9/11 and Constitutional Change: Resolving Cognitive Dissonance and Existential Crises in Judging and Teaching

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Paper prepared for delivery at the Consortium for Undergraduate Law and Justice Programs, Toledo, Ohio, June 1-2, 2007. An earlier version of this paper was delivered as remarks at a roundtable at the Western Political Science Association in 2007. Thanks to Susan Burgess for critical comments and encouragement. This paper is a work in progress, and any feedback or suggestions would be most welcome.
Our job is to teach about the law. While some of us teach graduate and law students modes of discourse and research techniques to advance their professional goals, most of us spend most of our time in the classroom with undergraduate students who want to know about the law: what it is, how it works, and how lawyers and judges (and to a lesser extent, other parties) shape its contours and dictate its scope. While this agenda is challenging enough, it takes on new dimensions when we engage in it during moments of legal crisis and change.

Undergraduates take our classes with different aims. Some want to go into law enforcement and others want to be lawyers themselves. Some have come to the law out of an interest in political theory or philosophy, while others just take our classes to fulfill some university requirement. But many of them come into our classrooms simultaneously holding two contradictory understandings of the law, one aspirational and the other cynical. The aspirational view is of law as the great guarantor of justice and judges and lawyers as heroic figures. This triumphal view presents Western legal systems as engines of never-ending teleological progress toward the full realization of liberal ideals of fairness, equality, and liberty. The cynical view in contrast holds that law is an entirely political phenomenon. Lawyers, focused only on winning their clients’ cases, are amoral hired guns, and judges manipulate legal concepts and facts to achieve the outcomes that they desire. Many undergraduates are attracted to studying the law and to pursuing a career in it by the aspirational view, but articulate explanations for the behaviors of people in the legal system in utterly cynical terms. Part of what we do as faculty members is to help them to see the complexities, pressures, and normative dilemmas that face legal actors. Another part is to teach them how to distinguish between what the legal system can be expected to accomplish and where it is institutionally or politically impotent, as well as how different actors’ outlooks and roles cause them to perceive the boundaries differently. Then, we congratulate ourselves, our students can leave our classes feeling confident at least in knowing what the parameters are for real lawyering and real judging.
But how do we teach these lessons if we ourselves are struggling with urgent questions about the contemporary legal system, its responsibilities, and its limits?

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Kahled El-Masri is a German citizen of Lebanese descent. His story provides a lens for thinking about judging and teaching in a post-9/11 context. He claims that Macedonian authorities seized him on New Year’s Eve of 2003 as he attempted to cross the border between Macedonia and Serbia. The Macedonians detained and interrogated him, imprisoning him incommunicado in a hotel room for 23 days. Thirteen days into his detention, El-Masri initiated a hunger strike to protest both the detention and the refusal to allow him to contact a lawyer or his family, but to no avail. On January 23, 2004, several men in civilian clothes entered El-Masri’s detention room and forced him to sign a statement disavowing any ill treatment, promising to fly him back to Germany. Upon delivering the statement, which was videotaped, El-Masri was blindfolded and transported to an airstrip, where he was stripped, beaten, and sodomized with a foreign object. His blindfold was removed and he was then photographed in the nude; when his eyesight returned from the camera’s flash, he saw several men clad in black and wearing ski masks who he claims were a CIA renditions team. He was sedated, restrained and flown to a location he later identified as Kabul, Afghanistan ((El-Masri v. Tenet, 437 F.Supp.2d 530, 532-33 (E.D. Va. 2006)).

In Kabul, things got worse for El-Masri. He was greeted with a beating and confined in a cell. He identified the detention site as a CIA-controlled facility known as the “Salt Pit”: “El-Masri alleges he was detained in the ‘Salt Pit’ for the next four months, during which time he was repeatedly interrogated about his alleged association with terrorists . . . . although the prison facility was nominally run by Afghans, two of his interrogators identified themselves as Americans” (Id. at 533). El-Masri eventually initiated another hunger strike along with other prisoners and was brought before the facility’s apparent administrators, whom he identifies as CIA operatives. He demanded that he be released, charged, or permitted to contact German officials, all of which were denied. One of the officials did allow that El-Masri had been inappropriately detained, but explained that permission from Washington was required for his release. When El-Masri continued his hunger strike, he was forcibly fed through a nasogastric tube; he lost sixty pounds during his detention (Id. at 533-34).
Finally, on May 28, 2004, a private jet flew a blindfolded El-Masri to Albania, where he was released on an abandoned road. With help from Albanian authorities, El-Masri made his way back to Germany, where he discovered that his wife and four children had returned to Lebanon under the impression that he had abandoned them (Id. at 534). He filed a suit in the district court for the Eastern District of Virginia in December of 2005 against the Director of the Central Intelligence Agency, George Tenet, and three companies he suspected of collaborating with the CIA in arranging clandestine flights for individuals subjected to a secret U.S. policy of extraordinary rendition (Shane 2005: A25). The suit alleged violations of el-Masri’s Fifth Amendment right to due process and provisions of the Alien Tort Statute prohibiting prolonged arbitrary detention and cruel, inhuman, or degrading treatment (El-Masri v. Tenet, 437 F.Supp.2d 530, 534-35 (E.D. Va. 2006)). In announcing his decision to file suit, el Masri explained, “I want to know why they did this to me . . . I don’t think I’m the human being I used to be” (Shane). While he had difficulties entering the United States to announce his filing of the suit (he was briefly detained upon landing in Atlanta and denied entry), El-Masri trusted that the machinery of the U.S. legal system would enable him to find answers about, if not compensation for, the experience he had undergone.

