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A Hard Look or a Blind Eye: Administrative Law and Military Deference

JONATHAN MASUR*

INTRODUCTION

On May 8, 2002, José Padilla, an American citizen accused of planning an attack on the United States in collaboration with al Qaeda, was arrested at O'Hare Airport in Chicago, Illinois. He was not charged with any crime; to date he has never been charged with a crime. Rather, since his arrest he has been held without trial in Charleston, South Carolina as an "enemy combatant," a member of an organization with which the United States is at war. Soon after his arrest, Padilla filed suit in the federal district court for the Southern District of New York, protesting that this indeterminate detention—imposed upon him without an opportunity to confront the accusations against him—had been undertaken in violation of his right to due process.

Two years later, Rumsfeld v. Padilla and its companion matter,
Hamdi v. Rumsfeld,5 arrived before the Supreme Court as this generation's two most important tests of the President's constitutional powers as Commander-in-Chief. Two interrelated issues were framed in stark relief by these cases: what are the scope and contours of the President's authority to designate and detain "enemy combatants" in times of war, and what role might the judiciary properly play in reviewing the Executive's determinations and its actions? On June 28, 2004, the Supreme Court issued a series of landmark decisions, dismissing Padilla's case on procedural grounds while answering these questions posed via the concomitant litigation involving Yaser Hamdi. In Hamdi, the Court held that while the President's wartime power extends to the detention of American citizens deemed to be unlawful combatants, individuals so designated have the opportunity to contest the evidence against them before an impartial arbiter.6

Much has already been written about these momentous legal rulings,7 and in the coming months the literature on these issues is likely to grow into a vibrant body of scholarship. The vast majority of the attention generated by the Supreme Court's decisions has focused upon the twin legal questions described above. Consequently, an underlying issue of fundamental importance—one that may in the end determine whether Padilla and Hamdi constitute a reaffirmation of the rule of law or a blow to its foundations—has gone relatively unnoticed. At the heart of the debate over the President's wartime authority lies the question of the degree of deference that courts must afford the Executive's factual determinations and conclusions in wartime, and thus (in the context of Padilla and Hamdi) the standard of proof and credibility to which the government's classifications would be held.

The story of this issue begins—and, as this Article will demonstrate, ultimately ends—not with the Supreme Court, but with the Southern District of New York, José Padilla's first point of judicial contact. On December 4, 2002, the district court held that while Padilla would be allowed to consult with an attorney and to present evidence disproving that he was an enemy combatant, the Administration would be required to provide only "some evidence" of his status to maintain indefinite custody over him.8 In adopting this highly deferential posture towards the Administration's interpretation of the facts surrounding Padilla's detention, the court relied predominantly upon what it believed to be the Department of Defense's essentially limitless statutory and constitutional

6. Id. at 2635.
authority over military matters. Nevertheless, the court also acknowledged the lack of anything approaching a "lush and vibrant jurisprudence governing" those questions.

On this last point, the Padilla court was particularly mistaken. There exists an entire doctrinal area of law devoted to issues that arise when the judiciary must oversee the actions and determinations of expert organizations empowered with far-reaching authority and possessing tremendous proficiency over broad and critical fields of activity. That field is administrative law, a jurisprudential domain whose generalizable rational structuralist approach to issues of deference incorporates a degree of searching judicial review well beyond what the Padilla district court applied. That case, and nearly all others that might be categorized as "wartime" or "military" cases, are striking for their lack of any explicit or implicit application of the principles gleaned from the Supreme Court's administrative law jurisprudence. This Article will examine the alternative approaches to executive determinations outlined in administrative law and in military jurisprudence and explore the potential legal and practical theories that might be used to justify these dichotomous attitudes. The absence of a meaningful distinction between military cases and quotidian administrative adjudications casts serious doubt upon the basis for the judiciary's disengagement with cases it believes invoke national security in light of its far more strenuous involvement in traditionally peacetime administrative affairs.

Courts have diverged drastically from the principles outlined in Supreme Court administrative law jurisprudence when confronted with cases they understand as involving military or wartime matters. This divergence has come despite administrative law's direct pertinence to questions of the deference due expert agencies. The deviations have assumed two predominant forms.

First, courts have merged issues of authority and constraint, arguing that the Executive's broad constitutional (and sometimes statutory) authority over national security immunizes its decisions from serious scrutiny under other restraining legal provisions. This Hohfeldian

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9. See id. at 607-08.
10. Id. at 607.
11. Throughout this article the words "wartime" and "military" are used to describe those cases that the adjudicating courts understand to have national security implications, regardless of whether the cases actually arise during a declared war or involve events in what might be even loosely termed a war zone.
12. In the course of this article I will refer to two types of legal constraints imposed upon executive and legislative actors, constraints whose enforcement is entrusted to Article III courts. The first are "internal" constraints, those contained within the statutory or constitutional authorization that empowers the actor, and within whose boundaries that actor must lawfully remain. For instance, Congressional action under the commerce power of Article I, Section 8 is lawful only if the law regulates interstate commerce; the grant of authority contained in that provision carries with it
“category mistake” contravenes both the general American constitutional framework and the principle, enunciated in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, that with respect to broadly empowered administrative bodies, legal grants of authority and legal restraints operate sequentially and independently.

Second, courts have relied on the expertise and experience of the President and the military in dealing with issues of national security to a degree far out of proportion with their concomitant reliance upon the competence of civilian administrative agencies. This deference conflicts with administrative law’s “hard look review” and “substantial evidence” doctrines, according to which courts must act at least to ensure that executive and legislative bodies are operating within the factual scope of governing law, even when the legal topic is one with which courts are comparatively unfamiliar.

Part I of this Article describes and catalogues the causes and consequences of courts’ deference to the Executive’s wartime factual determinations, illustrating the extent to which notions of deference have compelled courts to abdicate their archetypal fact-finding obligations and thereby short-circuited the process of judicial review. Part II deconstructs the underpinnings of the various deference doctrines captured within the broader field of administrative law and demonstrates their applicability to military, as well as civilian, cases. Part III addresses five possible distinctions that might be drawn between the proper juridical approaches to military and civilian administrative adjudications, eventually concluding that none of these distinctions offers an adequate explanation for diverging these two correlated lines of doctrine. Part IV attempts to assemble a coherent explanation for courts’ unwillingness to engage military cases with the same level of intellectual rigor they have long brought to administrative law. At the core of these transcendent wartime legal questions of detention and freedom lies the factual determinations that have been deployed to immunize or justify the Executive’s challenged actions. The judiciary’s silent march away from meaningful judicial review of those determinations threatens to transform the overarching legal questions into little more than a series of foregone conclusions.

inherent legal limitations. See, e.g., United States v. Lopez, 514 U.S. 549, 552–57 (1995); United States v. Morrison, 529 U.S. 598, 608–09 (2000). The second are “external” constraints, those that derive from grants of individual rights or restrictions of state action outside of the authorizing provisions themselves, such as the Free Speech, Due Process, or Equal Protection clauses. See U.S. Const. amends. I, V, XIV. For the purposes of this article, distinctions between these types of constraints exist generally as differences in degree (such as the applicable standard of review), not of kind. Nonetheless, clarity of nomenclature is important, as these dichotomous constraints often operate concurrently, either independently or as mutually reinforcing strictures upon executive authority.

I. JUDICIAL DEFERENCE IN WARTIME

The perceived duty of courts and judges to defer to the factual assertions and judgments of executive branch actors in times of war represents the unifying principle of all modern wartime cases. "Deference" has become a shibboleth that courts believe they must invoke if their wartime rulings are to have any hope of withstanding appellate (and public) scrutiny. Even a court that eventually concludes that no deference is due the executive branch often appears compelled to recite a statement of judicial fealty to the deference principle for fear of signaling an inappropriate lack of respect for the authority of the coordinate branches in wartime. Judicial deference to administrative decision-making in times of war remains inescapably and intuitively attractive. This Article should not be understood to suggest that courts should exercise anything approaching de novo review over executive decisions in military situations. Yet within wartime jurisprudence, the doctrine of judicial deference has overwhelmed the legal strictures established to constrain the operation of executive power. Courts sitting in judgment of the Executive's wartime actions have permitted the military to effectively define the constitutional scope of its own authority.

Within the legal lexicon, the phrase "judicial deference" captures a broad swath of courts' attitudes and actions united by a single generalized principle: courts will require some heightened measure of proof or surety before overturning a conclusion reached or a judgment made by a different branch of government. Much attention has been given to what one might describe as "legal deference" to the military, or juridical acceptance of the executive branch's extraordinarily broad construction of its own statutory and constitutional powers during wartime. The President's extant power to declare war sua sponte (and

14. Compare Padilla v. Rumsfeld (Padilla III), 352 F.3d 695, 712 (2d Cir. 2003) ("We agree that great deference is afforded the President's exercise of his authority as Commander-in-Chief."); with Chevron, 467 U.S. at 713 ("The Supreme Court has long counseled that while the Executive should be 'indulged' the widest latitude of interpretation to sustain his exclusive function to command the instruments of national force, at least when turned against the outside world for the security of our society,' he enjoys 'no such indulgence' when 'it is turned inward.'" (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 645 (1952) (Jackson, J., concurring))).


16. For a brief sampling of this multifarious and rich literature, see, for example Rostker v. Goldberg, 453 U.S. 57, 67 (1981) ("None of this is to say that Congress is free to disregard the Constitution when it acts in the area of military affairs. In that area, as any other, Congress remains subject to the limitations of the Due Process Clause ... but the tests and limitations to be applied may differ because of the military context.") (citations omitted) and compare Parker v. Levy, 417 U.S. 733, 756–58 (1974) (rejecting vagueness and overbreadth challenges to provisions of the Uniform Code of Military Justice and noting that "[w]hile the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of
without an act of Congress) stands as a paradigmatic example of this phenomenon.  

Yet interwoven with this widely acknowledged legal deference—and operating in concert with it—is a separate, more subtle, and far more neglected type of judicial deference: courts' inclination to accept without question or argument the factual determinations and conclusions proffered by the executive order to defend or justify its wartime actions. I designate this category “factual deference.” Factual assessments gain legal significance when a court must test the Executive's wartime actions against some constitutional or statutory limitation that itself requires factual inquiry, such as the Fourteenth Amendment's Equal Protection Clause in *Korematsu v. United States.* Credulous acceptance of the factual predicate necessary to surmount a constitutional protection is tantamount to legal evisceration of that same safeguard. Although courts frequently apply both types of deference in mutually reinforcing and (as

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17. Compare *The Brig Amy Warwick,* 67 U.S. (2 Black) 635, 668 (1862), with *U.S. Const. Art. I, §8, cl. 11 (“The Congress shall have Power . . . To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water.”); *see also* John C. Yoo, *War and the Constitutional Text,* 69 U. Chi. L. Rev. 1639, 1681–84 (2002) (arguing that Congress's appropriations power acts as a sufficient check upon the executive's authority to unilaterally wage war, and concluding that other constraints—be they judicial or congressional—are unnecessary).


discussed further below) mutually catalytic fashions, this Article focuses upon the functioning of factual deference and its role in determining the outcome of modern wartime decisions.

The courts' overwrought factual deference has its roots in two judicial tendencies that have grown to the point of logical absurdity in times of war. First, courts have come to conceive of the President’s expansive commander-in-chief power as not only an open grant of authority for the President to act during wartime, but also as a prerogative that truncates the reach of all other constitutional rights or liberties that might oppose it. The effect of this concept upon the courts’ level of factual deference to the Executive has been quite direct: as the commander-in-chief power has waxed, the factual showing the Administration must make in order to overcome a due process challenge (for instance) has waned. Second, courts have placed too great an emphasis upon what they view as the Executive’s comparatively greater expertise in national security matters, describing themselves as ill-equipped to second-guess the Administration’s “expert” judgments and refusing to challenge the Executive’s conceptions of “facts on the ground.”

These two complaisant judicial tendencies have in turn induced courts to assume too deferential a posture towards the Executive’s wartime factual determinations. This posture has become manifest in two respects. First, courts have failed to require the Executive to put forth any meaningful quanta of proof in support of its determinations and conclusions. Thus, court have accepted meager (or nonexistent) proffers as sufficient to satisfy what in peacetime would be searching constitutional review. Second, courts have refused to examine or challenge the logical reasoning and inferences—the paths from extant facts to administrative conclusions—used by the Executive to justify actions that might otherwise be held unconstitutional, even when those inferences involve nothing more than the type of punctilious logic and reasoning the assessment of which forms judges’ bailiwick. It is through these miscalculations that courts have most significantly hindered the Constitution’s ability to constrain executive conduct in wartime. When only minimal facts will suffice, and when all conclusions are accepted at face value, there exists no constitutional bulwark that cannot be overcome.

The sections that follow below will describe and analyze the judiciary’s overly deferential wartime posture. Section A will deconstruct and critique the courts’ overly inflated view of the President’s war powers and describe that view’s role in catalyzing the courts’ exaggerated posture of factual deference. Section B will perform the same analysis on the courts’ overestimation of the role of administrative expertise in military cases. Sections C and D will examine the operation of the two
forms of exaggerated factual deference—failure to demand substantial proof and refusal to scrutinize logical inferences—within the modern military cases, highlighting their dispositive role in the most important wartime jurisprudence in a generation.

A. DEFERENCE BY CATEGORY MISTAKE: JUDICIAL INFLATION OF THE PRESIDENT'S WAR POWERS

For nearly one hundred and fifty years, the judiciary's conception of the reach of the Executive's war-making powers has known few bounds. Beginning with *The Prize Cases* in 1862, the Supreme Court has read the President's commander-in-chief power broadly to encompass nearly any necessary war-related actions, even without a formal declaration of war. The Court's maxim, gleaned from *Hirabayashi v. United States*, that "the war power of the Government is 'the power to wage war successfully," has given rise to an understanding of presidential power that encompasses activities that do not involve the deployment of troops in the field, such as the Japanese-American internment, as well as

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20. The Brig Amy Warwick, 67 U.S. (2 Black) at 668-71. This set of four consolidated cases arose from challenges to the President's authority to impose a naval blockade (an act of war) against Secessionist Southern states in the absence of a congressional declaration of war. The Supreme Court rejected these challenges, observing that "war may exist without a declaration on either side," rendering the President "bound to accept the challenge without waiting for any special legislative authority." *Id.* at 668 (citation omitted).

21. One consequence of this broadening of presidential authority is that Congress's Article I power to declare war has, as a practical matter, been read completely out of the Constitution. See, e.g., *Mitchell v. Laird*, 488 F.2d 611, 613-14 (D.C. Cir. 1973) (holding that no Congressional declaration of war was required for the President to prosecute the war in Vietnam); *Mass. v. Laird*, 451 F.2d 26, 31-32 (1st Cir. 1971) (same); *Orlando v. Laird*, 443 F.2d 1039, 1043 (2d Cir. 1971) (same).


23. See, e.g., *Ludecke v. Watkins*, 335 U.S. 160, 164-65 (1948) (deportation of nationals of a hostile foreign power); *Juragua Iron Co. v. United States*, 212 U.S. 297, 306-07 (1909) (confiscation and destruction of enemy property). The pre-eminent counter-example is *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), in which the Court denied the President the power to seize the steel industries during the Korean War in order to maintain their operation during a potential strike. In *Youngstown*, Congress had explicitly refused to award the President statutory authority for the seizure, thus narrowing the President's scope of action to powers he held directly under the Constitution, and placing the President's power as Commander-in-Chief in conflict with Congress's greater authority to regulate economic affairs. *Id.* at 586-87. The case is most renowned for Justice Jackson's concurring opinion dividing these questions of presidential power into three categories: those in which Congress has granted the President statutory authority over the matter at hand, those in which Congress has explicitly denied to the President any such legal authority (e.g. *Youngstown itself*), and those in which "the President acts in absence of either a congressional grant or denial of authority, [where] he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain." *Id.* at 655-58 (Jackson, J., concurring). The judiciary's expansive statutory interpretations that placed cases in the first category, or its voluminous view of the Presidential dominion in the "zone of twilight," have prevented most other courts from reaching the same result as *Youngstown*.

There exists one modern anomaly within this apparent juridical monolith. In December 2003, the Second Circuit overturned the Southern District of New York's decision in *Padilla I* and held that
foreign policy making authority not directly tied to national security or the military. In some cases, the Supreme Court has refused even to entertain cases that attempt to demarcate limitations on the President's constitutional military powers.

This expansive understanding of the President’s wartime authority has led the Executive to argue that an entire range of military questions or executive measures are entirely beyond the courts’ reach as either non-justiciable or otherwise unsuitable for judicial review. Courts have accepted this argument most decisively in areas that hew closely to the actual mechanics of armed conflict, such as presidential decisions committing American forces to battle or selecting the means and mechanisms of waging war. Yet the judiciary has hardly confined its

the President’s commander-in-chief power did not include the authority to order military detentions of American citizens captured on American soil. Padilla v. Rumsfeld (Padilla III), 352 F.3d 695, 718 (2d Cir. 2003) (“Based on the text of the Constitution and the cases interpreting it, we reject the government’s contention that the President has inherent constitutional power to detain Padilla under the circumstances presented here.”). Even more surprisingly, the court held that the Joint Resolution for the use of force did not confer this power upon the President by statute. Id. at 722–23 (“[T]here is no reason to suspect from the language of the Joint Resolution that Congress believed it would be authorizing the detention of an American citizen already held in a federal correctional institution and not ‘arrayed against our troops’ in the field of battle.” (quoting Hamdi v. Rumsfeld (Hamdi I), 316 F.3d 450, 467 (4th Cir. 2003))); see also infra notes 309-320 and accompanying text. The Padilla III decision represents perhaps the most substantial curtailment of the President’s war powers since Ex parte Milligan, 71 U.S. (4 Wall.) 2 (1866), the Civil War case that held that the President could not suspend the writ of habeas corpus without an act of Congress. The Supreme Court's subsequent reversal of the Second Circuit’s decision—formally in Padilla IV, and effectively in Hamdi III—thus came as little surprise. These decisions are discussed at greater length in sections I.C.1-2, infra.

24. See, e.g., Dames & Moore v. Regan, 453 U.S. 654, 668, 680, 686 (1981) (holding that the President maintained the power to suspend American claims against Iran as an exercise of his authority over foreign affairs and Congress's traditional statutory granting of such power to the President, invoking Justice Jackson's notion of a "zone of twilight"); United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 320 (1936) (writing that the President wields "delicate, plenary and exclusive power... as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress").

25. See, e.g., Mora v. McNamara, 389 U.S. 934, 934 (1968) (cert. denied) (Stewart, J., dissenting) (“There exist in this case questions of great magnitude.... I. Is the present United States military activity in Vietnam a 'war' within the meaning of Article I, Section 8, Clause 11 of the Constitution? II. If so, may the Executive constitutionally order the petitioners to participate in that military activity, when no war has been declared by the Congress?").

26. See, e.g., Johnson v. Eisentrager, 339 U.S. 763, 789 (1950) (“Certainly it is not the function of the Judiciary to entertain private litigation... which challenges the legality, wisdom, or the propriety of the Commander-in-Chief in sending our armed forces abroad or to any particular region.”); Freeborn v. The Protector, 79 U.S. (12 Wall.) 700, 702 (1871) (treating executive proclamations as conclusive evidence of when the Civil War began and ended); Martin v. Mott, 25 U.S. (12 Wheat.) 19, 30 (1827) (“We are all of opinion, that the authority to decide whether the exigency has arisen [to call forth the militia and require men to serve], belongs exclusively to the President, and that his decision is conclusive upon all other persons.”); Campbell v. Clinton, 203 F.3d 19, 27 (D.C. Cir. 2000) (Silberman, J., concurring) (“I read the Prize Cases to stand for the proposition that the President has independent authority to repel aggressive acts by third parties even without specific congressional authorization, and courts may not review the level of force selected.”); Ornato v. Hoffman, 546 F.2d 10, 14 (2d Cir. 1976) (holding that the Army's decision to order a reservist to active duty is "committed to agency
deferential posture to such intimately military questions.\textsuperscript{27} Courts have concluded that even administrative decisions implicating traditional judicial authority and significant constitutional or statutory legal structures must command substantial judicial deference. Prominent among the actions receiving such deference are detentions of American citizens who have not been charged with crimes.\textsuperscript{28}

This doctrinal movement forms the basis for the judiciary's first movement towards amplified deference in military cases. Courts have conflated the separate questions of: first, what authority the Executive holds, and second, what "exogenous law"\textsuperscript{29} exists to which the Executive must be held in order to vindicate the rule of law. In so doing, they have fallen prey to a "category mistake, a failure to recognize that rights and powers are not simply the absence of one another but that rights can cut across or 'trump' powers."\textsuperscript{30} Few would dispute the idea that the President's decision whether to attack an enemy position with one battalion or two, for example, is unreviewable. Yet this is so not simply because the President holds so-called "plenary" constitutional authority over military commands, but rather because there is no further "law to apply" on the subject, and no relevant legal stricture that constrains executive action. A naval battle at Midway Island in 1942 does not implicate the due process or equal protection rights of the soldiers and sailors involved; the internment of Japanese-Americans (and only Japanese-Americans) on the West Coast that same year certainly does.\textsuperscript{31} On the contrary, in the wartime cases discussed, there exists further exogenous law to apply—such as individual constitutional freedoms unbridged by the simple power to act.\textsuperscript{32} It is this externally applicable

\textsuperscript{27} Cf. \textit{Youngstown}, 343 U.S. at 643-44 (Jackson, J., concurring) ("There are indications that the Constitution did not contemplate that the title Commander in Chief of the Army and Navy will constitute him also Commander in Chief of the country, its industries and its inhabitants. He has no monopoly of 'war powers,' whatever they are.").


\textsuperscript{29} By "exogenous" I mean simply a legal restraint external to—and separate from—the grant of legal authority pursuant to which the executive has acted. For example, the President might decide to detain a suspected terrorist without a warrant and without trial. This action, undertaken under the auspices of the President's authority as Commander-in-Chief, is nonetheless subject to review under the Fifth Amendment as a deprivation of liberty without due process. See U.S. CONST. amend. V. In that situation, the Fifth Amendment operates as the exogenous check upon unbridled administrative power.

\textsuperscript{30} \textit{JOHN HART ELY, DEMOCRACY AND DISTRUST} 36 (1980); see also Wesley N. Hohfeld, \textit{Some Fundamental Legal Conceptions As Applied in Judicial Reasoning}, 23 Yale L.J. 16, 40-70 (1913) (illuminating the mistakes that have occurred in the traditional taxonomy of juridical relations and describing the manner in which "rights" and "powers," for instance, might cross-cut the same legal relationships).

\textsuperscript{31} \textit{See generally Korematsu v. United States} (\textit{Korematsu I}), 323 U.S. 214 (1944).

\textsuperscript{32} See \textit{Home Bldg. & Loan Ass'n v. Blaisdell}, 290 U.S. 398, 426 (1934) (The Federal
A hard look or a blind eye?

law that triggers justiciability and ought to invite more searching scrutiny of factual administrative decision-making rather than the near-complete deference courts generally afford.

By way of illustration, consider a hypothetical law passed by Congress establishing post offices throughout the United States but prohibiting Caucasian males from being hired as postal workers. A Caucasian male postal worker denied employment under this law sues the United States, challenging the law on equal protection grounds. Congress might first claim that its decision is simply judicially unreviewable—the Constitution grants Congress sole power to establish post offices, just as it grants the President sole power over military actions as Commander-in-Chief. A court would surely reject this line of argument due to the rather obvious fact that Congress’s power as a lawmaking body is limited by other sections of the Constitution, such as the Fourteenth Amendment. Congress might then attempt to justify such a preposterous law by claiming that white male postal workers are statistically more likely to become violent than any other demographic

Governments war power “is a power to wage war successfully, and thus it permits the harnessing of the entire energies of the people in a supreme cooperative effort to preserve the nation. But even the war power does not remove constitutional limitations safeguarding essential liberties.”); cf. Gomillion v. Lightfoot, 364 U.S. 339, 343-45 (1960) (rejecting the contention that states possess unbridled power over municipal boundaries, despite their obvious constitutional role in managing these sorts of internal affairs, and holding that “[l]egislative control of municipalities, no less than other state power, lies within the scope of relevant limitations imposed by the United States Constitution. . . . [S]uch power, extensive though it is, is met and overcome by the Fifteenth Amendment to the Constitution of the United States.”). In addition to its ubiquity within the legal arguments advanced (and often accepted) in the wartime cases discussed below, this type of category mistake has become the Bush Administration’s veritable mantra when describing and defending its conduct of the “war on terror.” For instance, administration lawyers argued in an internal memo that both international treaties prohibiting torture and federal anti-terror laws did not apply to President Bush’s actions as Commander-in-Chief of American forces in that war:

In order to respect the President’s inherent constitutional authority to manage a military campaign, 18 U.S.C. § 2340A (the prohibition against torture) must be construed as inapplicable to interrogation undertaken pursuant to his Commander-in-Chief authority. . . . Congress may no more regulate the President’s ability to detain and interrogate enemy combatants than it may regulate his ability to direct troop movements on the battlefield. . . . Any effort by Congress to regulate the interrogation of unlawful combatants and [terrorists] would violate the Constitution’s sole vesting of the Commander-in-Chief authority in the President.


group and that the threat of violence from disgruntled postal workers is sufficiently severe to constitute a compelling governmental interest. Congress might support this claim with studies (of however dubious reliability) that appear to demonstrate that white males do pose a greater threat and that the number of deaths from postal violence could run into the thousands in coming years. Congress would then demand heightened judicial deference to its findings because it is the body best situated and constitutionally charged to make this sort of finding, and the costs of mistake could be enormous.

As should be readily apparent, any judge who acceded to Congress's demand for significant deference in this situation—and refused to subject Congress's factual findings to traditionally strict scrutiny—would be summarily reversed. The Supreme Court has, for better or worse, treated Congressional findings of fact with minimal deference in far less extreme cases, including most notably United States v. Lopez and United States v. Morrison. Nonetheless, Congress's stance in this example is hardly more radical than the position the Administration has taken (and seen approved) in several wartime cases.

