2012

War Powers, Foreign Affairs, and the Courts: Some Institutional Considerations

Jonathan L. Entin

Follow this and additional works at: https://scholarlycommons.law.case.edu/jil

Part of the International Law Commons

Recommended Citation
Available at: https://scholarlycommons.law.case.edu/jil/vol45/iss1/19

This Article is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Case Western Reserve Journal of International Law by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.
War Powers, Foreign Affairs, and the Courts: Some Institutional Considerations

Jonathan L. Entin
War Powers, Foreign Affairs, and the Courts: Some Institutional Considerations

Jonathan L. Entin*

As other contributions to this symposium make clear, much of the debate over presidential power in foreign affairs has focused on the dynamics of policy-making within the executive branch and about the relationship between the executive branch and Congress. Strikingly absent from the discussion has been the role of the judiciary. The courts have not been entirely silent, but they have played a diminished role in this area. Although it might very well be “the province and duty of the judicial department to say what the law is,” 1 courts generally have not played, nor are they likely to play, a significant role in resolving the debate over the roles of Congress and the president in war and foreign affairs. Getting courts to address those issues requires overcoming various procedural and jurisdictional obstacles. If those challenges are surmounted, courts generally have shown considerable deference to the executive on the merits of these disputes even when ruling against the president’s position. This essay concludes, somewhat tentatively, that a modest judicial role in this area probably is desirable because this leaves resolution of interbranch conflicts to the political process.

CONTENTS

I. PROCEDURAL AND JURISDICTIONAL BARRIERS TO JUDICIAL REVIEW .......................................................... 444
   A. Standing .............................................................................. 444
   B. Justiciability ....................................................................... 448
   C. Timing ............................................................................... 449
      1. Ripeness ........................................................................... 450
      2. Mootness .......................................................................... 450
II. DEFERENCE TO THE EXECUTIVE ON THE MERITS ............ 451
III. THE BENEFITS OF POLITICAL RESOLUTION OF INTERBRANCH DISPUTES .................................................. 456

* Associate Dean for Academic Affairs (School of Law), David L. Brennan Professor of Law, and Professor of Political Science, Case Western Reserve University.

I. PROCEDURAL AND JURISDICTIONAL BARRIERS TO JUDICIAL REVIEW

To be sure, the Supreme Court has decided some well-known national security cases. Among them are the Steel Seizure case, *Youngstown Sheet & Tube Co. v. Sawyer*;2 the Pentagon Papers case, *New York Times Co. v. United States*;3 the Iranian hostage case, *Dames & Moore v. Regan*;4 and some notable First Amendment cases arising out of World War I, such as *Schenck v. United States*5 and *Abrams v. United States*.6 Then there are the Japanese internment decisions during World War II, notably *Korematsu v. United States*7 as well as *Ex parte Quirin*,8 which upheld the use of military commissions to try German agents who landed in the United States as part of a sabotage mission. Most recently, the Supreme Court has addressed questions arising from the government’s response to the attacks of September 11, 2001, in such cases as *Hamdi v. Rumsfeld*,9 *Hamdan v. Rumsfeld*,10 and *Boumediene v. Bush*.11 These cases do matter, but they have not clearly resolved the constitutional and other legal issues that pervade the debate about presidential power and foreign affairs.

Beyond the limitations of the Supreme Court rulings, the judiciary probably will not contribute very much to the debate. Various procedural and jurisdictional obstacles make it difficult for courts to address the merits of disputes about war powers and foreign affairs. Even if those obstacles can be surmounted, those who decry what they view as presidential excess should note that the judiciary typically has taken a deferential role in reviewing challenges to executive action.

