense himself, and then, finally, to the President."[220]

This Executive-appointed panel, moreover, had been formed specifically to review the decisions of commissions set to try alleged enemy combatants like Hamdan.[221] Review of Hamdan's procedural challenge thus could be subject to substantial structural military influence, even if not deliberately exerted.[222]

According to the Court, the fact that Hamdan (at least as matters currently stood) was not automatically entitled to habeas review by a civilian court under the DTA further militated against abstention on the basis of inter-court or even inter-branch comity in this exceptional case.[223]

The Court preferred to provide a momentously important, though still developing, case with immediate review by a civilian court (which, under the circumstances, was the Supreme Court itself) rather than to defer to an uncertain review by a civilian court following the outcome of the military commission or to a potentially compromised executive-branch

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[219] *See supra* notes 105-106 and accompanying text.

[220] Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2771 (2006) (citations omitted) (citing Dept. of Defense Military Comm'n Order No. 1, § 6(H)(4)-(6) (Mar. 21, 2002) (last amended, as of the time of this case, on Aug. 31, 2005)). The Court noted later in its opinion that under the DTA the President had full discretion over the timing of the final decision of the commission. *Id.* at 2788. In this way, the *Hamdan* Court, unlike the *Hamdi* plurality, considered as legally relevant the prospect of uncertainly prolonged detention. *See supra* Part III.A.2.

[221] *Hamdan*, 126 S. Ct. at 2760.

[222] *See id.* at 2771-72.

[223] *See Hamdan*, 126 S. Ct. at 2771. Review of the final decision as such, under the DTA, would lie at the discretion of the Court of Appeals for the District of Columbia Circuit. *Id.*

review.[224] In simpler terms, but for the Court's current review, Hamdan's procedural challenge potentially would go unheard or, alternatively, be heard by a less than impartial body.

The *Hamdan* Court, as the foregoing discussion demonstrates, suggests that the military commission implicated vital issues beyond the specific procedural context of Hamdan's challenge,[225] including separation of powers and the availability of structural judicial protections. Whereas the *Padilla* Court expansively defined the traditional habeas framework to include even challenges arising in the war-on-terror context so as to reduce the judicial docket,[226] the *Hamdan* Court narrowly construed the concepts of comity and deference to expedite judicial review of (still-developing) cases by Article III courts where the executive branch had attempted to diminish traditional judicial protections.

Although the *Hamdan* Court concluded that the *Councilman* comity doctrine technically did not apply under the circumstances,[227] it also seemed to conclude that the important substantive attributes of the case overrode any consideration of inter-court or inter-branch comity.[228] As a baseline matter, given that *Councilman* did not apply, the latter conclusion (regarding the overriding substantive attributes of the case) probably should be viewed as dictum. But it is not clear that the formal, technical conclusion has stand-alone value apart from the substantive attributes of the case, considering the profound significance ascribed to these attributes and the manner in which they were emphasized. Rather, as in *Rasul*, the *Hamdan* Court purported to reach a self-contained, uncomplicated threshold conclusion, but resorted to the merits of the case to give this formal determination appreciable value.[229]

b. Procedural Deficiencies

As described in the preceding subsection, the Court rejected comity considerations as a reason for abstaining from reviewing Hamdan's procedural challenge in advance of a final

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[224] *See id.* at 2771-72.

[225] *See infra* Part III.B.2.b.

[226] *See supra* Part II.A.3.

[227] *See supra* notes 105-106 and accompanying text.

[228] *See supra* notes 105-106 and accompanying text.

[229] *See supra* Part II.B.2.

determination by the military commission. The Court, in like manner, did not abstain from early review on the basis that there were no grounds for presuming the illegality of the commission procedures prior to the commencement of Hamdan's trial.[230] On the contrary, the governing procedures not only were described with "particularity" in the government order establishing the commission, but some of them already had been implemented as of the time of the Court's review.[231] Both Hamdan and the government, the Court concluded, "ha[d] a compelling interest in knowing in advance whether Hamdan [could] be tried by a military commission that . . . operate[d] free from many of the procedural rules prescribed by Congress for courts-martial—rules intended to safeguard the accused and ensure the reliability of any conviction."[232]