The conclusion dictated by this thought experiment is not that military factual determinations are completely undeserving of deference and that courts should scrutinize all military actions de novo when there exists applicable law. Nor is it that the President's particular constitutional role in military and foreign affairs is completely irrelevant to issues of judicial deference. Rather, administrative law principles indicate that the Executive's singular role in matters of national security cannot be invoked as a talismanic guarantee of deference beyond that to which other civilian administrative agencies may lay claim. There may be legitimate reasons (such as those discussed in Part III) that military decisions warrant further deference than standard administrative determinations. Indeed, rationality review (which recognizes the value of administrative expertise) already demands significant judicial deference in comparison to the ordinary standard of scrutiny in cases that involve fundamental rights. Yet, according to the Supreme Court's administrative law doctrine, adherence to the rule of law requires greater

34. Laws that discriminate on the basis of race must be strictly scrutinized, and are allowed to stand only if they further a compelling governmental interest and are narrowly tailored to meet that interest. Adarand Constructors v. Pena, 515 U.S. 200, 227 (1995).

35. Lopez and Morrison involved Congress's affirmative power to make law under the Commerce Clause of Article I, Section 8, and Section 5 of the Fourteenth Amendment, respectively. United States v. Lopez, 514 U.S. 549, 551 (1995); United States v. Morrison, 529 U.S. 598, 607 (2000). In each case Congress had made factual findings that the law in question would have the type of impact that would bring it within the scope of Congress's affirmative power. Lopez, 514 U.S. at 563 n.4; Morrison, 529 U.S. at 614. In each case, the Court subjected Congress's determinations to significant scrutiny, eventually rejecting them and striking down the laws in question. Lopez, 514 U.S. at 567-68; Morrison, 529 U.S. at 626-27.
involvement than courts currently undertake.

B. **DEFERENCE FROM EXPERTISE: KOREMATSU, ENDO, AND THE FOUNDATIONS OF JUDICIAL ACCEPTANCE OF MILITARY PRONOUNCEMENTS**

A court's recognition that the Executive's general authority over military affairs should not preclude judicial protection of individual constitutional rights—and judicial acknowledgment of the extant legal constraints on executive action—does not guarantee meaningful judicial scrutiny of executive action and enforced adherence to the rule of law. Even when courts acknowledge the role of the judiciary as guardian of constitutional rights, they often defer to military factual determinations based purely on the military's experience and expertise over national security issues. This acquiescence to the government's factual claims in wartime cases renders operative legal constraints functionally toothless, just as did deference based on the Executive's particular role in military affairs. Self-propelled into accepting military proffers of fact at essentially face value, Article III courts have transformed "strict scrutiny" and other rights-protecting doctrines into exercises in artful pleading. An executive branch actor haled into court to defend its wartime actions need only allege sufficient facts to justify its choices and declare the question otherwise inscrutable to judicial eyes.

Perhaps the most striking example of overwrought judicial deference to an "expert" military is *Korematsu*, a case that achieved infamy on other grounds. *Korematsu* marked the first appearance of "strict scrutiny" for laws that classify by race (in this case, the exclusion of recent immigrants of Japanese descent from the West Coast in 1942) and, notoriously, is one of only two cases in which such a violation has ever been judicially sanctioned. Yet the case also contained the seeds of another insidious judicial practice, one that has continued to operate on a regular basis. In *Korematsu*, the factual determinations upon which the racist exclusionary and curfew orders rested received no meaningful scrutiny from the Court. Deference to the military was essentially unbounded.

When the United States entered World War II against Japan in December of 1941, military leaders and civilian populations were immediately gripped by fear of a Japanese invasion along America's west coast. Executive reaction to this putative threat was drastic. The United States military forcibly evacuated all Japanese-Americans (including the

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36. *Korematsu I*, 323 U.S. at 216 ("[A]ll legal restrictions that curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny.").

37. *See id* at 223 ("[T]he properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures . . . .").
American citizen children of immigrants) from the so-called "exclusionary zone" along the coast pursuant to an order issued by the commander in charge of coastal defense, General J. L. DeWitt.\textsuperscript{38} *Korematsu* arose from a legal challenge to one aspect of this forced evacuation—viz., a curfew imposed upon Japanese-Americans in particular locations—on the grounds that the curfew denied due process and equal protection on the basis of race.\textsuperscript{39}

Yet the Supreme Court did not dispose of *Korematsu* merely by claiming that the President’s plenary wartime constitutional power negated the judiciary’s role as final arbiter of infringement of constitutional rights—it eschewed the illogical move described above in Section A. Indeed, the Court upheld the military's action only after applying what it termed "the most rigid scrutiny" to the legal issues involved.\textsuperscript{40} Instead, the *Korematsu* Court announced that the military’s factual assertions (the framework upon which its legal case was built) deserved almost limitless deference because of the Executive’s particular expertise in military affairs. Rather than hold that courts were structurally proscribed from reviewing the military’s race-based detention, the Court essentially declared them institutionally incompetent. Justice Black’s opinion for the majority bears the stamp of a Court unwilling to inquire appreciably into General DeWitt’s claims or his order’s factual predicate:

[W]e cannot reject as unfounded the judgment of the military authorities and of Congress that there were disloyal members of that population, whose number and strength could not be precisely and quickly ascertained. We cannot say that the war-making branches of the Government did not have ground for believing that in a critical hour such persons could not readily be isolated and separately dealt with, and constituted a menace to the national defense and safety, which demanded that prompt and adequate measures be taken to guard against it.\textsuperscript{41}

\textsuperscript{38} Id. at 215–16.

\textsuperscript{39} See id. at 216 ("It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect."); id. at 232 (Roberts, J., dissenting) ("I had supposed that if a citizen was constrained by two laws, or two orders having the force of law, and obedience to one would violate the other, to punish him for violation of either would deny him due process of law."); id. at 234–35 (Murphy, J., dissenting) ("Being an obvious racial discrimination, the order deprives all those within its scope of the equal protection of the laws as guaranteed by the Fifth Amendment.").

\textsuperscript{40} Id. at 216; see also Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 Mich. L. Rev. 213, 232 (1992) ("*Hirabayashi* and *Korematsu* undeniably employed language suggesting that racial classifications were presumptively objectionable and thus subject to the most rigorous judicial scrutiny. Yet in both cases, notwithstanding the grandiose rhetoric, the Court actually applied its most deferential brand of rationality review.").

\textsuperscript{41} *Korematsu* I, 323 U.S. at 218 (quoting Hirabayashi v. United States, 320 U.S. 81, 99 (1943)). *Hirabayashi* upheld a curfew imposed upon Japanese immigrants and Americans of Japanese descent on essentially the same grounds. As the quotation indicates, much of *Hirabayashi*’s reasoning was
Even Justice Jackson's dissent, famous for its warning that "a judicial construction of the due process clause that will sustain this order is a far more subtle blow to liberty than the promulgation of the order itself," adopted the majority's deferential posture. Justice Jackson explained, "[I]n the very nature of things, military decisions are not susceptible of intelligent judicial appraisal." His assessment of the Court's options reads as a self-fulfilling prophecy: "[T]he Court . . . has no choice but to accept General DeWitt's own unsworn, self-serving statement . . . And thus it will always be when courts try to look into the reasonableness of a military order.

By contrast, Justice Murphy's dissent employed precisely the type of "intelligent judicial appraisal" of the government's case that Justice Jackson had deemed impossible, and it did so with devastating success. Justice Murphy's agility with a more searching type of review, and the categorically opposite result that he reaches, highlighted the failings inherent in the majority's sweeping factual deference. Justice Murphy's statement of the inquiry he planned to undertake offers a robust understanding of courts' role in enforcing the rule of law: "[T]he military claim must subject itself to the judicial process of having its reasonableness determined and its conflicts with other interests reconciled." Justice Murphy selected a standard of review that can hardly be considered taxing given the rights at stake, demanding only "that the action have some reasonable relation to the removal of the dangers of invasion, sabotage, and espionage." Yet General DeWitt's orders and justification could not meet even this level of scrutiny. Drawing upon readily available evidence, Justice Murphy demonstrated that General DeWitt had ordered the exclusion of all persons of Japanese ancestry, rather than only those considered to pose genuine threats, not (as General DeWitt claimed) because separating loyal from disloyal would have proven too difficult or time-consuming, but rather because he held the racist view that all Japanese must be considered the enemy. Justice Murphy then inspected General DeWitt's final report of

adopted in Korematsu I, to more drastic effect. By the time Korematsu I was decided, however, there existed reason to doubt the original veracity of the factual assertions upon which the case rested. See supra note 48 and accompanying text.

42. Korematsu I, 323 U.S. at 245-46 (Jackson, J., dissenting).
43. Id. at 245 (Jackson, J., dissenting).
44. Id. (Jackson, J., dissenting).
45. Id. (Jackson, J., dissenting).
46. Id. at 234 (Murphy, J., dissenting).
47. Id. at 235 (Murphy, J., dissenting).
48. Id. at 235-36 (Murphy, J., dissenting).

That this forced exclusion was the result in good measure of this erroneous assumption of racial guilt rather than bona fide military necessity is evidenced by the Commanding General's Final Report on the evacuation from the Pacific Coast area. In it he refers to all individuals of Japanese descent as 'subversive,' as belonging to 'an enemy race' whose...
the Japanese exclusion, debunking its various claims as “insinuation, based purely upon speculation and circumstantial evidence.”

Justice Murphy’s demolition of the rationale for exclusion served simultaneously to repudiate the Korematsu majority’s refusal to engage meaningfully with the factual questions before them. A supposed lack of expertise proved an insubstantial barrier to Justice Murphy’s reasoned analysis.

Ex parte Endo, a companion case to Korematsu, demonstrates by contrapositive the Court’s reluctance to dispute the military’s proffered justifications on account of that body’s supposedly dominant expertise in wartime matters. Endo closed the relocation camps built to intern Japanese-Americans; the Endo and Korematsu decisions were handed down on the same day, and defenders of the Korematsu Court have often deployed Endo as proof that the Supreme Court’s attitude towards the Japanese internment was not so racially unjust as Korematsu alone would indicate.

Yet, Endo and Korematsu presented starkly different issues to a reluctant Supreme Court. Endo turned on the fact that the Department of Justice (DOJ) had already conceded that Mitsuye Endo, the plaintiff challenging her confinement, was a “loyal and law-abiding citizen” who posed no danger to the United States. Not confronted with the difficulty of challenging on the merits an army contention that Endo posed a danger, the Court readily concluded as a matter of law that “[t]he authority to detain a citizen or to grant him a conditional release as protection against espionage or sabotage is exhausted at least when his loyalty is conceded.” Viewed together, these two cases exhibit a court unwilling to challenge the factual conclusions of an “expert” military or to offer more than cursory review of the logic behind executive actions taken in potential violation of external legal constraints. In Korematsu, the Court’s adoption of this level of factual deference rendered its

‘racial strains are undiluted,’ and as constituting ‘over 112,000 potential enemies . . . at large today’ along the Pacific Coast.

Id. (Murphy, J., dissenting) (footnotes omitted), Justice Murphy’s assessment was proven correct forty years later. In 1984, the Northern District of California overturned Fred Korematsu’s conviction according to evidence subsequently unearthed by the Commission on Wartime Relocation and Internment of Civilians demonstrating that “race prejudice” and “war hysteria,” not military necessity were the driving factors behind the Japanese internment. Korematsu v. United States, 584 F.Supp. 1406, 1416–17 (N.D. Cal. 1984) (“The Commission found that military necessity did not warrant the exclusion and detention of ethnic Japanese. It concluded that ‘broad historical causes which shaped these decisions [exclusion and detention] were race prejudice, war hysteria and a failure of political leadership.’” (quoting PERSONAL JUSTICE DENIED, REPORT OF THE COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS 18 (1982) (alteration in original))).

49. Korematsu I, 323 U.S. at 238 n.9 (Murphy, J., dissenting).
50. 323 U.S. 283 (1944).
52. Endo, 323 U.S. at 294.
53. Id. at 302.
A HARD LOOK OR A BLIND EYE?

ostensibly stringent legal scrutiny a virtual nullity.

C. CONSTITUTIONAL WAR POWERS AND THE FAILURE TO DEMAND "SUBSTANTIAL EVIDENCE"

The tendencies described above—judicial overemphasis of both the Executive's constitutional role and its expertise in military matters—have become endemic to Article III courts in wartime. Yet these juridical proclivities operate not merely as misguided grounds for decision in their own right, but also as catalysts for far more devastating systematic errors in the adjudicatory process. To begin with, the judiciary's wartime conflation of executive authority to act and constitutional restrictions upon action—the "category mistake" described above—has caused courts to diminish the strength of existing constitutional checks by refusing to demand sufficient factual proof before allowing administrative actors to abridge constitutional rights. Courts have refused to require the Executive to present substantial evidence before brushing aside restrictions on executive action.

I. PADILLA V. BUSH AND THE "SOME EVIDENCE" STANDARD

The factual and procedural history of the landmark case Padilla v. Bush—indeed, even the personal history of José Padilla himself—are by now well known to lawyers and non-lawyers alike. Under these circumstances, it will suffice to provide only a brief précis of the facts most critical to the succeeding analysis.

On May 8, 2002, José Padilla, an American citizen, was arrested at Chicago's O'Hare Airport pursuant to a civilian "material witness" warrant; the United States government apparently believed that Padilla possessed material information regarding al Qaeda or other terrorist organizations. His initial arrest and detention were carried out by the Department of Justice, as if Padilla were a quotidian civilian detainee. On June 9, 2002, however, the government notified the court that had issued the warrant for Padilla's arrest, that it had reclassified Padilla as an enemy combatant according to the President's wartime authority. Padilla was subsequently transferred from a civilian detention center into military custody and imprisoned in the naval brig in Charleston, South

55. For a thorough exegesis on the facts underlying this case, see generally Padilla v. Bush (Padilla I), 233 F. Supp. 2d 564, 568–75 (S.D.N.Y. 2002). The procedural history was ably summarized in Padilla v. Rumsfeld (Padilla III), 352 F.3d 695, 701–02 (2d Cir. 2003).
57. Id. at 568–69.
58. The warrant had been issued by the Federal District Court for the Southern District of New York. Id. It is for this reason that José Padilla's habeas petition was filed in that court, rather than (for instance) in Chicago or South Carolina.
There, Padilla was denied all contact with the outside world, and precluded from meeting with his lawyer, contacting family members, or accessing the courts as a means of endeavoring to free himself from confinement. On June 11, 2002, Padilla's court-appointed public defender, Donna Newman, filed a petition for habeas corpus relief as José Padilla's next friend. The district court's initial disposition of Padilla's habeas petition—the first judicial word spoken on this case—stands as a paradigmatic example of the misdirected path that constitutional role-based deference can cause a court to tread.

Chief Judge Mukasey of the Southern District of New York began a review of Padilla's habeas petition in a manner befitting typical civilian judicial oversight (i.e., lacking in indicia of significant deference to the military). The court held that the President's authority to detain Padilla indefinitely without trial turned on the question of whether he was indeed an enemy combatant, and found the government's factual determination of Padilla's status judicially reviewable.61

Though the Padilla district court did not significantly explore the issue, the "law to apply" in this situation was duplicative and mutually reinforcing. The Secretary of Defense's claim of affirmative authority to detain José Padilla rested upon the factual and legal contention that Padilla is, in fact, an unlawful combatant. The detention of a non-combatant under military authority would constitute an action outside of the law. Furthermore, as an American citizen arrested on American soil, Padilla was entitled to some sort of due process before being deprived of his liberty, again at least requiring a finding that he is an enemy combatant and thereby either outside the boundaries of normal criminal due process, or entitled only to the process he received, viz., determinations by the President (and presumably a court) of his status.

60. See Sontag, supra note 54, at A1.
61. See Padilla I, 233 F. Supp. 2d at 571.
62. In so doing, the court held that the President possessed statutory authority to detain individuals who were properly classified as enemy combatants. See id. at 597-99 ("Accordingly, the detention of Padilla is not barred by 18 U.S.C. § 4001(a); nor, as discussed above, is it otherwise barred as a matter of law."). For a more extensive discussion of the district court's resolution of this issue, see supra note 23; infra notes 88-92 and accompanying text.
64. See id. at 588 ("Does the President have the authority to designate as an enemy combatant an American citizen captured on American soil, and, through the Secretary of Defense, to detain him for the duration of armed conflict with al Qaeda? ... If so, by whatever standard this court must apply—itsel itself a separate issue—is the evidence adduced by the government sufficient to justify the detention of Padilla?").
65. The Padilla court notes correctly, in another context, that the contours of this due process right are hardly well-defined. Id. at 601 ("What emerges from [the] disparate cases and lines of thought [interpreting the Due Process Clause] is, quite clearly, less than a solidly grounded or coherently elaborated right of judicial access." (quoting Laurence H. Tribe, American Constitutional Law 759 (2d ed. 1988)) (alterations in original))).
The latter constraint molds the former: an insufficient procedural opportunity to prove that he is not an enemy combatant—and therefore that he may not be administratively detained without trial—would deprive José Padilla of liberty without due process.66

The Padilla district court next embarked upon a substantial factual examination into the ancillary question of whether Padilla should be granted the opportunity to consult with an attorney in advancing the claim that he is not an enemy combatant. The government maintained that allowing Padilla access to a lawyer would “jeopardize the two core purposes of detaining enemy combatants—gathering intelligence about the enemy, and preventing the detainee from aiding in any further attacks against America.”67 Refusing to defer to the government’s viewpoint, however, the district court attacked the logic behind the Administration’s assertion that to permit Padilla to consult with a lawyer would interfere with its interrogation and allow him to transmit dangerous information. The court observed that this argument “proves far too much” and was unsupported by proffered facts: “the government’s conjecture is, on the facts presented to me in [its affidavits], gossamer speculation.”68 Critically, Chief Judge Mukasey was not required to lay claim to any particular expertise in the fields of terrorism or national security in order to make such a judgment. Instead, the court simply recognized the flaws of the government’s reasoning and deduced from these that the government had failed to prove that Padilla would be capable of any further harm to the nation’s security were he simply allowed to consult with counsel.69 Chief Judge Mukasey eventually

66. See Padilla v. Rumsfeld (Padilla II), 243 F. Supp. 2d 42, 56 (S.D.N.Y. 2003) (holding that the court must confirm that “Padilla’s detention is not arbitrary, and that, because his detention is not arbitrary, the President is exercising a power vouchsafed to him by the Constitution”).
68. Id. at 603-04.
69. Id. The government had argued first that allowing Padilla contact with an attorney would interfere with their attempts to interrogate him. Id. at 603. The court rejected this contention, pointing out that Padilla would be allowed counsel only for the purpose of arguing the factual claim that he is not an enemy combatant, not as part of a general right to counsel that might be employed under the Fifth and Sixth Amendments to close off communications with authorities. Id. The Administration next claimed that permitting José Padilla communication with the outside world through his attorney would unlock the potential for him to transmit messages to other terrorists. Id. The court noted that, despite the Administration’s asseverations to the contrary, there was no indication that Padilla had been trained to pass information through an intermediary, or that the military could not effectively monitor his communications with his counsel—a respected, ethical member of the bar—in order to detect or prevent such information from being transmitted. Id. Moreover, José Padilla had already been permitted to meet once with an attorney during the period of time in which the Department of Justice was holding him in civilian custody. Id. Presaging the dissenting opinions in Detroit Free Press I and North Jersey Media I, discussed infra section 2.D.1, the court noted correctly that any damage Padilla might reasonably be expected to perpetrate through dissemination of intelligence had most likely already occurred. Id.
held that the Department of Defense must permit Padilla to meet with his attorney.\textsuperscript{70} Thus, granting the Secretary of Defense appropriate deference commensurate with the government's expert role did not necessitate accepting a factual conclusion for which support was wholly lacking.\textsuperscript{71}

Yet the district court's subsequent discussion of the standard of proof that the government must meet in order to establish José Padilla's unlawful combatant status diverged drastically from this mode of logical review. After describing the President's plenary authority in matters of national security, the court concluded that the President's constitutional powers, in addition to the powers delegated to him by Congress, compelled the judiciary to afford the Executive wide deference with regard to its wartime factual assertions.\textsuperscript{72}

Notably, the Padilla district court awarded heightened deference to the Secretary's factual assessments based purely on the President's

\textsuperscript{70} Id. at 610. The government apparently viewed the possibility that José Padilla might be allowed to meet with his court-appointed public defender as such a potential calamity that it refused to allow Ms. Newman access to Padilla even after the court initially ruled that such access was legally required. In an extraordinary turn of events, the court was forced to order the Department of Defense to allow Padilla to meet with Newman a second time. Padilla II, 243 F. Supp. 2d at 57 (writing—after the government refused to allow Padilla to consult with an attorney and attempted to relitigate the question—"[i]f any confusion remain, this is not a suggestion or a request that Padilla be permitted to consult with counsel, and it is certainly not an invitation to conduct a further 'dialogue' about whether he will be permitted to do so. It is a ruling—a determination—that he will be permitted to do so"). Despite the court's strong language, Chief Judge Mukasey subsequently agreed to certify an interlocutory appeal to the Second Circuit, effectively staying the order granting Padilla access to his attorney. Padilla v. Rumsfeld, 256 F. Supp. 2d 218, 222–23 (S.D.N.Y. 2003).

\textsuperscript{71} The court continued to apply this type of logical, fact-based scrutiny in response to the government's motion for reconsideration, which included supplemental written testimony arguing that the government's interrogation of Padilla would suffer irreparable harm if he were allowed to see an attorney. See Padilla II, 243 F. Supp. 2d at 53.

The point of the above discussion is not to show that Admiral Jacoby's prediction of adverse consequences from permitting Padilla to have contact with lawyers is wrong. Rather, the point is that although that prediction is plausible, it is only plausible. There are other equally plausible scenarios, at least some of which, suggested above, would be far more beneficial to the government than the prospect of waiting while Padilla, conceded to be a seasoned veteran of imprisonment, toughs it out for whatever period of time he may think someone on the outside might help him. It is a paradox of the government's own making that what prevents Padilla from becoming aware of the possibility that his avenues of appeal could be swiftly foreclosed is that he is not permitted to consult with a lawyer.

\textit{Id.}

\textsuperscript{72} See Padilla I, 233 F. Supp. 2d at 605.

It is the President who wields "delicate, plenary and exclusive power . . . as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress." And where as here the President does act with statutory authorization from Congress, there is all the more reason for deference. Indeed, Articles I and II prominently assign to Congress and the President the shared responsibility for military affairs. See U.S. Const. art. I, § 8; art. II, § 2. In accordance with this constitutional text, the Supreme Court has shown great deference to the political branches when called upon to decide cases implicating sensitive matters of foreign policy, national security, or military affairs.

\textit{Id.} (quoting Hamdi v. Rumsfeld, 296 F.3d 278, 282 (4th Cir. 2002)) (internal citations omitted).
“special constitutional role” and without relying upon the Executive’s greater expertise over the subject matter. To the contrary, Chief Judge Mukasey noted that the determination of whether adequate facts exist to support Padilla’s classification as an unlawful combatant is one to which Article III courts are particularly well-suited. In fact, it resembles strongly the general inquiry into whether a fact-finder’s determination is supported by facts on the record, one to which courts have become well accustomed in other contexts. It was Justice Jackson’s famous phrase—"we decide difficult cases presented to us by virtue of our commissions, not our competence"—that carried the day instead. The Padilla district court simply believed that it would be improperly controverting the President’s (and its own) constitutional roles in wartime were it to challenge the Executive’s claims in any consequential fashion.

In so doing, the Padilla district court succeeded in begging the crucial question. In light of Chief Judge Mukasey’s antecedent analysis, the question of whether the President held the authority to detain José Padilla was no longer in doubt. The court had already verified that the

73. Padilla I, 233 F. Supp. 2d at 607-08.

The deference to which the Supreme Court and the Fourth Circuit refer is due not because judges are not personally able to decide whether facts have been established by competent evidence, or whether those facts are sufficient to warrant a particular conclusion by a preponderance of evidence, or by clear and convincing evidence, or beyond a reasonable doubt. Indeed, if there is any task suited to what should be the job skills of judges, deciding such issues is it.

Id. Chief Judge Mukasey at one point took the even more drastic step of contravening the Administration’s “expert” opinion on a matter relating to José Padilla’s confinement and interrogation, declaring it outside of the government’s scope of expertise. Padilla II, 243 F. Supp. 2d at 52 ("Moreover, the forecast speculates not about an intelligence-related matter, in which Admiral Jacoby is expert, but about a matter of human nature—Padilla’s in particular—in which, most respectfully, there are no true experts.").

74. Padilla I, 233 F. Supp. 2d at 607-08.

The deference to which the Supreme Court and the Fourth Circuit refer is due not because judges are not personally able to decide whether facts have been established by competent evidence, or whether those facts are sufficient to warrant a particular conclusion by a preponderance of evidence, or by clear and convincing evidence, or beyond a reasonable doubt. Indeed, if there is any task suited to what should be the job skills of judges, deciding such issues is it.

Id.; see also infra Part II.A.3.