A. Standing

Because the judicial power of the United States encompasses only cases and controversies,12 neither Congress nor the president could

---

2. 343 U.S. 579 (1952).
5. 249 U.S. 47 (1919).
obtain an advisory opinion about war powers or foreign affairs, even if they were so inclined. To satisfy the requirement of standing, an appropriate plaintiff must allege a legally cognizable injury that was caused by the defendant and could be redressed by a suitable judicial remedy.\textsuperscript{13}

Most citizens will lack standing to challenge military actions or foreign policy decisions because they would be asserting a generalized grievance. This was the basis for rejecting a challenge to the constitutionality of the Vietnam War. The plaintiffs in \textit{Schlesinger v. Reservists Committee to Stop the War}\textsuperscript{14} claimed that members of Congress who were members of the military reserve were susceptible to undue influence by the executive branch, but the Supreme Court never reached the merits. The Court concluded that the plaintiffs lacked standing because they were asserting “an interest shared by all citizens.”\textsuperscript{15}

Although most citizens would be foreclosed from suing, perhaps a member or group of members of Congress might have standing. Legislators might try to assert that executive actions infringed their constitutional authority. This possibility seems to have been foreclosed by \textit{Raines v. Byrd},\textsuperscript{16} which held that individual members of Congress lacked standing to challenge the constitutionality of the Line Item Veto Act.\textsuperscript{17} The challengers, four Senators and two Representatives,\textsuperscript{18} could not and did not allege that their votes against the measure had been “completely nullified”;\textsuperscript{19} they opposed the bill and “simply lost.”\textsuperscript{20} Accordingly, these individual legislators lacked standing.\textsuperscript{21}


\textsuperscript{14} 418 U.S. 208 (1974).

\textsuperscript{15} Id. at 217. Lower courts also rejected legal challenges to the Vietnam War on standing grounds. See, e.g., Velvel v. Nixon, 415 F.2d 236 (10th Cir. 1969); Campen v. Nixon, 56 F.R.D. 404 (N.D. Cal. 1972).

\textsuperscript{16} 521 U.S. 811 (1997).

\textsuperscript{17} Pub. L. No. 104-130, 110 Stat. 1200 (1996). \textit{Raines} did not address the standing of either house or both houses of Congress to challenge executive action, holding only that individual members generally do not have standing. There is reason to believe that the House or Senate could have standing to challenge executive action. See infra notes 28–29 and accompanying text.

\textsuperscript{18} Raines, 521 U.S. at 814.

\textsuperscript{19} Id. at 823.

\textsuperscript{20} Id. at 824. The Senators and Representatives also could not establish standing on the theory that they had been “singled out for specially
This reasoning suggests that congressional opponents of presidential military and foreign policy initiatives would lack standing to sue unless they could claim that their votes “would have been sufficient to defeat (or enact)” legislation blocking executive action.\textsuperscript{22} Even that kind of showing might not suffice, however. A challenge to President Clinton’s decision to participate in the NATO operations in the former Yugoslavia foundered because the congressional plaintiffs in \textit{Campbell v. Clinton}\textsuperscript{23} lacked standing. The U.S. District Court for the District of Columbia recognized that the more than two dozen congressional plaintiffs alleged that they had sufficient votes to defeat a resolution authorizing the president to conduct air strikes in Yugoslavia and also to defeat a declaration of war; both measures in fact were defeated, but the military action went ahead anyway.\textsuperscript{24} Nevertheless, the situation did not involve “a true ‘constitutional impasse’ or ‘actual confrontation’ between the legislative and executive branches” because “neither vote facially required the President to do anything or prohibited him from doing anything.”\textsuperscript{25} In fact, other congressional actions pointed in the opposite direction: a proposal to require the president to withdraw American forces from the Yugoslavian conflict also failed, and Congress later passed an emergency supplemental appropriation for military operations there.\textsuperscript{26} The U.S. Court of Appeals for the District of Columbia Circuit affirmed the judgment that the congressional plaintiffs lacked standing, although the three judges on the panel needed four opinions to explain the result.\textsuperscript{27}

Presumably one or both houses of Congress would have standing to challenge executive action. The Supreme Court suggested as much unfavorable treatment as opposed to other Members of their respective bodies.” \textit{Id.} at 821 (distinguishing Powell v. McCormack, 395 U.S. 486 (1969)).