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El-Masri’s case was brought in the context of the U.S. legal system’s struggles to accommodate the threat of terrorism and the U.S.’s engagement in global, yet undeclared, warfare against non-state enemies. This war, authorized “against those nations, organizations, or persons [the President] determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons,” began conventionally against the combined forces of the Taliban and al Qaeda in Afghanistan (Pub. Law 107-40: 2001). The theatre for operations has expanded, however, and now encompasses the globe, and the enemy, rather than a nation-state or other formal political entity, is terror itself. Thus far, the war has resulted in nearly 3500 deaths of
American military personnel, more than 25,000 casualties, and somewhere in the neighborhood of 65,000 civilian deaths in Iraq alone (www.iraqbodycount.net).¹

The legal consequences, too, have been significant. The executive branch has responded to the threat of terrorism and the reality of the war with the articulation of new theories about the scope and reach of executive authority. Configuring the executive branch as the ultimate defender of national existence and the threat of terrorism as existential in nature, the Bush administration’s lawyers have pushed consistently for a broader array of presidential authority to manage military and security operations. These arguments are rooted in a fundamental assumption that the executive branch has the inherent authority to exercise its discretion to assess threats and determine appropriate responses without extensive authorization by Congress or extensive oversight by the judiciary, and present the executive’s power as commander-in-chief as the core organizing principle of constitutionalism in wartime. They further have triggered vigorous scholarly debate over what Giorgio Agamben has labeled a state of exception, a category of legal existence that occurs outside the boundaries of the law. Some view this debate as a sign of a serious crisis in constitutional theorizing that could have major institutional effects for generations to come.

This theory of executive power, understood to include the subsidiary powers to decide and do what is necessary in the executive’s view to protect the nation, pairs with a non-absolutist commitment to guarantees of rights. The administration requested and received a broad grant of authority to monitor communications and engage in other forms of surveillance over US citizens through the Patriot Act. It further extended this authority through conducting a series of wiretap operations kept secret even from FISA courts, which have generally been notorious in their willingness to grant sealed warrants quickly upon demand by the executive branch. These incursions against rights of citizens, while troubling, do not come close to either Lincoln’s efforts to suspend habeas corpus broadly during the Civil War or Roosevelt’s support for internment of American citizens solely on the basis of race during World War II. Nonetheless, the Bush administration has distinguished itself in its defiance of the international human rights standards developed and implemented through the Geneva Conventions, which administration lawyers

¹ Determining the scope of impact upon civilians is both difficult and controversial. Iraqbodycount.net, while a non-partisan and non-profit organization, is opposed to the war. Nonetheless, its documented statistics seem fairly conservative in comparison with other estimates.
have characterized as belonging to a different era and having little applicability to modern non-
national warfare.

These developments have been accompanied by little effective resistance on the part of
Congress or the public. The 107th, 108th, and 109th Congresses, led by Republicans, largely
complied with the Bush administration’s wartime agenda, broadly authorizing the use of military
force, voting to authorize the war in Iraq, passing the Patriot Act (albeit without all of the powers
the administration had wanted), allowing military commissions to proceed in Guantánamo Bay,
and reorganizing counterterrorism operations to give them greater prominence in the structure of
the federal government, to name just a few examples. While the 110th Congress was elected on a
wave of discontent with the war, it proved unable to thwart the Bush administration’s plan to
escalate troop commitments in Iraq and has not been able to set a time table for withdrawal. The
war is unpopular: 61% of recently surveyed adults now think the United States should have
stayed out of Iraq, and only 23% approve of the way that George W. Bush is handling the war
(CBS/New York Times 2007). Yet the kinds of vociferous protest and politically engaged
resistance that contributed strongly to the Nixon administration’s decision to end the war in
Vietnam have not materialized in the United States.

Our students come to our classrooms in this context, confronting the realities of the war
daily in the newspapers and on blogs. Some support the war, coupled with or without support for
the Bush administration’s stance on how to conduct it and what the constitution requires. Others
oppose the war, again taking different positions on what role constitutional limits should play in
structuring the executive branch’s conduct of it. But most find themselves vitally and at times
painfully engaged in questions of how the legal system ought to approach these dilemmas.

In teaching about law, I try to help my students see both the power and the limits of law
and legal reasoning. Part of this is about explaining the formal and institutional processes
through which legal controversies are resolved. Part of it is helping students to understand the
ideological boundaries within which legal actors argue and decide issues. Part involves teaching
them to understand both the words of the law and the discursive strategies that shape
constitutions, laws, opinions, policies and their interpretations. But yet another part is sensitizing
them to the significance – and structure – of ethics and power as phenomena that operate
dynamically within the system.
To demonstrate what this means, I return to El-Masri’s suit and other more prominent cases addressing the war, but also to the pathbreaking work of Robert Cover, a legal theorist whose considerations of the clash between formal and natural law and the intrinsic violence of law deserve our attention in the current moment. Cover’s analysis of anti-slavery judges’ responses to suits in the antebellum era provides an interesting window on the cognitive and moral dissonance of institutional-legal commitments to formalism in the face of practices that judges believe to be institutionally and morally destructive.