75. Id. at 608 (quoting Dames & Moore v. Regan, 453 U.S. 654, 661 (1981)).

76. Despite the government’s release of information indicating its belief that José Padilla had in fact trained with al Qaeda and intended to commit acts of terrorism within the United States, see Summary of José Padilla’s Activities with Al Qaeda, United States Department of Defense, May 28, 2004, available at http://news.findlaw.com/wp/docs/padilla/pad528o4dodsum.html (last visited Jan. 5, 2005), the Padilla case may yet come to stand as the paradigmatic example of the devastating consequences that may accrue if the Administration is permitted to detain suspected terrorists without meaningful judicial review. According to various news reports, “administration officials now concede that the principal claim they have been making about Padilla ever since his detention—that he was dispatched to the United States for the specific purpose of setting off a radiological ‘dirty bomb’—has turned out to be wrong and most likely can never be used in court.” Paul Krugman, Travesty of Justice, N.Y. TIMES, June 15, 2004, at A23 (internal quotations omitted) (quoting a report from NEWSWEEK MAGAZINE).
President possessed the power to order enemy combatants detained without either a judicial warrant or further Congressional authorization.\(^7\)

Rather, the issue before the court was whether José Padilla was himself an enemy combatant, and thus whether the President and the Secretary of Defense were acting within their lawful authority, or whether they had instead violated Padilla's Fifth Amendment right to be free from the deprivation of liberty without due process. It is precisely this point that Padilla raised, and that the court brushed aside: "Padilla insists that this court conduct a 'searching inquiry' into the factual basis for the President's determination that Padilla is an enemy combatant, lest the court 'rubber stamp' the June 9 Order and thereby enforce a 'Presidential whim.'"\(^7\) This request neatly mimics Justice Marshall's demand in *Citizens to Preserve Overton Park v. Volpe, Inc.*, a case discussed at some length in Part II.A, that courts conduct a "thorough, probing, in-depth review" of administrative factual determinations.\(^7\) The principles that underlie the two are identical, and stem from the most basic notions of the "rule of law" described above: where there is law to apply, the Executive must operate demonstrably within that law, or the alternative is government by executive fiat or "whim."\(^8\)

Nevertheless, the court rejected Padilla's argument according to the question-begging rationale Padilla had attempted to avoid. The district court opinion returns (as if in a mantra) to repeated invocations of the President's constitutional authority in wartime, and in so doing largely fails to engage with the thrust of Padilla's charge. Explained Chief Judge Mukasey, "[t]he President, for the reasons set forth above, has both constitutional and statutory authority to exercise the powers of Commander in Chief, including the power to detain unlawful combatants."\(^7\) In the end, the court settled upon the government's suggested standard for the threshold showing the Administration must make in order to continue to detain Padilla: the government must

\(^{77}\) Padilla I, 233 F. Supp. 2d at 588–90.

\(^{78}\) Id. at 606 ("In essence, Padilla argues that he is entitled to a trial on the issue of whether he is an unlawful combatant or not.").

\(^{79}\) *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971). This topic will be addressed in extended detail in Part II.A, infra.

\(^{80}\) See Louis L. Jaffe, *Judicial Control of Administrative Action* 595 (1965). This interpretation of underlying lawlessness did not escape notice within the popular press. As one reporter wrote, referring both to *Padilla v. Bush* (Padilla I) and *Hamdi v. Rumsfeld* (Hamdi I), discussed further infra,

> [d]etaining two American citizens without charge or access to counsel in military brigs, maintaining illegal combatants on a foreign island in a legal limbo, keeping lawful aliens under permanent surveillance while deporting others after secret hearings: these are not the actions of a republic that lives by the rule of law but of an imperial power reluctant to trust its own liberties.


\(^{81}\) Padilla I, 233 F. Supp. 2d at 606.
provide only "some evidence to support [the President's] conclusion that Padilla was . . . engaged in a mission against the United States." 82

In this first Padilla opinion the court provided essentially no guidance regarding the origin or workings of this standard. 83 However, in a second opinion disposing of the government's Motion for Reconsideration, Chief Judge Mukasey indicated explicitly that he had borrowed the standard from the Supreme Court's doctrine governing administrative disciplinary proceedings in prisons. 84 Importantly, according to the Southern District of New York's formulation, the some evidence standard—while requiring only a modicum of proof by the government—would permit José Padilla to present his own evidence of "innocence" and challenge the Administration's proffered proofs. The court "cannot confirm that Padilla has not been arbitrarily detained without giving him an opportunity to respond to the government's allegations." 85 Yet, Chief Judge Mukasey hinted that Padilla will not fare even as well as typical prisoners operating under the equivalent level of review. According to the court, the "chaotic and less accessible setting of a distant battlefield" may complicate the gathering and examination of evidence and force the court to permit the government to prevail upon even a lesser showing. 86

82. Id. at 806 (emphasis added).
83. See id.
85. Padilla II, 243 F. Supp. 2d at 54. The court elaborated at some length upon this interpretation, explaining that "some evidence" does not mean any evidence at all that would tend, however slightly, to make an inmate's guilt more probable. Rather, the evidence must prove the inmate's guilt in some plausible way." Id. at 55 (citing for support Zavaro v. Coughlin, 970 F.2d 1148, 1152–53 (2d Cir. 1992) and Lenea v. Lane, 882 F.2d 1171, 1175–76 (7th Cir. 1989)). "Further," added the court, "the evidence must carry some indicia of reliability." Id. (collecting cases). The fact that Chief Judge Mukasey felt compelled to state such a proposition explicitly provides an indication of the razor's edge upon which Padilla's right to any meaningful consideration of his status balanced.
86. Id. at 56

When I refer to 'the logic of [the prison cases],' I mean only that. Those cases, which dealt with evaluation of evidence gathered in the relatively accessible setting of a prison, cannot be applied mechanically to evaluation of evidence gathered in the chaotic and less accessible setting of a distant battlefield. What allowances will have to be made in applying the logic of those cases will have to abide whatever submission Padilla may choose to make.

Id. The court's reference to a "distant battlefield" also appears to ignore the fact that José Padilla was arrested in O'Hare Airport in Chicago by civilian authorities. Padilla I, 233 F. Supp. 2d at 568. Whatever evidence exists for or against him, it is not likely to assume the form of scattershot testimony by combatants on the field of battle. Regardless, Chief Judge Mukasey willingly let slip his own dim view of Padilla's chances during discussion of the possibility that Padilla might have agreed to
Though more of a question of legal deference, it is worth noting further that the district court’s importation of the “some evidence” standard strikes an improperly hostile pose towards Padilla’s due process rights. Defendants in prison disciplinary hearings have already been convicted of crimes after having exercised their due process rights in full and fair hearings under a “beyond a reasonable doubt” standard. Indeed, the lower standard of proof in prisons attaches because the inmates have previously been properly deprived of their liberty in a court of law. For José Padilla, the question is precisely whether he has in fact violated the law and thus subjected himself to confinement. The court’s selection of such a minimal standard of proof consequently would seem inappropriate.

The district court opinions in Padilla are no longer good law. In December 2003, the Second Circuit Court of Appeals reversed the district court’s conclusion\(^8\) that the President possessed statutory

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\(^8\) See, e.g., Hill, 472 U.S. at 454 (basing its selection of the “some evidence” standard on the “distinctive setting of a prison, where disciplinary proceedings take place in a closed, tightly controlled
decision of the court. People by those who have chosen to violate the criminal law and who have been lawfully incarcerated for doing so”) (internal quotation and citation omitted) (emphasis added).

88. Almost as an aside to its refusal to demand more than “some evidence” before allowing the United States to hold José Padilla indefinitely without trial, Padilla I also contains an excellent illustration of the judiciary’s willingness, on its own accord, to read Congressional empowerments of the military sufficiently broadly to eliminate questions of the executive’s affirmative authority. Padilla had argued that his detention violated 18 U.S.C. § 4001(a), which orders that “[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.” 18 U.S.C. § 4001(a) (2000); Padilla I, 233 F. Supp. 2d at 586. Though it held 18 U.S.C. § 4001(a) applicable to Padilla’s case, the court interpreted Congress’s “Authorization for Use of United States Armed Forces” as meeting the terms of that constraining statute. Padilla I, 233 F. Supp. 2d at 597–98; see Pub. L. No. 107-40, 115 Stat. 224 (2001). The salient portion of this statute states

\[\text{[t]hat the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.}\]

\[^{10}\]§ 2(a). The error in the court’s interpretation lies in the fact that the Joint Authorization covers only those individuals or organizations the President determines “planned, authorized, committed, or aided the terrorist attacks that occurred on September 11th.” \[^{10}\]§ 2(a). By comparison, the United States had alleged only that José Padilla was “closely associated with al Qaeda” and might be involved in “preparation for acts of international terrorism,” not that he was actually a member of that organization or bore any responsibility for the previous attacks. Padilla I, 233 F. Supp. 2d at 572.

The June 9 Order is addressed to the Secretary of Defense, and includes seven numbered paragraphs setting forth the President’s conclusion that Padilla is an enemy combatant, and, in summary form, the basis for that conclusion, including that Padilla: is “closely associated with al Qaeda,” engaged in “hostile and war-like acts” including “preparation for acts of international terrorism” directed at this country, possesses information that would be helpful in preventing al Qaeda attacks, and represents “a continuing, present and grave danger to the national security of the United States.” (June 9 Order ¶ 2-5)

\[^{11}\]Id. The district court attempted to obscure this linguistic defect by arguing that “Padilla is alleged in
authority to detain American citizens captured on American soil—a conclusion necessarily antecedent to that court’s discussion of the appropriate standard for reviewing Padilla’s status. The Second Circuit thus did not reach the issue of what standard of proof might apply to judicial review of lawful executive detentions. The Supreme Court granted certiorari two months later. In June of 2004, the Court reversed, holding that Secretary of Defense Donald Rumsfeld was not the proper respondent to Padilla’s request for habeas relief, and therefore that the Southern District of New York lacked jurisdiction over the petition. In dismissing the case accordingly, the Supreme Court reached neither the Second Circuit’s holding that the Executive lacked authority to detain Padilla nor the Southern District of New York’s resolution of the question of the government’s burden of proof.

Yet although Chief Judge Mukasey’s reasoning and analysis on this crucial issue died with the Supreme Court’s dismissal of José Padilla’s petition, the conclusion he reached appears to have lived on. The Supreme Court, in Hamdi v. Rumsfeld, a companion case to Padilla discussed at greater length below, announced that administrative classifications of prisoners as “enemy combatants” are to be evaluated according to a standard indistinguishable from Chief Judge Mukasey’s “some evidence” criterion. Like a doctrinal moebius strip, Padilla v. Bush’s tortured jurisprudential path ends just where it began.

2. HAMDI v. RUMSFELD: NADIR AND RETRENCHMENT

While Padilla left factual scrutiny in service of the rule of law dangling by a “gossamer” thread, the Fourth Circuit’s opinion in Hamdi sliced the remaining strand completely. The facts and procedural history of Hamdi v. Rumsfeld—consolidated alongside Padilla for certiorari

the June 9 Order to have been an unlawful combatant in behalf [sic] of al Qaeda,” contrary to its own description of that Order several pages earlier. Id. at 599. The result is a functional expansion of the Joint Authorization’s statutory language to cover even individuals “closely associated” with those organizations responsible for the attacks of September 11th, an exploitation of minimal statutory imprecision that seems to contradict the Resolution’s unambiguous statement. On appeal, the Second Circuit reversed the Southern District court and held that the Joint Authorization did not satisfy the requirements of 18 U.S.C. § 4001(a), though it did not reach the particular question of against which individuals or groups that statute particularly authorized action. Padilla v. Rumsfeld (Padilla III), 352 F.3d 695, 722-23 (2d Cir. 2003).

89. Id. at 698 (“We also conclude that Padilla’s detention was not authorized by Congress, and absent such authorization, the President does not have the power under Article II of the Constitution to detain as an enemy combatant an American citizen seized on American soil outside a zone of combat.”).


91. See Rumsfeld v. Padilla (Padilla IV), 124 S. Ct. 2711, 2727 (2004) (“The District of South Carolina, not the Southern District of New York, was the district court in which Padilla should have brought his habeas petition. We therefore reverse the judgment of the Court of Appeals and remand the case for entry of an order of dismissal without prejudice.”).

92. See generally id.

93. See Part I.C.2., infra.
review by the Supreme Court— are by now as well known as those of its Second Circuit companion. Little further explication is necessary or instructive here. Indeed, the Fourth Circuit's approach and reasoning in *Hamdi* largely mimics the *Padilla* district court's emphasis on the Executive's special constitutional role. The *Hamdi* appellate court first acknowledged that Yaser Hamdi, an American citizen, could not be held indefinitely by the Executive without some fashion of judicial review. The Fourth Circuit, like the Southern District of New York, understood that meaningful judicial review of the legality of an alleged enemy combatant's detention required consideration of the underlying facts that gave rise to the President's war power authority to detain combatants in the first instance. It is inappropriate, explained the *Hamdi* appellate court, for Article III courts to second-guess lawful executive decisions in wartime. However, courts must first ascertain whether those decisions were indeed lawful, an inquiry that demands examination of the predicate facts according to which executive action is taken.

95. A very brief recapitulation will suffice. Yaser Hamdi is an American-born citizen who was captured in Afghanistan during the United States' post-September 11th operations there, and was being held in a naval brig in Norfolk, VA. *Hamdi v. Rumsfeld* (*Hamdi I*), 316 F.3d 450, 459-60 (4th Cir. 2003). His father had filed a habeas petition as "next friend" on his behalf. *Hamdi v. Rumsfeld* (*Hamdi I* and *Padilla v. Bush* (*Padilla I*)) are the only cases within the last half-century to address substantively the lawfulness of military detention of American citizens.
96. *Hamdi* was, of course, decided before *Padilla*, and the latter drew to some degree upon the former. The time descriptors employed in the text are meant only as a guide to the reader.
97. *Hamdi I*, 316 F.3d at 465
While the scope of habeas review has expanded and contracted over the succeeding centuries, its essential function of assuring that restraint accords with the rule of law, not the whim of authority, remains unchanged. *Hamdi*'s petition falls squarely within the Great Writ's purview, since he is an American citizen challenging his summary detention for reasons of state necessity.

Under Article V of the Geneva Convention, Yaser Hamdi was also entitled to "an initial formal determination of his status" as either a lawful or unlawful combatant "by a competent tribunal." *Id.* at 468 (citing Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 5, 6 U.S.T. 3316, 75 U.N.T.S. 135) (internal quotation marks omitted). The Fourth Circuit disposed quickly of this potential source of law, holding that the Geneva Convention was not self-executing and therefore conferred no basis for a private right of action by an aggrieved individual in American courts. *Id.* at 468-69; see also Huynh Thi Anh v. Levi, 586 F.2d 625, 629 (6th Cir. 1978) (holding that a similar provision was not self-executing); Holmes v. Laird, 459 F.2d 1211, 1222 (D.C. Cir. 1972) ("[C]orrective machinery specified in the treaty itself is nonjudicial.").
98. In fact, *Hamdi I* employed the same rule-of-law formulation described above in *Padilla* in characterizing its role in evaluating whether the executive has acted within its constitutional authority: "This deferential posture, however, only comes into play after we ascertain that the challenged decision is one legitimately made pursuant to the war powers." *Hamdi I*, 316 F.3d at 472.
99. The executive's plenary wartime power, wrote the court, only comes into play after we ascertain that the challenged decision is one legitimately made pursuant to the war powers . . . Otherwise, we would be deferring to a decision made without any inquiry into whether such deference is due. For these reasons, it is appropriate, upon a citizen's presentation of a habeas petition alleging that he is being unlawfully detained by his own government, to ask that the government provide the legal authority
Yet the court selected an impossibly low standard for assessing the government's factual case against Hamdi: if the government has asserted facts that "would, if accurate, provide a legally valid basis for Hamdi's detention," the court will not inquire further—the court viewed the veracity of those asserted facts as beyond its purview. The Hamdi appellate court located the Executive's right to essentially unfettered discretion over the factual basis for Hamdi's incarceration within the President's plenary constitutional authority over national security and foreign affairs, committing the same error of conflation made by the court in Padilla. The Fourth Circuit stated further that anything beyond token judicial oversight would encroach upon the Executive's Article II war-making powers, ignoring the countervailing notion that judicial withdrawal might constitute an abdication of the courts' own constitutional responsibilities. The Fourth Circuit's overly deferential approach to the Administration's factual presentation regarding Yaser Hamdi's status was hardly lacking in deference.

upon which it relies for that detention and the basic facts relied upon to support a legitimate exercise of that authority.

Id. The Hamdi I court here employs the term "deference" not in the sense generally described above, but rather to mean complete judicial detachment from (and refusal to review) wartime executive actions. As the immediately following paragraphs will elucidate, the court's approach to the Administration's factual presentation regarding Yaser Hamdi's status was hardly lacking in deference. Lest there be any doubt regarding the extent of the Fourth Circuit's surrender, the Hamdi I opinion stated explicitly that even on its face Hamdi's habeas petition must fail, for his acknowledgment that he was arrested by military authorities in a theater of war is sufficient to endow the military executive henceforth with unfettered authority over his person. See id. at 469 ("[W]e conclude that Hamdi's petition fails as a matter of law. It follows that the government should not be compelled to produce the materials described in the district court's August 16 order.").

101. Id. at 471-72 ("We have already emphasized that the standard of review of enemy combatant detentions must be a deferential one . . .").

102. Id. at 463 ("For the judicial branch to trespass upon the exercise of the warmaking powers would be an infringement of the right to self-determination and self-governance at a time when the care of the common defense is most critical. This right of the people is no less a right because it is possessed collectively."). Unlike Chief Judge Mukasey in Padilla I, the Hamdi I court explicitly tied this reliance to the executive's greater expertise.

[T]he executive and legislative branches are organized to supervise the conduct of overseas conflict in a way that the judiciary simply is not. The Constitution's allocation of the warmaking powers reflects not only the expertise and experience lodged within the executive, but also the more fundamental truth that those branches most accountable to the people should be the ones to undertake the ultimate protection . . .

Id. Judicial oversight of administrative detentions, whether achieved through habeas corpus petitions or other jurisdictional means, is likely fundamental to the American constitutional system of separated powers and could not be overturned by Congressional manipulation of substantive or jurisdictional statutes. See generally U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."); RICHARD H. FALLON, JR., DANIEL J. MELTZER, & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 345-57 (5th ed. 2003); Richard H. Fallon, Jr. & Daniel J. Meltzer, New Law, Non-Retroactivity, and Constitutional Remedies, 104 HARY. L. REV. 1731, 1778-79 (1991) (arguing that the Constitution "demands a system of constitutional remedies adequate to keep government generally within the bounds of law").
approach to the military compelled it to criticize the district court for engaging in more searching review and demanding from the government even a quantum of proof of Hamdi's putative guilt. Such a standard strips much of the potency of the rule of law; the government need barely proffer any proof, much less "substantial" evidence or "a preponderance of the evidence," before being allowed to detain Yaser Hamdi indefinitely. By refusing to inquire meaningfully into the facts underlying and legitimating the government's deprivation of Hamdi's constitutionally guaranteed liberty, the Fourth Circuit had effectively demoted its powerful conception of the rights at stake to the status of mere precatory language.

The Fourth Circuit's opinion in *Hamdi* represents the high water

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103. See *Hamdi I*, 316 F.3d at 472–73.

The district court approached the Mobbs declaration by examining it line by line, faulting it for not providing information about whether Hamdi had ever fired a weapon, the formal title of the Taliban military unit Hamdi was with when he surrendered, the exact composition of the U.S. interrogation team that interviewed Hamdi in Sheberghan, and even the distinguishing characteristics between a Northern Alliance military unit and a Taliban military unit. Concluding that the factual allegations were insufficient to support the government's assertion of the power to detain Hamdi under the war power, the court then ordered the production of the numerous additional materials outlined previously. We think this inquiry went far beyond the acceptable scope of review.

104. While the holding in *Hamdi I* goes even further than *Padilla I*, the case's result remains in one regard more defensible. In his petition, Yaser Esam Hamdi admitted to having been captured in Afghanistan "during a time of active military hostilities." *Hamdi I*, 316 F.3d at 460. The Fourth Circuit relied specifically on this fact in its analysis of the case. In so doing, it differentiated the prayer for relief before it from Padilla's situation on the grounds that it would seem reasonable to presume the accuracy and regularity of a military detention in a zone of military operations, even when the same would not be true for civilians—such as José Padilla—who were arrested on American soil. *Id.* at 475 ("At least where it is undisputed that he was present in a zone of active combat operations, we are satisfied that the Constitution does not entitle him to a searching review of the factual determinations underlying his seizure there."); see also *Hamdi v. Rumsfeld* (*Hamdi II*), 337 F.3d 335, 344 (4th Cir. 2003) (Wilkinson, J., concurring in the denial of rehearing en banc) ("To compare this battlefield capture to the domestic arrest in *Padilla v. Rumsfeld* is to compare apples and oranges."). Nevertheless, it is far from obvious or uncontested that Hamdi was indeed a soldier for the Taliban or, for that matter, an enemy combatant. See Dahlia Lithwick, *Cruel Detentions*, SLATE, Apr. 28, 2004, at http://slate.msn.com/id/2099618 (last visited June 5, 2004) ("Dunham [Hamdi's defense attorney] replies that he was only recently allowed to speak to his client for the first time and that the government claims Hamdi's communications are classified, so he can't tell the court anything beyond the fact that there is 'substantial dispute' between Mobbs' view of the facts and Hamdi's."). Without meaningful inquiry into the facts underlying Hamdi's case, no court may ever know whether he was, indeed, an enemy combatant—particularly if, in addition to precluding Hamdi from pressing his case in court, the Department of Defense continues to preclude Hamdi's attorney from speaking publicly about his case.

Notwithstanding the court's official explanation invoking "accuracy," the Fourth Circuit may have had additional, pragmatic reasons—such as the difficulty the government might encounter in proving its case—for establishing such a low threshold. See *Hamdi I*, 316 F.3d at 473. ("The murkiness and chaos that attend armed conflict mean military actions are hardly immune to mistake. Yet these characteristics of warfare have been with us through the centuries and have never been thought sufficient to justify active judicial supervision of combat operations overseas. To inquire, for example, whether Hamdi actually fired his weapon is to demand a clarity from battle that often is not there.").
A HARD LOOK OR A BLIND EYE?

mark in the Executive’s efforts to abolish meaningful judicial review of its official determinations. Handed down nearly two full years later, the Supreme Court’s reversal of that opinion turned back the rising tide of factual determinism, but only to the line previously established by the district court in Padilla. The Supreme Court’s plurality opinion in Hamdi v. Rumsfeld first set about answering the principal question left open by Padilla’s untimely demise, holding that Congress had indeed authorized the Executive to detain “enemy combatants” and thus concluding that the Department of Defense possessed affirmative authority to incarcerate Yaser Esam Hamdi (and, presumably, José Padilla) if, in fact, he could be so classified. The Court then sidestepped the Hohfeldian category mistake urged upon it by the government, concluding that the President’s commander-in-chief authority does not fully trump the rights held by individuals. The Executive therefore cannot escape the independent evaluation (by some neutral arbiter) of prisoners’ claims.

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106. Id. at 2650. (“Because detention to prevent a combatant’s return to the battlefield is a fundamental incident of waging war, in permitting the use of ‘necessary and appropriate force,’ Congress has clearly and unmistakably authorized detention in the narrow circumstances considered here.”). The Supreme Court concluded that the Joint Authorization for the Use of Military Force, 115 Stat. 224, sufficed to meet the statutory mandate for administrative detentions set forth in 18 U.S.C. § 4001(a) and cured whatever other constitutional infirmities might remain. See id. at 2638 (“The capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, by ‘universal agreement and practice,’ are ‘important incident[s] of war.’”) (citing Ex parte Quirin, 317 U.S. 1, 28 (1942)) (alterations in original). Since the beginning of this case, the United States government has maintained that Hamdi was a member of the Taliban, an organization alleged to be “harboring” al Qaeda. See id. at 2637 (“The [government’s] declaration states that Hamdi ‘traveled to Afghanistan’ in July or August 2001, and that he thereafter ‘affiliated with a Taliban military unit and received weapons training.’”). Proof of these factual allegations would thus largely inoculate the Administration from the linguistic defects that plagued parallel attempts to draw José Padilla within the ambit of the Joint Authorization. See supra note 23; supra notes 88-92 and accompanying text.

It is notable that the Hamdi III plurality could muster only four votes for its own opinion holding, inter alia, that the President maintained the authority to detain Yaser Hamdi as an enemy combatant. See Hamdi III, 124 S. Ct. at 2641. The fifth vote—the reason that Yaser Hamdi remained incarcerated after the issuance of the opinion—came from Justice Thomas’s otherwise dissenting opinion, which argued that the government’s assessment of Hamdi’s guilt could not be challenged or overturned by the courts. See id. at 2674 (Thomas, J., dissenting). Justice Thomas was thus the only member of the Supreme Court to adopt the government’s position in full.


In so holding, we necessarily reject the Government’s assertion that separation of powers principles mandate a heavily circumscribed role for the courts in such circumstances. Indeed, the position that the courts must forgo any examination of the individual case and focus exclusively on the legality of the broader detention scheme cannot be mandated by any reasonable view of separation of powers, as this approach serves only to condense power into a single branch of government. We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation’s citizens. Youngstown, 343 U.S. at 587. Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake. Mistretta v. United States, 488 U.S. 361, 380.
The Supreme Court thus found itself faced squarely with the question of what evidentiary standard the Executive must meet in order to carry its burden of proof as to a detainee’s status, and, ultimately, the question of the proper level of deference the courts must afford to the Executive branch’s wartime factual determinations. The *Hamdi* Court’s choice of jurisprudential framework for evaluating this issue was both familiar and curious. The Court plurality elected to assess the process due Hamdi according to the balancing of interests set forth in the Court’s well-known line of civilian due process cases that begins with *Mathews v. Eldridge*. After a rather impressionistic balancing of the interests

Id. See also Mistretta v. United States, 488 U.S. 361, 380 (1989) (It was “the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty”).

108. Between the initial Fourth Circuit adjudication in *Hamdi* and the Supreme Court’s consideration of this case, the Department of Defense permitted Hamdi to meet with an attorney, and the *Hamdi III* plurality held without further discussion that Yaser Hamdi “unquestionably has the right to access to counsel in connection with the proceedings on remand.” *Hamdi III*, 124 S. Ct. at 2652.

109. Id. at 2626. ("The ordinary mechanism that we use for balancing such serious competing interests, and for determining the procedures that are necessary to ensure that a citizen is not 'deprived of life, liberty, or property, without due process of law,' U.S. Const., Amdt. 5, is a test that we articulated in *Mathews v. Eldridge*, 424 U.S. 319 (1976) ... "). According to the test set forth in *Mathews*, once a court determines that an individual holds a legally protected liberty or property interest, the court derives the process due that individual through consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.


