

2011

Judicial Review as Soft Power: How the Courts Can Help Us Win the Post-9/11 Conflict

Dawinder S. Sidhu

Follow this and additional works at: <http://digitalcommons.wcl.american.edu/nslb>

Recommended Citation

Sidhu, Dawinder S. "Judicial Review as Soft Power: How the Courts Can Help Us Win the Post-9/11 Conflict," American University National Security Law Brief, Vol. 1, No. 1 (2011).

Available at: <http://digitalcommons.wcl.american.edu/nslb/vol1/iss1/4>

This Article is brought to you for free and open access by the Washington College of Law Journals & Law Reviews at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in American University National Security Law Brief by an authorized administrator of Digital Commons @ American University Washington College of Law. For more information, please contact fbrown@wcl.american.edu.

JUDICIAL REVIEW AS SOFT POWER: HOW THE COURTS CAN HELP US WIN THE POST-9/11 CONFLICT

DAWINDER S. SIDHU*

The following is undisputed: on September 11, 2001, nineteen men hijacked four commercial planes, crashing them into the World Trade Center in New York, the Pentagon in Virginia, and a field in rural Pennsylvania.¹ Almost 3,000 innocents were killed in the process.² “Americans will never forget the devastation wrought by these acts,” Justice John Paul Stevens observed.³ Al Qaeda—a network of Islamic radicals based in Afghanistan led by Osama bin Laden—claimed responsibility.⁴

* J.D., The George Washington University; M.A., Johns Hopkins University; B.A., University of Pennsylvania. Mr. Sidhu is an attorney whose primary intellectual focus is the relationship between individual rights and heightened national security concerns. He is co-author of *CIVIL RIGHTS IN WARTIME: THE POST-9/11 SIKH EXPERIENCE* (Ashgate). My thanks to the National Security Law Brief staff for improving the quality and readability of this article; Amit Singh Aulakh for his research assistance; and my parents for their love. I also extend my best wishes to this journal as it embarks on its efforts to enrich the legal community’s understanding of pressing wartime issues. I am honored to be part of its inaugural issue. The views expressed herein, and any errors, are mine alone.

1 See NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, *THE 9/11 COMMISSION REPORT* 1-14 (2004) [hereinafter *9/11 COMMISSION REPORT*] (chronicling the activities which occurred on each plane on September 11, 2001).

2 See *id.* at 311 (noting that 2,973 fatalities occurred in the attacks, which were the largest loss of life as a result of a hostile attack in U.S. history) The attacks on the WTC killed 2,749 nonterrorists, including nonterrorist occupants of the aircrafts. The Pentagon attacks killed 184 victims, while forty nonterrorists died in United Flight 93. *Id.* at 311 n.188.

3 *Hamdan v. Rumsfeld*, 548 U.S. 557, 568 (2006).

4 E.g., “Bin Laden Claims Responsibility for 9/11”, FOXNEWS.COM, Oct. 30, 2004, <http://www.foxnews.com/story/0,2933,137095,00.html> (admitting and explaining why he ordered the September 11 attacks).

In response, the nation went to war. More specifically, the attacks triggered a military conflict in which the United States pursued al Qaeda and its Taliban sponsors in Afghanistan.⁵ In short order, the executive branch of the United States approved military plans to quell these closely linked organizations, and U.S.-led coalition forces moved in the vicinity of known al Qaeda strongholds in Afghanistan.⁶ On October 7, 2001, less than a month after 9/11, air strikes and raids began in these regions.⁷

Meanwhile, the United States government speculated as to a nefarious relationship between al Qaeda and Saddam Hussein's Iraqi regime.⁸ The United States, confident of a sufficient evidentiary nexus between the two, commenced its military campaign in Iraq on March 19, 2003.⁹

Fast forward to the present day. In the nine-plus years since 9/11, the United States expended significant resources and lost hundreds of lives in both theatres of war. With respect to Afghanistan, the United States spends roughly \$3.6 billion per month on the war effort,¹⁰ recently sent approximately 30,000 additional troops to the conflict, increasing the grand total of American soldiers there to 100,000,¹¹ and has suffered over 1,000 casualties.¹² With respect to Iraq, the United States

5 See Authorization for the Use of Military Force, Pub. L. 107-40, 115 Stat. 224 (2001) [hereinafter AUMF] (authorizing the President to “use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks” 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); accord George W. Bush, 43rd President of the United States, Address Before a Joint Session of the Congress on the United States Response to the Terrorist Attacks of September 11 (Sept. 20, 2001), available at <http://www.dartmouth.edu/~govdocs/docs/iraq/092001.pdf> (characterizing the attacks as an “act of war” which would not end until “every terrorist group of global reach has been found, stopped, and defeated).

6 E.g., 9/11 COMMISSION REPORT, *supra* note 1, at 337 (approving military plans to attack Afghanistan after meetings with key advisors).

7 *Id.* (planning Operation Enduring Freedom's air strikes and Special Operations attacks, which initiated on October 7).

8 *Id.* at 334 (exploring whether Saddam Hussein's regime maintained any involvement with the September 11 attacks). “[Richard Clarke, an administration counter-terrorism official] has written that on the evening of September 12, President Bush told him and some of his staff to explore possible Iraqi links to 9/11.” *Id.*

9 See George W. Bush, 43rd President of the United States, Address to the Nation Regarding the Invasion of Iraq (Mar. 19, 2003), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2003/03/20030319-17.html> (announcing the opening stages of the war on Iraq).

10 These are according to 2009 figures. CONGRESSIONAL RESEARCH SERVICE, LIBRARY OF CONGRESS, THE COST OF IRAQ, AFGHANISTAN, AND OTHER GLOBAL WAR ON TERROR OPERATIONS SINCE 9/11 22 (Sept. 28, 2009) [hereinafter CRS] (reflecting a \$500 million increase over the \$3.1 billion monthly cost of the Department of Defense's obligations in Fiscal Year 2008).

11 See Barack H. Obama, 44th President of the United States, Remarks by the President in Address to the Nation on the Way Forward in Afghanistan and Pakistan (Dec. 1, 2009), available at <http://www.whitehouse.gov/the-press-office/remarks-president-address-nation-way-forward-afghanistan-and-pakistan> (increasing the U.S. troop deployment to Afghanistan by 30,000); accord David E. Sanger & John F. Burns, *Afghanistan Drawdown to Begin in 2011, Officials Say*, N.Y. TIMES, Dec. 1, 2009, available at http://www.nytimes.com/2009/12/02/world/asia/02policy.html?_r=1&pagewanted=all (calling for a short-term troop increase followed quickly by the beginning of a withdrawal).

12 See iCasualties.org: Operation Enduring Freedom, ICASUALTIES.ORG, Mar. 26, 2010 (last visited Mar. 26, 2010), available at <http://www.icasualties.org/OEF/> (enlarging the total number of U.S. military deaths in Afghanistan to 1,029).

spent \$7.3 billion on the war in FY2009,¹³ had approximately 95,000 of its troops in the area,¹⁴ and lost over 4,000 casualties.¹⁵

The United States' post-9/11 military goals, particularly those in Afghanistan, are proving elusive, despite these burgeoning commitments and these ultimate sacrifices.¹⁶ Admiral Mike Mullen, Chairman of the Joint Chiefs of Staff, described the condition in Afghanistan as "deteriorating," adding that "[Afghanistan] is very vulnerable . . . [to the] Taliban and extremists taking over again, and I don't think that threat's going to go away."¹⁷ President Obama admitted that "the Taliban has gained momentum" and that al Qaeda elements "retain their safe-havens along the border" with Pakistan.¹⁸ As to Iraq, both the American and cooperating Iraqi contingents agree that Islamic terrorists are regaining strength.¹⁹ To be sure, the American effort is not without progress. Though certain milestones have been reached, including the toppling of Hussein and institution of voting democracies in both lands, the terrorists' reach continues. While the United States officially ended its part in Iraq combat operations bringing troops home was not a function of the presence of institutional stability or domestic security, but was rather the product of transfer of responsibility for reaching these goals to the Iraqis themselves.²⁰ In other words, stability and security remains a future

13 CRS, *supra* note 11, at 20 (illustrating how the gradual reversal in the troop surge reduced the monthly cost of the war from \$11.1 billion in FY2008).

14 See Yochi J. Dreazen, *U.S. Will Slow Iraq Pullout If Violence Surges After Vote*, WALL ST. J. ONLINE, Feb. 23, 2010, available at <http://online.wsj.com/article/SB10001424052748704454304575081642107227292.html> (remarking that troop reduction was ahead of schedule, as initial plans estimated that there would be 115,000 troops left in Iraq now).

15 See iCasualties.org: Operation Iraqi Freedom, ICASUALTIES.ORG, Mar. 26, 2010 (last visited Mar. 26, 2010), available at <http://icasualties.org/Iraq/index.aspx/> (increasing the total number of U.S. military deaths in Iraq to 4,386).

16 See THE WHITE HOUSE, WHITE PAPER OF THE INTERAGENCY POLICY GROUP'S REPORT ON U.S. POLICY TOWARDS AFGHANISTAN AND PAKISTAN 1 (Mar. 27, 2009) (defining American goals in Afghanistan to include disrupting terrorist networks in Afghanistan, promoting a more capable and effective government in Afghanistan that serves the Afghan people can eventually function, and developing increasingly self-reliant Afghan security forces that can lead the counterinsurgency and counterterrorism fight with reduced U.S. assistance); Barack H. Obama, 44th President of the United States, *Responsibly Ending the War in Iraq* (Feb. 27, 2009), available at <http://www.whitehouse.gov/the-press-office/remarks-president-barack-obama-ndash-responsibly-ending-war-iraq> (promoting an Iraqi government that is representative, fair and accountable, and one that provides neither support or safe-haven to terrorists, building new ties of trade and economy with the world, and creating a partnership with the government of Iraq that contributes to the peace and security of the region).

17 CNN's State of the Union with John King (television broadcast Aug. 23, 2009) (transcript available at <http://transcripts.cnn.com/TRANSCRIPTS/0908/23/sotu.02.html>) (indicating that the Taliban insurgency has increased their sophistication, efficiency and danger of their attacks).

18 Barack H. Obama, *supra* note 11 (noting that the situation in Afghanistan has been moving backwards for several years).

19 See Ernesto Londoño, *Al-Qaeda in Iraq Regaining Strength*, WASH. POST, Nov. 22, 2009, at A16 (stating that al Qaeda has rebounded recently and is launching a coordinated effort to destroy the Iraqi Government). General Ray Odierno, the top U.S. commander in Iraq, offered that al Qaeda remains "capable of conducting singular high-profile attacks." *Id.*

20 See Jim Michaels, *Military begins last phase in Iraq Combat over; Odierno hands over command*, USA TODAY, Sept. 2, 2010 (with the pullout, Iraqi forces are "to assume responsibility for security."); *Mission Truncated*, ECONOMIST, Sept. 2, 2010 (the pullout simply was a fulfillment of President Obama's "pledge" to "end of our combat mission in Iraq" by August 31, 2010).

prospect and must now be attained by the hands of the Iraqis.²¹

There can be little doubt that military victory overseas, at present, stands beyond the grasp of America's long and powerful arm.²² Perhaps even more sobering is the fact that even if the United States was faring better on the military front, such success would be insufficient to prevail in the war. As the 9/11 Commission noted, al Qaeda "represents an ideological movement, not a finite group of people," akin to a "decentralized force."²³

The American strategy, however, appears to be one based on warfare. Judge Richard A. Posner observed that "we have no strategy for defeating them, only fighting them."²⁴ President Obama's foreign policy objectives in the war have been considered to be "exclusively military" and, on that score, the war "is not going well."²⁵ Put differently, the American efforts appear to be limited in scope and disappointing in that narrow subset of possible action against transnational terrorism.

These facts are beyond dispute—in committing the terrorist atrocities on 9/11, al Qaeda provoked the United States into a war in Afghanistan that was expanded to Iraq. These conflicts are being waged primarily on the military arena, and the achievement of American goals in both arenas has been frustrated despite years of effort, billions of dollars, and the lives of many American soldiers.

What can we do differently? What other instruments are available to the United States such that defeating—not just capably fighting—the terrorists may be a closer prospect? Specifically, how can American law be an advantage to our national security?

This Article seeks to answer these questions. In this Article, I will argue that the American response to Islamic terrorist factions must move outside the military sphere in which battles are fought between arms and men to a more conceptual contest for hearts and minds, where the ammunition in this abstract war will be fundamental American principles, particularly a constitutional commitment to the rule of law, and where advancements in the war will be based on incrementally increased attraction to America. This approach will speak to one's will and conscience in an effort to secure a more lasting respite from the ongoing struggles that have no foreseeable end in sight, have been at-

21 See Michael Christie, *U.S. ends combat in Iraq but instability lingers*, REUTERS, Aug. 30, 2010 ("The U.S. military formally ends combat operations in Iraq on Tuesday as President Barack Obama seeks to fulfill a promise to end the war despite persistent instability and attacks that kill dozens at a time.").