\textit{Id.} at 830. The Supreme Court held the Line Item Veto Act unconstitutional the following year. Clinton v. City of New York, 524 U.S. 417 (1998). The Court found that the challengers, a city agency and a group of Idaho potato farmers who challenged various cancellations of federal expenditures under the Line Item Veto Act, had alleged concrete and personal injuries that were sufficient to satisfy the requirements for standing. \textit{Id.} at 430, 432.

\textit{Raines}, 521 U.S. at 823.


52 F. Supp. 2d at 42–43.

\textit{Id.} at 43.

\textit{Id.} at 44.

\textit{Id.} at 37 (Tatel, J., concurring).

\textit{Id.} at 24 (Silberman, J., concurring); \textit{id.} at 28 (Randolph, J., concurring in the judgment); \textit{id.} at 28 (Tatel, J., concurring in the judgment).
in *INS v. Chadha*, in which both congressional chambers intervened to support the constitutionality of the legislative veto when the executive branch declined to support it. The Court observed that the House and Senate were “proper parties” to advance legal arguments that the executive branch declined to make. An institutional decision by either or both houses might confirm the existence of the “constitutional impasse” or “actual confrontation” between the branches that the district court in *Campbell* found lacking.

For standing purposes, a member of the armed forces who receives orders to report to a combat zone might well be able to challenge a military operation. Soldiers face powerful disincentives to confront authority, but courts did find that some military personnel had standing to challenge the legality of the Vietnam War. Moreover, a member who is prosecuted for refusing orders to participate in a conflict would be able to assert the illegality of the operation as a defense to charges of insubordination.

The Supreme Court reinforced the significance of the standing barrier in this area in a decision rendered as this article was going to press. *Clapper v. Amnesty International USA* held that a group of lawyers as well as human rights and other organizations did not have standing to challenge the procedures for authorizing electronic surveillance of persons outside the United States for foreign-intelligence purposes. The plaintiffs had asserted legally cognizable injuries in fact relating to their fear of having sensitive communications monitored and the costly steps they had taken to

29. Id. at 930 n.5.
30. See supra text accompanying note 25.
31. See *John Hart Ely, War and Responsibility* 56–57 (1993) (noting that officers who filed suit would risk sacrificing their careers and that enlisted personnel would be challenging authority in ways that are fundamentally inconsistent with their training).
32. See, e.g., *Massachusetts v. Laird*, 451 F.2d 26, 29 (1st Cir. 1971) (concluding that “individual plaintiffs, particularly those serving in Southeast Asia,” had standing even though the state did not); *Berk v. Laird*, 429 F.2d 302, 306 (2d Cir. 1970) (finding that a soldier ordered to report for dispatch to South Vietnam had alleged sufficient injury to satisfy standing and other jurisdictional requirements). But see *Mottola v. Nixon*, 464 F.2d 178, 179 (9th Cir. 1972) (holding that members of the military reserve who were not under orders to report to a combat zone lacked standing to challenge the Vietnam War).
33. See, e.g., *United States ex rel. New v. Rumsfeld*, 448 F.3d 403 (D.C. Cir. 2006) (enlisted man deployed in a peacekeeping force who was court-martialed for refusing orders to wear United Nations insignia on his uniform).
avoid such monitoring, those injuries were caused by the government’s surveillance policies, and that their asserted injuries could be redressed by an appropriate judicial order.

In a 5-4 ruling, the Court held that the plaintiffs’ alleged injuries were “highly speculative” and rested on “a highly attenuated chain of possibilities” and therefore were not “certainly impending.” Moreover, those injuries were not “fairly traceable” to the program that the plaintiffs were challenging, because the plaintiffs could “only speculate” about whether any potential interception of their communications would occur under the aegis of the surveillance program at issue.