Justice Scalia, in dissent, makes much of the Court’s borrowing *Mathews* from the context of civil deprivations of liberty or—far more commonly—property. See *Hamdi III*, 124 S. Ct. at 2672 (Scalia, J., dissenting) ("[The plurality] claims authority to engage in this sort of 'judicious balancing' from *Mathews v. Eldridge*, 424 U.S. 319 (1976), a case involving ... the withdrawal of disability benefits! Whatever the merits of this technique when newly recognized property rights are at issue (and even there they are questionable), it has no place where the Constitution and the common law already supply an answer.") (emphasis and ellipses in original). Justice Scalia is certainly correct that the application of *Mathews* to what might fairly be characterized as a criminal detention and accompanying hearing is hardly a commonplace legal maneuver for the Court: “In our view, the *Mathews* balancing test does not provide the appropriate framework for assessing the validity of state procedural rules which, like the one at bar, are part of the criminal process.” *Medina v. California*, 505 U.S. 437, 443 (1992). Indeed, the Court has applied *Mathews* to a criminal proceeding only twice. *Ake v. Oklahoma*, 470 U.S. 68 (1985) (requiring that an indigent defendant who has shown that his sanity may be an issue at trial must be provided access to a psychiatrist); United States v. Raddatz, 447 U.S. 667 (1980) (upholding the authority of magistrate judges to make findings on motions to suppress evidence). The *Medina* Court swept those cases aside, concluding that “it is not at all clear that *Mathews* was essential to the results reached.” *Medina*, 505 U.S. at 444.

Perhaps by consequence, the *Mathews* regime has drawn numerous critiques as offering a framework unduly hostile to individuals’ due process rights and unfairly constrictive in the procedures that courts have tended to award. See, e.g., Cynthia R. Farina, *Conceiving Due Process*, 3 YALE J.L. &
invoked by Hamdi's liberty interest and the government's desire to detain him, the plurality concluded, not surprisingly, that "substantial interests lie on both sides of the scale in this case."

Befitting this cognizance of the forces at play on either side of the interests equation, the plurality's enumeration of which procedural protections must be afforded Hamdi and those similarly situated traces a cautious path among the available extremes: A "citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker." Yet these nominal procedural safeguards did not

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FEMINISM 189, 266 (1991) ("Escaping dependence has thus been an irresistible force within procedural due process jurisprudence. And it has met the immovable object of the contemporary regulatory state. If there were ever a time when the individual could avoid dependence upon the collective, that time is gone. If it were ever possible for the citizen to aspire to a balance of power with government, it is possible no longer."); Jerry L. Mashaw, Dignitary Process: A Political Psychology of Liberal Democratic Citizenship, 39 U. FLA. L. REV. 433, 437 (1987) ("Such an approach is functionally inadequate to address the problems of governmental or bureaucratic discretion that the due process clause was meant to address."); Jerry L. Mashaw, The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value, 44 U. CHI. L. REV. 28, 48 (1976) ("The utilitarian calculus is not, however, without difficulties. The Eldridge Court conceives of the values of procedure too narrowly: it views the sole purpose of procedural protections as enhancing accuracy, and thus limits its calculus to the benefits or costs that flow from correct or incorrect decisions. No attention is paid to 'process values' that might inhere in oral proceedings....").

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111. That is, it rejects both Justice Thomas's dissent arguing that detainees need not be afforded the opportunity to contest the government's factual assertions, id. at 630 (Thomas, J., dissenting), and Justice Scalia's dissent that asserts that Hamdi must either be charged with a crime by civilian criminal authorities or released. Id. at 626-29 (Scalia, J., dissenting).

112. Id. at 601 (emphasis added) (citing Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542-43 (1985) (holding that Mathews required that employees who may be terminated only for cause be afforded a pretermination hearing at which to contest the charges against them)). The plurality suggests later that this "neutral decisionmaker" could in fact be a military court, despite the self-evident lack of neutrality involved in placing the assessment of authority to detain an individual before the very governmental body attempting to perpetuate the detention. Id. at 604 ("There remains the possibility that the standards we have articulated could be met by an appropriately authorized and properly constituted military tribunal."). It appears that the government may choose exactly this route. See Phillip Carter, Prisoners' Dilemma: How the Administration Is Obstructing the Supreme Court's Terror Decisions, SLATE, Aug. 3, 2004, at http://slate.msn.com/id/2104715/ (last visited Aug. 5, 2004).
catalyze a concomitantly stringent demand upon the government to put forth substantial evidence of a detainee's enemy combatant status:

[T]he Constitution would not be offended by a presumption in favor of the Government's evidence, so long as that presumption remained a rebuttable one and fair opportunity for rebuttal were provided. Thus, once the Government puts forth credible evidence that the habeas petitioner meets the enemy-combatant criteria, the onus could shift to the petitioner to rebut that evidence with more persuasive evidence that he falls outside the criteria. 113

The plurality compounded its retrenchment of executive power by hinting that other unnamed accommodations of the government (of unknown detriment to Hamdi's efforts) might be necessary, in light of the "exigencies of the [wartime] circumstances." 114

Hamdi v. Rumsfeld thus leaves alleged unlawful combatants in a position nearly identical to the one in which they found themselves after the district court opinions in Padilla v. Bush. Though military detainees are granted an opportunity to challenge the Executive's case against them and to present evidence that they are improperly characterized, the government's factual conclusions will benefit from a judicial presumption of accuracy. Indeed, detainees may be presumed "unlawful combatants" until proven otherwise, and courts are unlikely to force the Administration to adduce more than "some evidence" in support of its asseverations. 115 The plurality opinion intentionally and explicitly

113. Hamdi III, 124 S. Ct. at 2649.

114. Id. ("At the same time, the exigencies of the circumstances may demand that, aside from these core elements, enemy combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict."). The plurality indicated further that various other evidentiary protections, such as the rule against hearsay evidence, may not apply to citizens such as Hamdi the government seeks to hold as unlawful combatants. Id. ("Hearsay, for example, may need to be accepted as the most reliable available evidence from the Government in such a proceeding.").

115. See Padilla v. Rumsfeld (Padilla II), 243 F. Supp. 2d 42, 54 (S.D.N.Y. 2003); Hamdi III, 124 S. Ct. 2645-47. Parallel analysis of these two cases is confused somewhat by the divergent uses of the phrase "some evidence" within the opinions. (The courts' inconsistencies are likely engendered by shifts in the government's nomenclature.) As described above, in Padilla II, Chief Judge Mukasey explained that the "some evidence" standard—which he had borrowed from the context of prison disciplinary proceedings—"does not mean any evidence at all that would tend, however slightly, to make an inmate's guilt more probable. Rather, the evidence must prove the inmate's guilt in some plausible way . . . and must carry some indicia of reliability." Padilla II, 243 F. Supp. 2d at 55 (collecting cases). Moreover, even under this standard the court would afford a detainee "an opportunity to respond to the government's allegations." Id. at 54; see also supra note 85 and accompanying text.

In Hamdi III, by contrast, the executive was advancing a far more restrictive interpretation of the same "some evidence" standard (again borrowed from the context of prison disciplinary hearings), according to which "a court would assume the accuracy of the Government's articulated basis for Hamdi's detention, as set forth in the Mobbs Declaration, and assess only whether that articulated basis was a legitimate one." Hamdi III, 124 S. Ct. at 2645 (citing Hamdi I, 316 F.3d at 473-74 ("The factual averments in the [Mobbs] affidavit, if accurate, are sufficient to confirm the legality of Hamdi's detention."). This latter conception of "some evidence," in focusing only upon the facts
delegates to the lower courts the task of fleshing out much of the nuance embedded in the legal standards it has announced, and *Hamdi* thus leaves indeterminate (and undetermined) the precise degree of deference courts will, in the final analysis, afford the Executive’s factual suppositions. Nevertheless, it appears that in the year since the Southern District of New York predicted that José Padilla (and others similarly situated) would “los[e] in short order... under a ‘some evidence’ standard,” less has changed than has remained the same.

D. MODERN WARTIME REJECTION OF RATIONALITY REVIEW

In concert with their willingness to accept less than compelling proof of the factual predicates to lawful executive action, courts’ deference to the Executive’s expertise in matters of national security has prevented them from applying meaningful scrutiny to the logic employed by the Administration to justify constitutionally suspect actions in wartime. From *Padilla* and *Hamdi* to *Detroit Free Press*, *North Jersey Media*, and *Center for National Security*, the lower courts’ modern wartime jurisprudence has been led astray by continued adherence to mistaken principles.

I. The INS Hearing Access Cases and the Subjugation of Rationality

The power of the Administration’s invocation of its experience and expertise in national security matters, and the deleterious effect this power can have on litigants’ attempts to invoke constitutional rights, has been on display more recently in two cases that touch upon the current “war against terror.” *North Jersey Media Group v. Ashcroft* and *Detroit Free Press v. Ashcroft* are two parallel lawsuits challenging the Department of Justice’s decision in the wake of the events of September 11, 2001, to close certain “special interest” Immigration and Naturalization Service deportation hearings to the public and the

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proffered by the government, would have stripped Hamdi of the opportunity to confront or challenge the Administration’s evidence and eliminated the requirement that the adduced facts prove his “culpability” in some “plausible” fashion. In rejecting the government’s harsher novel construction of the some evidence standard, the *Hamdi III* plurality aligned itself with the more judicially assertive stance struck by the *Padilla* district court. See id. at 2648 (holding that the process “proposed by the Government” does not “strike[] the proper constitutional balance when a United States citizen is detained in the United States as an enemy combatant”).

116. See id. at 2652.

We anticipate that a District Court would proceed with the caution that we have indicated is necessary in this setting, engaging in a fact-finding process that is both prudent and incremental. We have no reason to doubt that courts faced with these sensitive matters will pay proper heed both to the matters of national security that might arise in an individual case and to the constitutional limitations safeguarding essential liberties that remain vibrant even in times of security concerns.”

media. The deportation hearings selected for closure were those involving individuals that the Department of Justice, in the person of Chief Immigration Judge Michael Creppy, had decided “might have connections to or knowledge of the September 11, 2001 terrorist attacks.” The Administration apparently feared that information critical to the effort against terrorism might be disclosed during these proceedings. The plaintiffs in both cases—local media organizations that had been denied access to these hearings—asserted First Amendment rights under Richmond Newspapers, Inc. v. Virginia to open proceedings. In both cases the trial courts recognized such rights and held that the government must demonstrate a compelling interest if it wished the hearings sealed.

To prove such a compelling interest (in the form of a grave threat to national security), the Department of Justice and the INS submitted declarations from two anti-terrorism officials who laid claim to significant expertise on the subject: in Detroit Free Press, James S. Reynolds, Chief of the Terrorism and Violent Crimes Section of the Justice Department’s Criminal Division, and in North Jersey Media, Mr. Reynolds and Dale Watson, Executive Assistant Director for Counter Terrorism and Counterintelligence of the FBI. It is the courts’ treatments of the facts and conclusions alleged in these declarations that illuminate their extensive deference towards executive determinations of predicate facts, and the consequences of such deference for constitutional adjudications.

The affidavits of these anti-terrorism experts contained veritable laundry lists of the possible harms that might result from opening hearings, or even from identifying the “special” detainees who were subject to closed hearings. According to the Administration, releasing information such as the detainees’ names, the circumstances of their arrests, or the evidence against them might disrupt anti-terrorist investigations by placing terrorist groups on notice that one of their number had been captured, alert these organizations that a member they had counted upon would no longer be able to fulfill his tasks, “reveal the direction and progress of the investigation,” impair the government’s ability to “infiltrate terrorist organizations,” or any one of a number of


120. Id. at 200.

121. 448 U.S. 555 (1980).


123. Detroit Free Press I, 195 F. Supp. 2d at 946; North Jersey Media I, 205 F. Supp. 2d at 301.
other dire possibilities.\textsuperscript{124}

These concerns are not facially unreasonable. Indeed, the CIA and other intelligence-related agencies have long maintained that the admission that certain information exists—much less the disclosure of that information—could endanger the intelligence-gathering process and deleteriously impact national security.\textsuperscript{125} Yet the government’s argument contained one considerable logical flaw: nothing prevented the special INS detainees themselves, or their lawyers (who would be present at the closed hearings), from speaking publicly about any portion of the proceedings.\textsuperscript{126} In fact, in the event that a detainee succeeded in obtaining an appeal of the immigration judge’s ruling, a complete transcript of the hearing would become part of the public record.\textsuperscript{127} The \textit{Detroit Free Press} and \textit{North Jersey Media} trial courts seized upon this logical gap between the “facts found and the choice made.”\textsuperscript{128} Propelled by the irrationality of the government’s position, both federal district courts rejected the government’s attempts to demonstrate compelling interests and ordered the INS hearings opened to the public, noting that “the interests the Government offers cannot support its closure of [this case] even under the most deferential standard of review.”\textsuperscript{129}

The skeptical postures these courts assumed towards facially suspect governmental assertions would be unremarkable were it not for the contradictory poses subsequently struck by the Sixth and Third Circuits on appeal.\textsuperscript{130} The Sixth Circuit’s evaluation of the government’s interest in closed hearings in \textit{Detroit Free Press} appears cribbed directly from the government’s avowed position: “‘The identifications of the detainees, witnesses, and investigative sources would be disclosed . . . Methods of entry to the country, communicating, or funding could be revealed . . . ‘Information that is not presented at the hearings also might provide important clues to terrorist [sic] . . .’”\textsuperscript{131} Without mentioning the district court’s argument that this information would be revealed irrespective of

\textsuperscript{124} \textit{Detroit Free Press I}, 195 F. Supp. 2d at 946–47; see also \textit{North Jersey Media I}, 205 F. Supp. 2d at 301.


\textsuperscript{126} \textit{See Detroit Free Press I}, 195 F. Supp. 2d at 947.

\textsuperscript{127} \textit{See North Jersey Media I}, 205 F. Supp. 2d at 301.


\textsuperscript{129} \textit{Detroit Free Press I}, 195 F. Supp. 2d at 947.

\textsuperscript{130} \textit{Detroit Free Press v. Ashcroft} (\textit{Detroit Free Press II}), 303 F.3d 681 (6th Cir. 2002); \textit{North Jersey Media II}, 308 F.3d at 108.

\textsuperscript{131} \textit{Detroit Free Press II}, 303 F.3d at 706 (citing Gov’t Brief at 47–49).
whether the hearings were opened, the circuit court accepted the
government's asseverations in wholesale, uncritical fashion. Crucially,
the circuit court attributed its deferential posture to the executive
branch's superior expertise. Wrote Judge Keith for the court,
"[i]nasmuch as these agents' declarations establish that certain
information revealed during removal proceedings could impede the
ongoing anti-terrorism investigation, we defer to their judgment. These
agents are certainly in a better position to understand the contours of the
investigation and the intelligence capabilities of terrorist
organizations."\textsuperscript{132}

The Third Circuit court took up the same issue, to similar results, in
its review of the lower court's decision in \textit{North Jersey Media}.\textsuperscript{133} After
restating the government's now-familiar mantra of potential harms
resulting from open hearings, the \textit{North Jersey Media} majority
announced not only its intent to defer to the government's superior
expertise, but its explicit reluctance to become judicially involved in
matters of national security. Explained the court, "[w]e are quite hesitant
to conduct a judicial inquiry into the credibility of these security
concerns, as national security is an area where courts have traditionally
extended great deference to Executive expertise."\textsuperscript{134} Like the Sixth
Circuit before it, the Third Circuit then anchored its decision to the
supposed knowledge and reliability of the individuals who had submitted
affidavits. The court assessed the government's arguments based upon
the titles of the people making them, not their substantive merit:

The assessments before us have been made by senior government
officials responsible for investigating the events of September 11th and
for preventing future attacks. These officials believe that closure of
special interest hearings is necessary to advance these goals, and their
concerns, as expressed in the Watson Declaration, have gone
unrebutted.\textsuperscript{135}

Even under its current idiom of deference, the court's last statement
was particularly misleading—the government's concerns had in fact been
specifically rebutted, not on contested factual grounds but through pure
logical refutation, by two district courts. As Judge Scirica noted in

\textsuperscript{132} \textit{Id.} at 707. The court did hold that the closure of all INS deportation hearings was not
narrowly tailored to meet a compelling interest, and ordered the hearings opened on a case-by-case
basis. \textit{Id.} at 707–10.

\textsuperscript{133} The Third Circuit interpreted the "logic" prong of the \textit{Richmond Newspapers} test (for
determining whether a judicial proceeding should be opened) as encompassing the question of
"whether public access plays a significant positive role in the functioning of the particular process in
1, 8 (1986)). It thus reached the question of what harm might result from opening hearings at the
anterior stage of deciding whether a right to open hearings existed in the first instance.

\textsuperscript{134} \textit{North Jersey Media II}, 308 F.3d at 219 (citing for support \textit{Zadvydas v. Davis}, 533 U.S. 678, 696
(2001)).

\textsuperscript{135} \textit{Id.}
dissent, "[a]t issue is not whether some or all deportation hearings of special interest aliens should be closed, but who makes that determination." 136 The contrast with immigration cases the judiciary has not implicitly labeled "national security" is quite striking. Zadvydas v. Davis, a case relied upon by both the Sixth and Third Circuits in Detroit Free Press and North Jersey Media, concerned the INS's indefinite peacetime detention of an illegal immigrant pending deportation. 137 In the face of judicial inquiry into the constitutionality of a statute that appeared to authorize infinite confinement, the INS argued that its authority over, and experience with, immigration matters counseled for judicial deference to its determinations regarding when a particular detention might be necessitated for security reasons. 138 The Supreme Court rejected this approach, refusing to defer to the Administration's view of the facts and declaring that under exogenous law (the Due Process Clause, operationalized through a writ of habeas corpus) it must decide the matter de novo. 139 In so doing, the Court recognized the fundamental role of judicial review as a bulwark against administrative disregard for the rule of law: "This Court has suggested . . . that the Constitution may well preclude granting 'an administrative body the unreviewable authority to make determinations implicating fundamental rights.' Nonetheless, the Court in dicta specifically excluded "national security" cases from this general principle without further elaboration or explanation—the mere invocation of a threat to the country appeared sufficient to derail the general presumption of judicial oversight. 140

136. Id. at 221 (Scirica, J., dissenting).
137. Although the Supreme Court did not understand Zadvydas as a "national security" case in the classical sense, the detainees in that case were hardly common immigration violators. Rather, every individual subject to indefinite detention by the INS fit into one of a number of specific categories of heightened importance or perceived threat. The aliens were either "inadmissible aliens, criminal aliens, aliens who have violated their nonimmigrant status conditions, and aliens removable for certain national security or foreign relations reasons, as well as any alien 'who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal.'" Zadvydas, 533 U.S. at 688 (quoting 8 U.S.C. § 1231(a)(6)) (emphasis added).
138. See id. at 699.
139. Id. at 699.
140. The Government seems to argue that, even under our interpretation of the statute, a federal habeas court would have to accept the Government's view about whether the implicit statutory limitation is satisfied in a particular case, conducting little or no independent review of the matter. In our view, that is not so. Whether a set of particular circumstances amounts to detention within, or beyond, a period reasonably necessary to secure removal is determinative of whether the detention is, or is not, pursuant to statutory authority. The basic federal habeas corpus statute grants the federal courts authority to answer that question.

Id.
141. Id. at 696 ("Neither do we consider terrorism or other special circumstances where special arguments might be made for forms of preventive detention and for heightened deference to the
2. CENTER FOR NATIONAL SECURITY: TERRORISM'S SUBVERSION OF LEGISLATIVE PURPOSE

Contemporaneously with the closures of “special-interest” INS deportation hearings that gave rise to the Detroit Free Press and North Jersey Media, a number of independent organizations filed Freedom of Information Act (“FOIA”) requests with the Department of Justice, seeking disclosure of the names of all individuals detained “in the wake of the September 11 terrorist attacks,” as well as the names of their attorneys. The Department of Justice denied these requests, claiming that such information was exempted from disclosure under FOIA’s own statutory terms, and the FOIA petitioners turned to the courts. In Center for National Security Studies v. United States Department of Justice, the federal district court for the District of Columbia initially ordered the Department of Justice to release the names of its detainees and their attorneys. The court of appeals, employing a methodology precisely congruent to that of the Third and Sixth Circuits in North Jersey Media and Detroit Free Press (and begging the same questions), reversed the district court and permitted the DOJ to withhold the demanded names against all queries.

FOIA contains within its four corners a panoply of explicitly enumerated exceptions to its general rule of broadly compelled disclosure. In response to the Center for National Security plaintiffs’ requests, the Department of Justice asserted three separate exceptions as defenses to its duty of production. Such information, explained the government, is properly classified as

information compiled for law enforcement purposes [that] . . . (A) could reasonably be expected to interfere with enforcement proceedings, . . . (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, . . . or (F) could reasonably be expected to endanger the life or physical safety of any individual.

The court of appeals—relying solely upon the first of these exceptions—concluded that the DOJ had adduced sufficient proof that disclosure of the names of detainees and their attorneys could substantially impair the “law enforcement action” that is the war on terror. As in North Jersey Media, the government’s offer of proof on
A HARD LOOK OR A BLIND EYE?

[Image 0x0 to 438x653]

February 2005]

this issue consisted entirely of the sworn declarations of two now-familiar figures: “James Reynolds, Director of the Terrorism and Violent Crime Section of the Department of Justice, and Dale Watson, FBI Executive Assistant Director for Counterterrorism—officials with central responsibility for the ongoing terrorist investigation.” These affidavits’ conclusory descriptions of the harms that would likely result from divulgement of the information plaintiffs had requested again neatly paralleled the government’s case in Detroit Free Press and North Jersey Media:

[T]he declarations state that release of the requested information could hamper the ongoing investigation by leading to the identification of detainees by terrorist groups, resulting in terrorists either intimidating or cutting off communication with the detainees; by revealing the progress and direction of the ongoing investigation, thus allowing terrorists to impede or evade the investigation; and by enabling terrorists to create false or misleading evidence.

Despite the fact that these affidavits offered only “vague, poorly explained arguments,” the D.C. Circuit extended substantial deference to the conclusions they contained and adopted those conclusions in full: “Inasmuch as the concerns expressed in the government’s declarations seem credible—and inasmuch as the declarations were made by counterterrorism experts with far greater knowledge than this Court—we hold that the disclosure of the names of the detainees could reasonably be expected to interfere with the ongoing investigation.” Again, in assuming such a deferential stance the circuit court placed its two feet squarely upon the Administration’s putatively superior skills at fighting terrorism and evaluating threats to national security and that branch’s concomitantly designated institutional role in undertaking such assessments. Just as in the INS detainee cases, the

could reasonably be expected to interfere with the ongoing investigation.”]. The court arrived at this holding without any apparent appreciation for the irony of categorizing the war on terror as a “law enforcement action” just as other courts were going to great lengths to distinguish terrorism-related detentions from traditional civilian, law enforcement-based, confinement. See, e.g., Padilla v. Bush (Padilla 1), 233 F. Supp. 2d 564, 600 (S.D.N.Y. 2002); Hamdi 1, 316 F.3d at 473; see also infra notes 268–274 and accompanying text.

149. Ctr. for Nat’l Sec., 331 F.3d at 923.
150. Id.
151. Id. at 937 (Tatei, J., dissenting).
152. See id. at 926–27 (“It is equally well-established that the judiciary owes some measure of deference to the executive in cases implicating national security, a uniquely executive purview.”) (citing Zadvydas v. Davis, 533 U.S. 678, 666 (2001); Dep’t of the Navy v. Egan, 484 U.S. 518, 530 (1988) (“courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs”)).
153. Ctr. for Nat’l Sec., 331 F.3d at 932.
154. See id. at 928 (“It is abundantly clear that the government’s top counterterrorism officials are well-suited to make this predictive judgment. Conversely, the judiciary is in an extremely poor position to second-guess the executive’s judgment in this area of national security.”); id. at 931 (“The court
court was unswayed by the fact that since "each of the detainees has had access to counsel, access to the courts, and freedom to contact the press or the public at large," the prisoners themselves were at liberty to reveal all of the facts the DOJ maintained were so desperately worth guarding.\textsuperscript{155}

Yet, in affording such deference to the DOJ's assertions of fact and probability the District of Columbia Circuit neglected more than merely the logic of the situation—it ignored the balance of interests Congress had enshrined within FOIA. FOIA exists to vindicate "the public's right to know 'what [its] government is up to.'"\textsuperscript{156} That the defense of fundamental rights may demand the disclosure of information that the controlling administrative agency would not otherwise choose to publicize is central to the law's mission, not an ancillary consequence to be judicially minimized. Judge Tatel's dissenting opinion gave voice to this crucially overlooked understanding:

The law that governs this case is the same law that applies whenever the government's need for confidentiality in a law enforcement investigation runs up against the public's right to know... FOIA fully accommodates the government's concerns about the harms that might arise from the release of information pertaining to its investigations. To be sure, the statute strongly favors openness, since Congress recognized that an informed citizenry is "vital to the functioning of a democratic society, needed to check against corruption and to hold the

\textsuperscript{155} Id. at 922. In addition to this fact, Judge Tatel in dissent exposed myriad gaps and flaws within the government's case—and the majority's, as it adopted the Administration's conclusions without caveat. A few examples should suffice to provide a flavor of the court's reasoning. See id. at 943 (Tatel, J., dissenting) ("Reynolds never explains how a list of names of persons unknown to terrorist organizations would tell the terrorists anything at all about the investigation, much less allow them to 'map [its] progress.'") (alteration in original); id. at 932 ("It is within the role of the executive to acquire and exercise the expertise of protecting national security. It is not within the role of the courts to second-guess executive judgments made in furtherance of that branch's proper role.").

\textsuperscript{156} Id. at 938 (Tatel, J., dissenting) (quoting U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 773 (1989)) (alteration in original).
governors accountable to the governed."\textsuperscript{157}

It is this fundamental purpose that drives judicial application of FOIA and informs the operation and construction of its provisions. Even the law's "limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act."\textsuperscript{158} Consequently, courts are instructed to "narrowly construe" the statutory exemptions, and "the burden is on the agency to sustain its action."\textsuperscript{159} By accepting the government's "vague, poorly explained arguments"\textsuperscript{160} despite their inherent logical flaws, and refusing to insist that the government prove that the Executive's alleged harms "could reasonably be expected to"\textsuperscript{161} result from the disclosure of detainees' information, the D.C. Circuit allowed its own conception of deference to trump the balance between disclosure and security chosen by the legislature.