Indeed, Hamdan alleged that he would be and "already ha[d] been," excluded from his own trial.[233] The Court, in a sense, justified its anticipatory review of the dispute by virtue of the premise that the commission procedures had actively informed the current reality of the case. The circumstances that Hamdan challenged were not just based on some far-off possibility (like perpetual detention as understood by the *Hamdi* plurality).[234]

"Another striking feature" of the governing procedures noted by the Court was the admissibility of *any* evidence with probative value, as determined by the presiding officer.[235] Admissible evidence could potentially include testimonial hearsay, unsworn live testimony and statements, as well as coercively induced evidence.[236]

These procedural deficiencies can be compared to the structural deficiencies of the commission's review process[237] to the extent that both contributed to the one-sidedness of the military commission in favor of the government. Both types also widened the degree of separation between the commissions

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[230] *See* Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2787-88 (2006).

[231] *Id.* at 2788.

[232] *Id.* at 2772; *see also infra* note 236 and accompanying text.

[233] *Hamdan*, 126 S. Ct. at 2788. Even though any proceedings closed to Hamdan would have to be attended by an appointed military counsel, the presiding officer at his discretion could forbid this counsel from disclosing to Hamdan the events occurring therein. *Id.* at 2786.

[234] *See supra* Part III.A.2.

[235] *Hamdan*, 126 S. Ct. at 2786.

[236] *Id.*

[237] *See supra* Part III.B.2.a.

and courts-martial in terms of judicial access and internal protections.

Yet the Court's aggressive treatment of the subject of the presumption of illegality might give a false impression that deviations in the procedures governing military commissions from those governing courts-martial were per se illegal. Rather, the legality of these deviations turned on whether the procedures governing military commissions and courts-martial were "uniform insofar as practicable" per the UCMJ.[238]

Later, in its formal assessments of the merits of Hamdan's procedural challenge, the Court concluded that the government had not satisfied this uniformity requirement because it had not adequately demonstrated that it would not have been feasible, due to exigencies arising in the theater of war, to apply the rules governing trials by courts-martial to Hamdan's trial.[239] Viewing the concept of military necessity in a strict logistical (as opposed to strategic) sense,[240] the Court found that it was simply not evident that the government would suffer any undue hardship by following the traditional rules regarding the admissibility and authentication of evidence.[241] Similarly, the "jettisoning" of a person's basic right to be present at his own trial was not sufficiently tailored to the threat to national security posed by international terrorism.[242]

In turn, the Court's conclusion that grounds existed for presuming the illegality of the commission procedures depended on this same basic determination (that the commission procedures did not comply with the UCMJ uniformity requirement). To an appreciable (albeit backward) extent, the *Hamdan* Court thus incorporated in its analysis the merits of the case when determining whether to formally review these very same merits. Stated differently, in a sequentially reverse process, the Court's ultimate substantive holding significantly informed its earlier threshold determination.

Even if such merits-based review could be justified in light of Hamdan's allegation that some of the commission

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[238] *Hamdan*, 126 S. Ct. at 2790 (citing 10 U.S.C. § 836(b) (2000) ("All rules and regulations made under this article shall be uniform insofar as practicable and shall be reported to Congress")). *But see infra* note 244 and accompanying text.

[239] *Hamdan*, 126 S. Ct. at 2792-93.

[240] *See id.* at 2792.

[241] *See id.*

[242] *See id.*

procedures had already been implemented, the Court did not proceed to limit its substantive review to only those procedures.[243] Additionally, incorporating the merits of the case into the threshold determination perhaps could be justified if the correct application of the UCMJ uniformity test had been undisputed and unequivocal, which it ostensibly was not, and if the Court's interpretation of this test had been devoid of idiosyncrasy, which it likewise was not.[244] It is therefore difficult to find in *Hamdan* the sort of meaningful separation between threshold and substantive considerations that had been championed by the Court in *Padilla*.[245] It instead appears that the *Hamdan* Court, perhaps quietly drawing inspiration from *Rasul*, indirectly sanctioned a form of anticipatory review over the merits of this detainee challenge.[246]