The Court conceded that its ruling might make it very difficult for anyone to challenge the surveillance program but noted that this was no basis for adopting a more permissive approach to standing. Even if the Court had found that the plaintiffs had standing, such a ruling would not have resolved the legality of the intelligence-gathering program underlying the litigation.

B. Justiciability

Even if a plaintiff with standing were available, a court still might decline to reach the merits of a challenge to a military or other foreign operation under the so-called political-question doctrine. The idea that some cases raise nonjusticiable political questions has few scholarly defenders these days, and the Supreme Court has hesitated

35. Id. slip op. at 8.
36. Id.
37. Id. slip op. at 2 (Breyer, J., dissenting).
38. Id. slip op. at 11.
39. Id.
40. Id. slip. op. at 14. The Court also rejected the plaintiffs’ alternative standing argument that relied on the steps that they had taken to avoid surveillance under the program at issue. Id. slip op. at 16-19.
41. Id. slip op. at 22 (“[t]he assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing.” (quoting Valley Forge Christian Coll. v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 489 (1982).))
42. Id. slip op. at 20 (Breyer, J., dissenting) (expressing “no view on the merits of the plaintiffs’ constitutional claims”).
to invoke this doctrine recently. Nevertheless, lower courts rejected challenges to the legality of the Vietnam War on the basis that they presented political questions, including cases brought by members of Congress as well as others filed by members of the armed forces and other individuals. Similarly, a lawsuit contesting the legality of American involvement in El Salvador under President Reagan was dismissed under the political-question doctrine. Although some cases have treated such claims as justiciable, a plurality of the Supreme Court invoked the political-question doctrine to reject a challenge to President Carter’s unilateral termination of a defense treaty with Taiwan. Accordingly, the body of precedent relating to foreign affairs suggests that the justiciability issue must be taken seriously.

C. Timing

Two additional procedural hurdles, both relating to the timing of litigation, could pose serious difficulties for anyone seeking to involve


the judiciary in disputes relating to war powers and foreign affairs. Cases could be filed too soon, raising questions of ripeness, or too late, raising questions of mootness.

1. Ripeness

In some circumstances, a plaintiff might go to court too soon, before a legal dispute is ripe. This problem arose in *Dellums v. Bush*, where more than fifty members of Congress sought an injunction to prevent President George H.W. Bush from initiating military operations against Iraq during the first Persian Gulf War without explicit congressional authorization. The U.S. District Court for the District of Columbia concluded that the case did not present a political question and that the congressional plaintiffs had standing. Nevertheless, the court found the lawsuit to be premature for two reasons: (1) because Congress had not yet taken a position about the situation in Kuwait precipitated by an Iraqi invasion; and (2) because the president had not so clearly committed to imminent military action that a judicial ruling was yet necessary.

2. Mootness

In other circumstances, a legal challenge might come too late, when a dispute has become moot. *Burke v. Barnes*, a challenge to President Reagan’s policies in Central America, illustrates this phenomenon. This case involved a bill conditioning further U.S. military assistance to the government of El Salvador on the President’s certification that the Salvadoran government was making adequate progress in improving human rights in that nation. Reagan purported to pocket veto this bill following a congressional

51. See id. at 1143 & n.1.
52. Id. at 1145–46.
55. Id. at 1151–52.
57. Id. at 362.
adjournment.58 Because the bill in question had expired, its provisions had no present effect even if it had become law after the chief executive took no action on it within the ten-day period required by the Constitution.59 Accordingly, the dispute had become moot and the case was dismissed.60

To the extent that conflicts between Congress and the president relating to military and foreign policy rest on legislative restrictions on appropriations, as was the case in *Burke v. Barnes*, the time limits on funding measures could make mootness an important barrier to adjudication. But national security issues can play out in other types of litigation. The Pentagon Papers case, for example, involved the executive branch’s effort to prevent further publication of information obtained from a Defense Department study of U.S. involvement in Southeast Asia.61 Although that case went to final judgment on the merits, the government’s effort to suppress a magazine article about the hydrogen bomb foundered when essentially the same information was published elsewhere while the case was on appeal and the government therefore abandoned its efforts against the original article.62