"Neither FOIA itself nor this circuit's interpretation of the statute," explained Judge Tatel, "authorizes the court to invoke the phrase 'national security' to relieve the government of its burden of justifying its refusal to release information under FOIA."\textsuperscript{162} Yet it was that mere invocation of "national security" that allowed the Administration to carry the day.\textsuperscript{163}

\section*{II. Judicial Defeance to Administrative Determinations: State Farm, Chevron, and the Generality of Hard Look and Substantial Evidence Review}

To modern eyes, the instrumentalist picture of administrative agencies is intuitively simple. Agencies are the government's institutional specialists, designed to direct significant resources and expertise towards

\textsuperscript{157} Ctr. for Nat'l Sec., 331 F.3d at 938 (Tatel, J., dissenting) (citing NLRB v. Robbins Tire & Rubber Co., 427 U.S. 214, 242 (1978)).


\textsuperscript{159} Dep't of Air Force, 425 U.S. at 356 n.3 (citation omitted).

\textsuperscript{160} Ctr. for Nat'l Sec., 331 F.3d at 938 (Tatel, J., dissenting) (quoting John Doe Agency, 493 U.S. at 152).


\textsuperscript{162} Ctr. for Nat'l Sec., 331 F.3d at 939 (Tatel, J., dissenting).

\textsuperscript{163} One remarkable aspect of this case—again overlooked by the Center for National Security majority—is FOIA's explicit exemption from disclosure of documents that are "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order." 5 U.S.C. § 552(b)(1) (2000). This exception would appear tailor-made for cases such as the instant one in which national security concerns formed the crux of the Administration's objections to disclosure. Yet the government never invoked exception (b)(1)—forcing the court to rely disingenuously upon the "law enforcement" justification in order to uphold the government's claim to secrecy—because (in all likelihood) the President had never bothered to classify this information or stamp it with the official indicia of secrecy. Failure to do so was not a simple bookkeeping error, as claims of government officials in support of exempting information under subsection (b)(1) are unquestionably afforded "substantial weight." Weissman v. CIA, 565 F.2d 692, 697 n.10 (D.C. Cir. 1977).
solving particularly difficult or intractable economic or social problems. Agencies are typically granted expansive authority over their subject matter areas and endowed with the structural capability (in the form of scientific resources, specially trained employees, and other necessary components) to research and analyze technical or obscure questions with a capacity far beyond that which Congress could muster on its own.\(^\text{164}\)

The body of jurisprudence known as administrative law has grown out of courts' efforts to deal with the distinct types of legal problems raised by these specialized agencies: how to adjudicate complicated issues not easily cognizable by others than the experts authorized to study them, what force to assign the broad delegations of statutory authority granted executive branch (Article II) agencies by Congress, and how to hold agencies within the legal boundaries established by Congress and the Constitution.

These are precisely the same questions that confront courts attempting to adjudicate the Executive's military-related activities during wartime. Similar to civilian administrative agencies, the executive branch's war-making organizations possess unrivaled expertise and broad Constitutional (and often statutory) authority over national security, foreign affairs, and the military. Any court scrutinizing the legality of executive military actions must wrestle with both its own comparative ignorance of the questions involved (and the Executive's comparative proficiency) and the specific constitutional role assigned to the Executive for management of these issues. The inquiry is, in most respects, identical to that of a typical administrative case. Indeed, many of the executive actors charged with military operations, including the Departments of Defense and Justice, are "agencies" under the governing Administrative Procedure Act (APA). Thus, unless there exists some rationale by which to distinguish general administrative cases from those classified as "military," the approaches to administrative law dictated by the Supreme Court would seem to bear directly upon the judiciary's handling of wartime adjudications.

Administrative law, and in particular decisions concerning the degree of deference courts will award to administrative agencies regarding factual or legal determinations within the scope of their authority, incorporates the exposition of three broad principles. First, the modern overthrow of *NLRB v. Hearst's* regime of expertise-based

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164. See Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607, 675 (1980) (Rehnquist, J., concurring) ("Congress may wish to exercise its authority in a particular field, but because the field is sufficiently technical, the ground to be covered sufficiently large, and the Members of Congress themselves not necessarily expert in the area in which they choose to legislate, the most that may be asked under the separation-of-powers doctrine is that Congress lay down the general policy and standards that animate the law, leaving the agency to refine those standards, 'fill in the blanks,' or apply the standards to particular cases.").
deference and the rise of “hard look” or “rationality” review and “substantial evidence” scrutiny signal that courts should no longer defer to an agency’s findings of fact based purely on its superior experience and institutional competence. Judicial guardianship over the “rule of law” demands meaningful inquiry into the factual predicates of executive action.

Second, the concurrent existence of State Farm’s hard look review doctrine and Chevron’s deferential attitude towards agencies’ interpretations of their own legal restraints indicate that notions of authority and constraint remain separable and distinct, even as applied to administrative agencies. Administrative law independently confirms Professor Hohfeld’s notion of “category mistake”: rights may cut across, and even trump, a power or authority to act.165

Third, the Court’s willingness in Chevron to acknowledge the often permissive nature of congressional delegations to administrative agencies—and to allow those agencies to interpretively fashion their own statutory guidelines—establishes that an abiding fear of “democratically unaccountable fourth-branch bureaucracies” cannot be the driving force behind the Court’s imposition of rationality review. The need for judicial scrutiny of the factual predicates for action under law, even the actions of expert bodies, derives from the more fundamental requisites of liberal legality—requisites that exist whenever there is exogenous law to apply.

The general applicability of these administrative law principles to cases involving expert executive branch organizations ultimately lays bare the judiciary’s misconceived approach to the military cases described in Part I. Where there exists law to apply, courts must examine the logic behind wartime decisions and demand that an agency adduce substantial evidence in support of its factual predicates for action. The executive determinations at issue in Detroit Free Press, North Jersey Media, Korematsu, Padilla, and Hamdi deserved rigorous scrutiny, not unjustified deference awarded in the name of “national security.”

A. Hard Look and Substantial Evidence Review: Legal Boundaries for Expert Agencies

1. The Rise of “Hard Look” Rationality Review
   a. The Early Model: Expertise-Based Institutionalism

   Administrative agencies exist in large degree as institutional mechanisms for solving policy questions whose intricacies and difficulties exceed the capabilities of Congress itself. Staffed by experts within the field, agencies are charged with formulating policy while drawing upon the organizations’ superior experience and capacity for gathering and

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165. See Part I.A., supra.
analyzing technical information. According to this ontological model, deference by courts to agencies in the performance of these functions appears intuitively appealing. Judicial officers have no particular skill in the substantive areas of administrative inquiry and appellate courts generally lack the institutional ability or resources to make sound policy decisions according to extensive and complicated factual records. Judges are legal generalists, rather than subject-matter specialists. In accordance with this understanding, what might be termed administrative law's "institutional competence" model of judicial review held that courts may reassert control and authority over agency decision-making only when the task at hand, such as statutory interpretation or legal analysis, is one to which the courts are themselves best suited.

*NLRB v. Hearsi* stands as the apotheosis of this principled thrust. In *NLRB*, the question confronting the Supreme Court was whether the "newsboys" who sold papers on the streets of Los Angeles were "employees" within the meaning of the National Labor Relations Act. In addressing this question, it was necessary for the Court to consider a number of ancillary issues, ranging along a continuum from highly legalistic to specifically fact-based. The Court awarded deference to the Labor Relations Board's interpretation or determination on a particular issue based upon where it fell along this continuum—reviewing legal questions *de novo*, yet reacting deferentially to the Board's findings on factual issues—according to the rationale that the Board possessed the necessary knowledge, experience, and expertise to make factual judgments, while the courts themselves were expert at deciding legal questions.

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166. This view on the limitations of Article III courts when handling certain types of controversies has spawned numerous structural developments beyond the growth of agencies. The Federal Circuit's appellate jurisdiction over all patent cases and the advent of bankruptcy courts represent efforts, for example, to channel difficult technical evaluations to judicial decision-makers more capable of their resolution.

167. This model—in some sense the "original" theory of administrative law—held sway until 1971. See Peter L. Strauss, Todd Rakoff, Roy A. Schotland & Cynthia R. Farina, Gelhorn and Byse's Administrative Law—Cases and Comments 554-614 (9th ed. 1995); Part II.A.2., infra.

168. 322 U.S. 111 (1944).

169. Id. at 113.

170. As an initial matter, the Supreme Court had to adjudge whether the term "employee" was meant to be interpreted with reference to state common-law definitions or in line with some other, federal understanding. Id. at 124.

171. Having answered the statutory question, the next step was to determine the duties involved in a typical newsboy's job in order to ascertain whether they were covered under the statute. Id. at 128-32.

172. See id. at 130-31 ("Undoubtedly, questions of statutory interpretation, especially when arising in the first instance in judicial proceedings, are for the courts to resolve . . . .").

173. See id. at 131 ("[T]he Board's determination that specified persons are 'employees' under this Act is to be accepted if it has 'warrant in the record' and a reasonable basis in law.").

174. See id. at 130 ("Everyday experience in the administration of the statute gives it familiarity
Court adopted a similarly expertise-based approach to an agency's statutory interpretation in *Skidmore v. Swift*, decided later the same year. There, the Court announced that it would draw upon the legal "rulings, interpretations, and opinions" of an administrative agency only to the extent that they were based upon sound judgment regarding matters within the agency's field of expertise. In other words, the expert agency's interpretations would be afforded deference according to their "power to persuade," motivated primarily by the agencies' experiential authority over the matters to which they spoke.

b. *The Rule of Law and the Demand for Rationality Review*

Despite its apparent logic, the expertise-based model for judicial deference carried with it one inherent flaw. In the absence of meaningful oversight of an agency's factual determinations (and consequently the policy choices made on the basis of those determinations), the potential existed for an agency to take inconsistent positions, arrive at unsupported policy choices, or to otherwise operate in frustration of the purposes and ideals embodied in the agency's empowering statutes. The threat has as much a meta-legal character as a legal one. An agency whose factual decisions were so unwarranted or irrational as to depart from the strictures of its statutory mandate would disobey the fundamental demand of liberal legality that the government operate according to laws and rules, not executive fiat, just as it exceeded its own governing authority. Failure to meaningfully review the factual

with the circumstances and backgrounds .... The experience thus acquired must be brought frequently to bear on the question [of] who is an employee under the Act.

175. 323 U.S. 134 (1944).
176. Id. at 140.

We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

Id.


[A]ctions which the rules of law require and forbid should be of a kind which men can reasonably be expected to do and to avoid .... The rule of law also implies the precept that similar cases be treated similarly .... The requirement of consistency holds of course for the interpretation of all rules and for justifications at all levels .... [T]here is no offense without a law (Nullum crimine sine lege) .... [T]he rule of law requires some form of due process: that is, a process reasonably designed to ascertain the truth ....

Id.

178. See, e.g., Alexander M. Bickel, The Least Dangerous Branch 186 (1962) (confining the questions left wholly to the discretion of the political branches to those involving "r[ecognition of foreign governments and unilateral abrogation of treaties ... the nature of the general welfare for whose promotion the federal government may tax and spend ... [u]niform geographic restrictions on travel ... [and] which nationalities of aliens may be excluded or deported" and arguing that "[t]hese are discretionary functions of the political institutions which are unprincipled on principle, because we
determinations underpinning an agency’s policy choices threatens to effectively eliminate the very force of the legal strictures that bind and cabin the universe of potential agency actions.

This concern was powerfully raised in Justice Jackson’s famous dissent in Securities and Exchange Commission v. Chenery Corp.179 In Chenery, the Securities and Exchange Commission (SEC) had determined in an administrative adjudication that the Chenery Corporation’s proposed plan for reorganization was not “fair and equitable” as required by relevant statute.180 However, the SEC had not promulgated any sort of rule that purported to define “fair and equitable” or establish the requirements for a plan that would meet that requirement; instead, it had proceeded to weigh Chenery’s proposal against the SEC’s own heretofore unannounced standards.181 The SEC had followed the procedural commands of its organic statute and had adopted a case-specific understanding of “fair and equitable” that withstood judicial inquiry. Yet it had proceeded against the Chenery Corporation without first announcing what standards it would employ in judging a plan against the statute’s “fair and equitable” mandate, and without adopting any generalized guidelines or rules.182 To Justice Jackson, this action was anathema to the very foundation of liberal legality and ordered government because it authorized an agency to proceed with factual determinations that carried legal weight despite the lack of a legal framework to constrain them.183 By consequence, an aggrieved regulatory target possessed no basis by which to challenge the agency’s action against it. In the absence of a governing agency regulation, the amorphous “fair and equitable” standard remained the only law to apply.184

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180. Id. at 204.
181. Id. at 207-08.
182. Id. at 214 (Jackson, J., dissenting).
183. Id. at 212 (Jackson, J., dissenting) (“The difference between the first and the latest decision of the Court is thus simply the difference between holding that administrative orders must have a basis in law and a holding that absence of a legal basis is no ground on which courts may annul them.”).
184. See id. at 210 (Jackson, J., dissenting) (“I feel constrained to disagree with the reasoning offered to rationalize this shift. It makes judicial review of administrative orders a hopeless formality for the litigant, even where granted to him by Congress. It reduces the judicial process in such cases to..."')}
Justice Jackson's response to the Court's proffered justification for this deference—the familiar justification of "administrative experience"—was most telling. Justice Jackson argued that "administrative experience is of weight in judicial review only to this point—it is a persuasive reason for deference to the Commission in the exercise of its discretionary powers under and within the law. It cannot be invoked to support action outside of the law." Successive sentences indicate that Justice Jackson believed he was merely arguing that the agency determination at issue fell further towards the "legal interpretation" end of the Hearst/Skidmore fact/law continuum, not proposing a revolutionary principle for decision. Yet his explication of the problem reaches to the precise concern that would soon hold sway within the Court: an agency that could not be held within extant legal boundaries would become "a law unto itself," subverting the rule of law and the requirements of liberal legality.

Moreover, a short and logical leap takes one from Justice Jackson's admonition that agencies are due deference only when they operate "within the law" (and its concomitant charge to courts to scrutinize legal determinations with care) to significant, substantive review of even factual findings, the type of agency findings to which an institutional competence model of judicial review would counsel deference. The point is fundamental to the meaning of the "rule of law" itself. "The 'law' does not operate in a vacuum. The application of law requires a factual predicate; an action without such a predicate is lawless. A finding of fact which is based on no more than the will or desire of the administrator is lawless in substance if not in form." This argument captures within it a mere feint.

185. Id. at 213 (Jackson, J., dissenting).
186. Id. at 215 (Jackson, J., dissenting).
187. See id. (Jackson, J., dissenting) ("[W]hat action is, and what is not, within the law must be determined by courts, when authorized to review, no matter how much deference is due to the agency's fact finding.").
188. Id. (Jackson, J., dissenting) ("Surely an administrative agency is not a law unto itself, but the Court does not really face up to the fact that this is the justification it is offering for sustaining the Commission action.").
189. JAFFE, supra note 80, at 595; see also JUDGE JEROME FRANK, COURTS ON TRIAL 14 (Princeton University Press 1949) ("If you scrutinize a legal rule, you will see that it is a conditional statement referring to facts."). Professor Jaffe traces this argument to Justice Lamar's opinion in ICC v. Louisville & N.R.R., 227 U.S. 88, 91-92 (1913) ("A finding without evidence is arbitrary and baseless. And if the Government's contention is correct, it would mean that... where rights depended upon facts, the Commission could disregard all rules of evidence, and capriciously make findings by administrative fiat."). Nonetheless, Justice Lamar's view was, for that time, anomalous—in 1938, the Court viewed the type of review advocated by Jaffe and Lamar in a highly unfavorable light in Pacific States Box & Basket Co. v. White, 296 U.S. 176, 882 (1935)

Whether it was necessary in Oregon to provide a standard container for raspberries and strawberries; and if so, whether that adopted should have been made mandatory, involve questions of fact and of policy, the determination of which rests in the legislative branch of the state government. The determination may be made, if the constitution of the State
both the intellectual logic behind the desire for "rule of law" constraints, and the concerns that precipitated their arrival. If a government’s factual determinations cannot rationally justify the choice it has made, subject to a legal constraint, then the government is not operating according to the dictates of the constraint but at the whim of its executive.

It is upon this understanding that the Court’s construction of “hard look review” doctrine is based. This doctrine—first announced in 1971 in *Citizens to Preserve Overton Park v. Volpe,* then reaffirmed twelve years later in *Motor Vehicle Manufacturers v. State Farm*—had its genesis in cases that required the judiciary to consider pragmatic agency decisions made according to developed factual records, a variety of policy options, and some measure of cost-benefit analysis. These types of fact decisions would have received maximum deference under *NLRB v. Hearst.* Yet the Court rejected the agencies’ conclusions in each case after performing a type of searching review of the agencies’ analyses that would have been utterly foreign to courts operating according to *Hearst*’s institutional competence model.

Writing for the majority in *Overton Park,* Justice Marshall described the Court’s role as one of active examiner: “[T]he generally applicable standards of § 706 [of the Administrative Procedure Act] require the reviewing court to engage in a substantial inquiry. Certainly, the

permits, by a subordinate administrative body. With the wisdom of such a regulation we have, of course, no concern.

*Id.*


192. *Overton Park* concerned the Secretary of Transportation’s decision to authorize the construction, using federal funds, of an interstate highway through Overton Park, a 342-acre city park located near Memphis. *Overton Park,* 401 U.S. at 405-06. The operative statute precluded the Secretary from making such an authorization if a “feasible and prudent” alternative route exists,” *Id.* at 405. The case centered around the question of the Court’s authority to review the Secretary’s determination that no such route was available. *Id.* at 410. *State Farm* involved the National Highway Traffic Safety Administration’s (NHTSA) rescission of its own rule requiring that all new cars come equipped with “passive restraints” including safety devices, such as airbags or automatic seatbelts, that operate even without action by the passenger. *State Farm,* 463 U.S. at 34–37. The agency’s organic statute had mandated that the Secretary of Transportation (NHTSA is a department within the Department of Transportation) issue standards and rules based upon “‘relevant available motor vehicle safety data,’ whether the proposed standard ‘is reasonable, practicable and appropriate’ for the particular type of motor vehicle, and the ‘extent to which such standards will contribute to carrying out the purposes’ of the Act.” *Id.* at 33–34 (quoting 15 U.S.C. § 1392(f)(1), (3), (4)). The question presented in the case was whether NHTSA’s decision to rescind the passive restraint rule operated within those legal guidelines, and thus whether the evidence and reasoning upon which the agency relied supported its contentions.

193. This approach had in fact been specifically rejected by the Supreme Court in a precursor to *Hearst.* *See Pacific States Box & Basket,* 296 U.S. 176 (1935).

194. The importance (or lack thereof) of the Administrative Procedure Act in shaping this more rigorous standard of review is discussed in greater depth in notes 202–209, *infra,* and accompanying text.
Secretary's decision is entitled to a presumption of regularity. But that presumption is not to shield his action from a thorough, probing, in-depth review. This review would necessarily involve an inquiry into "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." Adopting and expanding upon this rule, Justice White in *State Farm* announced what is now viewed as the modern encapsulation of "hard look review": "the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"

Despite its self-admittedly "searching" character, "hard look" review should not be confused with either a full *de novo* inquiry or some sort of a factual contest or "battle of the experts" that challenges the agency's evidence on an equal basis. The Court's own language settles the first possibility. In addition to the "presumption of regularity" granted the agency, the court will only ask generally whether, on the facts, the agency's decision "can reasonably be said to be within" the law. Nor did the *Overton Park* or *State Farm* Courts challenge the respective agencies with controverting evidence. *Overton Park* demands only that a court inquire into whether the agency has reached a reasonable judgment based on the evidence available to it, while the

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195. Here Justice Marshall cited *Pacific States Box & Basket Co.*, 296 U.S. at 185, the case from which he was about to announce a significant departure.
197. *Id.* at 416.
198. *State Farm*, 463 U.S. at 43 (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)). Despite its invocation of the phrase "rational connection," this type of review requires far more probing judicial inquiry than the so-called "rational basis review" applied in non-suspect-class Equal Protection cases. See, e.g., United States R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 177 ("The only remaining question is whether Congress achieved its purpose in a patently arbitrary or irrational way."). Though frequently referred to as "rationality review" (since its ultimate touchstone is the logical link between the agency's extant information and its conclusions drawn), hard look review subjects the agency's substantive decision (indeed, even "its thought processes") to comparatively intense scrutiny.

Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. The reviewing court should not attempt itself to make up for such deficiencies: "We may not supply a reasoned basis for the agency's action that the agency itself has not given."

*State Farm*, 463 U.S. at 43 (quoting *Chenery*, 332 U.S. at 196); *cf. Fritz*, 449 U.S. at 179 ("Where, as here, there are plausible reasons for Congress' action, our inquiry is at an end. It is, of course, constitutionally irrelevant whether this reasoning in fact underlay the legislative decision" because this Court has never insisted that a legislative body articulate its reasons for enacting a statute.") (internal citation omitted).
200. *Id.* at 416 ("To make this finding the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.") (citations
NHTSA's decisions in *State Farm* were defeated because the agency had apparently operated “without any consideration whatsoever” of a viable alternative and had “merely recite[d] the terms 'substantial uncertainty' as a justification for its actions,” not because the Court had granted equivalent weight to some conflicting outside data. Instead, as the *State Farm* Court explained, the reviewing court must examine the rationality of the decision and the connection between the factual conclusion reached and the evidence that exists to support it.

Though *Overton Park* (and, by extension, *State Farm*) purports to be a mere interpretation of the APA's “arbitrary and capricious” language, it is clear from the reasoning in *Overton Park* that hard look review was far from a necessary or inevitable consequence of that statutory standard. The Court cited none of its own precedents in arriving at this new level of scrutiny, relying instead upon a series of lower court decisions and, most tellingly, Professor Louis Jaffe's influential treatise. Notably absent during the “development” of this standard was any mention of the Court's decision in *Burlington Truck Lines v. United States*, the 1962 case from which Justice White in *State Farm* had borrowed the “rational connection” language. Moreover, the phrase “arbitrary and capricious” itself hardly compels the searching review that *Overton Park* demanded—any number of paths of relative severity were open to the Court, including the belief that the APA merely codified the traditional *Hearst* standard of deference. Justice Marshall seems to have created hard look review more or less from

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202. See Administrative Procedure Act (APA), 5 U.S.C. § 706 (2000) (“The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . .”).

Id.

204. *Overton Park*, 401 U.S. at 416.
205. See *State Farm*, 463 U.S. at 43 (“Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’” (quoting *Burlington*, 371 U.S. at 168)).
whole cloth, and for reasons beyond the demands of the APA itself.

One can divine the true source of hard look review from an examination of the severe limitation Justice Marshall places upon the range of cases to be considered "committed to agency discretion" and thus beyond any judicial review. The Supreme Court held that this exception will operate only "in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'" Yet by so confining the scope of cases that will not be reviewed, the Overton Park Court placed its focus squarely upon the laws that might govern agency action and the question of whether an agency has acted demonstrably within the boundaries outlined by those laws. Having determined that rules exist to govern the agency "game," courts will then inquire into whether the agency is playing by those rules. In other words, it was the very foundational principle of the rule of law—not the Congressionally-enacted text of the APA—that drove the Supreme Court's creation of hard look review.

The rule-of-law principle underlying this type of review is hardly specific to administrative agencies. The idea that government organizations of all types must abide by the legal rules that have been established to govern their behavior, and that meaningful judicial review exists to hold governmental actors to those terms, is fundamental both to the American constitutional structure and, at a more elemental level, to liberal legality itself." The Court is rightfully concerned with a government that threatens to operate by executive fiat. As Professor Jaffe suggested, neglecting to hold a government to its own rules places matters solely in the hands of the "will or desire of the administrator." According to this understanding, even if Congress were

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208. Overton Park, 401 U.S. at 410 (quoting legislative history from the passage of the APA, S. REP. NO. 79-752, at 26 (1945)).
209. The further implication of this rule is that the "arbitrary and capricious" standard must be anchored to some baseline point of legality.
210. This phrase is intended to describe judicial inquiry that is, in at least some respect, more searching and thorough than near-complete deference (in the mold of factual review under Hearst) or so-called "rational basis" scrutiny. See, e.g., Williamson v. Lee Optical Co., 348 U.S. 483 (1955).

When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power.... And the law is the definition and limitation of power.

Id. This idea is most famously captured in the legal axiom, derived from Part the First, Article XXX, of the Massachusetts Constitution of 1780, that it is to be "a government of laws and not of men." Id. at 370.
212. JAFFE, supra note 80. Indeed, the direct threat of government by executive whim may well
to repeal the APA (and eliminate the "arbitrary and capricious" standard), courts would still be required to conduct a type of hard look review of agency decisions in order to ensure their compliance with whatever governing law existed. To believe otherwise would be to render that law a nullity. More importantly, the universality of the "rule of law" principle renders it equally and directly applicable to any governmental body that must operate under some set of rules or conditions. Where there is "law to apply," a reviewing court must scrutinize governmental action (including component factual determinations) to ensure compliance with that law. No principled line exists to confine hard look review to the domain of administrative agencies.

2. Available Facts and the Substantial Evidence Test

Consonant with this need to preserve the rule of law, Congress and the Supreme Court have also required that the judiciary meaningfully scrutinize the weight and import of the evidence proffered by administrative bodies to defend those agencies' adjudicatory decisions. Administrative judgments made pursuant to recorded facts generated at an adversarial hearing must be supported by "substantial evidence," a measure of proof equivalent to the evidence necessary to defeat summary judgment and send a typical civil case to the jury. Even when

have played a role behind the scenes of State Farm. The fact that the NHTSA may have rescinded its passive-restraint rule simply because a new administrator had come to power (due to the election of a new President) appears to have weighed upon the State Farm Court, at least in the view of one of its critics. See State Farm, 463 U.S. at 59 (Rehnquist, J., dissenting) ("The agency's changed view of the standard seems to be related to the election of a new President of a different political party.").

213. The courts' power in this instance would flow directly from their Article III status as arbiters of cases and controversies. An aggrieved private party might challenge the legality of an agency decision under law in the same manner as any other lawsuit, and if that party met the standing requirement (and the statute conferred a private right of action) the lawsuit could go forward.