3. Comparing *Hamdan* to *Hamdi*

With respect to the issue of anticipatory review, the relative expansiveness of the *Hamdan* approach, as described above, conflicted in material respects with the more temporally restricted vantage point employed by the *Hamdi* plurality.[247] Whereas the *Hamdi* plurality settled for a position of judicial restraint, the *Hamdan* Court essentially espoused a breed of judicial activism. *Hamdan*, moreover, justified its expeditious review on the basis of resolving the significant legal controversies engendered by this case and facilitating closure on the subject. By contrast, the *Hamdi* plurality preferred to

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[243] To the contrary, the Court proceeded to assess the legality of the military commission as a whole on the basis of select governing procedures. *See id.* at 2853 (Alito, J., dissenting) (noting that "[i]f Congress enacted a statute requiring the federal district courts to follow a procedure that is unconstitutional, the statute would be invalid, but the district courts would not." By that same logic, even assuming the impropriety of some of the commission procedures, "the appropriate remedy is to proscribe the use of those particular procedures, not to outlaw the commission[].").

[244] Substantial disagreement within the Court itself tends to demonstrate that the uniformity test was far from settled waters. *See id.* at 2842 (Thomas, J., dissenting) ("Nothing in the text of Article 36(b) [of the UCMJ] supports the Court's sweeping conclusion that it represents an unprecedented congressional effort to change the nature of military commissions . . . to tribunals that must presumptively function like courts-martial. . . . The vision of uniformity that motivated the adoption of the UCMJ . . . is nothing more than uniformity across the separate branches of the armed services." (referring to 10 U.S.C. § 836(b))); *see also id.* at 2852 (Alito, J., dissenting) (disagreeing with the Court's holding that the "military commission is 'illegal,' because its procedures allegedly do not comply with 10 U.S.C. § 836").

[245] *See supra* Part II.A.

[246] *See supra* Part II.B.

[247] *See supra* Part III.A.

let matters develop more naturally and not to ascribe legal significance to presumptions, even if reasonably grounded. Still, these cases did not flatly contradict each other, and differing contexts may in part explain any divergence.

Significantly, the *Hamdi* plurality was confronted with a prospect (lifelong detention) that, even if reasonably foreseeable, is subject to innumerable military and political developments. Reviewing the legality of a detention in light of this prospect would require a certain degree of prescience, which arguably fell outside the judiciary's ordinary sphere of competence.[248] The realization of this prospect, at any rate, technically would comply with the traditional law of war insofar as the detention tracked continual hostilities.[249] The law of war could eventually adapt to accommodate novel factual circumstances, but, again, the plurality could not predict any such changes with legitimate confidence. For similar reasons, the Court should not prognosticate with regard to how the law might respond to reflect these factual developments, including the effective reality of permanent detention, at least not when only a relatively short period of time (three years from the plurality's vantage point) had elapsed since the relevant military campaign began.

By contrast, the *Hamdan* Court stood in a more self-contained universe, one where the legality of future scenarios turned predominantly on a previously established set of written instructions, even some that had already been implemented. Furthermore, the procedures governing the military commission, which the government had documented in

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[248] *See* Yoo, *supra* note 58, at 590-601. With specific reference to the war on terror, Yoo discusses how federal courts, comparatively speaking, are institutionally incompetent to address foreign policy disputes at both micro and macro levels. *See id.* According to Yoo, the judiciary, "[r]ather than ask[ing] itself whether it can balance security against liberty interests . . . ought to ask itself whether the [political] branches could strike a better balance based on more informed judgment." *Id.* at 601. In a similar vein, several scholars, including Yoo, have envisioned the judicial/political power struggle in administrative law (or quasi-administrative law) terms. *See, e.g.*, *id.* at 600-01, 601 n.141 (suggesting that federal courts, in contributing to "terrorism policy . . . might adopt the deference afforded to executive agency decision making under . . . *Chevron*" (referring to Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837, 842-43 (1984) (courts should defer to reasonable agency interpretations of facially ambiguous or inconclusive controlling statutes))); Eric A. Posner and Cass R. Sunstein, *Chevronizing Foreign Relations Law*, 116 YALE L.J. 1170, 1178, 1220-26 (2007) (describing Supreme Court's failure to apply *Chevron*-like deference or analysis in both *Hamdi* and *Hamdan* as "a puzzling and important omission"). Indeed, it has become rather trendy for an article addressing separation of powers and foreign policy issues to make at least one *Chevron* reference.