22 See, e.g., A.J. Rossmiller, *Stalemate: Why A Real Counter-insurgency Strategy Is Not Possible in Afghanistan—And Why Politics May Be the Answer*, THE NEW REPUBLIC, Oct 13, 2009, <http://www.tnr.com/article/world/stalemate> (asserting that first, the insurgency lacks the capability to depose the central government or defeat U.S. forces; and, second, U.S. forces do not have the ability to vanquish the insurgency).

23 See 9/11 COMMISSION REPORT, *supra* note 1, at 16 (explaining that the capture or death of bin Laden would do little to stem the creation of a new generation of terrorists).

24 RICHARD A. POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY 5 (2006) (arguing that the success of the 9/11 attacks did more to turn the Muslim world against the West than the vigorous military response to al Qaeda has done to weaken the terrorist movement).

25 Fareed Zakaria, *Obama, the Anti-Churchill?*, WASH. POST, Dec. 7, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/12/06/AR2009120602381.html> (describing Obama's efforts as a focus on reorienting U.S. foreign policy, narrowing the "war on terrorism," increasing bipartisan relationships with key allies and scaling back the conflict with the Islamic world and the Middle East).

tended by suffering and sorrow, and have claimed a growing number of victims on all sides.²⁶

Part I will distinguish between “hard power,” which generally constitutes the ability to attain favorable foreign policy outcomes by way of military force or economic coercion, and “soft power,” defined as the ability to achieve those outcomes by way of attraction.²⁷ Though soft power generally is thought to include a nation’s values, social norms, and culture, academic studies have not fully demonstrated that a nation’s legal dimensions—specifically its legal institutions and adherence to the rule of law—are also a form of soft power.²⁸ This part will attempt to make this showing, citing to aspects of the American constitutional design that may be attractive to people of other communities, including Muslims.²⁹

The legal principles established by the Framers and enshrined in the Constitution are a source of attraction only if we have meaningfully adhered to them in practice. Part II will posit that the Supreme Court’s robust evaluation of cases in the wartime context suggests that the nation has been faithful to the rule of law even in times of national stress. As support, this part will provide examples of cases involving challenges to the American response to wars both before and after 9/11, the discussion of which will exhibit American respect for the rule of law. While the substantive results of some of these cases may be particularly pleasing to Muslims, for instance the extension of habeas protections to detainees in Guantánamo,³⁰ this part will make clear that it is the legal process—not substantive victories for one side or against the government—which is the true source of American legal soft power.

If it is the case that the law may be an element of soft power conceptually and that the use of the legal process has reflected this principle in practice, the conclusion argues that it would benefit American national security for others in the world to be made aware of the American constitutional framework and the judiciary’s activities related to the war. Such information would make it more likely that other nations and peoples, especially moderate Muslims, will be attracted to American interests.

26 See LINDSEY J. BORG, PROGRAM ON INFORMATION RESOURCES POLICY, COMMUNICATING WITH INTENT: THE DEPARTMENT OF DEFENSE AND STRATEGIC COMMUNICATION vii (Feb. 2008), available at: http://pirp.harvard.edu/pubs_pdf/borg/borg-i08-1.pdf (arguing that the “[u]se of a nation’s hard power [i.e. military force or economic coercion] is inadequate as the sole—or even primary — means to address an insurgency”).

27 See JOSEPH S. NYE, JR., BOUND TO LEAD: THE CHANGING NATURE OF AMERICAN POWER 32, 188 (1990) [hereinafter BOUND TO LEAD] (finding that modern trends and changes in political issues are having significant effects on the nature of power and the resources that produce it).

28 See *infra* Part I.B (examining different aspects of the American legal system that may appeal to the Muslim world).

29 See Donald J. Kochan, *The Soft Power and Persuasion of Translations in the War on Terror: Words and Wisdom in the Transformation of Legal Systems*, 110 W. VA. L. REV. 545, 557 (2008) (suggesting that translating the “documents we rely on in the United States for the foundation of our own laws” into Arabic publications may allow us to connect with others and alter their behavior). Kochan, however, does not focus on judicial behavior as a form of soft power, draw out specific elements of American constitutional law that may be particularly attractive in theory, or provide examples, either post-9/11 or otherwise, of how we have lived up to the legal principles in actuality. *Id.*

30 See *Boumediene v. Bush*, 128 S. Ct. 2229, 2275–76 (2008) (entitling the constitutionally guaranteed right of habeas corpus review applies to persons held in Guantánamo and to persons designated as enemy combatants).

This Article thus reaches a conclusion that may seem counterintuitive—that the judicial branch, in the performance of its constitutional duty of judicial review, furthers American national security and foreign policy objectives even when it may happen to strike down executive or legislative arguments for expanded war powers to prosecute the current war on terror and even though the executive and legislature constitute the foreign policy branches of the federal government. In other words, a “loss” for the executive or legislature, may be considered, in truth, a reaffirmation of our constitutional system and therefore a victory for the entire nation in the neglected but necessary post-9/11 war of ideas.³¹ As such, it is the central contention of this Article that the judicial branch is a repository of American soft power and thus a useful tool in the post-9/11 conflict.

Before proceeding, it is important to note what this Article will not do. First, while I will discuss Supreme Court cases as indicating the continued vitality of judicial review in wartime, I will not assess the relative merits of the cases themselves, again as it is the legal process and not the specific results that is important for purposes of this Article. Whether the Supreme Court should have come out another way in a given case will require a comprehensive analysis best suited for a separate forum. Second, this Article does not intend to downplay or second-guess the military efforts undertaken by the United States thus far, including the decision to go in to Iraq.³² This Article argues that a military component, however managed, is part and parcel of the American response to the 9/11 attacks. It aims only to supplement these military efforts by adding a more sophisticated and meaningful tactic to the overall arsenal available to the United States. Third, this Article does not deny that the political landscape in the United States has changed in that the Obama administration is apparently more receptive to the use of diplomacy as a piece of its foreign policy apparatus.³³ But it does not appear that the administration has actually propagated this idea into reality.³⁴

That said, this Article offers more than a theory or idea, but a proposal about how the United States may fulfill its national security needs in an unconventional war of indefinite nature. Any suggestions as to how progress can be achieved such that the war may be brought to an end should be

31 See JOSEPH S. NYE, JR., *SOFT POWER: THE MEANS TO SUCCESS IN WORLD POLITICS* 25 (2004) [hereinafter *SOFT POWER*] (“the means the Bush administration chose . . . did not take enough account of soft power.”). *But see* Jaime Holguin, *Soft Power and Hard Power: CBS’ Charles Wolfson Examines Powell’s Remarks In Davos*, CBSNEWS.COM, Jan. 28, 2003, available at <http://www.cbsnews.com/stories/2003/01/28/opinion/diplomatic/main538320.shtml> (quoting then-Bush administration official Colin Powell as stating, “There comes a time when soft power or talking with evil will not work, where, unfortunately, hard power is the only thing that works”).

32 See Kochan, *supra* note 29, at 557 (championing an argument for simultaneous mix of hard and soft foreign policy rather than advocating against the use of hard power). “[Soft power] is . . . a necessary complement to the hard power of conventional war.” *Id.* at 569.

33 See *Unjust, Unwise, Un-American: Why Terrorist Tribunals Are Wrong*, THE ECONOMIST, July 12, 2003, at 9 (arguing that the Bush Administration’s failure to use civilian courts to try enemy combatants “[blunted] one of America’s most powerful weapons against terrorism). *But cf.* David E. Sanger, *Obama’s Advisers to Back Soft Power*, N.Y. TIMES, Nov. 1, 2008, available at <http://www.nytimes.com/2008/12/01/world/americas/01iht-obama.4.18305735.html> (finding that the Obama administration has signaled some interest in incorporating soft power into its foreign policy regime).

34 See, e.g., Barack H. Obama, 44th President of the United States, *Remarks by the President at the Acceptance of the Nobel Peace Prize*, (Dec. 10, 2009), available at <http://www.whitehouse.gov/the-press-office/remarks-president-acceptance-nobel-peace-prize> (justifying the use of military force [“hard power”] against terrorists, but failing to consider the effect that non-violent means [“soft power”] may have in attaining the same result).

entertained, particularly when it is clear that current and discarded strategies have not been entirely successful. A failure to enrich the universe of national security programs and policies, given the persistent elusiveness of victory, may be tantamount to a willful extension of a multi-theatre campaign necessarily entailing further death and destruction.

The very safety—typified as freedom from further acts of terrorism on U.S. soil that resemble or may dwarf 9/11—of the American people not only hangs in the balance, but is dependent upon our collective ability to embrace strategies that will strengthen our national security by softening the will of our adversaries.

What follows is one such proposed strategy, predicated on our belief in and adherence to the rule of law.

I. SOFT POWER

A. Soft Power Defined

The world is comprised of different peoples, located in various regions, having their own particular languages, cultures, and norms. Some have found it necessary or convenient to constitute themselves into sovereign entities in order to more effectively ensure the welfare and safety of its members, advance collective interests, and regulate certain behavior among the inhabitants, among other things.³⁵

A necessary byproduct of this is the inclination and potential for one sovereign to interact with and influence others.³⁶ John Jay, for example, noted that monarchs are apt to dominate neighboring lands for no “just” reason, but to further their selfish, personal ambitions.³⁷ By contrast, Jay’s more idealistic contemporaries, Thomas Jefferson and James Madison, contemplated a world in which foreign relations would be based on mutual interest as expressed in commerce—such financial pushes and pulls would replace aggression and conflict as the appropriate arena of international intercourse.³⁸

Joseph S. Nye—a former government official who served in the State, National Security, and Defense agencies, and current professor of government and international affairs at Harvard University—made a significant contribution to American political theory by recognizing that foreign influence is not monolithic,³⁹ suggesting specifically that foreign influence spans a spectrum of certain

36 See THE FEDERALIST NOS. 2-4 (John Jay), *supra* note 35, at 5–15 (implying that a united federal government was best suited to resist and handle such influences, that nations impact each other, and that the U.S. was not immune from this reality of a heterogeneous globe).

37 THE FEDERALIST NO. 4 (John Jay), *supra* note 35 (demonstrating that monarchs often wage war for personal reasons, revenge, private ambition or economic enrichment, rather than for the benefit of their nation).

38 See GORDON S. WOOD, REVOLUTIONARY CHARACTERS: WHAT MADE THE FOUNDERS DIFFERENT 168 (2006) (envisioning a world composed of states whose governments were identical with the will of the people, existing in an environment held together by commerce); see also Letter from Thomas Jefferson, to Meriwether Lewis (Aug. 21, 1808), in A JEFFERSON PROFILE: AS REVEALED IN HIS LETTERS 173 (Saul K. Padover ed., 1956) (noting that Jefferson “advocate[ed] commerce as ‘the great engine’ with which to ‘coerce [others]’ into more compliant posture”).

39 See SOFT POWER, *supra* note 31, at 6 (reminding the reader that while “influence” may be based on soft power, it “can also rest on the hard power of threats and payments”).

identifiable resources available to nations and peoples.⁴⁰

On one end is “hard power,” which “is usually associated with tangible resources like military and economic strength.”⁴¹ Coercion is the essence of hard power, a foreign policy characterized by way of the carrot (inducements) and the stick (threats).⁴² “Money and guns” are “the traditional high cards of hard state power,”⁴³ though hard power resources include not only “armed forces” and “economic sanctions,” but also “oil and gas reserves,” and “industrial assets that can be mobilized in an emergency.”⁴⁴

On the other is “soft power,” which generally consists of a nation’s ability to get what it wants “through attraction rather than coercion or payments.”⁴⁵ It tends to be associated with intangible power resources such as an appealing culture, ideology, or institutions.⁴⁶ For example, “democracy,” “listening to others,” “promoting peace and human rights,” are all aspects of soft power.⁴⁷ Whereas hard power is direct, soft power is indirect; whereas hard power generally is unilateral, soft power is less so.⁴⁸

The spectrum analogy may lead to the impression that hard and soft power resources are separate instruments of foreign influence that operate wholly independent of one another. According to Nye, they do not operate in isolation—they are interrelated. For example, despite the significant amount of soft power resources the United States amassed immediately after the tragedies of 9/11, the U.S.’s “stunning” demonstration of hard power in the war on Iraq “was costly for our soft power,” Nye states.⁴⁹ More to the point, he posits that “our neglect of allies and institutions has created a sense of illegitimacy that has squandered our attractiveness,”⁵⁰ and the U.S.’s “overbearing,

40 See *id.* at 7 (characterizing hard and soft power on a related spectrum, as they are both tools to effectuate a result by affecting others’ behaviors); BOUND TO LEAD, *supra* note 27, at 267 n.11 (describing the distinction between hard power and soft power as one of “degree, both in the nature of behavior and the tangibility of the resources”).

41 BOUND TO LEAD, *supra* note 27, at 32 (identifying command power, or the ability to change what others do, with hard power).