Cover, in his classic work *Justice Accused*, described the initial commitment of the US legal system to natural law in its early considerations of slavery. British common law engaged with questions about the legal status of slavery through the framework of debates over the relationship between slavery and natural law. Lord Blackstone’s formulation, which drew from Montesquieu and characterized slavery as a violation of the law of nature, had gained currency by the time of the American Revolution. In Lord Mansfield’s opinion in *Somerset’s Case* in 1772, the English legal system adopted this formulation, ruling that the state of slavery could only be introduced through the passage of positive law, as no natural law could justify it (Cover 1975: 14-17).

This belief had a profound impact on early American law, according to Cover’s careful review of published opinions concerning slavery. In combination with the liberty-based ethos of the Revolutionary Era, it sparked a significant emancipation movement in the law and politics of the new nation. Tom Paine and other less prominent revolutionary theorists wrote against slavery (Id. at 21). Revolutionary rhetoric and ideology contributed to the elimination of slavery, usually through gradual and Sometimes compensated means, in several northern states in the late 1700s, culminating in the early 1800s (Klinkner 1999). As Cover described the situation, “the lawyer’s library was a repository of political philosophy gently probing, doubting, and usually apologizing for slavery,” which grounded a remarkable set of cases at common law in the early American courts (Cover 1975: 22). These cases developed the principle that slavery could exist by positive fiat, but that the background context of natural law mandated confining it strictly within the boundaries of what clear statutes authorized and administered. In cases involving early state constitutions’ clauses mandating the freedom and equality of all men, judges saw convergence between natural law and positive law, which encouraged them to work out a symbiotic relationship between them allowing for the dominance of positive law (42-61).
As the republic developed, however, gaps began to emerge between the natural law principles opposing slavery and the increasing presence of positive laws authorizing its components. Some of this distance was generated as legislatures responded to adverse decisions by creating positive law to overcome the background natural law principles. Efforts by Quakers and other opponents of slavery to resist increasing restrictions on manumission came under the shadow of positive law. At the same time, previous courts’ inclination to view natural law as background principle subject to amendment and change by statute led to a growing commitment to formalism and reliance on legislative purposes (id. 63-83).

Ultimately, anti-slavery judges found themselves trapped. Reliance on formalism became entrenched, and the practice of allowing legislative judgments and intentions to trump natural law principles became well established. Efforts to work around and limit slavery had gradually come to center around formalism, abandoning broader attempts to set up natural law as a meaningful counterweight, and the formalistic commitments of common-law judges eventually impaled them on the horns of a dilemma: fidelity to law, understood as the broad network of formal rules authorizing slavery and its expansion, or moral principle, which led some judges to view slavery as evil and sinful. Cover explained, “as legal doctrine grew apart from antislavery morality, the conflict was accentuated,” leading to distress and cognitive dissonance on the part of antislavery judges (202, 226-32). This tendency was most pointed as judges considered applications of the Fugitive Slave Act, particularly after Congress amended it in 1850 to increase its stringency and the scope of federal control over fugitive slave recovery (id.). Ultimately, fidelity to law led to judicial impotence in the face of what these judges felt to be deeply wrong.

Slavery began as a peculiar but manageable problem in the institutional structuring of the American state, but ultimately generated its own mass of exceptions, compromises, institutional crises, and destructive effects. Recent scholarship is untangling the impact of slavery on constitutional political design and antebellum politics generally, but it is probably fair to say that ultimately the struggle over how to accommodate the exceptional state of slavery triggered institutional crisis and constitutional collapse.²

² For more specific discussion of this process, see Graber 2006. Essays by Richard Young and Jeffrey Meiser and Kathleen Sullivan in the forthcoming volume Race and American Political Development also provide insights concerning the ripple effects of slavery on the development of the antebellum state; Young and Meiser particularly address the massive effects of militarization structured around slavery (Young and Meiser 2008; Sullivan 2008).
Legal scholars generally concur that the era of formalism, strictly defined, ended with the advent of legal realism in the twentieth century. The triumph of realism, however, was never as complete or comprehensive as either its supporters or detractors would argue. In a looser sense, the ideas of fidelity to law, to rules of statutory construction, and to the trumping power of statutory and constitutional texts over normative principle were never eradicated or even significantly threatened. As Kenneth Kersch has argued recently, the abandonment of substantive laws and doctrine grounded in formalism did not prevent judges in the post-New Deal era from applying the methods of formalistic reasoning and interpretation in their decisions (Kersch 2006). In fact, fears of “standard-less” natural law reasoning increased as the notorious cases of *Dred Scott* and *Lochner* became cautionary tales to those seeking concrete limits on interpretation and the elimination of moral principle – or judicial political proclivities – from decision-making.

Fast forward to the twenty-first century. The first cases to reach the US Supreme Court addressing the administration’s conduct in the ongoing military conflict were decided in 2004 and involved various aspects of the administration’s detention policies. Rulings in *Hamdi v. Rumsfeld*, *Rasul v. Bush*, and *Rumsfeld v. Padilla* were all released on June 28, 2004 and when read together, issued a sharp rebuke to the Bush administration. *Hamdi*, a complex and divided ruling, allowed that the 2001 Authorization for the Use of Military Force did permit the detention of suspects captured in the course of the war, but affirmed that citizens held as enemy combatants had to have access to some regularized process before a neutral fact-finder to challenge their detentions (542 U.S. 507 (2004)). In *Rasul*, the Court ruled that non-citizens being held in Guantánamo Bay had the right to challenge their detentions in federal court through the mechanism of habeas corpus (542 U.S. 466 (2004)). And while the Court in *Padilla* denied jurisdiction over Padilla’s claim to a district court in New York, the Justices clarified that a claim could be sustained if brought in the proper jurisdiction and a combination of concurrences and dissents sent a coded message that military authorities could not move prisoners strategically to evade jurisdiction (542 U.S. 426 (2004)).