[249] *See supra* notes 196-202 and accompanying text.

detail, apparently would not comply with the UCMJ (nor the Geneva Conventions) as matters currently stood.[250] The Court, accordingly, could limit any conjecturing on its part.[251] Plus, if the Court had declined to act when it did, the detainee Hamdan potentially would have been foreclosed from an opportunity for a civilian court to review his challenge.[252] Reviewing trial procedures for compliance with a statutory requirement, moreover, arguably fell well within the abilities of a federal court, even if the government had not yet fully implemented those procedures.[253]

But even in light of these contextual differences, *Hamdi* and *Hamdan* at best submit to a partial jurisprudential reconciliation with regard to the issue of anticipatory review. In particular, *Hamdi* restricted its analysis to a traditional, well-established legal framework,[254] whereas *Hamdan* not only adopted an evidently controversial interpretation of a complicated military code, but essentially based this interpretation on the relative equities of the case.[255] The differences in these cases thus cannot just be rationalized as that in one case but not the other grounds existed to presume

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[250] *See supra* notes 112-114, 238-242 and accompanying text.

[251] Even still, a viable argument can be made against judicial competency in this area given the inextricable, underlying (or even overlying) foreign policy considerations. But it is arguable that the Court was at least somewhat more competent here than in *Hamdi*—as previously described—within the meaning of "competency" as understood by John Yoo. *See supra* note 248.

[252] *See supra* notes 223-224 and accompanying text.

[253] Review for compliance with international law perhaps less arguably fell within this realm, but such review in this case nonetheless would involve an actual document (i.e., the Geneva Conventions) and thus a relatively self-contained vantage point from which to proceed.

For an interesting discussion of the litigation strategies employed by Hamdan's legal team, see Katyal, *supra* note 44, at 72-105. For instance, Hamdan's legal team, which included Katyal, sought to emphasize in oral arguments before the Supreme Court that striking down the military commission set to try Hamdan would only minimally interfere with the Executive Branch, given that no military commission trials had taken place in over half a century. *Id.* at 92-93. The Court thus would only be preserving "the status quo," *id.* at 93, which, as a practical matter, is generally an attractive option. Additionally, Hamdan and similarly situated defendants were being detained indefinitely, so there would be no major, immediate change in their statuses resulting from a decision striking down the military commissions. *Id.* Moreover, following the Court's decision, there was always the possibility of congressional (as opposed to unilateral Executive) endorsement of a military commission scheme. *Id.* By contrast, legislative correction of a decision favoring the government would not come easy due to the likelihood of a presidential veto and the near impossibility of obtaining a supermajority vote in the "tight political party environment." *Id.* at 95. In sum, there was no compelling reason to find for the government, and not finding for Hamdan could have detrimental, practically irreversible consequences.

[254] *See supra* notes 196-202 and accompanying text.

[255] *See supra* notes 238-246 and accompanying text.

the illegality of a future scenario. To do so trivializes the substantively different values and rationales underlying the respective determinations in these cases.

C. A Divided Jurisprudence

The major discrepancies between the temporal vantage points applied by the *Hamdi* plurality and *Hamdan* Court further added to the inconsistencies in the Supreme Court's post-9/11 war-on-terror jurisprudence. Viewing these cases in conjunction with *Rumsfeld v. Padilla* and *Rasul v. Bush*, it becomes apparent that the Court has struggled to determine the extent to which it should review on the merits detainee challenges or particular elements thereof. The *Padilla* Court and *Hamdi* plurality selected a relatively narrow framework and favored the accessible over the distant.[256] By contrast, the *Rasul* and *Hamdan* Courts resorted to, or effectively condoned, the incorporation of more subjective factors into threshold analyses.[257]

The overall trend probably leans toward the latter, more expansive approach, at least when considering the extent to which the Court in *Hamdan*, the most recent of these detainee challenges, appeared to consider the exceptional surrounding circumstances in assessing whether and to what extent to review this dispute on the merits. But even if this emerging trend makes the war-on-terror jurisprudence more predictable in one sense, it has occurred in a relatively unstable manner. For this reason it is difficult to extract from these trendsetters (if *Rasul* and *Hamdan* may be labeled as such) any readily applicable formulas.