42 JOSEPH S. NYE, JR., THE PARADOX OF AMERICAN POWER: WHY THE WORLD’S ONLY SUPERPOWER CAN’T GO IT ALONE 8 (2002) [hereinafter PARADOX] (giving military power and economic coercion as examples of hard power that can induce others to change their viewpoint).

43 *Id.* at 11 (detailing other means like war, coercive diplomacy, economic sanctions and bribes).

44 *Id.* at 8, 11 (determining that although some of these means are strictly governmental or inherently national, many can be transferred to collective control).

45 SOFT POWER, *supra* note 31, at x (arising from the appeal of a country’s “cultural and political ideals”).

46 PARADOX, *supra* note 43, at 11 (illustrating soft power as including its behavior at home, in international institutions, in foreign policy and its cultural behavior).

47 *Id.* at 11 (expressing that soft power does not belong to the government in the same degree as hard power does).

48 See BOUND TO LEAD, *supra* note 27, at 33 (finding that soft power is becoming more important in world politics today than hard power).

49 SOFT POWER, *supra* note 31, at xii (reflecting the idea that creating peace is harder than winning a war, and soft power is essential to creating peace).

50 *Id.* at 147 (identifying the conscious U.S. choice to focus its efforts primarily in the domain of hard power, where it has invested more, trained more and succeeded more).

unilateral” use of hard power “undermines its soft power.”⁵¹ Quite simply, the way in which America used its hard power affected, that is to say drained, its soft power.

Nye argues that hard and soft power are not only related, but are both necessary to achieve desirable international outcomes—in other words, sound foreign policy requires a healthy blend of both hard and soft power. While hard power “will play a role in defeating terrorists,”⁵² by itself it is inadequate to contend with foreign policy matters, particularly transnational terrorism.⁵³ Similarly, soft power is “crucial” to American foreign policy,⁵⁴ but cannot succeed by itself. Rather, “[b]oth hard and soft power will be necessary for successful foreign policy in a global information age.”⁵⁵ That American foreign engagement must stand on two legs is not a theoretical fiction, but a verifiable reality exemplified by the American wartime conduct. In the aftermath of the 9/11 attacks, the United States has relied too heavily on hard power, thereby neglecting soft power.⁵⁶ Over nine years after 9/11, it is evident by the continuing threats to American security domestically and abroad that American dependence on hard power “did not resolve our vulnerability to terrorism.”⁵⁷

Therefore to win the peace—not just win the war—America will need to use soft power as well.⁵⁸ For example, soft power was imperative to American success in the Cold War. This idea is demonstrated quite favorably by a commentator who said, “However important the military power and political promise of the United States were . . . it was the American economic and cultural attraction that really won over the hearts and minds of the majorities of young people for Western democracy.”⁵⁹

Indeed, soft power will not only complement and steady American foreign policy, but may be a more compelling and dependable conduit for positive foreign policy results. In the Internet era es-

51 PARADOX, *supra* note 43, at 39 (specifying that those who recommend a largely hegemonic “hard power” response to foreign policy are relying on woefully inadequate analysis that further harms the U.S.’ ability to be successful in the foreign arena). It is beyond the purposes of this article to verify or challenge Nye’s assessment of the American post-9/11 use of hard power is correct. It is important to note only the more limited principle that there is a relationship between hard and soft power.

52 *Id.* at 7 (writing that ignoring the role of force and the centrality of security would be catastrophic to maintaining peace).

53 *See* SOFT POWER, *supra* note 31, at 15 (contending that the sole use of command and control strategies ignores the use of structural power, which achieves outcomes without making actors change their behavior without threats or payments).

54 PARADOX, *supra* note 43, at 39 (noting that soft power resources, primarily the openness of American society, easily penetrate state actors while enhancing U.S. credibility and attractiveness to the rest of the world).

55 *Id.* (observing that a mix of hard and soft power will be necessary to succeed in the next century).

56 SOFT POWER, *supra* note 31, at 7 (writing that “the U.S. government spends four hundred times more on hard power than on soft power.”).

57 *Id.* at 119 (regarding the military removal Saddam Hussein and his Iraqi regime as only the first step in a long-term transformation of the country that will require economic and political change to keep the country peaceful and free).

58 *Id.* at xii (explaining that getting “others to buy in to your values” is the key foundational step necessary to use soft power effectively).

59 *Id.* at 50 (illustrating that hard power created the stand-off of military containment, but that soft power eroded the Soviet system from within).

pecially, “soft power may prove the more effective sell.”⁶⁰ This is because “seduction is always more effective than coercion, and many values like democracy, human rights, and individual opportunities are deeply seductive.”⁶¹

In short, the theory of soft power dictates that, for America to prevail in its campaign against transnational terrorism, soft power—the ability to attract others—must become a conspicuous component of its foreign policy activities.

B. American Legal Institutions as a Form of Soft Power Generally

For soft power to move from the shadows to a place of prominence in American foreign policy with respect to the national struggle against terrorists, America must first determine what soft power resources are available to it. The universe of American soft power resources is indeed extensive and includes, for example, American popular culture, democracy, support of human rights, and its civic institutions.⁶²

This Article is concerned with the law as an aspect of American soft power. Nye, in almost passing fashion, indicates that the law is subsumed under the banner of soft power.⁶³ But he does not explicitly flesh out the precise features of the law in America that may attract others to our interests. The question therefore arises, what is it about law in America that may serve as soft power?

Before attempting an answer, it is important to identify the audience of any soft power volley in the post-9/11 context. As Nye acknowledges, a prerequisite for the use of soft power is the existence of “willing receivers” of a nation’s particular message.⁶⁴ The core fundamentalists absorbed by their warped take on Islam may be beyond reason and thus may not be receptive to a message on the intangible virtues of the American state. The moderate elements in Afghanistan, Iraq, and neighboring regions, however, may be amenable to persuasion and, if convinced, may be effective agents of the American narrative by subsequently and more meaningfully conveying it to the extremists. With the hardcore fundamentalists presumptively out of the reach of reasonable argument or enticement, “the ability to attract the moderates is critical to victory.”⁶⁵ Therefore, legal soft power must address and convince these moderates.

With the “who” out of the way, the “what” question remains. The rest of this section will

60 *Id.* at 107 (commenting that the information age and its ability to broadcast news and information from multiple sources have changed the efficacy of soft power).

61 *Id.* at x (arguing that soft power can advance U.S. influence further beyond the edge of traditional hard power tactics).

62 PARADOX, *supra* note 43, at 11 (expressing the value of democracy, personal freedom, upward mobility and openness through these resources).

63 *See, e.g.*, SOFT POWER, *supra* note 31, at 12, 15, 119 (mentioning, without significant discussion, how foreign public opinion identifies the American rule of law with soft power resources).

64 *Id.* at 120 (suggesting that cultural barriers are far from insurmountable, as soft power has proven effective in both Europe, a willing receiver, and Japan and South Korea, two countries that had great cultural differences between themselves and the U.S.).

65 *Id.* at 131 (predicting victory only if the U.S. adopts policies that appeal to moderates and more effectively explains our common interests rather than identifies our differences).

identify six fundamental themes in the American constitutional system which may resonate with the moderates in the Muslim world.

The Role of The People

The constituent members of a political community, the people, are generally and increasingly marginalized in the traditionally “autocratic” and “repressive” governmental systems of the Arab world.⁶⁶ By contrast, the people are the sole source of political authority in the United States and exhibit the ability to check the actions of their political representatives.⁶⁷ The government in the United States is a “limited agency of the people—lent out to the various government officials . . . on a short-term, always recallable loan.”⁶⁸ The power of the government is temporary and subject to the consent of the governed, with all non-delegated power reserved to the people.⁶⁹ Moreover, the Constitution operates as the governing document of the United States only because it was ratified by the people⁷⁰ and the federal government has “no power not derived from the Constitution.”⁷¹ The fact that power rests with the people, and that the government holds limited and temporary responsibilities in trust for the people, may be of significant attraction to those with theoretically and/or practically less political control over the direction or welfare of their lives.

Separation of Powers

At “the heart” of the Constitution is the allocation of federal power into three separate, coordinate branches.⁷² The government of the United States is diffused so as to frustrate the ability of the people to be oppressed by its colluding leaders.⁷³ Put differently, “[t]he ultimate purpose of this

66 Cf. Sharon Otterman, *Middle East: Islam and Democracy*, COUNCIL ON FOREIGN RELATIONS, Sept. 19, 2003, available at <http://www.cfr.org/publication/7708/#p3> (citing a Freedom House study that over “the last 30 years ha[s] seen a trend diametrically opposite to the global trend toward political liberalization’ in Muslim nations”). This is particularly true for nations in the Arab world, many of which have taken steps backward in terms of political liberties and electoral democracy in the last 10 years.” *Id.*

67 See THE FEDERALIST NO. 78, at 228 (Alexander Hamilton) (Roy P. Fairfield ed., 1989) (stating that an affirmation of a legislative act enacted contrary to the Constitution “would be to affirm, that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers, may do not only what their powers do not authorize, but what they forbid.”).

68 WOOD, *supra* note 38, at 192 (Penguin Press 2006) (differentiating the U.S. system of governance from monarchies, aristocratic senates and popular democracy).

69 U.S. CONST. amend. X.

70 See, e.g., Letter from James Madison to Henry Lee (Jun. 25, 1824), THE WRITINGS OF JAMES MADISON, 1819–1836, at 191 (Gaillard Hunt ed., 1910) (“I entirely concur in the propriety of resorting to the sense in which the Constitution was accepted and ratified by the nation. In that sense alone it is the legitimate Constitution.”).

71 *Ex Parte Quirin*, 317 U.S. 1, 25 (1942).

72 See *INS v. Chadha*, 462 U.S. 919, 951 (1983).

73 See, e.g., THE FEDERALIST NO. 47, at 140 (James Madison) (Roy Fairfield ed., 1961) (saying that where the same body controls the whole power of more than one department, the fundamental principles of a free constitution are subverted).

separation of powers is to protect the liberty and security of the governed.”⁷⁴ The very design of the government stems from the Framers’ own experience with an overreaching monarch and their attendant concern that a similarly powerful government could infringe upon the rights of the people.⁷⁵ Those in the Muslim world may be inclined to think of the United States as an unrestrained occupying force without regard for those subject to its hegemonic aspirations.⁷⁶ But these individuals may be contented in the knowledge that the United States government from its origins is set up to safeguard and maximize the liberty of the everyday citizen, not to embolden or create an imperial republic.

Substantive Rights

In addition to the structure of the American government, which aims to ensure that the people are free of oppression, the Constitution contains substantive guarantees that explicitly protect the life, liberty, and property of the people.⁷⁷ As some Muslims may be of the view that the target of the current conflicts in Iraq and Afghanistan is Islam (rather than terrorism),⁷⁸ the right that may be of greatest interest to moderate Muslims is the freedom of religion mandated by the First Amendment.⁷⁹ The freedom of an individual to practice his or her faith according to the dictates of conscience alone, and free of government interference, is a core American right.⁸⁰ As with the concept of the separation of powers, religious liberty enjoys a special place in American society precisely be-

74 *Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 272 (1991).

75 *See Boumediene v. Bush*, 128 S. Ct. 2229, 2246 (2008) (describing the Framers’ “inherent distrust of governmental power” as the primary force behind the separation of powers).

76 *See, e.g.*, MICHAEL SCHEUER, IMPERIAL HUBRIS: WHY THE WEST IS LOSING THE WAR ON TERROR 213 (2004) (suggesting that before 2003, it was only a far-fetched dream for Bin Laden that “Muslims would see each day on television that the United States was occupying a Muslim country, insisting that made-man [sic] laws replace God’s revealed word, stealing Iraqi oil, and paving the way for the creation of a ‘Greater Israel.’”).

77 *See e.g.* U.S. CONST. amend. I (freedom of religion, speech, press and assembly); U.S. CONST. amend. IV (freedom from unreasonable searches and seizures); U.S. CONST. amend. V (due process, double jeopardy, self-incrimination, eminent domain); U.S. CONST. amend. VI (trial by jury and rights of the accused, Confrontation Clause, speedy trial, public trial, right to counsel); U.S. CONST. amend. VIII (prohibition of excessive bail and cruel and unusual punishment).

78 It is this belief that seems to have contributed to the Fort Hood shooting in which a Muslim, Major Nidal Malik Hasan, an Army psychiatrist, indiscriminately killed fellow soldiers about to deploy for a tour of duty overseas. *See* Justin Blum, *Hasan Called War on Terror an Attack on Islam, Classmate Says*, BLOOMBERG.COM, Nov. 7, 2009, <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=a0OrWS8lBtNg> (reporting that classmates of Hasan claimed that he called the U.S. war on terror “a war against Islam”, and that he “was always concerned that Muslims in the military were being persecuted.”).

79 *See* U.S. CONST. amend. I (“Congress shall make no law . . . prohibiting the free exercise of [religion.]”)