The cases presented a strong and historically resonant image of a fundamental – one might even say natural – right against arbitrary detention protected for centuries by the writ of habeas corpus. They were trumpeted by opponents of the war and of the Bush administration’s policies concerning detention as a much-needed curb on the headlong rush to expand executive
power and abandon national protections for rights and international human rights standards. Coming in the immediate wake of revelations about US military personnel’s abuses of prisoners at the Abu Ghraib prison, the cases tied in with the idealistic conception of the courts – the Supreme Court in particular – as a lonely protector of fundamental values in times of transition and crisis.

This impression was heightened with the Supreme Court’s ruling in *Hamdan v. Rumsfeld* in 2006. Liberal commentators rejoiced when the Supreme Court ruled against the administration, finding that the procedural mechanisms for conducting military commissions for Guantánamo Bay detainees were both insufficiently authorized by Congress and legally inadequate. Bruce Shapiro, writing for the *Nation*, described *Hamdan* as “a devastating rebuke to a President who thought he had a blank check; a clear reaffirmation of the rule of law even — or especially — in times of national crisis” (Shapiro 2006). The *Washington Post* hailed the decision as providing an opportunity to rethink the legal basis for the entire war on terror (“Let there be Law” 2006). Rosa Brooks, writing for the *Los Angeles Times*, wondered if the Court’s ruling implied that George W. Bush might ultimately be liable for committing war crimes (Brooks 2006). And blogger Glenn Greenwald saw the ruling as potentially dealing a fatal blow to the Bush Administration’s entire theory of executive authority (Greenwald 2006). While the American Bar Association was more cautious in its overall summary of the expected impact of the ruling, ABA President Michael Greco nonetheless hailed the ruling as a “significant victory for the rule of law and our cherished constitutional protections” (McDonough 2006).

For the majority of the Court, the problem with the administration’s stance was that, in the absence of very specific authorization, military commissions must comply with the conditions of the American common law of war, the Uniform Code of Military Justice (UCMJ), and the Geneva Conventions. In several ways, claimed the majority, “the procedures that the Government has decreed will govern Hamdan’s trial . . . violate these laws” (*Hamdan v. Rumsfeld*, 548 U.S. __, 49).³ The commissions, whose procedural rules were still works in progress, did provide some significant procedural safeguards. The Court was troubled, however, by the rules that the accused and his or her civilian counsel could be excluded from any phase of

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³ A plurality of four (Stevens, Breyer, Ginsburg, and Souter) also objected to the use of conspiracy as the primary charged crime for Hamdan, claiming that the laws of war did not permit such charges in the absence of very specific claims of wrongdoing going beyond the usual criminal standard of evidence of plotting plus at least one overt act (Id. 49-52).
the proceedings and that evidence could be presented without its being revealed to the accused or his or her counsel. While the accused’s military lawyer could be present for closed sessions, she or he could be forbidden by the tribunal to reveal what had happened in the closed sessions to the accused and his or her civilian counsel (Id. at 51). Further, the entire stream of appellate review was confined within the military and ultimately the executive branch (Id. at 51-52).

While the Court was willing to acknowledge that military exigency at times requires deviation from the ordinary procedural safeguards guaranteed by the UCMJ, it found that the situation of the Guantanamo Bay detainees is not such a moment. The UCMJ and law of war rest significant weight upon practicability, and the Court ruled that the executive branch had not justified the crabbed nature of the procedures on the grounds that they are necessary to pursue war effectively. Indeed, the majority implied that, since the detainees are in fact being detained far from the field of combat and some have been there for years, an argument based in the standard of practicability would not be met with sympathy (Id. at 59). Brushing aside the Government’s claim of undue burden, the Court found that the usual rules governing courts martial would be appropriate for the situation of the detainees. The majority thus delivered a stern rebuke to the executive, undercutting the entire basis for military commissions. Further, the majority again insisted that the AUMF passed in the wake of September 11 could not be understood as an effective transfer of power from Congress to the executive branch, thus advancing the reasoning presented in the 2004 detainee cases on the question of authorization.

These cases, however, like the early cases concerning slavery, carried in their reasoning the seeds of their own defeats. To begin the cautionary side of the analysis, we need look no further than the important concurrences filed by Justices Breyer and Kennedy. These opinions sketched out a set of institutional limits embedded in the scope of Hamdan. Both opinions emphasized that the Court had ruled against the Administration on the basis of separation of powers. While this was a welcome development for those who believe that the prosecution of the war on terror has significantly undermined separation of powers and has enabled an unprecedented accumulation of plenary authority in the executive branch, it raised the specter of a quiescent Congress acceding to increasingly dangerous demands from the executive to permit the erosion of longstanding constitutional standards in the interest of national security.