The Government seems to argue that, even under our interpretation of the statute, a federal habeas court would have to accept the Government's view about whether the implicit statutory limitation is satisfied in a particular case, conducting little or no independent review of the matter. In our view, that is not so. Whether a set of particular circumstances amounts to detention within, or beyond, a period reasonably necessary to secure removal is determinative of whether the detention is, or is not, pursuant to statutory authority. The basic federal habeas corpus statute grants the federal courts authority to answer that question.

Id. Some commentators have suggested that other concerns, such as fear of agencies as an unregulated and democratically unresponsive "fourth branch" of government, are in fact the source of hard look review. See, e.g., Sidney A. Shapiro and Richard E. Levy, Heightened Scrutiny of the Fourth Branch: Separation of Powers and the Requirement of Adequate Reasons for Agency Decisions, 1987 DUKE L. J. 387 (1987) (rejecting the "rationalist" rule of law model in favor of a structuralist, separation of powers understanding). This ontological conception would undermine the general applicability of the Court's rule of law principle. Its strength will be addressed in Part II.B.1., infra.


216. See Fed. R. Civ. P. 56; Celotex Corp. v. Catrett, 477 U.S. 317 (1986); NLRB v. Columbian Enameling & Stamping Co., 306 U.S. 292, 300 (1939) ("[I]t must be enough to justify, if the trial were
dealing with expert administrative agencies operating with clear constitutional or statutory mandates, courts must pursue this inquiry with considerable rigor, going so far as to question an agency’s judgments regarding matters within its expertise, if necessary. “The [agency’s] findings are entitled to respect; but they must nonetheless be set aside when the record . . . clearly precludes the [agency’s] decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both.”

In congruence with hard look rationality review, the “substantial evidence” standard stems from courts’ duty to ensure that adjudicating agencies abide by the ground rules of their own proceedings, thus vindicating and enforcing the rule of law. The inquiry is fundamental to the precept that courts must exert judicial control in order to effectuate legal constraints upon executive action: “Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function.” By consequence, Congressional repeal of the Administrative Procedure Act could not eliminate substantial evidence scrutiny as a judicial dictate any more than it could terminate hard look review. The principles underlying substantial evidence review are thus general to all expert executive branch bodies: absent some ulterior motivation, they should be applied with equal force to ostensibly “military” cases as they are to administrative ones. The next section takes up this argument with reference to the standard of judicial deference announced in Chevron v. National Resources Defense Council, to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury.”;


218. See id. (noting that courts hold the “responsibility for assuring that the [agency] keeps within reasonable grounds.”); see also JAFFE, supra note 80. The “law to apply” in such adjudicatory settings most commonly involves internal restraints; for instance, an agency must properly determine whether a private party has in fact violated the terms of a statute; see, e.g., Universal Camera, 340 U.S. at 492 (“If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice . . .”). The necessity of ensuring the accuracy of an agency’s legal conclusions drives the concomitant requirement that courts examine the factual predicates of decision.


220. See JAFFE, supra note 80. It is true that the “substantial evidence” standard was chosen specifically by Congress, and it is possible that a lesser standard of inquiry would nevertheless exceed the minimum requirements of liberal legality and respect for the rule of law. However, the Supreme Court has described the substantial evidence standard as a curtailment of traditional judicial duties under law, rather than an enhancement. See Consolo v. Federal Maritime Commission, 383 U.S. 607, 620 (1966) (pointing out that this standard “frees the reviewing courts of the time consuming and difficult task of weighing the evidence” again de novo). It is unlikely that a further loosening of the standard would comport with courts’ duty to enforce adherence to existing legal rules; Congress may well have chosen the least stringent level of review that remains consistent with courts’ duty to enforce the rule of law.
perhaps the best-known of administrative law's modern doctrinal developments.

B. CHEVRON DEFERENCE AND THE UNIVERSALITY OF ADMINISTRATIVE LAW PRINCIPLES

I. Refutation of the "4th Branch" Justification for Judicial Scrutiny

A principal animating factor within administrative law is the judiciary's desire to ensure that agency action comports with both the letter and the spirit of constitutional conceptions of separation of powers and majority rule. "Delegation doctrine"—the line of cases addressing to what degree Congress may delegate Article I lawmaking power, Article II executive authority, or even Article III judicial authority over cases and controversies to executive or legislative agencies—represents the most self-evident embodiment of this concern. The courts' unease in these types of separation of powers cases is easily discernible: courts fear that vesting an ostensibly democratically unaccountable agency with significant authority will create an unchecked source of power. This trepidation generates serious consternation regarding whether structural constitutional mandates have been violated in cases of broad Congressional delegations of responsibility.

The Supreme Court's approach to sweeping delegatory legislation, however, has hardly been cautious or restrained. Instead, the Court has permitted all but the most vast and unbridled delegations, so long as they articulate at least an "intelligible principle," viz., some vague statement of objectives and purpose, to guide the empowered agency. The

221. See, e.g., Morrison v. Olson, 487 U.S. 654 (1988) (upholding the Congressional grant of prosecutorial authority to an independent prosecutor in the "Independent Counsel" statute); Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833 (1986) (permitting an independent Article II agency charged with administering claims against commodity brokers to additionally hear typical state law counterclaims through a type of ancillary jurisdiction); Indus. Union Dep't v. American Petroleum Institute, 448 U.S. 607 (1980) (upholding the Occupational Safety and Health Administration's delegated power to promulgate regulations "reasonably necessary or appropriate to provide safe or healthful employment" and places of employment).

222. See, e.g., Indus. Union Dep't, 448 U.S. at 672-73 (Rehnquist, J., concurring) (beginning his discussion by quoting John Locke: "[t]he power of the legislative, being derived from the people by a positive voluntary grant and institution, can be no other than what that positive grant conveyed, which being only to make laws, and not to make legislators, the legislative can have no power to transfer their authority of making laws and place it in other hands.") (citation omitted); Morrison, 487 U.S. at 698 (Scalia, J., dissenting) ("[T]he great security," wrote Madison, "against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack.") (quoting The Federalist No. 51, at 321-22 (James Madison))).

223. J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 400 (1927) ("If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power."); see also Whitman v. American Trucking Ass'n., 531 U.S. 457, 474 (2001) ("In the history of the Court we
Court's curbing of the delegation doctrine has functionally eliminated all but one limiting principle: Congress cannot delegate to a single agency all-encompassing power to manage the nation's economic affairs.\(^{224}\)

These structural considerations have impacted the issue of judicial deference to agency determinations in a peculiar manner, triggering another departure (a notably counter-intuitive one) from the traditional *Hearst* model of expertise-based deference. The seminal case that announced this move was *Chevron U.S.A., Inc. v. Natural Resources Defense Counsel, Inc.*, where the Supreme Court declared that it would afford great deference to an agency's legal interpretation of its own empowering statutes.\(^{225}\) In *Chevron*, the Court fashioned the familiar two-part test that awards generous deference to an agency's interpretation of its own empowering statutes if (and only if) these statutes are silent or ambiguous:

> If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. . . . Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.\(^{226}\)

*Chevron* and its progeny are indicative of the Supreme Court's

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\(^{224}\) Only twice has the Court abrogated an administrative agency's authority on the grounds that Congress had overly and impermissibly delegated power. *See Panama Ref. Co. v. Ryan*, 293 U.S. 388, 415 (1935) ("So far as this section is concerned, it gives to the President an unlimited authority to determine the policy and to lay down the prohibition, or not to lay it down, as he may see fit."); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537–38 (1935) ("But Congress cannot delegate legislative power to the President to exercise an unfettered discretion to make whatever laws he thinks may be needed or advisable for the rehabilitation and expansion of trade or industry."). As the cited portions would indicate, both of these cases involved the grant of generalized power to the President to manage a significant swath of the economy without any meaningful Congressional guidance; also, both were decided at the height of the *Lochner* era. As the jurisprudence of the last 65 years has indicated, more limited grants of field-restrained authority do not appear to raise constitutional problems.

\(^{225}\) *Id.* at 842–43 (emphasis added).

\(^{226}\) *Id.* at 842–43 (emphasis added).
attitude towards administrative agencies and the rule of law in two respects. First, *Chevron* demonstrates that the Court will reap the consequences of its own delegation doctrine (or, to some extent, the lack thereof) with deadly seriousness. Throughout the *Chevron* opinion, the touchstone for the Court is its belief that Congress has implicitly intended to delegate the authority to interpret an agency-empowering statute to the agency itself;\(^\text{227}\) not only may Congress delegate to an agency the power to take certain actions, it may also delegate the authority to interpret the scope of that delegated power. The Court's subsequent holding in *United States v. Mead*, which narrowed the range of situations in which *Chevron* deference would apply, emphasizes this point.\(^\text{228}\) Justice Souter's opinion for the eight-person majority explicitly anchored itself with the idea that Congress had not intended to afford agencies full *Chevron* rein in deciphering their own statutes when those agencies were engaged only in more informal proceedings; the type of agency action at issue functions as the Court's proxy for Congress's delegatory intent.\(^\text{229}\) For a Supreme Court willing to permit significant delegations conveying only minimal guidance, acceptance of even an intended delegation of interpretive authority is merely the next logical consequence.

The reasoning behind *Chevron* and *Mead* belies contentions that hard look review exists only (or even primarily) due to an image of administrative agencies as an unaccountable "fourth branch" of government run amok.\(^\text{230}\) Were the Court truly vexed by this possibility, *Chevron* and its model of deference would collapse under its own logic; broad grants of legal freedom are a rather counter-productive method of constraining an institution seen as possessing a surplusage of uncontrolled power. By the same rationale, once the Court has granted

\(^{227}.\) *Id.* at 843–44 ("If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. . . . Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit."); *id.* at 845 ("If this choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.") (emphasis added) (internal quotations and citation omitted).

\(^{228}.\) 533 U.S. 218, 226–27 (2001) ("We hold that administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.").

\(^{229}.\) See *id.* at 231 ("There are, nonetheless, ample reasons to deny *Chevron* deference here. The authorization for classification rulings, and Custom's practice in making them, present a case far removed not only from notice-and-comment process, but from any other circumstances reasonably suggesting that Congress ever thought of classification rulings as deserving the deference claimed for them here."); *id.* at 229 ("We have recognized a very good indicator of delegation meriting *Chevron* treatment in express congressional authorizations to engage in the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed.").

an agency the power (via *Chevron*) to determine its own path under the law, hard look and substantial evidence review, with their curtailment of deference on factual issues, became a comparatively ineffective method of genuinely circumscribing agency power, particularly when those doctrines simply require sound reasoning based on available evidence. The Court that decided *Morrison v. Olson*231 and *Chevron* was not uniquely afraid of untrammeled agency power. Hard look review has its roots in rule-of-law considerations more fundamental than a fear of the “fourth branch.”

The second administrative axiom revealed by *Chevron* is the minimal value placed upon issues of “expertise” in the Court’s calculation of an agency’s deserved level of deference on any particular topic. The notion that an agency’s expertise might counsel in favor of deference to its statutory interpretations makes only a brief appearance in *Chevron*. The fact that Congress has chosen to delegate a decision to an agency is determinative of the approach a court should take, regardless of whatever expertise either Congress or the court might believe the agency to possess.232 *Mead* does incorporate expertise as a variable within its calculation of deference, but only after it has determined first that Congress did not intend to delegate power, and second that there exists no unambiguous rule of law to apply. Moreover, it does so only in a remarkably back-handed way. Rather than assuming that an expert agency deserves deference regarding matters within its field, the Court demands that any agency prove that its judgments are worthy of heightened respect. Under *Mead*, as under *Skidmore*, an agency’s judgment will be adopted only according to its “power to persuade.”233 Even the internal logic of *Chevron* flouts the common expectations of an expertise-based model of adjudication. Appellate courts are the institutional bodies best positioned to interpret statutory language.234 The relinquishing of this responsibility highlights the primacy

232. See *Chevron*, 467 U.S. at 865.

Perhaps [Congress] consciously desired the Administrator to strike the balance at this level, thinking that those with great expertise and charged with responsibility for administering the provision would be in a better position to do so; perhaps it simply did not consider the question at this level; and perhaps Congress was unable to forge a coalition on either side of the question, and those on each side decided to take their chances with the scheme devised by the agency. For judicial purposes, it matters not which of these things occurred.

*Id.*

233. *Mead*, 533 U.S. at 228 (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)) (“The fair measure of deference to an agency administering its own statute has been understood to vary with circumstances, and courts have looked to the degree of the agency’s care, its consistency, formality, and relative expertise, and to the persuasiveness of the agency’s position . . . .”) (internal citation omitted); see also *Skidmore*, 323 U.S. at 140.

234. See *NLRB v. Hearst Publ’ns*, Inc., 322 U.S. 111, 130-31 (1944) (“Undoubtedly questions of statutory interpretation, especially when arising in the first instance in judicial proceedings, are for the courts to resolve . . . .”).
of other considerations.

2. Reaffirmation of the Authority/Constraint Disjunction

*Chevron* and *Mead* demonstrate further that rationality-based rule-of-law principles can coexist—and are alive and well—alongside even the broadest statutory grants of authority and their attendant deference on matters of statutory interpretation. *Chevron* did not overrule *State Farm* and *Overton Park*; it did not even mention them. The Environmental Protection Agency, given tremendous authority by the United States Congress to fashion all manner of rules and regulations carrying the force of law and even to interpret its own statutes in the process, is still subject to rationality (or, where appropriate, substantial evidence) review of its environmental decisions in order to ensure that they remain logical and supported by available evidence. The structural framework of administrative law itself demonstrates the concurrent operation of legal empowerment and legal restraint.

The Supreme Court has also applied this understanding to cases outside of the typical administrative context. In *Zadvydas v. Davis*, for instance, the Court held that Congress’s “plenary power” over immigration did not release it from external “important constitutional limitations” such as the Fifth Amendment. Respect for the rule of law requires only that an executive actor abide by the legal limitations that already exist, not that the actor have no hand in shaping those rules. Prior to the existence of “law to apply” (anterior to the settling of rules),

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237. *See generally Chevron*, 467 U.S. at 837.
238. Cf. Arent v. Shalala, 70 F.3d 610 (D.C. Cir. 1995). In *Shalala*, Chief Judge Edwards (for the court) and Judge Wald (concurring) reached the same result but were unable to agree as to whether the court should analyze the case under *State Farm’s* “hard look review” rubric (for factual determinations) or *Chevron’s* doctrinal framework for questions of law, implying that the two represent separate and concurrent legal considerations.

While I agree with the panel’s conclusion that the Food and Drug Administration’s (‘FDA’) rule is justifiable, I would resolve the case under the *Chevron* step two challenge which was presented by the parties and addressed by the trial court, rather than grounding our decision on a different facet of Administrative Procedure Act (‘APA’) review.

*Id.* at 619 (Wald, J., concurring)

239. 533 U.S. 678 (2001); *see also supra* note 16 and accompanying text.
241. *Zadvydas*, 533 U.S. at 695. Again, *Zadvydas* is notable in that several of the lower courts to consider military cases (see *supra* notes 113–116) have specifically relied upon *Zadvydas’s* dicta indicating that greater deference might be due the executive in cases relating to terrorism. *Id.* at 696.

We think, however, that the exercise by Congress of its control over jurisdiction is subject to compliance with at least the requirements of the Fifth Amendment. That is to say, while Congress has the undoubted power to give, withhold, and restrict the jurisdiction of courts other than the Supreme Court, it must not so exercise that power as to deprive any person of life, liberty, or property without due process of law or to take private property without just compensation.

*Battaglia v. Gen. Motors Corp.*, 169 F.2d 254, 257 (2d Cir. 1948)
there is nothing of which an agency may run afoul.\textsuperscript{242}

The rule of law principle lurks in the background in other respects, too. \textit{Mead} involved one of approximately ten thousand customs rulings produced each year, a structure of adjudication that carried with it the threat of widespread internal inconsistencies and contradictions.\textsuperscript{243} The prospect that the resultant disparate treatment of similarly situated parties might frustrate the rule of law appeared to weigh upon the \textit{Mead} Court, despite the Court's attempt to subsume the issue under the question of whether those letters carried the force of law.\textsuperscript{244} Furthermore, \textit{Chevron}'s initial inquiry as to whether Congress has spoken to an issue or whether the statute is silent or ambiguous\textsuperscript{245} remains a final bulwark against government in violation of the rule of law. Statutory silence or ambiguity is synonymous with the idea that there is not yet "law to apply," and thus an agency may act to set the rules for its own operation. If a reviewing court finds that a statute is unambiguous, the \textit{Chevron} presumption is turned upon its head—there is law to apply, and the agency must be held to it.\textsuperscript{246} Only once this essential question has been answered does the window of broad deference open for the Administration.

C. APPLICATION OF HARD LOOK AND SUBSTANTIAL EVIDENCE REVIEW TO MILITARY CASES

The ramifications of administrative law's jurisprudential approach for the wartime cases discussed in Part I are straightforward. The district court decisions in \textit{Detroit Free Press} and \textit{North Jersey Media} exemplify the proper functioning of rationality review. Importantly, the trial courts' inquiries into the Administration's claims of harm resultant from open hearings did not require any particular expertise in military matters, and

\textsuperscript{242} The \textit{Chevron} Court is surprisingly explicit about this point, noting on several occasions the possibility that Congress had deliberately chosen to "punt" the tough decisions about what rule of law should exist to the agency, both sides to the argument seemingly content with leaving these choices in the hands of a third, executive branch party. See, \textit{e.g.}, \textit{Chevron}, 467 U.S. at 845 ("If this choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.") (emphasis added) (internal quotations and citation omitted); \textit{id.} at 865 ("[P]erhaps Congress was unable to forge a coalition on either side of the question, and those on each side decided to take their chances with the scheme devised by the agency.").


\textsuperscript{244} \textit{See id.} at 231–33 (discussing whether Customs letters have precedential value, concluding that they likely do not, and stating that this fact brings them directly into conflict with the heart of the "\textit{Chevron} regime").

\textsuperscript{245} This inquiry is commonly known as \textit{Chevron} "step one." \textit{Chevron}, 467 U.S. at 842–43.

\textsuperscript{246} \textit{Chevron}'s "step two", the court's inquiry into whether "the agency's answer is based on a permissible construction of the statute," \textit{id.} at 843, operates in a philosophically similar fashion. By definition, an impermissible construction would constitute agency action beyond even ambiguous statutory bounds, in other words a violation of the (limited) rule of law that is present.
neither court was forced to second-guess the substance of the facts and predictions asserted by the Department of Justice.\textsuperscript{247} The courts' analyses in no way resembled either \textit{de novo} review or the proverbial “battle of the experts.” Rather, the trial courts' examinations of the Administration's position focused precisely on the logical errors contained within its argument, viz., the “rational connection [or lack thereof] between the facts found and the choice made,” as dictated by \textit{Overton Park}.\textsuperscript{248} On appeal, the Sixth and Third Circuits disregarded this analysis and accepted the government's declarations at face value,\textsuperscript{249} based purely on the expertise of the government declarants. The appellate courts' jurisprudential approach runs contrary to administrative law's dictates regarding treatment of an expert agency's proffered factual predicates. Administrative law precedent would demand that the Circuit courts hew more closely to the approaches adopted by their inferior trial courts.

The Supreme Court's inquiry in \textit{Korematsu} ought to have functioned in much the same way. Rather than accepting “the judgment of the military authorities” simply because they were “charged with the primary responsibility of defending our shores”\textsuperscript{250} and thus presumptively possessed the greatest institutional expertise on the subject, \textit{State Farm} and \textit{Overton Park} dictate that the judiciary should have probed the military's explanation in a manner far closer to that undertaken by Justice Murphy in dissent. The available evidence contradicting General DeWitt's assertions and raising questions as to his racial biases,\textsuperscript{251} if examined thoroughly, could have pointed the \textit{Korematsu} majority in the


\textsuperscript{248} Detroit Free Press I, 195 F. Supp. 2d at 947 (“Furthermore, neither in the Creppy directive nor elsewhere does the Government prohibit detainees in special interest cases... from revealing that information to the press and public.”); North Jersey Media I, 205 F. Supp. 2d at 301–02 (“The problem with the Creppy Memo is that there is nothing in it to prevent disclosure of this very information by the 'special interest' detainee or that individual's lawyer, both of whom are permitted to be present in the 'special interest' proceedings.”). In these cases, the “facts found” necessarily included those pertinent facts that the Government had neglected to mention, namely that the detainee and her lawyer would themselves be present at any hearing, and that at least the attorney (if not the detainee herself) would be able to communicate any desired message to the public. However, this fact was uncontested on all sides, and thus did not require any particularized knowledge or fact-finding by the courts.

\textsuperscript{249} See Detroit Free Press v. Ashcroft (Detroit Free Press II), 303 F.3d 681, 707 (6th Cir. 2002) (“[W]e defer to their judgment. These agents are certainly in a better position to understand the contours of the investigation and the intelligence capabilities of terrorist organizations.”); North Jersey Media Group, Inc. v. Ashcroft (North Jersey Media II), 308 F.3d 198, 219 (3d Cir. 2002) (“The assessments before us have been made by senior government officials responsible for investigating the events of September 11th and for preventing future attacks.... To the extent that the Attorney General's national security concerns seem credible, we will not lightly second-guess them.”).

\textsuperscript{250} Korematsu v. United States (Korematsu I), 323 U.S. 214, 218 (1944).

\textsuperscript{251} See id. at 235–36.
A HARD LOOK OR A BLIND EYE?

divergent direction advanced by Justice Murphy. The Court’s complete failure to scrutinize the military’s claims stands, alongside Korematsu’s eventual outcome, as one of the unfortunate legacies of that case. Even more than the Court’s racially discriminatory constitutional holding, which has never been replicated, its exaggeratedly deferential attitude towards military assertions has lain “about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need.”

Administrative law’s application to Padilla and Hamdi is equally plain. The Supreme Court unwisely grafted the meager “some evidence” standard to a case that warranted far greater scrutiny. Instead, the Court should have demanded that the government proffer “substantial evidence” in support of its conclusions that José Padilla and Yaser Hamdi were unlawful combatants. Meaningful judicial scrutiny of the factual predicates for administrative decisions is a necessary condition for ensuring that the rule of law prevails, even as applied to expert executive agencies acting within their assigned fields. Judicial abdication of the oversight responsibilities established throughout the Supreme Court’s administrative law jurisprudence threatens to deny Padilla and Hamdi their right to fair treatment under law, and offers the prospect that many others may similarly find themselves in the hands of an unfettered Executive.

III. THE SEARCH FOR A PRINCIPLED BASIS:
POTENTIAL GROUNDS FOR DIFFERENTIATING MILITARY CASES FROM PEACETIME ADMINISTRATIVE ADJUDICATIONS

Courts have been curiously opaque when justifying and substantiating their decisions to afford deference to the military’s factual determinations based on the decision-makers’ assumed expertise or constitutional role. For example, the Sixth Circuit in North Jersey Media, after extensive discussion of the propriety of acquiescence to the Department of Justice’s expert judgment, rationalized its deference primarily on the basis of “tradition.” Nevertheless, there exist five principled bases that might provide legitimate justifications for the distinction between courts’ compliant adjudications of national security matters and their less deferential behavior with regard to concomitantly “expert” civilian administrative agencies. First, wartime cases may involve demonstrably higher stakes, rendering the price of an incorrect anti-military decision so prohibitive that courts must adopt a deferential

252. Id. at 246 (Jackson, J., dissenting).
254. North Jersey Media II, 308 F.3d at 219 (citing Dep’t of the Navy v. Egan, 484 U.S. 518, 530 (1988), for the proposition that “courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs”).
approach as a hedge against harm. Second, military cases may involve exigencies that thwart the type of considered decision-making upon which courts rely, putting judges to a Hobson’s choice between significant deference and highly fallible snap decisions. Third, military agencies and the President may possess comparatively greater expertise vis à vis courts than do similarly positioned civilian agencies; military decisions may indeed not “be susceptible of intelligent judicial appraisal” to the same degree as other factual questions. Fourth, the mandatory statutory or constitutional standard for review of the military determinations that arise in wartime cases may be less stringent than the APA’s “arbitrary and capricious,” thus enshrining deference within the controlling legal strictures themselves. Fifth, the Executive’s sui generis constitutional role as Commander-in-Chief (of the nation’s military and foreign policy) might set the wartime executive apart from administrative agencies that receive their mandate only through Congressional enactment. Yet as the following discussion will demonstrate, none of these principles provides a valid basis for defending the discrepancy between civilian and wartime judicial review.

A. Higher Stakes

The notion that the elevated price of a misstep in a military case justifies increased reliance upon the military’s expert judgments carries with it strong logical and intuitive appeal. Proponents of this view may argue that wartime situations are often critical. If the United States military has become involved in some wartime manner on the home front, a serious threat to the country must be present. A responsible court must naturally defer to the judgment of the authorities charged with the task of alleviating such dangers. Embedded in this principle, however, are three structural flaws: the theory, on its own terms, is hardly self-evidently correct; calculations of this sort systematically understate or ignore the danger to the national interest of an overly

255. Korematsu I, 323 U.S. at 245.
256. Though it does not so state explicitly, the Third Circuit appeared to be reasoning along such lines in North Jersey Media II. The court understood the case before it as demanding a weighing of “the community benefit of emotional catharsis against the security risk of disclosing the United States’ methods of investigation and the extent of its knowledge.” North Jersey Media II, 308 F.3d at 219. The court appeared to believe not only that such an act of balancing was logically impossible, but also that such judicial balancing would be unwise for a court to undertake under conditions of such potential danger.

We are keenly aware of the dangers presented by deference to the executive branch when constitutional liberties are at stake, especially in times of national crisis, when those liberties are likely in greatest jeopardy. On balance, however, we are unable to conclude that openness plays a positive role in special interest deportation hearings at a time when our nation is faced with threats of such profound and unknown dimension.

Id. at 220 (emphasis added). Under such conditions, the Third Circuit evidently believed that a court should be especially wary of substituting its own judgment, however soundly reasoned, for those of the military authorities.
deferential judicial posture, just as they overstate the potential harm that might result from failing to defer; and, most importantly, the principle begs, in circular fashion, the only important question—the actual magnitude of the risk at hand.