80 *See School Dist. of Abington v. Schempp*, 374 U.S. 203, 226 (1963) (recognizing that religion’s role in society is an “exalted one”, and that it is not within the government’s power to invade this arena); *Buckley v. Valeo*, 424 U.S. 1, 93 n.127 (1976) (“[R]eligious worship both in method and belief must be strictly protected from government intervention.”).

cause of the Framers' unfavorable experience with religious intolerance,⁸¹ which may strike a special chord with some Muslims who have endured injustice or who perceive hostility due to their holding of particular religious beliefs.⁸²

Value of Diverse Views

Similarly, that people with different interests and passions, including religious ideologies, would be part of the United States was a factual reality not only contemplated but embraced by the Framers. In Federalist No. 10, one of the bedrock statements of American political theory,⁸³ James Madison argued that a nation of increasingly heterogeneous people would make it less likely that any one such group, or "faction," would be able to dominate or oppress the rest.⁸⁴ Diversity of interests to the Framers was not simply a matter of tolerance, but was seen as a pragmatic advantage of the extended American republic.⁸⁵ Accordingly, the United States, from the outset and at least in principle, can be considered an earnest bastion for diverse peoples, including the religious.⁸⁶

Judicial Review

The courts are a vehicle through which the people may seek to stop and seek redress for infringements on individual rights, including religious freedom.⁸⁷ "The evidence is overwhelming," scholar Michael W. McConnell notes, that the "framers and ratifiers understood and intended the

81 See *Bowen v. Roy*, 476 U.S. 693, 703 (1986) (remarking that "historical instances of religious persecution and intolerance . . . gave concern to those who drafted the Free Exercise Clause . . ."); *Douglas v. Jeannette*, 319 U.S. 157, 179 (1943) (Jackson, J., concurring in result) (explaining that "the First Amendment separately mention[s] free exercise of religion" due to "[t]he history of religious persecution . . .").

82 The religious strife amongst Muslims and those in the Muslim world are perhaps best exemplified by the historic situation in Iraq. See Michael J. Frank, *Justice for Iraq, Justice for All*, 57 OKLA. L. REV. 303, 308 (2004) (recounting some of the atrocities committed by the Sunni-majority in Iraq as including "oppression of the Shiites, genocide against the Kurds, torture and systematic rape of the citizenry, [and] testing biological weapons on prisoners of war . . ."). Such religious-based conduct is not limited to Iraq. E.g., U.S. DEP'T OF STATE, INTERNATIONAL RELIGIOUS FREEDOM REPORT 2009, available at <http://www.state.gov/g/drl/rls/irf/2009/index.htm> (recording the status of respect for religious freedom in all countries during the period from July 1, 2008 to June 30, 2009).

83 See Frank H. Easterbrook, *Abstraction and Authority*, 59 U. CHI. L. REV. 349, 378 (1992) (calling *Federalist* No. 10 "perhaps the greatest document of political theory penned on this side of the Atlantic"); see also WOOD, *supra* note 38, at 161 ("*Federalist* No. 10 has become the most famous document in the history of American political thought").

84 See THE FEDERALIST NO. 10 (James Madison), *supra* note 73, at 22–23 (arguing that larger the variety of parties and interests, the less likely a majority of the whole will have the ability to invade the rights of other citizens).

85 See *id.* (finding this diversity of interests to be a "republican remedy" for the afflictions affecting most democratic governments).

86 As an example of such religious inclusion, Thomas Jefferson stated, "I write with freedom because, while I claim a right to believe in one God, I yield as freely to others that of believing in three." Jon Meacham, AMERICAN GOSPEL: GOD, THE FOUNDING FATHERS, AND THE MAKING OF A NATION 75 (2006).

87 See 1 *Annals of Cong.* 457 (J. Gales ed. 1790) (noting that Madison believed that independent tribunals would be the guardian of the rights guaranteed by the Bill of Rights, acting as an impenetrable wall against every assumption of power by the legislative or the executive).

courts to engage in constitutional judicial review” of actions that may be thought to contravene the solemn boundaries of the separation of powers or the substantive mandates of the American governing documents.⁸⁸ This is particularly so when the religious rights of the people are implicated by such challenged governmental or private action.⁸⁹ As Justice Sandra Day O’Connor wrote, “Our Founders conceived of a Republic receptive to voluntary religious expression, and provided for the possibility of judicial intervention when government action threatens or impedes such expression.” The judiciary engages in and completes its review of cases independently, that is “on the basis of law and facts, not extraneous matters,” such as influence from other organs of the government or pressure from the people.⁹⁰

The “Great Wall”

The writ of habeas corpus enables an individual to challenge the factual basis and legality of his detention,⁹¹ activating the judiciary’s review function in the separation of powers scheme.⁹² Because the writ acts to secure individual liberty by way of the judicial checking of unlawful executive detentions, the writ has been regarded as a bulwark of liberty. The Supreme Court has observed, for example, that “There is no higher duty of a court, under our constitutional system, than the careful processing and adjudication of petitions for writs of habeas corpus”⁹³ The writ is seen as a vital aspect of American jurisprudence, and an essential element of the law since the time of the Framers.⁹⁴

88 Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1445 n.186 (1990) (viewing the judiciary as the empowerment of the individual against the power of the state and wanting to secure its independence to achieve that end).

89 See *McCreary County, Ky. v. ACLU of Ky.*, 545 U.S. 844, 883 (2005) (O’Connor, J., concurring).

90 *A Conversation About Judicial Independence and Impartiality*, 89 JUDICATURE 339, 341 (2006) (statement of Shirley Abrahamson, Wis. C.J.); see *id.* at 339 (statement of Sandra Day O’Connor, J.) (asserting that “an independent judiciary is an impenetrable bulwark against every assumption of power in the legislative or executive [I]f you believe, as Madison and I do, that the courts are important guardians of constitutionally guaranteed freedoms in our common law system, you know the system breaks down without judicial independence.”).

91 See *Harris v. Nelson*, 394 U.S. 286, 290–91 (1969) (calling the writ “the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action.”).

92 The writ of habeas corpus has served as a means of reviewing the legality of Executive detention and it is in that context that its protections have been strongest. *INS v. St. Cyr*, 533 U.S. 289, 301 (2001). See also Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 HARV. L. REV. 2029, 2032 (2007) (arguing that the habeas corpus is a mechanism which requires that no other branch of government illegally detain an individual, even during wartime).

93 *Harris*, 394 U.S. at 292.

94 The language of Congress, the history of the writ, the decisions of this Court, all make clear that the power of inquiry on federal habeas corpus is plenary. *Townsend v. Sain*, 372 U.S. 293, 312 (1963), *overruled by Keeney v. Tamayo-Reyes*, 504 U.S. 1, 5 (1992), *superseded by statute*, Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, *as recognized in Evan v. Thompson*, 465 F. Supp. 2d 62, 83 (D. Mass. 2006) (Insofar as Townsend held that the deliberate bypass standard is applicable in determining whether a federal habeas corpus petitioner is entitled to an evidentiary hearing on a claim that material facts were not adequately developed in state court proceedings, will be overruled by the Supreme Court).

The United States is a conspicuous actor in the world theater, subject to the interests and inclinations of other players, and possessing a similar, natural desire to shape the global community in a manner most favorable to its own objects. The tendency to attempt to influence others is an inevitable symptom of international heterogeneity and, at present, the United States is mired in an epic battle with fundamentalists bent on using terrorism as a means to repel,⁹⁵ if not destroy, America.⁹⁶

American success in foreign policy depends on the internal assets available to and usable by the United States, including its soft power. The law in America is an aspect of its national soft power. In particular, the moderates in the Muslim world—the intended audience of America’s soft power—may find attractive the American constitutional system of governance in which 1) the people are the sovereign and the government consists of merely temporary and recallable agents of the people, 2) federal power is diffused so as to diminish the possibility that any branch of the government, or any of them acting in tandem, can infringe upon the liberty of the people, 3) structural protections notwithstanding, the people are entitled to certain substantive rights including the right to be free of governmental interference with respect to religious exercise, 4) the diversity of interests inherent in its populace is considered a critical safeguard against the ability of a majority group to oppress the minority constituents, 5) the courts are to ensure that the people’s rights to life, liberty, and property are not abridged, according to law, by the government or others, and 6) individuals deprived of liberty have available to them the writ of habeas corpus to invoke the judiciary’s checking function as to executive detention decisions.

The Constitution, in the eyes of Judge Learned Hand, is “the best political document ever made.”⁹⁷ If the aforementioned constitutional principles are part of the closest approximation to a just and reasoned society produced by man, surely they may have some persuasive appeal to the rest of the world, including moderate Muslims who generally live in areas less respectful of minority rights and religious pluralism.

Such reverence is to be expected and warranted only if the United States has remained true to these constitutional principles in practice, and in particular, in its behavior in the aftermath of the 9/11 attacks, when national stress is heightened and the option of deviating from such values in favor of an expedient “law of necessity” similarly tempting.⁹⁸

The extent to which the United States has remained true to itself as a nation of laws—and thus may credibly claim such legal soft power—is the subject of the next section.

II. THE COURTS AND SOFT POWER

95 See EXECUTIVE SUMMARY, 9/11 COMMISSION REPORT, *supra* note 1, at 2–3 (noting that Osama bin Laden and others issued a directive to operatives to kill Americans because of the United States’ “‘occupation’ of Islam’s holy places and aggression against Muslims.”).

96 See Michael Chertoff, *Lam, Loyalty, and Terror: Our Legal Response to the Post-9-11 World*, WKLY. STANDARD, Dec. 1, 2003, at 15 (“[al Qaeda’s] proclaimed goal, however unrealistic, was to destroy the United States.”).

97 LEARNED HAND, *THE SPIRIT OF LIBERTY* 252 (Irving Dillard ed., 1960).

98 POSNER, *supra* note 26, at 70 (postulating that in the face of national emergencies, including the post-9/11 world in which we live, there is a “law of necessity” that “supersedes” the “law of the Constitution.”); *id.* at 158 (defining the “law of necessity” as not a “law” but the “trumping of law by necessity.”).

The Judiciary In Wartime

The United States has been charged with being unfaithful to its own laws and values in its prosecution of the post-9/11 campaign against transnational terrorism. With respect to its conduct outside of the United States, following 9/11, America has been alleged to have tortured captured individuals in violation of its domestic and international legal obligations,⁹⁹ and detained individuals indefinitely without basic legal protections.¹⁰⁰ Closer to home, the United States is thought to have profiled Muslims, Arabs, and South Asians in airports and other settings,¹⁰¹ conducted immigration sweeps targeting Muslims,¹⁰² and engaged in mass preventative detention of Muslims in the United States,¹⁰³ among other things.

These are serious claims. The mere perception that they bear any resemblance to the truth undoubtedly impairs the way in which the United States is viewed by Muslims around the world, including Muslim-Americans, and thus diminishes the United States' soft power resources.¹⁰⁴ The degree to which they are valid degrades the ability of the United States to argue persuasively that it

99 See, e.g., Marcy Strauss, *The Lessons of Abu Ghraib*, 66 OHIO ST. L.J. 1269, 1296 (2005) (“The Bush administration in a variety of ways conveyed at least an implicit approval of the use of interrogation tactics that at their worst crossed the line into torture, and at best constituted cruel and inhumane treatment. Singly or in combination, the Administration’s refusal to acknowledge abusive practices for years, its production of memoranda consistently embracing a possible use of torture, its approval of severe tactics in Guantanamo, its failure to cabin those tactics to that location, and its practice of rendering terrorist suspects to other countries for aggressive questioning all conveyed a coherent message that was not lost on anyone: do what you need to get the information necessary to win the war on terror and the war in Iraq, and pay no heed to domestic or international law.”).

100 See, e.g., Kermit Roosevelt III, *Detention and Interrogation in the Post-9/11 World*, 42 SUFFOLK U. L. REV. 1, 23 (2008) (explaining that the Military Commissions Act, passed by Congress after 9/11, “authorizes the Executive to seize individuals, including lawful residents of the United States, and to detain and interrogate them indefinitely without access to courts.”).

101 See, e.g., Muneer I. Ahmad, *A Rage Shared by Law: Post-September 11 Racial Violence as Crimes of Passion*, 92 CAL. L. REV. 1259, 1267–70 (2004) (chronicling “‘public’ racial violence” against these groups).

102 See, e.g., Adam B. Cox & Eric A. Posner, *The Second-Order Structure of Immigration Law*, 59 STAN. L. REV. 809, 810 (2007) (“In the immediate aftermath of the attacks, federal officials conducted sweeps in which they rounded up over a thousand noncitizens” where “[n]early all of these noncitizens were from predominantly Muslim countries.”).

103 See, e.g., David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 960 (2002) (asserting that “a feature of the government’s response to the attacks of September 11 has been its campaign of mass preventive detention,” in which 1,147 individuals were detained by November of 2001).