Breyer’s concurrence was brief, but joined by all of the other members of the majority save Stevens. He explained Stevens’ 73 page opinion succinctly, citing Hamdi: “The court’s
conclusion ultimately rests upon a single ground: Congress has not issued the Executive a ‘blank check’” (Hamdan v. Rumsfeld, Breyer concurring, 1). He understood the UCMJ in fact to deny this authority to the President, having filled the legislative space. However, he noted that the President may readily turn to Congress to obtain specific authorization. While he characterized the President’s actions as undemocratic, he limited this analysis by claiming that no emergency has prevented consultation with Congress (likely thinking of the stretch of time between Hamdan’s capture and the eventual initiation of the litigation).

Kennedy developed a fuller argument around the legal framework of Justice Jackson’s concurrence in Youngstown Sheet & Tube Co. v. Sawyer.4 He placed the President’s actions within Jackson’s third category, where executive power is at its nadir, because he understood the area of military courts to be one “with a history of congressional participation and regulation” (Hamdan v. Rumsfeld, Kennedy concurring, 3). The primary problem for Kennedy was the breadth and detail of the UCMJ, which sets forth clear procedures for the conduct of legal inquiries involving combat matters and military personnel. In line with his broader interest in international law expressed in other unrelated cases, he also cited Common Article 3 as a barrier to the adoption of unauthorized procedures directly by the executive branch (Id. at 6-8). He incorporated Common Article 3 as a direct obligation against the US government, however, by reading it in through the UCMJ (Id. at 9). And like Breyer, Kennedy noted that “practical need” does not provide justification for the procedures put into place, since no urgent emergency drives the conduct of review actions and trials by military commission (Id. at 10-11).

Ultimately, however, Kennedy explained his standpoint as follows: “Because Congress has prescribed these limits [in the UCMJ], Congress can change them, requiring a new analysis consistent with the Constitution and other governing laws. At this time, however, we must apply the standards Congress has provided” (Id. at 18). While this statement maintained that the Constitution and treaties always remain in back of any analysis of authorization, it invited a more specific effort on the part of Congress to authorize – and justify – a set of procedures at

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4 Youngstown Sheet & Tube, also known as the Steel Seizure Case, upheld a challenge to President Truman’s order seizing national steel mills to ensure continued operation in the face of a labor dispute during the Korean War. Justice Jackson, in his concurrence, articulated the principle that executive authority in times of crisis is highest when Congress has provided direct and explicit authorization for action, at medium ebb when Congress has been silent, and at the lowest point when Congress has previously acted contrary to the executive’s proposed path of action (Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635-37 (1952)).
significant variance with those established in the UCMJ and supported by the Geneva Conventions.\(^5\)

The ruling also did not suggest how far Congressional authorization can go, and where the boundaries of the Constitution and the law of war may come into play to limit procedures and the suspension of substantive rights in the war on terror. Stevens implied and Kennedy seemed to agree that some outside boundary does exist, but the case’s reliance on lack of Congressional authorization suggests that a procedure very much like the one that exists could be permitted if specifically authorized. This seemed likely, given that only a plurality raised what seemed to be insurmountable objections to Hamdan’s lack of a right to confront evidence against him.

Supporters of slavery, when confronted with the courts’ discomfort with the practice and endorsement of natural law limits, responded by filling the free space of natural law governance with positive law, in the hope of capitalizing upon judicial commitments to formalism. So, too, did the Congress act in the fall of 2006, passing the Military Commissions Act. Taking seriously the Court’s reliance on the statutory scheme of the UCMJ and backgrounding of international human rights and national guarantees of civil rights, Congress directly and specifically amended the UCMJ to allow for military tribunals and to limit almost completely the federal courts’ capacity to review these quasi-judicial determinations (Military Commissions Act, Pub. L. 109-366: 2006). This statutory change placed the conflict in stark relief and posed the question of fidelity to law for future judges considering the fate of detainees.

Thus far, the Supreme Court has declined to hear cases addressing the constitutionality of the Military Commissions Act. But this modesty may signal, instead of the usual willingness of the Court to wait for a full conflict to develop, a sense of powerlessness on the part of the Justices. After the passage of the MCA, several detainees filed suit, seeking habeas relief on the ground that the MCA’s removal of federal court oversight of detention policies and practices was ineffective and/or unconstitutional. The Supreme Court refused to hear the detainees’ appeal from the Circuit Court of Appeals for the District of Columbia, which had supported the District Court’s ruling that jurisdiction was lacking. Unusually, Justices Stevens and Kennedy wrote to

\(^5\) Even Stevens’ opinion enabled retrenchment. He too reasoned that the primary problem was the lack of specific Congressional authorization, inviting Congress to return to the issue and provide, rather than a blank check, a specific set of practices with justifications for each. His reading of the existing statutory law was a bit different from Kennedy’s – he primarily argued that the AUMF and the DTA are not specific enough authorizations to constitute justification for deviating from the procedures set forth in the UCMJ – but nonetheless he implied that direct and focused authorization, if accompanied by sufficient justificatory language, would move him toward allowing the military trials.
explain their votes against granting certiorari, citing the *Ashwander* rules and the principle of only deciding cases after other remedies had been exhausted (*Boumediene v. Bush*, 127 S.Ct. 1478, 1479 (2007)). Justice Breyer’s dissent from the denial of certiorari, joined by Justices Souter and Ginsburg, argued that the District Court’s ruling interpreted the MCA to generate an extreme level of judicial incapacity, contending that “no constitutional rights (not merely the right to habeas) extended to the detainees” (id., Breyer, J. dissenting, 127 S.Ct. 1480)(emphasis in original). Since the detainees hold no rights that free Americans are bound to respect, the courts stand helpless in the face of executive power.