I. Equivalent Dangers

As an initial matter, an examination of some of the more prominent case law leads to the conclusion that the penalties for misjudgment in wartime cases are not always demonstrably larger than in quotidian civilian administrative lawsuits. While the specter of a Japanese invasion of the West Coast loomed somewhere above Korematsu, the specific danger in allowing people of Japanese ancestry to remain in the area, as alleged by the military, was that they would engage in “espionage and sabotage,” not that they would take up arms against the United States and actively begin guerilla warfare within the country. While even this threat was certainly no small matter, it belies the hyperbolic rhetoric employed to justify the Korematsu decision, including the suggestion that perfidious Japanese-Americans “constituted a menace to the national defense and safety.” Likewise, while the information that terrorists might glean from INS deportation hearings could well be significant (and it is not difficult to imagine the government painting a particularly dire picture), it seems unlikely that tens of thousands of lives hung in the balance. In the course of their analyses, the Detroit Free Press and North Jersey Media appellate courts engaged in a type of overestimation parallel to that in Korematsu. Those courts’ assessment of the attendant dangers subsume the entirety of the war on terrorism and all of its possible consequences, coalescing them under a general “terrorism” heading, rather than focusing particularly upon the harms that might stem from the alternative courses of action in the case at bar.

However, according to the Administration’s own facts, thousands of lives did depend on the passive restraint (airbag and automated seatbelt) regulations at issue in State Farm. Prior to canceling its own regulations, NHTSA had conducted a study and concluded “that passive restraints could prevent approximately 12,000 deaths and over 100,000 serious injuries annually.” Even the seeming bureaucratic mundanities addressed in typical administrative law cases, the type for which the Court designated hard look review appropriate, may carry utilitarian

257. See Korematsu I, 323 U.S. at 217.
258. Id. at 218.
259. See, e.g., North Jersey Media II, 308 F.3d at 220 (speaking generically of the war on terrorism, not of the specific threat posed by the release of information at INS detention hearings, and stating that “our nation is faced with threats of such profound and unknown dimension”).
261. Id. at 35 (citing 42 Fed. Reg. 34298).
consequences of the same order of magnitude as prototypical wartime adjudications.

2. Under-Estimation of Deference’s Resultant Harms

Courts have placed preeminent emphasis upon the grave harm that may result from judicial failure to defer in the absence of concomitant appreciation of the national harm potentially resultant from the act of deference itself. Many of the cases that allegedly present the greatest danger to national security are litigated over military prescriptions that, if permitted, might themselves inflict grievous harm upon the nation. Korematsu stands as a paradigmatic example. The potential harm to the nation were the military not given free rein counseled strongly (and likely carried the day) in favor of near-complete deference to General DeWitt’s decision. At the same time, the forcible evacuation and internment of Japanese-Americans has itself inflicted tremendous injury upon those thousands of people, and the country as a whole, over the subsequent decades. The hazard the United States supposedly faced in 1942 gave birth to an extreme measure that may well have left a deeper scar than even an actual attack by the Japanese ever could have. Opposing the Executive’s plans in many wartime cases are not mere statutory dictates but closely guarded constitutional rights whose infringement, even when not easily measurable in lives lost, could deal substantial injury to public confidence in the government and in an open and free society.

262. See Korematsu I, 323 U.S. at 223.

Korematsu was not excluded from the Military Area because of hostility to him or his race. He was excluded because we are at war with the Japanese Empire, because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures, because they decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily, and finally, because Congress, reposing its confidence in this time of war in our military leaders—as inevitably it must—determined that they should have the power to do just this.

Id.

263. See, e.g., DONNA K. NAGATA, LEGACY OF INJUSTICE: EXPLORING THE CROSS-GENERATIONAL IMPACT OF THE JAPANESE AMERICAN INTERNMENT (1993); PERSONAL JUSTICE DENIED, REPORT OF THE COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS at i8 (1982) (“[A] grave injustice was done to American citizens and resident aliens of Japanese ancestry who, without individual review or any probative evidence against them, were excluded, removed and detained by the United States during World War II.”); Korematsu v. United States (Korematsu II), 584 F. Supp. 1406, 1413 (N.D. Cal. 1984) (“Fortunately, there are few instances in our judicial history when courts have been called upon to undo such profound and publicly acknowledged injustice.”).

264. See, e.g., Detroit Free Press I, 195 F. Supp. 2d at 944 (“The right to a public trial is not only to protect the accused but to protect as much the public’s right to know what goes on when men’s lives and liberty are at stake. . . It is important that our citizens be free to observe court proceedings to insure a sense of confidence in the judicial process.”) (internal quotations and citation omitted) (alteration in original); Detroit Free Press v. Ashcroft (Detroit Free Press II), 303 F.3d 681, 683 (6th Cir. 2002) (“The Executive Branch seeks to uproot people’s lives, outside the public eye, and behind a closed door. Democracies die behind closed doors. The First Amendment, through a free press, protects the people’s right to know that their government acts fairly, lawfully and accurately in
A HARD LOOK OR A BLIND EYE?

should those rights be eviscerated—opposing action by the Department of Transportation, in Overton Park, or the automobile industry, in State Farm, do not rise to the same level.

3. Question-Begging

Finally, to claim that executive actors deserve deference in wartime cases because of the magnitude of risk at hand is to begin the inquiry by begging the fundamental question. Frequently, the Executive's asseveration of imminent harm constitutes but another administrative determination that may itself not deserve significant deference under applicable law. Arguments for deference based upon the present deportation proceedings.

Judge Tatel eloquently expressed this concern in his dissent to Center for National Security Studies v. U.S. Dep't of Justice:

First, no one can doubt that uniquely compelling governmental interests are at stake: the government's need to respond to the September 11 attacks—unquestionably the worst ever acts of terrorism on American soil—and its ability to defend the nation against future acts of terrorism. But although this court overlooks it, there is another compelling interest at stake in this case: the public's interest in knowing whether the government, in responding to the attacks, is violating the constitutional rights of the hundreds of persons whom it has detained in connection with its terrorism investigation—by, as the plaintiffs allege, detaining them mainly because of their religion or ethnicity, holding them in custody for extended periods without charge, or preventing them from seeking or communicating with legal counsel.

331 F.3d 918, 937–38 (D.C. Cir. 2003) (Tatel, J., dissenting). Judge Tatel's exegesis neatly captures the dichotomous character that any inquiry into "harm" must rightly assume: Though prohibition of executive action in wartime may carry with it the potential for damage to the nation, so too may permission of such action present the threat of widespread, often inchoate, harm. Courts have not so much failed to balance these harms correctly as they have neglected to consider this second category of damage altogether. See id. at 938 (Tatel, J., dissenting) (“But although this court overlooks it, there is another compelling interest at stake in this case...”) (emphasis added).

265. For all of the courts' discussions of the superior expertise at war-making and intelligence-gathering mustered by the executive branch (including the Departments of Defense and Homeland Security and the Central Intelligence Agency, as well as the President himself), recent events have illustrated vividly the gross misjudgments of imminent harm those ostensibly proficient agencies are capable of. For instance, the government appears to have drastically overstated the value of—and therefore the harm posed by—the alleged Al Qaeda operatives detained at the military prison at Guantánamo Bay.

In interviews, dozens of high-level military, intelligence and law-enforcement officials in the United States, Europe and the Middle East said that contrary to the repeated assertions of senior administration officials, none of the detainees at the United States Naval Base at Guantánamo Bay ranked as leaders or senior operatives of Al Qaeda. They said only a relative handful—some put the number at about a dozen, others more than two dozen—were sworn Qaeda members or other militants able to elucidate the organization's inner workings.

Tim Golden and Don Van Natta, Jr., U.S. Said to Overstate Value of Guantánamo Detainees, N.Y. TIMES, June 21, 2004, at A1. That the Administration could so overestimate the potential harm stemming from a select population such as this one is hardly surprising, given the concomitant inflation (whether purposeful or not) of the threat posed to the United States by Saddam Hussein prior to the initiation, in March 2003, of the war to remove him. See, e.g., Douglas Jehl, Senators Assail C.I.A. Judgments on Iraq's Arms as Deeply Flawed, N.Y. TIMES, July 10, 2004, at A1 (“In a scathing, unanimous report, the Senate Intelligence Committee said Friday that the most pivotal assessments used to justify the war against Iraq were unfounded and unreasonable, and reflected major missteps by American intelligence agencies.”). The practical case against granting substantial deference to the
danger thus quickly devolve into a familiar circularity. Indeed, the government’s assessment of harm (and the amount of deference that assessment warranted) was the primary factual question at issue in *Detroit Free Press* and *North Jersey Media*. The courts in those cases decided the appropriate level of deference to award the Executive’s factual claims before they analyzed what type or degree of risk the country might actually face from unsealed “special interest” deportation hearings.266

Furthermore, there exists no internal mechanism to prevent executive branch actors from simply alleging generalized threats to national security at the outset of any wartime adjudication. Indeed, the very classification of “wartime cases” signals intuitive acceptance by the judiciary of such reasoning. Credulous acceptance of such claims by the judiciary, followed by excessive deference to the military’s formulation of whatever factual issues might remain, effectively bars the judiciary from imposing meaningful scrutiny upon the substantive merits of a case.2 Far from justifying an habitual judicial posture of deference, continued operation of this circular algorithm threatens to truncate wartime adjudications before they have meaningfully begun.

266. See *Detroit Free Press II*, 303 F.3d at 705 (“The Government contends that ‘[c]losure of removal proceedings in special interest cases is necessary to protect national security by safeguarding the Government's investigation of the September 11 terrorist attack and other terrorist conspiracies.’”) (citation omitted); *North Jersey Media II*, 308 F.3d at 218 (“Watson presents a range of potential dangers, the most pressing of which we rescribe [sic] here.”). Even in *Korematsu I* the defendant had raised a legitimate question of fact regarding whether the danger of Japanese invasion of the West Coast had in fact passed by May 1942, the date that General DeWitt issued his race-specific exclusion order. See 323 U.S. at 218.

267. For instance, the Fourth Circuit approached *Hamdi v. Rumsfeld* (*Hamdi I*) under the potentially mistaken belief that Yaser Hamdi—or other, similarly situated detainees—posed a significant threat to the nation’s security. See 316 F.3d 450, 465 (4th Cir. 2003) (“As we emphasized in our prior decision, any judicial inquiry into Hamdi’s status as an alleged enemy combatant in Afghanistan must reflect this deference as well as a recognition that government has no more profound responsibility than the protection of American citizens from further terrorist attacks.”) (internal quotation marks and citation omitted). This generic perception of national danger—and the concomitant deference it catalyzed—prevented the court from ever reaching the genuine merits of the case, viz., whether or not Yaser Hamdi actually qualified as an enemy combatant.

The designation of Hamdi as an enemy combatant thus bears the closest imaginable connection to the President’s constitutional responsibilities during the actual conduct of hostilities. We therefore approach this case with sensitivity to both the fundamental liberty interest asserted by Hamdi and the extraordinary breadth of warmaking authority conferred by the Constitution and invoked by Congress and the executive branch.

*Id.* at 466. In essence, the military executive—and the court—had substituted a factual truism (the terrorist threat to national security) for the more nuanced question of Hamdi’s genuine status. The result was decisive: The court’s immediate acceptance of the government’s conceptualization of national threat effectively foreclosed any potential for meaningful consideration of whether Hamdi properly belonged within the “enemy combatant” category into which he had been placed.
B. WARTIME EXIGENCIES

The relative exigencies of wartime situations present another articulable case for awarding particular deference to military decision-making. The military may be forced to act hurriedly and decisively in order to forestall some imminent potential danger, making careful hindsight-aided judicial review an unjust basis by which to judge its actions. Courts may also be forced to decide wartime cases with undue haste, robbing them of the opportunity for meticulous consideration upon which their judgments depend. *Korematsu* is something of an example of the first type of these cases. Although the *Korematsu* decision only issued in 1944, the military had ordered the internment in May 1942, at the height of public fears of invasion (though over six months after the attack on Pearl Harbor). *Ex parte Quirin*, while not involving issues of factual judicial deference as defined in this Article, is an example of the second of these types. *Quirin* was, by necessity, argued on a drastically expedited schedule (on direct review to the Supreme Court) and decided by the Court the day after argument. The opinion was only issued three months later, after the defendants in the case had already been executed.

Many more cases, however, bear a closer resemblance to *Detroit Free Press*, *North Jersey Media*, *Padilla*, and *Hamdi*, in which both district and appellate courts have ample opportunity to deliberate and in which the governmental action at issue is judged on its merits according to the elongated schedules familiar to judicial decision-makers. In such situations, there is no reason to presuppose or even suspect that a judge, or a military commander, is placed under any greater time pressure than that which occurs in the course of typical peacetime lawsuits. The harm in many cases—even when inchoate or ongoing—is not irreparable: a court may take all the time it wishes in deciding whether to open INS deportation hearings to the public with the knowledge that its chance

268. See *Korematsu* I, 323 U.S. at 217; *id.* at 223–24 ("There was evidence of disloyalty on the part of some, the military authorities considered that the need for action was great, and time was short. We cannot—by availing ourselves of the calm perspective of hindsight—now say that at that time these actions were unjustified.").

269. 317 U.S. 1 (1942). *Quirin* concerned the lawfulness of the military detention of German saboteurs who had infiltrated the United States in civilian dress with the intention of destroying factories and causing other damage. The German soldiers had filed habeas corpus petitions challenging their detention and trial by military authorities (rather than in civilian courts), and the Supreme Court was called upon the adjudicate this question as a prelude to their impending execution as unlawful combatants.

270. *id.* at 19–20

271. See, e.g., *Detroit Free Press v. Ashcroft* (*Detroit Free Press II*), 195 F. Supp. 2d 937, 940 (E.D. Mich. 2002) ("These proceedings have been closed to the press and public.... [P]laintiffs in three separate cases seek an injunction against such procedure in any future hearings.").

272. In fact, the circuit split between *Detroit Free Press II* and *North Jersey Media II* indicates that these cases will almost certainly be heard by the Supreme Court, pushing their timetables back many
to influence events will not slip past. Furthermore, these cases present situations that bear little resemblance to the typical parade of horribles mustered in support of broad administrative deference.\textsuperscript{273} Courts are not instructing military commanders in the field on how to conduct wars, battalions are not being asked to carry along judges to advise them of their constitutional powers and restrictions, and soldiers need not consult legal treatises before firing. In this respect, the argument based on exigency seems to lack broad applicability.

C. Comparative Difficulty

The third potential principled distinction—that military cases are comparatively more difficult for courts to evaluate than civilian administrative ones—does not carry the same intuitive weight as other justifications.\textsuperscript{274} To the contrary, courts seem hardly less capable of understanding military cases than technical civilian administrative ones.\textsuperscript{275}

\textsuperscript{273} See supra note 20 and accompanying text.

\textsuperscript{274} The utter indecipherability of wartime facts, and possibly even the comparatively greater difficulty a court would have in grappling with them than with the factual questions underlying a peacetime administrative action, appeared to be the animating principle behind the Fourth Circuit's deferential attitude in Hamdi v. Rumsfeld (Hamdi I), 316 F.3d 450, 463 (4th Cir. 2003).

The reasons for this deference are not difficult to discern. Through their departments and committees, the executive and legislative branches are organized to supervise the conduct of overseas conflict in a way that the judiciary simply is not. The Constitution's allocation of the warmaking powers reflects not only the expertise and experience lodged within the executive, but also the more fundamental truth that those branches most accountable to the people should be the ones to undertake the ultimate protection and to ask the ultimate sacrifice from them. Thus the Supreme Court has lauded "[t]he operation of a healthy deference to legislative and executive judgments in the area of military affairs." Id. (quoting Rostker v. Goldberg, 453 U.S. 57, 66 (1981)); see also Ctr. for Nat'l Sec. Studies v. U.S. Dept' of Justice, 331 F.3d 918, 928 (D.C. Cir. 2003) ("America faces an enemy just as real as its former Cold War foes, with capabilities beyond the capacity of the judiciary to explore.").

This passage from the Hamdi I opinion raises the related prospect that courts such as the Fourth Circuit have drawn such distinctions between civilian and military cases based upon the belief that whether and how to fight a war are uniquely questions that must be addressed solely to the nation's "democratic" branches, viz., the President and the Congress, and to which courts—consonant with their role as apolitical neutral arbiters—may not appropriately speak. See, e.g., President's State of the Union Address to Congress and the Nation, N.Y. TIMES, Jan. 29, 2003, at A12 ("Sending Americans into battle is the most profound decision a president can make."). This rather facile argument ignores the point that wartime cases such as those at issue in this Article do not concern the commitment or disposition of military forces, but rather involve such jurisprudential mundanities as the lawfulness of detention without trial and First Amendment rights of media access, issues that have traditionally and consistently been given over to the sound discretion of the courts. See supra note 20 and accompanying text; Detroit Free Press II, 303 F.3d at 687 (discussing the courts' traditional authority over immigration cases).

\textsuperscript{275} See, e.g., Ctr. for Nat'l Sec. Studies, 331 F.3d at 938 (Tatel, J., dissenting).

Second, while the governmental interests in this case may be uniquely compelling, the legal principles that govern its resolution are not at all unique. . . . The law that governs this case is the same law that applies whenever the government's need for confidentiality in a law enforcement investigation runs up against the public's right to know what [] government is up to. . . . In all such situations, FOIA fully accommodates the government's concerns about the harms that might arise from the release of information pertaining to its investigations.
Educated generalists such as judges are no more qualified to determine the proper placement of a highway or the benefit of mandatory airbags than the danger of an invasion of the West Coast or the potential threat from revealing the names of deportees.276

War and national security are matters of intense national debate. To the extent that they are impenetrable to judges, it is often because military authorities have simply refused to share relevant and necessary information;277 as with other potential distinctions between wartime and peacetime cases, this rationale thus rests upon a circularity. In addition, many so-called “wartime” cases may turn on issues that have little to do with actual military strategy and involve instead more general questions—such as the effect that awarding counsel to a suspect will have upon that individual’s willingness to cooperate with authorities—about which military administrators hold no particular expertise.278 Hard look review of agency factual determinations exists despite the fact that agencies were created precisely in order to deal with technically difficult topics that do not submit easily to lay analysis.

Moreover, rationality and substantial evidence reviews are designed to draw not upon any specialized knowledge on the part of the overseeing judiciary, but rather upon judges’ nomological reasoning abilities and their facility at divining linkages (or the lack thereof) between facts and the conclusions that have sprung from them. These are precisely the types of analyses to which judges are best suited and best

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277. Compare the Korematsu majority decision: [W]e cannot reject as unfounded the judgment of the military authorities and of Congress that there were disloyal members of that population, whose number and strength could not be precisely and quickly ascertained. We cannot say that the war-making branches of the Government did not have ground for believing that in a critical hour such persons could not readily be isolated and separately dealt with, and constituted a menace to the national defense and safety, which demanded that prompt and adequate measures be taken to guard against it.

Korematsu I, 323 U.S. at 218 (internal quotation marks and citation omitted), with Justice Murphy’s dissent:

In support of this blanket condemnation of all persons of Japanese descent, however, no reliable evidence is cited to show that such individuals were generally disloyal, or had generally so conducted themselves in this area as to constitute a special menace to defense installations or war industries, or had otherwise by their behavior furnished reasonable ground for their exclusion as a group.

Id. at 236 (Murphy, J., dissenting)

278. See Padilla v. Rumsfeld (Padilla II), 243 F. Supp. 2d 42, 52 (S.D.N.Y. 2003) (“Moreover, the forecast speculates not about an intelligence-related matter, in which Admiral Jacoby is expert, but about a matter of human nature—Padilla’s in particular—in which, most respectfully, there are no true experts.”).
sustained to perform. Hard look review demands only that courts scrutinize agency decisions for a "rational connection between the facts found and the choice made," demanding ratiocination—and frequently merely syllogistic reasoning—not necessarily nuanced interpretation of technical data. Although a court may be forced to delve into administrative details in the course of evaluating policy alternatives not adopted or facts left unconsidered, most hard look review adjudications turn simply upon the rationality of the agency's logical connections.

Detroit Free Press and North Jersey Media are precisely these types of cases. In those adjudications, the district courts were capable of dismissing the government's argument for refusing to open INS hearings simply by virtue of the weakness of the government's syllogism in light of available facts, not with reference to some purported font of expert knowledge regarding terrorist practices or national security. Indeed,

279. Cf. Markman v. Westview Instruments, Inc., 517 U.S. 370, 388 (1996) ("The construction of written instruments is one of those things that judges often do and are likely to do better than jurors unburdened by training in exegesis."); Salve Regina Coll. v. Russell, 499 U.S. 225, 241 (1991) ("A judge attempting to predict how a state court would rule must use not only his legal reasoning skills, but also his experiences and perceptions of judicial behavior in that State."); Miller v. Fenton, 474 U.S. 104, 116-117 (1985) (discussing the division between questions of law and questions of fact with reference to the varied abilities of judges and juries).

280. State Farm, 463 U.S. at 43 (internal quotations and citation omitted)

281. See, e.g., AT&T Corp. v. FCC, 236 F.3d 729, 736 (D.C. Cir. 2001) ("Were this the first time the FCC was asked to consider whether a carrier was dominant in a given market, the explanation provided by the Commission in the Forbearance Order may well have been adequate; but it is not the first time that the Commission has addressed this issue. Indeed, the FCC has considered this question on several occasions, each time applying a test different from that applied here to determine whether the firm in question retained market power."); Sloan v. HUD, 231 F.3d 10, 17 (D.C. Cir. 2000) ("The Secretary's decision is at best a half-hearted attempt to address appellants' claim for relief. And, as is true with portions of the ALJ's decision, the Secretary's decision seems to blame the appellants for the blunders committed by agency investigators. In short, the decision fails to articulate a satisfactory explanation for [the agency's] action including a rational connection between the facts found and the choice made.") (internal quotation marks and citations omitted) (alteration in original); Ctr. for Auto Safety v. Peck, 751 F.2d 1336, 1344-50 (D.C. Cir. 1985) (scrutinizing the data relied upon by the agency in order to determine whether they support the agency's conclusion, while refusing to displace the agency's expert conclusion regarding the fungibility of automobile bumpers of divergent heights en route to evaluating which data to rely upon); Farmers Union Cent. Exch., Inc. v. FERC, 734 F.2d 1486, 1511-12 (D.C. Cir. 1984) ("Despite explicit concessions as to the shortcomings of the ICC rate base formula and the recognized advantages of a rate base formula derived from the original cost, FERC rejected the original cost alternative. . . . We find that none of FERC's explanations for its rejection of an original cost rate base satisfies accepted standards of reasoned decisionmaking."); Int'l Ladies' Garment Workers' Union v. Donovan, 722 F.2d 795, 822-23 (D.C. Cir. 1983) ("Our review of the record and the Secretary's explanation of his decision indicates that the Secretary has not given sufficient consideration to factors that may be highly relevant to the Department's ability to enforce the Act without homework restrictions.").

282. See Detroit Free Press v. Ashcroft (Detroit Free Press I), 195 F. Supp. 2d 937, 947 (E.D. Mich. 2002); North Jersey Media Group, Inc. v. Ashcroft (North Jersey Media I), 205 F. Supp. 2d 288, 301-02 (D.N.J. 2002); see also Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice, 331 F.3d 918, 939 (D.C. Cir. 2003) (Tatel, J., dissenting) ("But requiring agencies to make the detailed showing FOIA requires is not second-guessing their judgment about matters within their expertise. And in any event, this court
the analytical approach adopted by the Detroit Free Press and North Jersey Media district courts directly parallels that of State Farm, where the Court concluded (presumably without the aid of a prior study) that a mandatory airbag standard would save more lives than a standard that did not require passive restraints; and did so solely with reference to the NHTSA's own logic and argument. The Executive's contention that courts are not equipped to apply hard look or substantial evidence review to ostensibly complicated military decisions is a logical non sequitur. Regardless of whether or not military cases are in fact more difficult for courts to comprehend, rationality and substantial evidence reviews are intentionally impervious to such a concern.

D. Internal Limitations on Review

The concept that the laws governing executive action in wartime might, by their very terms, dictate a lesser standard of review than the APA's "arbitrary and capricious" or "substantial evidence" provisions represents yet another variant of the claim that it is necessary to constrain "fourth branch" administrative agencies to a greater degree than other governmental bodies. In this form, the argument has two fatal flaws. First, the "law to apply" applicable in most military cases compels a far higher standard of judicial review than the APA's "arbitrary and capricious" language. In contrast to Overton Park and State Farm's mere statutory constraints, military cases invoke some of the most closely guarded and prized constitutional rights, including freedom of speech and the press, equal protection and due process. According to traditional constitutional jurisprudence, and by the courts' own admissions, the abrogation of these rights by the executive branch calls for the most searching scrutiny the judiciary can apply. In order to

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is also in an extremely poor position to second-guess the legislature's judgment that the judiciary must play a meaningful role in reviewing FOIA exemption requests.

283. State Farm, 463 U.S. at 46 ("The first and most obvious reason for finding the rescission arbitrary and capricious is that NHTSA apparently gave no consideration whatever to modifying the Standard to require that airbag technology be utilized.").

284. It is for perhaps this reason that the "disparate institutional competence" model's most famous proponent, Justice Jackson, appears conflicted on the issue. Despite having argued in Korematsu I as grounds for judicial restraint (or abstention) that "[i]n the very nature of things, military decisions are not susceptible of intelligent judicial appraisal," Korematsu v. United States (Korematsu I), 323 U.S. 214, 245 (1944) (Jackson, J., dissenting), Justice Jackson is frequently quoted for the principle "that we decide difficult cases presented to us by virtue of our commissions, not our competence." Padilla v. Bush (Padilla I), 233 F. Supp. 2d 564, 608 (S.D.N.Y. 2002) (quoting Justice Jackson in Dames & Moore v. Regan, 453 U.S. 654, 661 (1981)).