104 See e.g. Deborah Ramirez & Stephanie Woldenberg, *Balancing Security and Liberty in a Post-September 11th World: The Search for Common Sense in Domestic Counterterrorism Policy*, 14 TEMP. POL. & CIV. RTS. L. REV. 495, 495 (2005) (arguing that “racial profiling of Arabs and Muslims does not make operational sense because it fails to help in narrowing down a list of potential terrorist subjects and succeeds only in alienating . . . the largely untapped linguistic and cultural expertise that the Arab and Muslim communities can bring to the table with law enforcement in a joint effort to prevent future acts of terrorism.”); Susan M. Akram & Maritza Karmely, *Immigration and Constitutional Consequences of Post-9/11 Policies Involving Arabs and Muslims in the United States: Is Alienage A Distinction without a Difference?*, 38 U.C. DAVIS L. REV. 609, 671 (2005) (concluding that “discrimination inherent in racial and religious profiling alienates Arabs and Muslims in the United States . . . inexorably leads[ing] to grievances that may ultimately result in violent acts against the government[.] Government authorities themselves have indicated that alienating the very communities whose cooperation is needed for vital information on the ‘war on terror’ is counterproductive.”).

not only touts the rule of law, but exhibits actual fidelity to the law in times of crisis.

These claims relate to conduct of the executive and/or the legislature in the aftermath of the 9/11 attacks. This Article is concerned, however, with the judiciary, that is whether the courts have upheld the rule of law in the post-9/11 context—and thus whether the courts may be a source of soft power today (even if the other branches have engaged, or are alleged to have engaged, in conduct that is illegal or unwise).

As to the courts, it is my contention that the judiciary has been faithful to the rule of law after 9/11 and as such should be considered a positive instrument of American soft power. Prior to discussing post-9/11 cases supporting this contention, it is important to provide a historical backdrop to relationship between the courts and wartime situations because judicial decision-making in cases implicating the wars in Afghanistan and Iraq does not take occur on a blank slate, despite the unique and modern circumstances of the post-9/11 conflict.

The Constitution provides that “[t]he privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”¹⁰⁵ In *Ex Parte Merryman*, the Supreme Court was confronted with the question of whether President Abraham Lincoln’s suspension of the writ of the habeas corpus, which was a response to unrest in and around Baltimore, was lawful.¹⁰⁶ The Court ruled that as Congress, not the Executive, possesses the power to suspend the writ, Lincoln’s actions were unconstitutional.¹⁰⁷ “That the president, under the constitution of the United States, cannot suspend the privilege of the writ of habeas corpus, nor authorize a military officer to do it.”¹⁰⁸

In *Ex parte Milligan*, which also concerned Executive action during the Civil War, the Court assessed the constitutionality of the military tribunals created by President Lincoln to try Southern sympathizers in the North.¹⁰⁹ The Court recognized that “[n]o graver question was ever considered by this court, nor one which more nearly concerns the rights of the whole people,” than whether the tribunal possessed “the legal power and authority” to punish Lamdin P. Milligan, a citizen of the United States, resident and citizen of the State of Indiana, and suspected Southern supporter.¹¹⁰ The Court held that Milligan’s military trial was unconstitutional—“[m]artial rule can never exist where courts are open, and in the proper and unobstructed exercise of their jurisdiction.”¹¹¹ The Court acknowledged the wartime context in which the military tribunals were established and the general national distress generated by the Civil War, but stated nonetheless that the “Constitution

105 U.S. CONST. art. I, § 9; see Daniel Michael, *The Military Commissions Act of 2006*, 44 HARV. J. ON LEGIS. 473, 481 (2006) (distinguishing between “the two forms of habeas corpus—first the statutory right embodied in 28 U.S.C. § 2241 (which the jurisdiction-stripping provision amends), and second, “the privilege of the Writ of Habeas Corpus,” one of the few constitutional rights enshrined by the Framers in the original Constitution of 1787.”) (quoting U.S. CONST. art. I, § 9).

106 *Ex parte Merryman*, 17 F. Cas. 144 (C.D. Md. 1861) (No. 9487).

107 *See id.* at 148.

108 *See id.* at 147.

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

110 *Id.* at 118–19 (emphasis removed).

111 *Id.* at 127.

of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances.”¹¹²

In another wartime context, World War II, the Supreme Court decided in *Ex parte Quirin* whether President Franklin D. Roosevelt’s could try in a military tribunal eight German saboteurs captured on American soil during the war.¹¹³ The Court determined that the military tribunals constituted for this purpose were constitutional.¹¹⁴ Critically, Congress “explicitly provided” for the tribunals by law.¹¹⁵ FDR, according to the Court, simply “invoked that law” and “exercise[d] the authority conferred upon him by Congress” in instructing the trials to be performed “by the military arm of the nation in time of war.”¹¹⁶

World War II triggered two other Supreme Court cases that are nothing if not infamous: *Hirabayashi v. United States*¹¹⁷ and *Korematsu v. United States*.¹¹⁸ Following the Japanese attack on Pearl Harbor, FDR issued an executive order,¹¹⁹ ratified by Congress, designating areas of exclusion and imposing curfew requirements applicable to persons of Japanese ancestry.¹²⁰ Gordon Hirabayashi, an American citizen of Japanese ancestry, was convicted of violating the order and subsequently contested the constitutionality of the restrictions.¹²¹ The Court, acknowledging the racial undertones of the case, upheld the government conduct in question, observing that, “[w]e cannot close our eyes to the fact, demonstrated by experience, that in time of war residents having ethnic affiliations with an invading enemy may be a greater source of danger than those of a different ancestry.”¹²²

In *Korematsu*, Fred Korematsu, a natural-born United States citizen of Japanese ancestry, challenged the forced exclusion and removal of individuals of Japanese ancestry from locations on the West Coast into Internment camps, actions made pursuant to the same executive order at issue in *Hirabayashi*.¹²³ The Supreme Court similarly found constitutional this particular application of the executive order.¹²⁴ The Court rejected claims that the internment was premised on racial animus towards the Japanese, explaining instead that Korematsu 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

112 *Id.* at 120–21.

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

114 *See id.* at 44–45.

115 *Id.* at 28.

116 *Id.*

117 *Hirabayashi v. United States*, 320 U.S. 81 (1943).

118 *Korematsu v. United States*, 323 U.S. 214 (1943).

119 Exec. Order No. 9066, 7 C.F.R. 1407 (Feb. 19, 1942).

120 *See Hirabayashi*, 320 U.S. 81.

121 *See id.*

122 *Id.* at 101.

123 *See Korematsu*, 323 U.S. 214.

124 *See id.* at 217–18 (explaining that in light of its decision in *Hirabayashi*, the Court is unable to find it beyond the war power of Congress and the Executive to exclude citizens of Japanese ancestry from the West Coast war area).

the West Coast temporarily[.]¹²⁵

Following the end of the active hostilities in World War II, the Court agreed to decide whether it had jurisdiction over habeas petitions filed by twenty-one German nationals detained in Germany and convicted by American military commissions of violating the laws of war.¹²⁶ In *Johnson v. Eisentrager*, the Court held that constitutional habeas rights did not extend to these nationals because they were detained in an Allied prison outside of the sovereign *de jure* jurisdiction of the United States—“in extending constitutional protections beyond the citizenry, the Court has been at pains to point out that it was the alien’s presence within its territorial jurisdiction that gave the Judiciary power to act.”¹²⁷

The last wartime case of greatest consequence prior to 9/11 is *Youngstown Sheet & Tube Co. v. Sawyer*, which concerned whether President Harry Truman could, in the context of a military conflict in Korea, permissibly issue an executive order¹²⁸ directing the Secretary of Commerce to seize steel mills during the course of a labor dispute at said mills in order to ensure the continued availability of steel.¹²⁹ The Court answered in the negative, stating that the President lacked the unilateral authority to act in this fashion.¹³⁰ While the reasoning of the Court was splintered, it is generally regarded that Justice Jackson’s concurrence contains the operative legal principle pertaining to the legitimacy of presidential wartime action.¹³¹ Justice Jackson wrote that “[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum,”¹³² “[w]hen the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers,”¹³³ and “[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb[.]”¹³⁴

It may be fair to say that these notable wartime cases have produced “mixed” results. If one was to view these cases through the non-government/government prism, some cases appear to reject robust government projections of authority (e.g., *Ex Parte Merryman*), while others have sanctioned government action based on the coordinated support of the other federal branches (e.g., *Ex parte Quirin*). Others who may opt for a binary civil libertarian vs. security hawk perspective similarly may find that the Supreme Court has protected individual/private rights in some instances (e.g., *Youngstown Sheet*), while others may be pleased that the Court has pragmatically deferred to military

125 *Id.* at 223.

126 *See Johnson v. Eisentrager*, 339 U.S. 763 (1950).

127 *Id.* at 771.

128 Exec. Order No. 10340, 17 C.F.R. 3139 (Apr. 8, 1952).

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

130 *See id.* at 635 (Jackson, J., concurring) (noting that “[p]residential powers are not fixed, but fluctuate, depending upon their disjunction or conjunction with those of Congress.”).

131 Harold H. Bruff, *Judicial Review and the President’s Statutory Powers*, 68 VA. L. REV. 1, 12 (1982) (considering Justice Jackson’s Steel Seizure concurrence to have “most influenced” the analysis on the relationship between presidential power and Congress) (citing *Dames & Moore v. Regan*, 453 U.S. 654, 661 (1981) (noting that the opinion has brought together “as much combination of analysis and common sense as there is in this area[.]”)).

132 *Youngstown Sheet*, 343 U.S. at 635 (Jackson, J., concurring).

133 *Id.* at 637 (Jackson, J., concurring).

134 *Id.* (Jackson, J., concurring).

necessity over the individual (e.g., *Korematsu*). In terms of the rule of law, the Court indicated that the civil courts may hear wartime cases when open (e.g., *Ex parte Milligan*), yet the Court has also left individuals outside of Article III courts altogether (e.g., *Eisentrager*). The results of these cases are thus “mixed” in the sense that no one “side” has a monopoly over the Court’s wartime decision-making.

If it is the case that the Court’s behavior in cases arising in the context of war, as a historical matter, has been varied, what of the Court’s wartime cases from the post-9/11 era? The Court’s resolution of seminal cases implicating governmental power and individual rights in the aftermath of the post-9/11 attacks is the subject of the next section.¹³⁵

The Judiciary in the Post-9/11 Context

On September 18, 2001, a week after the attacks, Congress enacted into law the Authorization for Use of Military Force (AUMF), which authorized the President to “use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks” 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.”¹³⁶ President George W. Bush invoked this congressionally-supplied authority to, among other things, deploy “Armed Forces into Afghanistan to wage a military campaign against al Qaeda and the Taliban regime that had supported it.”¹³⁷

On one day, June 28, 2004, the Supreme Court issued the first three decisions respecting the government’s actions under the AUMF. The first case, *Rumsfeld v. Padilla*, was set in motion by President Bush’s order, issued pursuant to the AUMF, to then-Secretary of Defense Donald Rumsfeld to designate Jose Padilla an “enemy combatant.”¹³⁸ Padilla, a United States citizen, was captured in Chicago’s O’Hare Airport on the charge of being an alleged material witness to terrorism and was subsequently detained in a naval brig in Charleston, South Carolina.¹³⁹ After Padilla was transferred, his counsel filed a 28 U.S.C. § 2241 habeas petition in the Southern District of New York, naming President Bush, Secretary Rumsfeld, and the commander of the brig as respondents.¹⁴⁰ The government moved to dismiss the petition, arguing that, as a habeas petition is to be filed against the peti-

135 As with the pre-9/11 cases, the following discussion of these post-9/11 cases is not intended to be comprehensive or normative -- rather it is to serve the simple purpose of informing the reader of the basic nature, substance, and outcome of these cases with a degree of specificity to permit the reader to appreciate the contents of judicial review and the interplay of various elements of legal soft power.

136 Authorization for Use of Military Force, Pub. L. No. 107-40, § 2, 115 Stat. 224, 224 (2001).

137 *Rasul v. Bush*, 542 U.S. 466, 470 (2004).

138 *Rumsfeld v. Padilla*, 542 U.S. 426, 431 (2004). See generally William Haynes, Memorandum on Enemy Combatants, COUNCIL ON FOREIGN RELATIONS (Dec. 12, 2002), available at <http://www.cfr.org/publication.html?id=5312> (explaining that “[a]n ‘enemy combatant’ is an individual who, under the laws and customs of war, may be detained for the duration of an armed conflict. In the current conflict with al Qaida and the Taliban, the term includes a member, agent, or associate of al Qaida or the Taliban.”).