The moral conflict is painfully evident in El-Masri’s case as well. El-Masri’s suit alleged treatment by agents of the US government that violated not only fundamental ethical norms but also provisions of US law, giving rise to clear grounds for suit under the Alien Tort Claims Act and the principle of *Bivens v. Six Unknown Federal Agents*, which authorizes suits based on violations of fundamental due process rights by individuals acting under color of U.S. law. When El-Masri filed suit based on the allegations described earlier, the federal government moved for summary judgment, seeking dismissal of El-Masri’s claims on the ground that “maintenance of the suit would invariably lead to disclosure of . . . state secrets” (*El-Masri v. Tenet*, 437 F. Supp. 2d 530, 535 (E.D. Va. 2006)). In order to continue the litigation, El-Masri would have to enter evidence supporting his allegations of cruelty, degradation, and outright torture, as well as evidence of the United States’ direct participation in these activities. This evidence would then be open for contestation – one might hope, refutation – by the government.

The court retreated, however, into formalism and passivity, displaying its unwillingness to confront the evil in the legal documents before it. Granting the government’s motion to dismiss, the court explained the retreat of law not as a threshold issue of an inability to structure inquiries about the veracity of El-Masri’s claims, but rather as quiescence in the face of power and secrecy: “any answer to the complaint by the defendants risks the disclosure of specific details about the rendition argument. These threshold answers alone would reveal considerable detail about the CIA’s highly classified overseas programs and operations” (id. at 539). While the administration has refused to release details about rendition, the privileging of secrecy and security over the rule of law is striking in this case.

Moreover, the court rooted its decision not simply in balancing between security interests in an extraordinary time and ordinary legal principle, but rather upon a loose version of
formalism. The opinion insisted, “It is important to emphasize that the result reached here is required by settled, controlling law” (id. at 540). The emphasis on requirement and *settled, controlling* law heightened the court’s presentation of moral conflict and regretful acquiescence to fidelity in a manner strikingly similar to Cover’s antislavery judges’ rulings for slavery. The rigidity of positive law’s forcing an unwilling court to reach an unsavory result arose, in the court’s logic, from the procedural regularity of the invocation of the privilege and its clear application in the general framework of the case, regardless of the “truth or falsity” of El-Masri’s claims. Resistance, hinted the court, was possible by “reasonable and patriotic Americans.” But these Americans, the court argued remarkably, had to stand outside of the courts to exercise dissent: “these steps are not proper grist for the judicial mill” (id.). In a painful admission, opinion author T.S. Ellis explained:

> putting aside all the legal issues, if El-Masri's allegations are true or essentially true, then all fair-minded people, including those who believe that state secrets must be protected, that this lawsuit cannot proceed, and that renditions are a necessary step to take in this war, must also agree that El-Masri has suffered injuries as a result of our country's mistake and deserves a remedy. Yet, it is also clear from the result reached here that the only sources of that remedy must be the Executive Branch or the Legislative Branch, not the Judicial Branch. [Id. at 541]

Law, thus, becomes a sterile and formal environment where politics and ethics are barred from entry through the conjunction of executive power and formalized legal deference.

On appeal, the dilemma of law and morality and the distancing between law and politics was even more pronounced. The courts’ role, explained the fourth circuit, was limited by Article III itself and “modest,” encompassing only the decision of cases and controversies (*El-Masri v. United States*, 479 F.3d 296, 312 (4th Cir. 2007)). El-Masri’s mistake, in the court’s view, was to “envision[] a judiciary that possesses a roving writ to ferret out and strike down executive excess,” thereby protecting fundamental values and broadly conceived human rights against encroachment in times of crisis (id.). Again hewing to a formal interpretation of the limits imposed by the state secrets doctrine and the court’s conception of its own institutional incapacities, the opinion claimed that to allow the case to move forward would render the court itself “guilty of excess in our own right if we were to disregard settled legal principles” (id.). The
court thereby created a moral and institutional equivalence between two phenomena. On one side of the scale was the executive overreaching inherent in the development and operation of an extraordinary rendition program incorporating kidnap and torture as key elements. On the other was the judicial overreaching inherent in deciding a case that falls outside of its discretionary jurisdiction. This rhetorical equivalence allowed the court to tip the balance in favor of its conception of fidelity to law, which required the dismissal of El-Masri’s lawsuit.

The court framed its decision as deeply constrained, requiring the outcome reached almost regardless of the background facts or consequences. The opinion acknowledged an amicus brief field on the behalf of former diplomats and State Department officials arguing in part that providing a neutral forum for the resolution of claims of rights violations would serve vital foreign policy interests of the United States. However, the court reasoned that even if it were to conclude independently that these interests were more important than the executive branch’s claims that the need to protect national security required concealing the details of the extraordinary rendition policy, it was still powerless, in its own words “not at liberty to abrogate the state secrets doctrine” (id., at note 6). This powerlessness and lack of institutional liberty related back to a narrow conception of law as separate from independent ethical standards and critical judgment, an understanding of law as only composed of formal doctrine, procedural regularities, statutory language, and their interplay. According to both courts, El-Masri is left only with recourse to the political system. The law has failed, not to offer compensation for his injury or even to resolve his dispute, but ultimately even to provide a space within which his dispute can be articulated and tested.