II. DEERENCE TO THE EXECUTIVE ON THE MERITS

Although these procedural and jurisdictional barriers to judicial review can be overcome, those who seek to limit what they regard as executive excess in military and foreign affairs should not count on the judiciary to serve as a consistent ally. The Supreme Court has shown substantial deference to the president in national security cases. Even when the Court has rejected the executive’s position, it generally has done so on relatively narrow grounds.

Consider the Espionage Act cases that arose during World War I. *Schenck v. United States,*63 which is best known for Justice Holmes’s

58. *Id.* (citing U.S. CONST. art. I, § 7, cl. 2 (“If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress, by their adjournment prevent its return, in which Case it shall not be a Law.”))).

59. *Id.* at 363–64.

60. *Id.* at 365.


63. 249 U.S. 47 (1919).
announcement of the clear and present danger test, upheld a conviction for obstructing military recruitment based on the defendant’s having mailed a leaflet criticizing the military draft although there was no evidence that anyone had refused to submit to induction as a result. Justice Holmes almost offhandedly observed that “the document would not have been sent unless it had been intended to have some effect, and we do not see what effect it could be expected to have upon persons subject to the draft except to influence them to obstruct the carrying of it out.”64 The circumstances in which the speech took place affected the scope of First Amendment protection: “When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right.”65 A week later, without mentioning the clear and present danger test, the Court upheld the conviction of the publisher of a German-language newspaper for undermining the war effort66 and of Eugene Debs for a speech denouncing the war.67 Early in the following term, Justice Holmes refined his thinking about clear and present danger while introducing the marketplace theory of the First Amendment in Abrams v. United States,68 but only Justice Brandeis agreed with his position.69 The majority, however, summarily rejected the First Amendment defense on the basis of Holmes’s opinions for the Court in the earlier cases.70

Similarly, the Supreme Court rejected challenges to the government’s war programs during World War II. For example, the Court rebuffed a challenge to the use of military commissions to try German saboteurs.71 Congress had authorized the use of military tribunals in such cases, and the president had relied on that authorization in directing that the defendants be kept out of civilian courts.72 In addition, the Court upheld the validity of the Japanese internment program.73 Of course, the Court did limit the scope of the

64. Id. at 51.
65. Id. at 52.
68. 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).
69. Id. at 631.
70. Id. at 619 (citing Schenck and Frohwerk).
72. Id. at 28.
program by holding that it did not apply to “concededly loyal” citizens. But it took four decades for the judiciary to conclude that some of the convictions that the Supreme Court had upheld during wartime should be vacated. Congress eventually passed legislation apologizing for the treatment of Japanese Americans and authorizing belated compensation to internees.

The Court never directly addressed the legality of the Vietnam War. The Pentagon Papers case, for example, did not address how the nation became militarily involved in Southeast Asia, only whether the government could prevent the publication of a Defense Department study of U.S. engagement in that region. The lawfulness of orders to train military personnel bound for Vietnam gave rise to Parker v. Levy, but the central issue in that case was the constitutionality of the provisions of the Uniform Code of Military Justice that were the basis of the court-martial of the Army physician who refused to train medics who would be sent to the war zone. The few lower courts that addressed the merits of challenges to the legality of the Vietnam War consistently rejected those challenges.

The picture in the post-2001 era is less clear. In three different cases the Supreme Court has rejected the executive branch’s position, but all of those rulings were narrow in scope. For example, Hamdi v. Rumsfeld held that a U.S. citizen held as an enemy combatant must be given a meaningful opportunity to have a neutral decision-maker determine the factual basis for his detention. There was no majority opinion, however, so the implications of the ruling were ambiguous to say the least. Justice O’Connor’s plurality opinion for four members of the Court concluded that Congress had authorized the president to detain enemy combatants by passing the Authorization for Use of Military Force and that the AUMF satisfied the statutory requirement of congressional authorization for the detention of U.S.