139 See *Padilla*, 542 U.S. at 432.

140 See *id.*

tioner's custodian,¹⁴¹ the brig commander was the only proper respondent and that the commander is located outside of the jurisdiction of the Southern District of New York.¹⁴² The government further contended that, even assuming that the district court in New York has jurisdiction over the commander, President Bush has the authority to detain Padilla in the brig under the AUMF.¹⁴³

The district court determined that Rumsfeld was a sufficient custodian because of his involvement in the detention and that the court could assert jurisdiction over Rumsfeld under New York's long-arm statute, but as to the merits, President Bush has the authority to hold Padilla in military custody on the naval brig.¹⁴⁴ The U.S. Court of Appeals for the Second Circuit agreed with the district court's jurisdictional conclusion, but held that the President was without the constitutional or statutory power to authorize the military detention of an American citizen captured on American soil.¹⁴⁵

The Supreme Court reversed. The Court explained that, as a habeas petition is to be directed against the person with the power to physically produce a petitioner in custody (much like a jailer or warden),¹⁴⁶ the commander of the brig at which Padilla was being held is the only proper respondent in this action.¹⁴⁷ The Court rejected Padilla's argument that the district court in New York retained jurisdiction over Padilla on the grounds that "Padilla was moved from New York to South Carolina before his lawyer filed a habeas petition on his behalf."¹⁴⁸ The Court further noted that, because the petition could be filed only against the brig commander, jurisdiction lies in the district of confinement.¹⁴⁹ Taking these two principles together, the Court held that, "Whenever a § 2241 habeas petitioner seeks to challenge his present physical custody within the United States, he should name his warden as respondent and file the petition in the district of confinement."¹⁵⁰ In other words, Padilla should have brought the habeas action in South Carolina, not the Southern District of New York.¹⁵¹ Accordingly, the Court dismissed the petition for want of jurisdiction and declined to address the merits question of whether the President possessed the authority to detain Padilla, saving it for another case.

In *Rasul v. Bush*, fourteen Kuwaitis and Australians—captured during the Afghanistan conflict

141 See 28 U.S.C. § 2243 ("The writ, or order to show cause shall be directed to the person having custody of the person detained."); see also 28 U.S.C. § 2242 ("It shall allege the facts concerning the applicant's commitment or detention, the name of the person who has custody over him[.]").

142 See *Padilla*, 542 U.S. at 432.

143 See *id.*

144 See *id.* at 432–33.

145 See *id.* at 433–34.

146 See *id.* at 434–36.

147 See *id.* at 442 (finding that the brig commander was Padilla's custodian and thus the proper respondent to Padilla's habeas petition).

148 *Id.* at 441.

149 See *id.* at 443 (finding that "the Great Writ is issuable only in the district of confinement.") (quoting *Carbo v. United States*, 364 U.S. 611, 618 (1961)).

150 *Id.* at 447.

151 See *id.* at 450–51 (holding that "[t]he District of South Carolina, not the Southern District of New York, was the district court in which Padilla should have brought his habeas petition.").

and detained in Guantánamo without charge or hearing—filed writs of habeas corpus pursuant to Section 2241 in which they challenged the basis of their detention and argued that they did not commit any wrongdoing related to the conflict in Afghanistan.¹⁵² The touchstone of the legal dispute was whether federal courts had jurisdiction to review statutory habeas petitions filed by aliens held in Guantánamo.¹⁵³ The statutory writ of habeas corpus was created by Congress and is codified at 28 U.S.C. § 2241, as distinct from the constitutional writ, which derives from the Constitution’s express declaration that “The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”¹⁵⁴ The district court and U.S. Court of Appeals for the D.C. Circuit determined that they did not have jurisdiction to hear writs filed by those in Guantánamo, relying on *Eisentrager* for the proposition that statutory habeas rights do not extend to aliens detained outside of the sovereign *de jure* territory of the United States.¹⁵⁵

The Supreme Court reversed, clarifying that *Eisentrager* does not categorically restrict statutory habeas jurisdiction to situations in which a detainee is located within the territorial jurisdiction of the United States.¹⁵⁶ Instead, the Court held, federal courts’ statutory habeas jurisdiction extends to the formal territorial borders and may also reach places over which the United States exercises plenary and exclusive control.¹⁵⁷ Here, habeas runs because the United States exerts “‘complete jurisdiction and control’ over the Guantanamo Bay Naval Base, and may continue to exercise such control permanently if it so chooses.”¹⁵⁸ Moreover, the Court made clear that statutory habeas protections may be sought by citizens as well as foreign nationals held in federal custody.¹⁵⁹ As no party disputed that the district court in question had jurisdiction over the custodians,¹⁶⁰ the central issue in *Padilla*, the Court found that the Section 2241 petition could be heard.

Whereas *Padilla* and *Rasul* dealt with jurisdiction, the third case, *Hamdi v. Rumsfeld*, spoke to process. This case was brought by Yaser Hamdi, who was captured in the course of the American campaign against al-Qaeda in Afghanistan and who challenged whether he could be indefinitely detained

152 See *Rasul*, 542 U.S. at 470–72.

153 *Id.* at 542 U.S. 470 (“[this case] present[s] the narrow but important question whether United States courts lack jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at the Guantanamo Bay Naval Base, Cuba466.”).

154 U.S. CONST. art. I, § 9; see Daniel Michael, *The Military Commissions Act of 2006*, 44 HARV. J. ON LEGIS. 473, 481 (2006) (distinguishing between “the two forms of habeas corpus—first the statutory right embodied in 28 U.S.C. § 2241 (which the jurisdiction-stripping provision amends), and second, “the privilege of the Writ of Habeas Corpus,’ one of the few constitutional rights enshrined by the Framers in the original Constitution of 1787.”) (quoting U.S. CONST. art. I, § 9).

155 See *Rasul*, 542 U.S. at 472–73 (citing *Rasul v. Bush*, 215 F.Supp.2d 55, 68 (D.D.C. 2002); *al Odah v. Bush*, 321 F.3d 1134, 1144 (D.C. Cir. 2003)).

156 See *id.* at 478–79.

157 See *id.* at 481–82 (noting that, historically, habeas extends to “all other dominions under the sovereign’s control.”).

158 *Id.* at 480 (citation omitted).

159 See *id.* at 481 (finding that “there is little reason to think that Congress intended the geographical coverage of the statute to vary depending on the detainee’s citizenship. Aliens held at the base, no less than American citizens, are entitled to invoke the federal courts’ authority under § 2241.”).

160 See *id.* at 483 (noting that “[n]o party questions the District Court’s jurisdiction over petitioners’ custodians.”).

without the opportunity to contest the basis of his detention.¹⁶¹ The factual circumstances surrounding Hamdi's detention differed from those present in *Rasul* in that Hamdi was designated by the government as an "enemy combatant," was an American citizen, and was initially held in Guantánamo but transferred to the territorial United States (specifically, a naval brig in Charleston, South Carolina) upon the government learning that Hamdi was a citizen.¹⁶² Hamdi's father filed a Section 2241 habeas petition on his son's behalf, claiming that Hamdi was in Afghanistan for humanitarian purposes and was not involved with any fighting related to al-Qaeda.¹⁶³ The question thus became what process, if any, should be afforded to "a United States citizen on United States soil [labeled] an 'enemy combatant[.]'"¹⁶⁴

The district court ordered the government to turn over certain materials which the court deemed "were necessary for 'meaningful judicial review' of whether Hamdi's detention was legally authorized and whether Hamdi had received sufficient process[.]"¹⁶⁵ The U.S. Court of Appeals for the Fourth Circuit reversed, stating that, as "Hamdi was captured in a zone of active combat in a foreign theater of conflict,' no factual inquiry or evidentiary hearing allowing Hamdi to be heard or to rebut the Government's assertions was necessary or proper."¹⁶⁶ Drawing on *Ex Parte Quirin*, the circuit court stated that Hamdi's American citizenship and American detention location did not affect this constitutional conclusion because Hamdi was "present in a zone of active combat operations[.]"¹⁶⁷ With respect to the courts' role, the circuit court noted that, because the Constitution did not assign specific war powers to federal courts,¹⁶⁸ "separation of powers principles prohibited a federal court from 'delving further into Hamdi's status and capture.'"¹⁶⁹ In any case, the circuit court added, Congress had authorized detentions of this sort as the "necessary and appropriate force referenced in the [AUMF] necessarily includes the capture and detention of any and all hostile forces arrayed against our troops."¹⁷⁰

On review, the Supreme Court first accepted the government's position and agreed with the Fourth Circuit "that Congress has in fact authorized Hamdi's detention, through the AUMF[.]"¹⁷¹ It also acknowledged, citing to *Ex Parte Quirin*, that "[t]here is no bar to this Nation's holding one of its own citizens as an enemy combatant,"¹⁷² and distinguished *Ex Parte Milligan* on the grounds that Milligan was not a prisoner of war, whereas here Hamdi is alleged to have raised arms against the

161 *Hamdi*, 542 U.S. 507 (2004).

162 *See id.* at 510–11.

163 *See id.* at 511–12.

164 *Id.* at 509.

165 *Id.* at 514–15 (citation omitted).

166 *Id.* (quoting *Hamdi v. Rumsfeld*, 316 F.3d 450, 459 (4th Cir. 2003)).

167 *Id.* at 516 (quoting *Hamdi*, 316 F.3d at 475).

168 *See id.* at 514–15; *Hamdi v. Rumsfeld*, 316 F.3d 450, 459 (4th Cir. 2003), *cert. granted*, 540 U.S. 1099 (2004), *vacated*, 542 U.S. 507 (2004).*Hamdi*, 316 F.3d at 463.

169 *Hamdi*, 542 U.S. at 515 (quoting *Hamdi*, 316 F.3d at 473) (brackets removed).

170 *Id.* (quoting *Hamdi*, 316 F.3d at 467) (internal quotes omitted).

171 *Id.* at 517.

172 *Id.* at 519.

United States.¹⁷³

The Court insisted that even if the underlying detention may be congressionally authorized, “there remains the question of what process is constitutionally due to a citizen who disputes his enemy–combatant status.”¹⁷⁴ On this point, the Court held that “due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decision-maker.”¹⁷⁵ Put differently, “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 decision-maker.”¹⁷⁶

With respect to Hamdi’s specific circumstances, the Court held that he “received no process” – that is, his being interrogated by his captors fell short of the “constitutionally adequate factfinding before a neutral decision-maker.”¹⁷⁷ As to judicial review in this area more generally, the Court left open the possibility that process “could be met by an appropriately authorized and properly constituted military tribunal.”¹⁷⁸

Finally, the Court rebuked the Fourth Circuit’s suggestion that the Constitution did not contemplate a war powers function for the federal courts. The Court, citing to *Youngstown Sheet*, noted that, “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.”¹⁷⁹ Further, “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.”¹⁸⁰ More to the point, the Court stated that “the Great Writ of habeas corpus allows the Judicial Branch to play a necessary role in maintaining this delicate balance of governance, serving as an important judicial check on the Executive’s discretion in the realm of detentions.”¹⁸¹

Following the 2004 Term, the Supreme Court issued a landmark opinion in *Hamdan v. Rumsfeld*,¹⁸² which has been called the “the most important decision on presidential power and the

173 See *id.* at 521–22 (explaining that in *Milligan*, the Court’s decision was based in large part on the fact that Milligan was an Indiana resident arrested in his home and, had Milligan been captured while carrying arms against Union troops, the Court’s holding may have been different) (citation omitted); *id.* at 22 n.1 (reiterating that in the instant case, “the basis for detention by the military is that Hamdi was carrying a weapon against American troops on a foreign battlefield; that is, that he was an enemy combatant.”).

174 *Id.* at 524.

175 *Id.* at 509.

176 *Id.* at 533.

177 *Id.* at 537.

178 *Id.* at 538.

179 *Id.* at 536 (citing *Youngstown Sheet*, 343 U.S. at 587).

180 *Id.*

181 *Id.*

182 *Hamdan*, 548 U.S. 557 (2006).

rule of law ever.”¹⁸³ The Court addressed the question left open by *Hamdi*, namely whether the military commissions established by the Executive to try “enemy combatants” comport with the law, specifically in this case the Uniform Code of Military Justice (UCMJ)¹⁸⁴ and the Geneva Conventions.¹⁸⁵ The case was brought by Salim Hamdan—a Yemeni national alleged to have been a driver and bodyguard for Osama bin Laden—who was captured in Afghanistan, detained in Guantánamo, and designated by President Bush as an “enemy combatant” triable by military commission.¹⁸⁶ Following the decision to subject Hamdan to a military commission, Hamdan’s military counsel made demands pursuant to the UCMJ.¹⁸⁷ The convened military authorities determined, however, that Hamdan was not entitled to the protections of the UCMJ.¹⁸⁸ Hamdan filed a habeas petition after which formal charges were lodged by the government.¹⁸⁹

The district court granted Hamdan’s petition, stayed Hamdan’s military commission proceedings, and ruled, in part, that “the military commission convened to try him was established in violation of both the UCMJ and Common Article 3 of the Third Geneva Convention because it had the power to convict based on evidence the accused would never see or hear.”¹⁹⁰ The U.S. Court of Appeals for the D.C. Circuit reversed—while it entertained the habeas petition, it rejected the district court’s conclusions that Hamdan could invoke Common Article 3 and that the military commissions violated the UCMJ and the Geneva Conventions.¹⁹¹

In 2005, the Supreme Court granted certiorari.¹⁹² In 2006, Congress enacted the Detainee Treatment Act (DTA), which, in part, divested federal courts of jurisdiction to hear habeas petitions filed by aliens held in Guantánamo.¹⁹³ The government therefore sought to dismiss the writ of certiorari on the grounds that the Supreme Court lacked jurisdiction to review the circuit court’s decision.¹⁹⁴ The Court denied the government’s motion, reasoning that the jurisdiction-stripping provision of

183 Jenny S. Martinez, *Process and Substance in the “War on Terror,”* 108 COLUM. L. REV. 1013, 1054 (2008) (quoting Walter Dellinger, *The Most Important Decision on Presidential Power. Ever.*, SLATE, June 29, 2006, available at <http://www.slate.com/id/2144476/entry/2144825/>); see Ernest A. Young, *The Constitution Outside the Constitution*, 117 YALE L.J. 408, 436 (2007) (stating that “[*Hamdan*] “may be the most important separation-of-powers decision in a generation.”).