286. See Korematsu I, 323 U.S. at 214.


288. See Korematsu I, 323 U.S. at 216 ("[C]ourts must subject them to the most rigid scrutiny."); Detroit Free Press v. Ashcroft (Detroit Free Press II), 303 F.3d 681, 705 (6th Cir. 2002)
ensure executive compliance with the constitutional “law to apply” in these cases, courts have already determined that judicial inquiry must assume an even more aggressive posture than “arbitrary and capricious” hard look review.

Second, one fact often overlooked amidst the unprincipled jumble of wartime cases is that the Department of Justice, the Department of Defense (DOD), the Department of Homeland Security (containing within it the Bureau of Citizenship and Immigration Services (CIS), formerly known as the Immigration and Naturalization Service) and other related war-related agencies are administrative agencies within the meaning of the Administrative Procedure Act, and consequently are subject to arbitrary and capricious review under APA § 706. The Administrative Procedure Act’s definition of its applicable scope is

("[G]overnment action that curtails a First Amendment right of access . . . must be supported by a showing that denial is necessitated by a compelling governmental interest.") (internal quotations and citation omitted); North Jersey Media I, 205 F. Supp. 2d at 301 (same); Hamdi I, 316 F.3d at 466 (“We therefore approach this case with sensitivity to [] the fundamental liberty interest asserted by Hamdi . . . .”).

289. In none of the cases discussed at length in this article did the court so much as mention that the executive action in question had been perpetrated by an administrative agency, much less attempt to grapple with the implications of APA § 706 upon the case before it. See generally Detroit Free Press I, 195 F. Supp. 2d at 937; North Jersey Media I, 205 F. Supp. 2d at 288; Detroit Free Press II, 303 F.3d at 681; North Jersey Media Group, Inc. v. Ashcroft (North Jersey Media II), 308 F.3d 198 (3d Cir. 2002); Ctr. for Nat’l Sec. Studies v. U.S. Dep’t of Justice, 331 F.3d 918 (D.C. Cir. 2003); Padilla I, 233 F. Supp. 2d at 564; Hamdi I, 316 F.3d at 450.

Among those cases that one could conceivably consider modern wartime adjudications, in only one instance did the court deign to examine an agency decision according to the APA’s “arbitrary and capricious” standard. In December 2001, pursuant to the President’s authority under the International Emergency Economic Powers Act, codified at 50 U.S.C. § 1701 et seq., the Department of the Treasury’s Office of Foreign Asset Control (“OFAC”) declared the Holy Land Foundation—an ostensible Muslim charity—a “Specially Designated Global Terrorist” and froze all of the assets that the Holy Land Foundation possessed within the United States. See Holy Land Found, for Relief and Dev. v. Ashcroft, 333 F.3d 156, 159–60 (D.C. Cir. 2003). Holy Land Foundation filed suit in federal court attacking this designation and the concomitant seizure on a number of grounds, among them the claim that OFAC’s action had been “arbitrary and capricious” per APA § 706(2)(A). See id. at 160–62. The district court rejected this argument (as well as the rest of Holy Land Foundation’s claims) after a “detailed review of the administrative record” that revealed “substantial evidence” supporting OFAC’s conclusions. Id. at 161. The court of appeals affirmed. See generally id.

The opinion gives no particular indication regarding why this, of all cases, garnered hard look review; it is possible that this is simply the only action in which the plaintiffs raised a claim based upon the APA. Alternatively, the OFAC’s categorization decision may have more strongly resembled a commonplace administrative action than the other adjudications discussed here that touched upon the war on terror. The Department of the Treasury surely is less easily characterized as a “warming” agency than are the Departments of Homeland Security and Defense, and the agency action at issue in Holy Land involved assets controlled by an organization with ties to terrorism, not the detention of any individual thought to be a terrorist. Id. at 159. In this field of law it is easy to lose sight of the fact that claims for relief under the APA ought to be the rule, rather than the exception; it is the absence of explanation in North Jersey Media I and Detroit Free Press I for those courts’ failures to address the APA’s demands of rationality—rather than the corresponding silence regarding the Holy Land Foundation court’s consideration of that statute’s strictures—that begs for elucidation.
comprehensive: "'agency' means each authority of the Government of the United States, whether or not it is within or subject to review by another agency." While the Supreme Court has held the APA inapplicable to the President, the only cognizable exceptions that might exempt a military agency such as the DOD from APA strictures are the narrow ones written into the statute itself: the APA "does not include . . . (F) courts martial and military commissions; (G) military authority exercised in the field in time of war or in occupied territory."

No litigant has ever successfully employed the "military authority" exception, so its outer limits remain somewhat murky. Yet courts have outlined numerous domestic situations in which the exception does not apply and in doing so have provided some guidance as to the categories of situations they believe it contemplates. The judiciary has generally construed this exception narrowly and literally, constraining its application to genuine military operations in theaters of battle, as exemplified by the D.C. Circuit's language in Doe v. Sullivan:

We think the 'military authority' exception is not on point.

[The plaintiff] currently does not ask us to review military commands made in combat zones or in preparation for, or in the aftermath of, battle. His claim, as now advanced, entails no judicial interference with the relationship between soldiers and their military superiors.

Though dicta, the court's gloss on the exception's inapplicability is illuminating: "[W]hen he adopted the rule, [the Secretary] did not purport to be exercising the President's powers as Commander in Chief."

The Doe principle, if adopted, would immunize administrative actions that rely principally upon the President's constitutional Commander-in-Chief power (often those undertaken by military forces themselves)—as opposed to statutory delegation based on other constitutional provisions—from scrutiny under the APA. Hamdi.

292. 5 U.S.C. § 551(1)(F), (G) (emphasis added).
293. 938 F.2d 1370, 1380 (D.C. Cir. 1991) (discussing an emergency FDA regulation, promulgated during the Gulf War hostilities, that permitted the military to use unapproved drugs on soldiers in certain combat situations without obtaining those soldiers' informed consent); see also Dickson v. Sec'y of Defense, 68 F.3d 1396, 1406 (D.C. Cir. 1995) (holding the "military authority" exception inapplicable to the Army Board for Correction of Military Records' decision not to waive the statute of limitations period for former servicemen to apply for upgrades of their discharge statuses); Guerrero v. Stone, 970 F.2d 626, 628 (9th Cir. 1992) (same); Neal v. Sec'y of Navy, 639 F.2d 1029, 1036 (3d Cir. 1981) (holding the "military authority" exception inapplicable to a denial of reenlistment into the Marines).
294. Sullivan, 938 F.2d at 1380.
295. See Hamdi v. Rumsfeld (Hamdi I), 316 F.3d 450, 459-60 (4th Cir. 2002) ("The President responded by ordering United States armed forces to Afghanistan to subdue al Qaeda and the
Padilla,296 and Korematsu,297 all of which concerned deprivations of individual rights performed by military authorities, fall into this first category. However, non-military, statute-driven actions such as the closing of INS deportation hearings in Detroit Free Press298 and North Jersey Media299 almost certainly fall outside of the "military authority" exception.300 Nor are these actions "committed to agency discretion,"301 since "law to apply" per the Overton Park standard (in this case, the First Amendment) is obviously present. It is thus possible to formulate a colorable argument that the APA § 706 "arbitrary and capricious" standard should control judicial review of the INS decisions in Detroit Free Press and North Jersey Media. Though the contours of this doctrine

governing Taliban regime supporting it. During this ongoing military operation, thousands of alleged enemy combatants, including Hamdi, have been captured by American and allied forces.

296. See Padilla v. Bush (Padilla I), 233 F. Supp. 2d 564, 569 (S.D.N.Y. 2002) (detailing José Padilla's arrest and "the President's designation of Padilla as an enemy combatant associated with a terrorist network called al Qaeda—Padilla is now detained, without formal charges against him or the prospect of release after the giving of testimony before a grand jury, in the custody of the U.S. Department of Defense at the Consolidated Naval Brig in Charleston, South Carolina."). Padilla's case appears somewhat more ambiguous, since he was originally arrested "in Chicago, on a material witness warrant issued by" the Southern District of New York, and "[h]is arrest and initial detention were carried out by the U.S. Department of Justice." Id. at 568-69. However, Padilla had since been transferred to military custody, and the military's intention to detain him indefinitely constituted the prompt for his lawsuit. Id. at 569. As a result, his case likely would fall outside of the APA under this rubric.

297. See Korematsu v. United States (Korematsu I), 323 U.S. 214, 215-16 (1944) ("The petitioner, an American citizen of Japanese descent, was convicted in a federal district court for remaining in San Leandro, California, a 'Military Area,' contrary to Civilian Exclusion Order No. 34 of the Commanding General of the Western Command, U.S. Army . . . .").

298. Detroit Free Press v. Ashcroft (Detroit Free Press II), 303 F.3d 681, 683-84 (6th Cir. 2002) ("Chief Immigration Judge Michael Creppy issued a directive (the 'Creppy directive') to all United States Immigration Judges requiring closure of special interest cases. The Creppy directive requires that all proceedings in such cases be closed to the press and public, including family members and friends.").

299. North Jersey Media Group, Inc. v. Ashcroft (North Jersey Media II), 308 F.3d 198, 199 (3d Cir. 2002) ("This category was created by a directive issued by Michael Creppy, the Chief United States Immigration Judge, outlining additional security measures to be applied in this class of cases, including closing hearings to the public and the press.").

300. Despite Sullivan's contrary interpretation, there remains the possibility that a court will read (and apply) the "in the field in time of war" language impossibly broadly to cover even actions within the United States itself during this open-ended "war against terrorism." Such a dramatic legal expansion seems unlikely, however. Even one of Hamdi's authors (the case was jointly authored by Chief Judge Wilkinson and Judges Wilkins and Traxler) distinguished that case's holding from the disparate conclusion reached by the Southern District of New York in Padilla I on the ground that Yaser Hamdi was captured in a war zone, while José Padilla was arrested on domestic soil in Chicago. See Hamdi I, 316 F.3d at 465 ("We have no occasion, for example, to address the designation as an enemy combatant of an American citizen captured on American soil or the role that counsel might play in such a proceeding. See, e.g., Padilla v. Bush, 233 F. Supp. 2d 564, (S.D.N.Y. 2002). We shall, in fact, go no further in this case than the specific context before us—that of the undisputed detention of a citizen during a combat operation undertaken in a foreign country and a determination by the executive that the citizen was allied with enemy forces.").

remain unsettled, in the presence of "law to apply" the APA itself may possess greater legal muscle than it has heretofore been afforded. The argument that the externally applicable constitutional law in military cases sets a less demanding standard of review than the Administrative Procedure Act founders on all fronts.

E. THE EXECUTIVE'S SPECIAL CONSTITUTIONAL ROLE

The final basis upon which one might attempt to justify greater judicial deference towards "expert" military organizations is the Executive's *sui generis* constitutional role as Commander-in-Chief. The President enjoys a singular position in the American constitutional order and possesses all-embracing responsibility for securing the nation against outside threats. Judicial interference with that authority would seem, on its face, not only to overreach the prerogative of an expert body but to violate the very structure of separated powers. Yet this argument cannot constitute sufficient grounds for deferring to military determinations when there exists "law to apply." This is merely another manifestation of the "category error" described in Part I.A., which runs afoul both of the demands of liberal legality in modern constitutional structure and of the more particularized dictates of administrative law.

As described above in Part II.B., the simultaneous co-existence of *Chevron*'s grant of delegated interpretive authority and *State Farm*'s requirement of rationality review illustrate more particularly the dichotomous separation of authority and constraint, even as applied to expert executive actors. Repeated invocation of the mantra that "any [judicial] inquiry must be circumscribed to avoid encroachment into the military affairs entrusted to the executive branch" is no longer justifiable on its own terms.

IV. TOWARDS AN UNDERSTANDING OF JUDICIAL ABDICATION

Pervading these modern wartime cases are recurring indications that reviewing courts—in some inchoate fashion—perceive military decisions as simply dissimilar to civilian adjudications, lacking in some important characteristic of judicial accessibility. Judges have thus adopted the practice of merely asserting the exceptionality of wartime adjudications, rather than arguing it. The *Hamdi* court's approach is paradigmatic:

The safeguards that all Americans have come to expect in criminal

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302. See, e.g., *Ex Parte Quirin*, 317 U.S. 1, 26 (1942) (describing how the Constitution invests "the President as Commander in Chief, with the power to wage war which Congress has declared, and to carry into effect all laws passed by Congress for the conduct of war and for the government and regulation of the Armed Forces, and all laws defining and punishing offences against the law of nations, including those which pertain to the conduct of war.").

303. See Sections I.A. and II.A.1.b., supra.

prosecutions do not translate neatly to the arena of armed conflict. In fact, if deference to the Executive is not exercised with respect to military judgments in the field, it is difficult to see where deference would ever obtain.\textsuperscript{305}

In similar fashion, the Supreme Court in \textit{Zadvydas} adverted to this class of cases simply as "terrorism or other special circumstances," without any particular explanation of what might make them special.\textsuperscript{306} Courts have also frequently relied upon "tradition" as a panacea, providing little additional argument.\textsuperscript{307} Occasionally a court has expressed its position not as a matter of doctrine, but simply as a statement of preference: "We are quite hesitant to conduct a judicial inquiry into the credibility of these security concerns . . . ."\textsuperscript{308}

The courts' ceaseless efforts to distinguish military detentions from normal criminal actions follow in a similar vein. In criticizing the district court's rigorous analysis of the government's stated rationale for detaining Yaser Hamdi, the Fourth Circuit went to great lengths to demonstrate that such scrutiny was inappropriate in the context of a President's exercise of war powers, as opposed to his mere law enforcement powers.\textsuperscript{309} To be sure, the court may well be correct that some heightened level of deference should apply. However, its method of insertion into this argument seems backwards and peculiar. The Fourth Circuit cited two cases for the proposition that military detentions are significantly distinct from normal criminal proceedings. The first is Justice Black's dissent in \textit{Johnson v. Eisentrager}, in which he argued that even foreign nationals caught and convicted of war crimes overseas ought to have recourse to the writ of habeas corpus to challenge their detentions.\textsuperscript{310} The \textit{Hamdi} appellate court can hardly be endorsing that proposition with any strength, given its decision to functionally eviscerate any substantive standard of habeas review in the case before it.\textsuperscript{311} The

\textsuperscript{305} Id. at 465.


\textsuperscript{307} See, e.g., Dept' of the Navy v. Egan, 484 U.S. 518, 530 (1988) ("[C]ourts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs."); North Jersey Media Group, Inc. v. Ashcroft (North Jersey Media II), 308 F.3d 198, 219 (3d Cir. 2002) ("[N]ational security is an area where courts have traditionally extended great deference to Executive expertise.").

\textsuperscript{308} North Jersey Media II, 308 F.3d at 219 (emphasis added).

\textsuperscript{309} Hamdi 1, 316 F.3d at 473.


\textsuperscript{311} Hamdi I reached the courts on a petition for habeas relief under 28 U.S.C. § 2241, and the 4th Circuit accepted that jurisdiction to hear the petition existed without discussion. See 316 F.3d at 459. Nonetheless, the court's eventual decision on the merits displays an obvious lack of desire to impose stringent substantive standards on administrative detentions, quite in contrast to Justice Black's dissent in \textit{Eisentrager}. See 339 U.S. at 793–94.

Certainly decisions by the trial court and the Court of Appeals concerning applicability of that principle to these facts would be helpful, as would briefs and arguments by the adversary parties. It should not be decided by this Court now without that assistance,
second is *In re Winship*, a juvenile delinquency proceeding the Fourth Circuit referenced for the idea that an elevated burden of executive proof exists in criminal cases due to the "consequences of conviction, including social stigma." This is surely an unconventional means of distinguishing these situations. The consequences of classifying Hamdi as an unlawful combatant include potentially interminable detention and far greater stigma than would besmirch a common criminal.

The Southern District of New York set out upon a parallel track in *Padilla*, explaining that José Padilla's Sixth Amendment right to counsel does not attach due to the fact that his detention is not a "criminal proceeding." From a simple textual perspective, this is an indisputably correct point of law. Yet the court was not satisfied and attempted to further buttress the distinction between criminal and military detentions in a functionally suspect manner. The court noted that "a proceeding which may result in deprivation of liberty is nonetheless not a 'criminal proceeding' within the meaning of the Sixth Amendment if there are elements about it which sufficiently distinguish it from a traditional civilian criminal trial." It then claimed that "Padilla's detention 'does not implicate either of the two primary objectives of criminal punishment: retribution or deterrence.'"

As an initial matter, Padilla's detention certainly serves to incapacitate him and prevent future crime, another traditionally important criminal objective. Secondly, Administration officials (and José Padilla himself) may well conceive of his imprisonment as at least partly retributive in nature, particularly if, as some have suggested, Padilla was engaged in a conspiracy against the United States that the government lacks sufficient evidence to prove in ordinary criminal

... particularly since failure to remand deprives these petitioners of any right to meet alleged deficiencies by amending their petitions.

*Id.* (Black, J., dissenting).


314. See *Middendorf v. Henry*, 425 U.S. 25, 38 (1976). Even the *Middendorf* Court could not resist the engaging in the type of tautological literalism that pervades this area of the law. Faced with the question of whether the Sixth Amendment applied to military servicemembers tried at "summary courts-martial," the Supreme Court announced first that its previous holdings "surely stand for the proposition that even in the civilian community a proceeding which may result in deprivation of liberty is nonetheless not a 'criminal proceeding' within the meaning of the Sixth Amendment if there are elements about it which sufficiently distinguish it from a traditional civilian criminal trial." *Id.* What "sufficiently" distinguished the summary court-martial at issue in *Middendorf* from a "traditional civilian criminal trial?" "The summary court-martial proceeding here is likewise different from a traditional trial in many respects, the most important of which is that it occurs within the military community." *Id.* (emphasis added).


316. *Id.* at 600 (quoting *Kansas v. Hendricks*, 521 U.S. 346, 361-62 (1997)).

These courts' efforts to categorize Hamdi's and Padilla's detentions as non-criminal are striking not for their legal conclusion that the defendants have no entitlement to certain aspects of criminal process, but rather for the dubious lengths they travel to describe these incarcerations as if they bear no resemblance to criminal confinement. The *Hamdi* appellate court offered a meager explanation for this labored path, an explanation that may shed more light upon the court than it does upon the court's decision:

The murkiness and chaos that attend armed conflict mean military actions are hardly immune to mistake. Yet these characteristics of warfare have been with us through the centuries and have never been thought sufficient to justify active judicial supervision of combat operations overseas. To inquire, for example, whether Hamdi actually fired his weapon is to demand a clarity from battle that often is not there.\(^{219}\)

In evidence is a court that instinctively views military action as judicially incomprehensible and legally untouchable. To the Fourth Circuit, law cannot bend the exigent realities of war to its constraining will because it cannot extract necessary factual clarity from amidst the "murkiness and chaos"; courts would thus be well-advised to remain outside the fray.\(^{320}\) It is this judicial predilection that necessitates firm proof of dissimilitude between military and criminal detention. When military operations assume the form and function of typical law enforcement acts, courts become hard-pressed to justify their abstention from the rule-of-law constitutional questions that form the core of their juridical task.

Despite a body of Supreme Court administrative law doctrine counseling judicial intervention into areas of executive expertise, and despite the principle that courts must act to vindicate the rule of law even

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\(^{218}\) This contention appears to have been borne out in late May and early June 2004 when the Department of Justice, in an extraordinary and largely unprecedented step, declassified a report detailing much of the information it had learned from Jos6 Padilla during the course of his interrogation. See Summary of Jos6 Padilla's Activities with Al Qaeda, United States Department of Defense, May 28, 2004, available at http://news.findlaw.com/wp/docs/padilla/pad52804dodsum.html (last visited June 5, 2004). Commenting upon the release of this information, Deputy Attorney General James Comey admitted that the government never possessed sufficient information to establish probable cause and thereby detain Padilla pursuant to the ordinary criminal process. According to *The New York Times*, had Padilla been charged initially, "he would very likely have followed his lawyer's advice and said nothing, which would have been his constitutional right," Mr. Comey said. 'He would likely have ended up a free man, with our only hope being to try to follow him 24 hours a day, seven days a week and hope—pray, really—that we didn't lose him.'" Eric Lichtblau, *U.S. Spells out Dangers Posed by Plot Suspect*, *N.Y. Times*, June 2, 2004, at A1.

\(^{219}\) Hamdi v. Rumsfeld (*Hamdi I*), 316 F.3d 450, 473 (4th Cir. 2003).

\(^{320}\) See Ctr. for Nat. Sec. Studies v. U.S. Dep't of Justice, 331 F.3d 918, 928 (D.C. Cir. 2003) ("America faces an enemy just as real as its former Cold War foes, with capabilities beyond the capacity of the judiciary to explore.") (emphasis added).
in fields of overwhelming executive or legislative authority, Article III courts have come to view military questions as a taxonomic grouping they are simply incapable of navigating. Yet in this legal area (as in most others), doctrinal facts ought to drive psychological attitudes. Military cases do not always hold the threat of substantially greater national peril, nor offer more pressing exigencies, nor present more intractable fact or policy questions than do typical administrative law adjudications. Courts that remain unafraid to pass on the factual rationality of highway safety regulations that may affect tens of thousands of lives each year should hold no particular impressionistic aversion towards inquiring into the legality of detentions or secretive hearings. There, the danger of a judicial misstep remains speculative precisely because courts have refused to put the Administration to its proofs.

Moreover, courts themselves possess responsibility for enforcing the legal limitations that exist to bind administrative actors. To leave wartime cases exclusively in the hands of the Executive Branch in the name of "comity" or "deference" would be to reduce fundamental constitutional guarantees to mere precatory language, slaves to the vicissitudes of the executive expediency they were meant to curb. Lower courts need not shrink from validating the rule of law in cases that bear such resemblance to the administrative law doctrines with which they are familiar. If they continue to do so, the Supreme Court must act to reconstitute wartime doctrine along existing precedential lines, lest the United States reap the consequences of this unfortunate, self-conscious judicial hand-washing.

CONCLUSION

Over the past three years, the "War on Terror" has become as much a legal strategy as a military operation. Incursions abroad have been matched by informational blackouts at home. International manhunts for suspected terrorists are coupled with detention of American citizens. Constitutional rights have been eroded by a torrent of ostensibly security-enhancing measures, and aggrieved individuals have turned to the courts for redress, just as they did six decades ago when the Japanese population of the West Coast was interned in the name of national defense.

Yet courts have behaved solicitously not towards claims of constitutional deprivations, but rather towards governmental declarations of necessity and authority over the lives and rights of the citizenry in wartime. In particular, courts have overwhelmingly deferred to the executive branch regarding the assertions of fact that form the factual predicates for governmental actions. Deference has come according to two rationales: first, the President's unique constitutional role as guarantor of national security, and second, the Executive's
superior institutional expertise in wartime matters.

In awarding deference on these grounds, the judiciary has ignored the operation of the Constitution and laws as contemporaneous structural constraints on executive military action. The President and the military hold only the authority vested in them by the Constitution or by law. Action outside of those legal boundaries is by definition unconstitutional and unauthorized. Similarly, the Bill of Rights enshrines individual freedoms that executive action, even if otherwise lawful, cannot infringe. Moreover, many cases implicating national security turn on issues of individual statutory and constitutional rights—such as the lawfulness of detention or free speech rights such as access to information—that form the archetypal bailiwick of civilian tribunals. Thus, even in wartime circumstances there is often constitutional and statutory law to apply, law to which courts must hold the Executive and the legislature. As courts have nearly unanimously recognized, it is emphatically the province of the judiciary to vindicate the rule of law by demanding that government bodies remain within circumscribed boundaries.

It is in this respect that administrative law can usefully inform the adjudication of wartime cases. Administrative law jurisprudence developed to address the particular problems presented by executive branch agencies possessing tremendous institutional expertise and resources and specially empowered by Congress to manage technically difficult subject matter. So-called "military" cases come to Article III courts within precisely the same jurisprudential framework as civilian administrative ones: courts must determine the degree to which they should defer to the legal or factual allegations of an expert, empowered executive branch organization.

Despite the obvious considerations favoring substantial administrative deference, the Supreme Court's modern administrative law jurisprudence stands for the principle that adherence to the rule of law demands that courts meaningfully scrutinize administrative determinations of fact. The Court has recognized that enforcement of a legal stricture is toothless without a concomitant inquiry into that stricture's factual predicate. It has therefore insisted upon "substantial evidence" in support of agency judgments before affirming them and required courts to perform "rationality review" of agency policy decisions to ensure that agencies have considered all available alternatives and reached logical conclusions from available information.

The rule-of-law principles that motivate judicial scrutiny of administrative determinations compel similar treatment for the claims of fact proffered by the military in the interest of surmounting constitutional restraints. The reasons that courts advance in defense of their acquiescence in wartime circumstances are logically unconvincing.
The military matters that have come before the judiciary are neither more judicially inscrutable nor more legally intractable than the administrative issues upon which hard look and substantial evidence review were founded. If military cases present greater national dangers—a question that can hardly be answered accurately without judicial review in the first instance—than their civilian counterparts, they also threaten more dramatic erosions of civil and constitutional rights. Courts cannot continue to invoke "national security" as a shibboleth absolving them from their responsibility, exemplified within the principles of administrative law, to examine especially those actions taken by broadly empowered, highly experienced executive bodies.

On September 22, 2004, almost three years after Yaser Esam Hamdi was taken into custody by American forces in Afghanistan, and nearly three months after the Supreme Court had ruled that he could not be held indefinitely without some nature of adjudicative process, the United States Department of Justice decided that Hamdi's "intelligence value had been exhausted" and agreed to release him, provided he never again set foot in the United States. Nineteen days later, Hamdi was placed on a flight bound for Saudi Arabia. What justification the United States military believed it possessed for holding Hamdi may never be known; one can only presume that it would not have withstood even the limited scrutiny the Supreme Court had prescribed. Hamdi's release completed the military's circular narrative: it was the executive branch that chose to incarcerate Hamdi; it was the executive branch that unilaterally chose to release him; and it appears that the executive branch never ceased believing that it alone held the authority to make these decisions. Yaser Hamdi, José Padilla, and all American citizens bearing constitutional rights are entitled to a government that operates by law and logic, not by executive fiat. Courts must act to vindicate the rule of law if such a government is to persevere.

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