Teaching undergraduates about law is often rewarding in part because their ignorance of formal constraints and the categorical organization of the legal system renders them free to exercise a creativity that will likely disappear, for those who go on to law school, by the end of their first year. One might expect, then, that undergraduates thinking about these issues can bring to bear a more comprehensive moral analysis, even if some of their ideas fall outside of the ordinary boundaries for legal reasoning and would not read legibly within the legal community as law. Asking them to think through questions about the treatment of detainees is thus useful and illuminating, as it also serves as a means of teaching complex conceptions of the interplay between rights and constitutionalism on the one hand and the structure of the national government on the other. In the winter and fall of 2006, I asked my undergraduate classes in...
constitutional law to complete, for their major writing assignments, mock opinions concerning detainee claims for habeas relief. This assignment, I felt, would bring together what they had learned about constitutional structure, separation of powers, checks and balances, and limits on executive power in times of emergency, while also raising dilemmas about fundamental process rights and their role in a constitutional system. My winter 2006 students wrote opinions for *Hamdan v. Rumsfeld* prior to the Court’s issuance of its ruling in June, and my fall 2006 students considered a habeas claim filed by a detainee challenging the application of the Military Commissions Act of 2006 on constitutional grounds.

I expected my students, mostly situated on the liberal side of the political spectrum and opposed to the war, to seek ways to rule in favor of the detainees in both cases. In winter 2006, several students in the class (more than half) did extend relief, some on the basis of insufficient authorization by Congress, others relying on limits generated from interpretations of Article II, and still others turning to the UCMJ and to the Geneva Conventions for substantive objections to the procedures used to handle detainees. Some of the more sophisticated students built arguments explicitly relying upon natural law as a touchstone for resolving the question of what kind of authorization could be read into Congress’ statements, reasoning that the questionable procedures used in Guantánamo Bay would require clear and explicit structuring by Congress to overcome the background principles protecting fundamental human rights from abridgment.

I did not ask my fall constitutional law students to read Robert Cover before encountering the *Hamdan* ruling, nor did I substantially restructure the course. As I was teaching constitutional law in the fall of 2006, Congress passed the Military Commissions Act, and I seized on this opportunity for my major writing assignment. For my liberal students, many of whom were energized by upcoming congressional elections, I expected the idealistic conception of courts as the highest guarantors of justice to prevail.

Most of my students, however, read *Hamdan* and the Military Commissions Act together and, despite their lack of full socialization into the legal profession – and my injunctions to be conscious about different modes of legal reasoning and their analytical strengths and weaknesses – ruled that they did not have the power to hear the habeas claims of my hypothetical detainees. Their reasoning in these mock opinions denying relief often reflected moral anguish over their belief that, despite the moral and human rights imperatives in the factual scenarios, the formal legal and structural principles they had learned drove the outcome in the case. Several students
were so troubled by their feelings of constraint that they came to my office hours to talk through the case rather than to fret over the typically low range of rough draft grades. Although I advised the class that they were to be graded on the quality of their arguments rather than the outcome they reached, none of the troubled students reversed course and argued what they felt to be the “right” ruling rather than the “correct” ruling when they revised their papers.

Perhaps assigning a hypothetical appeal of *El-Masri* would lead to less moral anguish for my students, since they largely seemed to see the MCA as a comprehensive gap-filling exercise in positive law. In fact, the parallel between the MCA and the Fugitive Slave Act of 1850 seems not at all inapt for students – and perhaps others – who oppose the war. But even there, the Cover dilemma seems likely to arise for at least some students who endorse a strong conception of fidelity to law and read ethics and politics as outside the boundaries of the law. What can be done to address this moral dilemma, which seems at least in part to be rooted in the persistence, despite radical changes across multiple other dimensions, of positive law’s capacity to undermine and supplant the broader engagement with standards and principles for the rights so vital to protect the most vulnerable and contingent supplicants in the legal system?

Cover’s brilliance and intellectual honesty rendered him incapable of presenting a neatly argued resolution to the dilemma he articulated with such care. Nonetheless, he did point to some rulings that gave hints of alternative paths that could have been begun at crucial points in the developmental process. The most notable of these alternatives was probably the Wisconsin Supreme Court’s choice to defy Congress and its delicately calibrated systemic compromises designed to pacify the problem of slavery. In a ruling issued in 1854, Wisconsin’s high court ruled that the Fugitive Slave Act of 1850 was unconstitutional as an illegitimate exercise of power on the part of Congress, a denial of the fugitive’s right to trial by jury, and a fundamental deprivation of due process of law (Cover 1975: 186). While Cover hastened to qualify his discussion of Wisconsin’s ruling by explaining the US Supreme Court’s subsequent harsh reversal, which struck fundamentally at Wisconsin’s authority to intervene in the issue, the ruling nonetheless stands as a testament to the capacity of the judicial mind to escape the constraints of formalism.

Where, though, is our room for maneuver in an age of war without end, extensive executive autonomy, rumors and more than rumors of authorized practices that violate both U.S. and international laws, and little congressional oversight? Cover notes that one of the Wisconsin
judges rooted his radical reading of what the Constitution mandated “not upon precedent, not upon history, and not solely upon a view of the judicial function that would permit him, as an individual, to incorporate his own ideas of right into the law” (id. at 188). Instead, A.D. Smith relied upon a robust and creative vision of states’ rights built from the existing milieu of arguments over federalism. In the contemporary moment, international human rights norms and standards might provide a robust source of argumentative fodder for judges, teachers, students, and citizens seeking to rethink the problem of fidelity to law in a time of lawlessness.