184 10 U.S.C. §§ 801–946 *et seq.* (2006).

185 Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 T.I.A.S. No. 3364, Feb. 2, 1956 [hereinafter “Geneva Convention”].

186 See *Hamdan*, 548 U.S. at 566–69 (noting that Hamdan’s status was determined by the President on July 3, 2003 under the November 13, 2001 “Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism” Order).

187 See *id.* at 569 (noting that Hamdan was appointed counsel in December 2003).

188 See *id.*

189 See *id.* (remarking that the Government did not charge Hamdan with a crime until a year after his initial determination under the November 13, 2001 Order).

190 See *id.* at 571.

191 See *id.* at 571–72 (commenting that the U.S. Court of Appeals for the D.C. Circuit did not find the Geneva Conventions as “judicially enforceable” treaties).

192 *Hamdan v. Rumsfeld*, 546 U.S. 1002 (2005).

193 Detainee Treatment Act of 2005, Pub.L. No. 109-148, 119 Stat. 2739.

194 See *Hamdan*, 548 U.S. at 576–77.

the DTA did not, by its own terms, apply retroactively and thus to Hamdan's petition.¹⁹⁵ The government next contended that, even if the Court had jurisdiction, principles of comity require the Court to await the outcome of the military commission prior to hearing Hamdan's challenges to the commission itself.¹⁹⁶ The Court declined the government's invitation to hold off—the military commissions, the Court held, were insufficiently constituted to evoke comity considerations generally accorded other judicial bodies and the parties possess a compelling interest in knowing in advance whether the military commissions were legally adequate.¹⁹⁷

The Court therefore turned to the crux of the case—whether the military commissions established by the President were lawful.¹⁹⁸ The Court noted that Congress merely referenced, but not did expressly authorize, the President's ability to convene Hamdan's military commission.¹⁹⁹ Accordingly, the Court inquired as to whether the military commissions were nonetheless authorized by the Constitution and laws of the United States.²⁰⁰ Military commissions, the Court explained, are proper if it premised on military necessity and, specifically if it is convened as an incident to war and to determine, factually, if an adversary has transgressed the law of war in an active theatre of war.²⁰¹ The Court determined that, in this case, Hamdan is charged with conspiracy, however conspiracy is not a violation of the law of war and, in any case, Hamdan is not alleged to have committed a recognized violation in a theatre of war.²⁰²

Further, the Court ruled, the commissions themselves are not consistent with American legal obligations. Specifically, the military commissions' procedural and evidentiary rules for defendants are weaker than those mandated by UCMJ courts-martial and these differences are not justified by any military exigencies or practical needs.²⁰³ The Court also found that the conflict with al-Qaeda is sufficient to trigger Common Article 3, which requires trials of adversaries to be conducted by “regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”²⁰⁴ As the commissions materially deviated from the regularly constituted courts-martial, the commissions fell short of the minimum requirements demanded by Common

195 See *id.* at 575–84 (finding evidence that Congress deliberately intended the jurisdiction-stripping provisions to not apply to pending cases because of “deliberate omissions” in the text of the act).

196 See *id.* at 584–85.

197 See *id.* at 585–90 (distinguishing Hamdan's case from *Councilman* because Hamdan does not involve the unique position of an established military court proceeding involving a member of the United States armed forces).

198 See *id.* at 595.

199 See *id.* at 591–95 (remarking that the Supreme Court does not answer the question whether the President can convene military commissions without Congress's approval in exceptional circumstances).

200 See *Hamdan*, 548 U.S. at 595–96 (noting that there is little precedent on the legality of military commissions because few examples of military commissions have existed in the past and only in exceptional circumstances).

201 See *id.* at 596–97 (naming this precedent as the “law-of-war” model based on *Quirin* and *Yamashita*).

202 See *id.* at 599–600 (“The offense [the commission] alleges is not triable by law-of-war military commission.”).

203 See *id.* at 613–24 (commenting on the careful balance that needs to be struck between adequate procedures and the “true exigenc[ies]” which exist in times of war).

204 *Id.* at 631–32 (quoting Geneva Convention, Art. 3, ¶ 1 (d), 6 U.S.T. at 3320).

Article 3.²⁰⁵ To fill the gap, the Court added, Hamdan must be present for his trial and privy to the evidence against him.²⁰⁶ The Court therefore concluded that the military commissions convened by the Executive must comply with the law, however the particular commissions convened the President Bush to try Hamdan violated both the UCMJ and Geneva Conventions.²⁰⁷

The Supreme Court's next major foray into the post-9/11 wartime cases came the 2008 case of *Boumediene v. Bush*.²⁰⁸ While *Rasul* determined that federal courts have jurisdiction to hear Section 2241 habeas petitions filed by aliens imprisoned in Guantánamo, *Boumediene* resolved whether certain aliens—determined to be “enemy combatants” by the government and held in Guantánamo—are entitled to the constitutional habeas privilege.²⁰⁹ District court judges were split on the issue.²¹⁰ Congress subsequently passed, in response to the Court's ruling in *Hamdan* that the DTA did not apply retroactively, the Military Commissions Act (MCA)²¹¹, which stripped the federal courts of jurisdiction to hear habeas petitions filed by aliens held in Guantánamo, including those petitions that were pending at the time of the MCA's enactment.²¹² The U.S. Court of Appeals for the D.C. Circuit, which the MCA provided with exclusive jurisdiction to review enemy combatant determinations, held that the MCA denied to federal courts jurisdiction over the petitioners' habeas challenges and that the petitioners were not entitled to constitutional habeas protections.²¹³

The Supreme Court's approach to the case may be summarized with the following framework: under the Suspension Clause of the Constitution, the constitutional habeas privilege applies unless formally suspended;²¹⁴ the MCA deprives the Court of habeas jurisdiction, but the parties do not dispute that the MCA is not a formal suspension of the privilege;²¹⁵ accordingly, the MCA is unconstitutional as applied to the petitioners if the petitioners are entitled to the constitutional habeas

205 See *id.* at 631–34 (noting that although the Geneva Conventions do not define what minimum requirements constitute, minimum requirements must include the essential trial protections under customary international law).

206 See *id.* at 634 (“Common Article 3 obviously tolerates a great degree of flexibility in trying individuals captured during armed conflicts; its requirements are general ones . . . [b]ut *requirements* they are nonetheless.”).

207 See *id.* at 635.

208 *Boumediene*, 128 S. Ct. 2229.

209 See *id.* at 2240 (noting that subject to exceptions under the Suspension Clause, habeas corpus should not be withdrawn).

210 See *Khalid v. Bush*, 355 F. Supp. 2d 311 (D. D.C. 2005) (holding that petitioners' rights could not be vindicated by way of constitutional habeas instrument); *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 481 (D.D.C. 2005) (holding that petitioners were entitled to due process rights).

211 See Military Commissions Act, § 7(a)(1), codified as 28 U.S.C. § 2241(e)(1).

212 See *Boumediene*, 128 S.Ct. at 2241–42.

213 See *id.* at 2242 (noting that the circuit court determination did not reach the question of whether the DTA provided an adequate substitute for habeas corpus because it found that the petitions were not entitled constitutional habeas protections under the Suspension Clause); see also *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007) (circuit court ruling).

214 See U.S. CONST. art. I, § 9 (“The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”).

215 See *Boumediene*, 128 S. Ct. at 2262 (“The MCA does not purport to be a formal suspension of the writ; and the Government, in its submissions to us, has not argued that it is.”).

privilege.²¹⁶ While the government argued that habeas is limited to the territorial borders and areas over which the United States retains *de jure* sovereignty, the Court concluded that the habeas privilege extends to the detainees held in Guantánamo²¹⁷ because the United States exercises *de facto* control over Guantánamo.²¹⁸ As a result, under the Court’s functional analysis, the petitioners may invoke the habeas privilege, and the MCA is unconstitutional as applied to them because it does not formally suspend the habeas privilege in conformance with the Suspension Clause.²¹⁹ The Court also held that the DTA’s review procedures were an inadequate substitute for habeas review given the circumscribed factfinding role, evidentiary limitations, and adversarial structure of the DTA tribunals.²²⁰

In the last full-term, OT 2009, the Supreme Court issued *Ashcroft v. Iqbal*, a case which touched upon the legality of profiling in the national security context and qualified immunity for government officials accused of wrongdoing in post-9/11 investigative or security activities.²²¹ The case was brought by a Muslim—a Pakistani national arrested in weeks after 9/11 for charges related to identity theft and thereafter housed in a detention facility in New York—alleging that he was mistreated, segregated and placed in a highly restrictive prison unit simply because of his race, religion, and national origin, and not because of any tie to terrorism.²²² John Ashcroft, then-Attorney General, and Robert Mueller, Director of the Federal Bureau of Investigation, were named as defendants for allegedly designing the discriminatory policy that the plaintiff alleges he was mistreated under, and at a minimum, for approving the discriminatory behavior of their subordinates.²²³ These high-level government officials moved to dismiss, arguing that the plaintiff’s complaint insufficiently detailed

216 See *id.* at 2244 (asking “whether petitioners are barred from seeking the writ or invoking the protections of the Suspension Clause[.]”); *id.* at 2248 (describing “the specific question before” the Court has “whether foreign nationals, apprehended and detained in distant countries during a time of serious threats to our Nation’s security, may assert the privilege of the writ and seek its protection.”).

217 See *Boumediene*, 128 S. Ct. at 2262 (noting that this case “lack[s] any precise historical parallel” and therefore the fact that the Court has never held that “noncitizens detained by our Government in territory over which another country maintains de jure sovereignty have any rights under our Constitution” is not dispositive).

218 See *id.* at 2248 (suggesting that federal courts may hear “a petition for a writ of habeas corpus brought by a prisoner deemed an enemy combatant . . . when held in a territory, like Guantanamo, over which the Government has total military and civil control.”); *id.* at 2258 (“questions of extraterritoriality turn on objective factors and practical concerns, not formalism.”); *id.* at 2261 (holding that the writ extended to the petitioners in Guantánamo because of the “plenary control the United States asserts over the base”). The Court distinguished the present facts with those present in *Eisentrager*, as in that case “the United States’ control over the prison in Germany was neither absolute nor indefinite.” *Id.* at 2260.

219 See *id.* at 2262 (“We hold that Art. I, § 9, cl. 2, of the Constitution has full effect at Guantanamo Bay. If the privilege of habeas corpus is to be denied to the detainees now before us, Congress must act in accordance with the requirements of the Suspension Clause. . . . The MCA does not purport to be a formal suspension of the writ. . . . Petitioners, therefore, are entitled to the privilege of habeas corpus to challenge the legality of their detention.”).

220 See *id.* at 2274 (noting that the Supreme Court did not find it necessary to reach “the claims of unlawful conditions of treatment or confinement” at Guantanamo Bay).

221 *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009).

222 See *id.* at 1943–44 (alleging jailors physically assaulted and strip searched him without justification and would also not let him pray).

223 See *id.* at 1944 (alleging Ashcroft as the principle designer of the policy and Mueller as the primary promoter of the implementation of the policy).

any direct wrongdoing on their part to overcome their entitlement to qualified immunity.²²⁴ The district court denied the motion, and the circuit court affirmed on appeal.²²⁵

The Supreme Court reversed. With respect to the adequacy of the allegations, the Court held that they were either “bald assertions” not entitled to an assumption of truth²²⁶ or are simply not “plausible” even if accepted as true.²²⁷ In the course of doing so, the Court found unremarkable the possibility that the government would target Muslims in the wake of the 9/11 attacks:

The September 11 attacks were perpetrated by 19 Arab Muslim hijackers who counted themselves members in good standing of al Qaeda, an Islamic fundamentalist group. Al Qaeda was headed by another Arab Muslim—Osama bin Laden—and composed in large part of his Arab Muslim disciples. It should come as no surprise that a legitimate policy directing law enforcement to arrest and detain individuals because of their suspected link to the attacks would produce a disparate, incidental impact on Arab Muslims, even though the purpose of the policy was to target neither Arabs nor Muslims. On the facts respondent alleges the arrests Mueller oversaw were likely lawful and justified by his nondiscriminatory intent to detain aliens who were illegally present in the United States and who had potential connections to those who committed terrorist acts.²²⁸

The targeting of Muslims was, the Court found, consistent with lawful conduct and thus the plaintiff had not sufficiently alleged actionable acts by the defendants at the pleadings stage.²²⁹

Borrowing the same analytical devices used to examine the pre-9/11 cases, it would appear that the results of the post-9/11 are similarly “mixed.” The Supreme Court ruled in favor of the government in some cases (e.g., *Padilla*), but not in others (e.g., *Rasul*). Civil libertarians may be inclined to celebrate cases like *Hamdi*, while national security hawks *Iqbal*. With respect to the rule of law, the Court solidified the expanded scope of habeas protections in *Rasul* and *Boumediene*, but placed certain cases outside of the reach of judicial review, at least as they were plead, in *Padilla* and *Iqbal*.