74. Ex parte Endo, 323 U.S. 283, 297 (1944).
75. See Hirabayashi v. United States, 828 F.2d 591 (9th Cir. 1987); Korematsu v. United States, 584 F. Supp. 1406 (N.D. Cal. 1984).
77. See supra text accompanying note 61.
79. See id. at 752–61; id. at 766 (Douglas, J., dissenting); id. at 773–74 (Stewart, J., joined by Douglas & Brennan, JJ., dissenting).
80. See, e.g., Massachusetts v. Laird, 451 F.2d 26, 34 (1st Cir. 1971); DaCosta v. Laird, 448 F.2d 1368, 1369–70 (2d Cir. 1971).
citizens. Justice Souter, joined by Justice Ginsburg, thought that the AUMF had not in fact authorized the detention of American citizens as required by the statute, which suggested that Hamdi should be released. But the Court would have been deadlocked as to the remedy had he adhered to his view of how to proceed. This was because Justices Scalia and Stevens also believed that Hamdi’s detention was unlawful and that he should be released on habeas corpus, whereas Justice Thomas thought that the executive branch had acted within its authority and therefore would have denied relief. This alignment left four justices in favor of a remand for more formal proceedings, four other justices in favor of releasing Hamdi, and one justice supporting the government’s detention of Hamdi with no need for a more elaborate hearing. To avoid a deadlock, therefore, Justice Souter reluctantly joined the plurality’s remand order.

Hamdi was atypical because that case involved a U.S. citizen who was detained. The vast majority of detainees have been foreign nationals. In *Hamdan v. Rumsfeld*, the Supreme Court ruled that the military commissions that the executive branch had established in the wake of the September 11 attacks had not been authorized by Congress and therefore could not be used to try detainees. A concurring opinion made clear that the president could seek authorization from Congress to use the type of military commissions that had been established unilaterally in this case.

Congress responded to that suggestion by enacting the Military Commissions Act of 2006, which sought to endorse the executive’s detainee policies and to restrict judicial review of detainee cases. In *Boumediene v. Bush*, the Supreme Court again rejected the government’s position. First, the statute did not suspend the writ of habeas corpus, and the executive’s detention policies were not valid. Moreover, the Court held that the military commissions did not meet the requirements of due process and that the executive lacked authority to detain persons under the AUMF. The Court also held that the government’s interpretation of the AUMF was invalid because it was inconsistent with the plain language of the statute.

---

84. 542 U.S. at 545 (Souter, J., joined by Ginsburg, J., concurring in part, dissenting in part, and concurring in the judgment).
85. Id. at 573–74 (Scalia, J., joined by Stevens, J., dissenting).
86. Id. at 579 (Thomas, J., dissenting).
87. Id. at 553 (Souter, J., joined by Ginsburg, J., concurring in part, dissenting in part, and concurring in the judgment).
89. Id. at 593–94.
90. Id. at 636 (Breyer, J., joined by Kennedy, Souter & Ginsburg, JJ., concurring).
habeas corpus. 93 Second, the statutory procedures for hearing cases involving detainees were constitutionally inadequate. 94 At the same time, the Court emphasized that the judiciary should afford some deference to the executive branch in dealing with the dangers of terrorism 95 and should respect the congressional decision to consolidate judicial review of detainee cases in the District of Columbia Circuit. 96

Detainees who have litigated in the lower federal courts in the District of Columbia have not found a sympathetic forum. The U.S. Court of Appeals for the D.C. Circuit has not upheld a single district court ruling that granted any sort of relief to detainees, and the Supreme Court has denied certiorari in every post- Boumediene detainee case in which review was sought. 97 In only one case involving a detainee has the D.C. Circuit granted relief, and that case came up from a military commission following procedural changes adopted in the wake of Boumediene. 98 About a month after this symposium took place, in Hamdan v. United States 99 the court overturned a conviction for providing material support for terrorism. The defendant was the same person who successfully challenged the original military commissions in Hamdan v. Rumsfeld. 100 This very recent ruling emphasized that the statute under which he was prosecuted did not apply to offenses committed before its enactment. 101 It remains to be seen how broadly the decision will apply.