CONCLUSION

The Supreme Court's post-9/11 war-on-terror jurisprudence has been characterized by inconsistencies with regard to the proper boundary between threshold determinations and the substantive attributes of a federal detainee challenge, and also with regard to the appropriate scope of the temporal perspective from which issues should be assessed. Despite these general inconsistencies, the emerging trend, as evidenced by *Rasul* and *Hamdan*, has favored affording special treatment

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[256] *See supra* Part II.A.

[257] *See supra* Parts II.B, III.B.

to detainee challenges at the threshold level in light of the remarkable surrounding circumstances or the important security/liberty debate embodied by these cases.[258] But providing such treatment necessarily entails normative judgment about what constitutes "exceptionality" or "profundity."[259] To an extent then, the Court has endorsed the role of federal courts as arbiters of the public interest.

Stated more positively, the Court has placed traditional legal and judicial guarantees in a higher realm than considerations of military logistics, even prior to formally reviewing a detainee challenge on the merits. Yet this preference too requires making a distinction between actual exigency and mere strategy. This distinction, furthermore, in large part turns on the particular circumstances of a detainee challenge, such as the duration of the detention and the extent and nature of judicial process afforded to detainees. Consequently, the important substantive attributes of a detainee challenge, as perceived by a court, may militate against a finding of military necessity, even against the backdrop of the threat of international terrorism.[260] From this same perspective, the major personal liberties implicated by government action may even demand an expedited merits-based review.

This author does not doubt the potential societal significance inherent to detainee challenges arising from the war on terror. Nonetheless, the Court should scale back the expansive approach to threshold issues that it adopted in *Rasul* and *Hamdan*. This approach requires, at a preliminary stage, extensive ad hoc determinations regarding the worth of a case. The resulting absence of baseline standards contributes to uncertainty "in an area where certainty is called for."[261]

But the current situation may be still trickier than this, given the relative instability with which the Court, as in *Rasul* and *Hamdi*, has ascribed to an activist position.[262] Indirectly considering the momentousness of a detainee challenge when determining threshold issues implicates the same basic problems described above. If anything, the resulting confusion

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[258] *See supra* Parts II.B, III.B.

[259] *See supra* Part II.A.3.

[260] *See supra* notes 238-242.

[261] Rasul v. Bush, 542 U.S. 466, 495 (2004) (Scalia, J., dissenting); s*ee also supra* note 168.

[262] *See supra* Parts II.B, III.B.

reflects the practical difficulty of incorporating special circumstances into the legal analysis. The terms "merits-creep" and "dicta-creep" are perhaps overly simplistic, but they concisely describe certain insidious jurisprudential tendencies.

Clearer judicial analysis in detainee challenges—without creative synergizing of threshold determinations and substantive attributes and without conflation of merits and dicta—may in time obviate and replace the language of "creep." Clear statutory language, whose plain meaning avoids constitutional concerns, could also help undo the damage left by the Court in the first five years following 9/11. But the Supreme Court (or, less abstractly, the interpretive methods of the individual Justices) is not completely beholden to, but rather to some degree transcends, the particular statutory or political contexts in which a detainee challenge arises.

Currently on the Court's war-on-terror, detainee-challenge docket is *Boumediene v. Bush*.[263] Will the Court turn over a new leaf in the second five years following 9/11, opting for a more stable course and straightening out the inconsistencies in the process? Unlike the Court in *Hamdan*,[264] and more like the plurality in *Hamdi*,[265] this author will refrain from speculating (just yet).

Ari Aranda[†]

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[263] This case actually does appear to be correctly poised for a direct constitutional ruling, *see supra* note 104, though there are probably different ways in which such a ruling can be framed. For descriptions of other terrorism-related cases that the Court has agreed to hear, see Facts on File, *Supreme Court; Cases Accepted of Americans Held in Iraq; Other Developments*, WORLD NEWS DIGEST, Dec. 13, 2007.

[264] *See supra* Part III.B.

[265] *See supra* Part III.A.

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