If the intended audience of any legal soft power is moderate Muslims, another layer of assessment may be added, namely whether Muslim plaintiffs or petitioners were successful in their cases before the Supreme Court. On this score, the results, again, resist uniformity. Specifically, Muslims prevailed in *Rasul*, *Hamdi*, *Hamdan*, and *Boumediene*, but were rebuffed in *Padilla* and *Iqbal*. While *Padilla* was a “loss” on jurisdictional grounds, *Iqbal* is far more problematic, as I have aggressively suggested elsewhere, in large part because the Court effectively sanitized blanket profiling in a man-

224 *See id.*

225 *See id.* at 1944–45.

226 *Id.* at 1951; *see id.* (“It is the conclusory nature of respondent’s allegations, rather than their extravagantly fanciful nature, that disentitles them to the presumption of truth.”).

227 *Id.* at 1951 (“Taken as true, these allegations are consistent with petitioners’ purposefully designating detainees “of high interest” because of their race, religion, or national origin. But given more likely explanations, they do not plausibly establish this purpose.”).

228 *Id.*

229 *See id.* at 1951–52.

ner eerily similar of *Korematsu*.²³⁰

The Message to Moderate Muslims

If it is the case that the Court itself did not rule in favor of Muslim interests in post-9/11 cases, and at least in one case appears to be quite hostile to or dismissive of Muslim claims of discrimination, how can American judicial review serve to attract moderate Muslims to the United States? Simply, because the essence and allure of judicial review is the legitimate and peaceful process itself—not the substantive outcomes of particular cases. For example, libertarians, civil libertarians, rule of law advocates, and Muslims may be particularly pleased with the decision handed down in *Hamdan* because a Muslim detainee prevailed against the government. But in the context of legal soft power, *Hamdan* must be viewed as an affirmation of the American principle of judicial review and the American constitutional design more generally, as well as a reflection of other vital legal values, including the separation of powers and the limited authority of the federal government.

Indeed, Hamdan’s lead counsel, Neal Katyal -- perhaps the one person aside from Hamdan with the greatest reason to be especially pleased with the substantive outcome of the Court’s decision—reminded individuals just one day after the opinion was handed down that *Hamdan* was not a victory for one party, but ultimately a tribute to the American system of laws and thus to America:

[On] the lesson of the decision more generally. . . . I had hoped that when we won that the administration would just take a deep breath and think to themselves, ‘well this is actually something great about America.’

Presidents make mistakes. . . . I don’t think that this [decision] is a rebuke to the Bush administration per se; I think the Founders anticipated that presidents are going to push their power. But, what’s great about America, it seems to me, is that we have a court system . . . that checks the President and allows this guy [Hamdan]—a fourth-grade educated Yemini accused of conspiring with one of the worst individuals on the planet, Osama bin Laden—[to] sue the . . . world’s highest, most powerful official, the President of the United States, and says ‘you’re doing something illegal to me, you’re violating your own basic laws.’

What other nation on earth allows people to do that? It’s a great thing about America. We should be celebrating it, I think, and I think the administration should celebrate it as well because it says that we’re different.²³¹

It is this in this same spirit that the judiciary’s post-9/11 activities should be adjudged and exposed for foreign policy purposes. Hamdan happened to be victorious in his case, but there can be little doubt that in each of the other post-9/11 cases discussed here the litigants went through the same open process in which impartial judges, bound by known procedures and precedents, attempt-

230 See Dawinder S. Sidhu, *First Korematsu and Now Ashcroft v. Iqbal: The Latest Chapter in the Wartime Supreme Court’s Disregard for Claims of Discrimination*, 58 BUFF. L. REV. ____ (forthcoming, 2010), (draft available at: <http://ssrn.com/abstract=1478787>).

231 Video recording: Comments by Neal Katyal at Successes and Challenges in Terrorism Prosecutions, held at the American Enterprise Institute (June 30, 2006), available at <http://www.aei.org/video/100593> (follow “PLAY FULL VIDEO” hyperlink) [hereinafter, Katyal, Successes and Challenges in Terrorism].

ed, in good faith and based on the law, to reach a decision that's faithful to existing caselaw, statutes, and the Constitution as a whole.

The regularity and legitimacy of the judicial process, in place since the founding, animates and breathes life into subsidiary concepts, such as the presumption of innocence and the right of appeal, proving they are actual requirements in real cases rather than theoretical platitudes or aspirational goals. And this is so in the aftermath of 9/11, too, with the Supreme Court exploring seriously the arguments and claims of all the parties, including Muslims.

Nations threatened, injured, and fearful may be tempted to depart from the norm, and may look to the unusual circumstances of the particular threat to create a novel system of law governed by modified expectations of what is just. But in the post-9/11 context, judicial review has remained a vital cog in the American wartime machine even when the other coordinate branches sought to diminish or circumscribe its constitutional role, for example with the DTA and MCA. That individuals may invoke this system to air their grievances, compel the other side to answer for their conduct, and potentially vindicate their rights—even in a time of national stress and hostilities like 9/11—is a testament to the vitality of American law.²³²

In short, while specific decisions may satisfy some and rub others the wrong way, the legal process in which the courts neutrally hear individual cases and dispense with them based on facts, evidence, and law is a source of American soft power that deserves wider understanding on the global stage. Muslims and others may be drawn closer to American interests with the knowledge, exemplified by the robust judicial review occurring after 9/11, that this is a nation of laws, not men. As Katyal concluded in his remarks after *Hamdan*:

[I]f we're going to win the war on terror, we are going to win it through our soft power, we're going to win it through saying to the world that we actually have a better model than you because in your countries you settle these things through force and fiat, and here we settle them through law, we settle them through law.²³³

CONCLUSION

In this Article, I have argued that, to the extent that the American military campaigns tied to 9/11 are not providing desired results and that winning the battle of “hearts and minds” is a necessary component for an American victory in those theatres, American law, particularly judicial review,

232 The argument can be made that judicial review is not only important in wartime, see *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 164–165 (1963) (“The imperative necessity for safeguarding these rights to procedural due process under the gravest of emergencies has existed throughout our constitutional history, for it is then, under the pressing exigencies of crisis, that there is the greatest temptation to dispense with fundamental constitutional guarantees which, it is feared, will inhibit governmental action”); *United States v. Robel*, 389 U.S. 258, 264 (1967) (“It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . . which makes the defense of the Nation worthwhile”), but is even more critical role in times of national emergency or crisis, such as war, see 9/11 COMMISSION REPORT, *supra* note 1, at 394 (a “shift of power and authority to the government [after 9/11] calls for an *enhanced* system of checks and balances to protect the precious liberties that are vital to our way of life.”) (emphasis added).

233 Katyal, *Successes and Challenge in Terrorism*, *supra* note 231.

may resonate with moderates in the Muslim world. I am optimistic in the potential for the American constitutional scheme, encompassing judicial review, to generate a more favorable impression of the United States.

This confidence is tempered by two, related issues. First, the United States must have an accessible and reliable mechanism by which to inform moderate Muslims of the Constitution and its legal dimensions.²³⁴ The Internet, with its cost-effectiveness, increasing availability, expansiveness, and rampant use by the youth, may be an effective means by which to spread substantive information on the United States and her legal dimensions.²³⁵ It is unclear how the United States may impartially disseminate content in an online format that will reach, let alone appeal, to the moderate Muslim population.²³⁶ Suffice it to say for present purposes that the underlying subject matter—the Constitution and its requisite legal elements—exist. How to dress it up, for example by using games for students,²³⁷ is outside the realm of this Article and is an issue best left addressed by more creative minds.

This brings me to my second concern, which is that success of a legal soft power resource is predicated to some degree on our *own* knowledge of the Constitution and the law. Data on the lack of such knowledge is as striking as it is disturbing. A report by the National Constitution Center, for example, found that more American teenagers “can name three of the Three Stooges than can name the three branches of government (59% to 41%), know the Fresh Prince of Bel-Air than know the Chief Justice of the Supreme Court (94.7% to 2.2%), [and] know which city has the zip code ‘90210’ than the city in which the U.S. Constitution was written (75% to 25%).”²³⁸

Until broader understanding of the Constitution and legal character of the United States is

234 See Kochan, *supra* note 29, at 558 (“Universal truths, individual rights, constitutional governance, the rule of law, and free markets have evolved from written documents debating these principles under the U.S. legal system. These principles have traction in international relations, but only if they are exposed to the outside world for reflection.”); *id.* at 569 (“words ring hollow if they are not read because they cannot be disseminated or are lost in translation.”).

235 As the Internet is a recruitment ground for Muslims, see Griff Witte, Jerry Markon and Shaiq Hussain, *Terrorist Recruiters Leverage the Web*, WASH. POST, Dec. 13, 2009 (describing the extremists’ tactic of trolling popular web sites, including social networking sites, to connect with prospective members), it may also serve as a place in which the United States can get to everyday Muslim youth and moderates. *But see* Kochan, *supra* note 29, at 561 (advocating that books should be the way in which American foundational documents are shared, as “[b]ook translations are cost efficient and an empirically successful means of cultural diplomacy.”).

236 What I mean by “impartially” is that the contents of the information about the United States should be descriptive in nature rather than comparative. Information conveyed with actual or perceived or condescension will repulse moderates and be counterproductive. See Nye, *SOFT POWER*, at x *supra* note 31, at x (“attraction can turn into repulsion if we act in an arrogant manner and destroy the real message of our deeper values.”).

237 For example, Our Courts, “a web-based education project designed to teach students civics and inspire them to be active participants in our democracy,” headed by Justice Sandra Day O’Connor, attempts to instruct students about the law through ostensibly “fun” games. See About Our Courts, Our Courts, *available at* <http://www.ourcourts.org/about-our-courts> (last visited Mar. 18 2010).

238 More Teens Can Name Three Stooges Than Can Name Three Branches of Government, National Constitution Center, Sept. 2, 1998, *available at* <http://constitutioncenter.org/files/stooges/pdf> (last visited Mar. 18, 2010).

achieved, a “learned” subset must be relied upon to release soft power premised on the law.²³⁹ For this soft power to be more credible and effective, however, it would behoove members of this country to have a minimal appreciation for the constitutional nature of the republic such that Americans can be substantive ambassadors of and vehicles for this form of soft power.

These issues aside, I hope this Article has identified to the American legal community a foreign policy resource that heretofore has been neglected and that may be useful in the beleaguered American efforts abroad. America has drawn millions to its shores and led countless others to be enamored by the opportunities and narratives that make up the “American dream.” In a war which has been fought on military terms, it is incumbent on those interested in prevailing in these conflicts to safeguard America, perhaps by discussing America itself.²⁴⁰

The courts, in performing their traditional checking function during the course of these hostilities, are honoring their place in the Framers’ concept of an Empire of Liberty.²⁴¹ They are also, perhaps unwittingly, providing us with a substantive and meaningful instrument that may help quell those bent on destroying the United States and thereby orphaning the very ideas that define us, make us different, and worthy of enduring with mankind.²⁴²

239 See generally THE FEDERALIST No. 35 (Alexander Hamilton) (envisioning an intellectual crème-of-the-crop which would guide the direction of the nation above the people who would be understand and follow only their parochial interests).

240 See Abraham Lincoln, Address at Gettysburg, Pennsylvania (Nov. 19, 1863), in LINCOLN: SPEECHES AND WRITINGS 1859–1865 536 (Don E. Fehrenbacher ed., 1989) (noting that the “nation, conceived in Liberty, and dedicated to the proposition that all men are created equal,” is engaged in a war that “test[s] whether that nation, or any nation, so conceived and so dedicated, can long endure,” and that it is up to the living to ensure that “this nation . . . shall not perish from the earth.”).

241 See JOSEPH J. ELLIS, AMERICAN CREATION: TRIUMPHS AND TRAGEDIES IN THE FOUNDING OF THE REPUBLIC 230 (Random House 2007) (identifying Thomas Jefferson as the Framers who coined this phrase to describe the character of the United States); see also *id.* at 228 (providing an example of Jefferson’s use of this phrase).

242 See THOMAS PAINE, COMMON SENSE 3 (Mark Philp ed., Oxford Univ. Press 1995) (1776) (“The cause of America is, in a great measure, the cause of all mankind.”).