93. Id. at 771.
94. Id. at 795.
95. Id. at 796–97.
96. Id. at 795–96.
100. See supra notes 88–90 and accompanying text.
101. Hamdan, 696 F.3d at 1241, 1247. Hamdan was prosecuted under the Military Commissions Act of 2006, see supra note 91 and accompanying text, some of the procedural provisions of which were rejected in Boumediene, see supra notes 92–94 and accompanying text. The substantive provisions of the statute were not at issue and remained intact after Boumediene. In its recent ruling, the D.C. Circuit sought to
Meanwhile, other challenges to post-2001 terrorism policies also have failed, and the Supreme Court has declined to review those rulings as well. For example, the lower courts have rebuffed claims asserted by foreign nationals who were subject to extraordinary rendition. In *Arar v. Ashcroft*, the U.S. Court of Appeals for the Second Circuit affirmed the dismissal of constitutional and statutory challenges brought by a plaintiff holding dual citizenship in Canada and the United States. And in *Mohamed v. Jeppesen Dataplan, Inc.*, the U.S. Court of Appeals for the Ninth Circuit held that the state-secrets privilege barred a separate challenge to extraordinary rendition brought by citizens of Egypt, Morocco, Ethiopia, Iraq, and Yemen. Unlike *Arar*, in which the defendants were federal officials, this case was filed against a private corporation that allegedly assisted in transporting the plaintiffs to overseas locations where they were subjected to torture. Although at least four judges on the en banc courts dissented from both rulings, the Supreme Court declined to review either case.

### III. THE BENEFITS OF POLITICAL RESOLUTION OF INTERBRANCH DISPUTES

Whatever the merits of the decisions discussed in the previous section, those rulings should give pause to those who might rely on avoidance any constitutional infirmities that might arise under the Ex Post Facto Clause, U.S. Const. art. I, § 9, cl. 3, by narrowly construing the scope of the 2006 statute so as to exclude conduct that occurred before its passage. The conduct that gave rise to the charges against Hamdan occurred between 1996 and 2001. 696 F.3d at 1241.

102. 585 F.3d 559 (2d Cir. 2009) (en banc), cert. denied, 130 S. Ct. 3409 (2010).


104. 614 F.3d 1070 (9th Cir. 2010) (en banc), cert. denied, 131 S. Ct. 2442 (2011).


106. *Arar*, 585 F.3d at 567.


108. *Arar* was a 7–4 ruling. See 585 F.3d at 562. The vote in *Mohamed* was 6–5. See 614 F.3d at 1073, 1093.

109. See supra notes 102 & 104 (citing the denial of certiorari in both cases). For criticism of these decisions, see Daniel Joseph Natalie, Note, *No Longer Secret: Overcoming the State Secrets Doctrine to Explore Meaningful Remedies for Victims of Extraordinary Rendition*, 62 CASE W. RES. L. REV. 1237 (2012).
the judiciary as a check on what they regard as executive overreaching. When combined with the procedural and jurisdictional obstacles discussed in Part I, a more general lesson emerges: the judiciary cannot resolve all the questions that might arise in connection with war powers and foreign affairs. Nonetheless, the substantive and procedural limitations of judicial review provide an opportunity for greater civic and political engagement in decisions that can have profound consequences for our nation and the world.

If the courts cannot resolve these matters, questions of war and diplomacy, it should come as no surprise that they are getting worked out largely through political accommodation and negotiation. These accommodations and negotiations necessarily reflect the differing constitutional views of the legislative and executive branches as well as of the persons and groups that engage on these issues. Although many lament the quality of current political discourse, excessive reliance on the judicial process has undesirable consequences. The Supreme Court has had difficulty rendering consistent or principled decisions about legislative-executive relationships. 110 Sometimes the Court has taken a formalistic approach that emphasizes the need to maintain clear lines between the branches. 111 At other times, the Court has used a functional approach that emphasizes the importance of checks and balances to prevent the accumulation of excessive power in any particular branch. 112 In other words, judicial review does not always provide clear answers to complex questions.

The complexity of those questions is particularly evident in the military and diplomatic arenas. Reliance on the political process recognizes the uncertainties and contingencies involved in many of


111. E.g., Bowsher v. Synar, 478 U.S. 714 (1986) (holding that Congress may not assign executive functions to the Comptroller General because that official is subject to removal by Congress even though no Comptroller General had been removed or even threatened with removal since the position was created); INS v. Chadha, 462 U.S. 919 (1983) (invalidating the legislative veto because disapproval of agency decisions required Congress to pass a bill that complies with the bicameralism and presentment requirements of Article I, section 7 of the Constitution).

112. E.g., Morrison v. Olson, 487 U.S. 654 (1988) (upholding the validity of the independent counsel as a mechanism for investigating and prosecuting serious criminal conduct by high-level executive officials on the theory that the Department of Justice, as part of the executive branch, might have a conflict of interest in such matters); Humphrey’s Ex’r v. United States, 295 U.S. 602 (1935) (upholding a limitation on the President’s ability to remove a member of an independent agency).
these matters. Moreover, interbranch negotiation rather than litigation recognizes that an effective government requires a degree of comity that is inconsistent with frequent reliance on the judiciary. Our system rests on a rich set of subtle understandings and an implicit sense of political limits. As a result, structural and institutional factors often dampen the inevitable conflicts that arise between Congress and the president. Excessive reliance on the judiciary tends to raise the stakes of conflict by clearly identifying winners and losers and by encouraging the assertion of extreme positions for short-term litigation advantage that might complicate the resolution of future disagreements.

In addition, the litigation process takes time. Of course, the Pentagon Papers case was resolved in less than three weeks after the New York Times published its first article on the subject. Ordinarily, however, the judicial process proceeds at a much statelier pace. Consider another landmark case, albeit one that dealt with domestic issues. Cooper v. Aaron was decided approximately one year after President Eisenhower dispatched federal troops to enforce the desegregation of Little Rock Central High School in the face of massive resistance encouraged by Arkansas Governor Orval Faubus. Often, disputes over military and diplomatic matters are time-sensitive. Expedited judicial review might help, but events on the ground might well frustrate orderly judicial disposition.

Let me close with some points of clarification. Although I am skeptical about the value of judicial review of disputes about war powers and foreign affairs, I do not advocate that they be treated as political questions and therefore outside the purview of the courts. I offer no doctrinal bright lines for determining which cases should be resolved on the merits through litigation. Nor, in advocating less

119. See id. at 4 (summarizing the chronology of events in court); id. at 11–12 (summarizing the chronology of events in Little Rock).
reliance on lawsuits, do I exaggerate the quality of political discourse in the United States. But that is hardly a new concern. More than a century ago the legendary Chicago saloonkeeper, Mr. Dooley, observed that “politics ain’t beanbag.”120 Some things never change.

I end as I began. We cannot count on the legal process to resolve the debate about war powers and foreign affairs. Many potential lawsuits will founder on the shoals of jurisdiction and procedure. And for those who believe that the executive has accumulated excessive power in these fields, the judicial record of modesty and deference militates against relying on the courts to rein in the president. In short, most of the time we must leave issues of war and foreign affairs largely to our politicians.

120. Finley Peter Dunne, Mr. Dooley: In Peace and in War xiii (1898).