Such a commitment might require us to re-raise the question with which so many of us start classes in constitutional law: What is the constitution and what does it incorporate? How can we find the critical purchase to get around the paralysis generated between the imperatives of morality and positive law? Paths out are not obvious, as Cover found when writing in the immediate wake of the Vietnam War more than thirty years ago. But one potential path would be to pursue in more confident fashion American law’s cautious and halting turn toward international law in recent years. Especially with respect to rights issues, commentators and some judges have considered and relied upon as persuasive evidence the reasoning of other nations’ courts and standards formalized in international laws and treaties. This trend was probably most visible in leading Supreme Court cases on decriminalizing same-sex sexual intimacy and raising scrutiny concerning the death penalty, but it exists in other areas as well. Particularly with respect to conducting military operations against non-state actors, handling the individuals swept up in these conflicts, and managing the relationships among military, quasi-military, and non-military personnel, the United States has much to learn from other nations and from the international community. While the infusion of these ideas cannot resolve the problems generated through constitutional structure and design, they can generate new insights and potentially create alternatives to the trap of formalism.

But how can we teach as scholars who want to understand the law ourselves and who, regardless of our own positions, see this as a critical moment in our own encounters with the institutions and people who are the subjects of our intellectual lives? My encounter with Cover and other writing concerning the antebellum era (particularly Mark Graber’s consideration of constitutional evil) leaves me with five recommendations.

1. Re-humanize those caught up in the war on terror. It is easy to forget the fundamental humanity of the individuals who are fighting and are affected by the war. Other scholars in
recent work are showing how the war in Iraq has contributed to the generation of the Muslim other – a construct combining dangerous elements of racialization, fear of radical Islam, and a peculiar notion of masculinity and threat. This construct directly contributed to the specific nature of the abuses perpetrated in Abu Ghraib, as prisoners were targeted through attacks designed for psychic emasculation and religious humiliation. To understand that Abu Ghraib was not a bizarre anomaly, we need look only to the specifics of what Khaled El-Masri claimed happened to him. But humanization should, I emphasize, also include a deep analysis of the impact of war on the Americans fighting it. This process ideally would also raise critical questions about how the identity of soldiers is situated, and how this plays in with the politics of race, gender, and class in the United States.

2. *Foster fundamental respect for the structure of governance.* This should not be taken as an injunction to worship the Constitution. Rather, the Constitution should be taught for what it is: an eighteenth century design shaped by existential moral struggles over slavery, reworked most dramatically to resolve the nineteenth century crisis of secession and war. Nonetheless, questions of institutional design and the fundamental reliance of the system on separation of powers should be taught critically and urgently, not just as materials that should be memorized for examinations, but as civic imperatives of which the citizenry – not the political or legal elites – are the ultimate guarantors.

3. *Recognize that the courts alone cannot save the situation.* If the second point resonates with students’ idealism about American law and constitutionalism, the third marks the outer boundary. We should teach *Brown v. Board*, for instance, as a significant triumph and milestone in the struggle against racial ascription. But *Brown* should not be the end of that story, and our students should know about the debate over Gerald Rosenberg’s work, the law and politics of mass resistance, and the struggles to achieve investment and intervention from the other branches of the national government. As Mark Graber has shown in the context of slavery, constitutions cannot guarantee justice; at best they can preserve peace and sometimes fail at that (Graber 2006). We can teach the detainee cases and other cases that will hopefully come as points where the rule of law has been able to reassert itself, but we should work to show the

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6 See the essays in the forthcoming volume, *Disarmed: Critical Perspectives on Race, Gender, and Militarization*, in particular contributions by Mann, Houppert, and Feldman. (Mann 2008; Houppert 2008; Feldman 2008).
7 The best work on anxieties about the Constitution and the need for citizen reclamings of constitutional interpretation comes from Mark Tushnet and Sandy Levinson.
institutional connections and commitments that can make these rulings effective – and critically point out the institutional and political moments when they are not.

4. Help our students to see what is extraordinary about the contemporary struggle. We ourselves may disagree on this point; some scholars have argued that what is happening now is a continuation of other wartime stances of the executive branch. Still others have seen the current moment as the modern response to a new type of non-state threat and understand the Bush administration’s policies as a genuine effort to adjust our ideas about constitutional warfare to meet this threat. But still others identify the current struggle, for good or ill, as a Schmittian moment of the exercise of extraconstitutional authority that can only be evaluated once the moment has passed (see, e.g., the essays in Tushnet 2005 and Agamben’s work on states of exception). Regardless, we should guide our students, always maintaining deep sensitivity to their political beliefs, toward their own encounters with serious questions about what might be extraordinary about the contemporary military conflict and the administration’s conduct of it. Our first duty here is to provide our students with the frameworks and analytical tools they will need to understand how the unfolding scenarios are influencing constitutional and legal development and structure even as they are learning it.

5. Finally, and perhaps most controversially, urge our students to document, analyze, resist, and remember. We may someday face a process for truth and reconciliation from these days. Such a process may be formal, or it may take place only in the hearts of those who have lived through this era. But we should prepare our students and give them the critical purchase on these deep questions that they will someday need as they return in years to come to reflect upon their own encounters with constitutionalism and war in this vital intellectually and morally formative period of their lives and the life of our nation, for the Americans among us.
BIBLIOGRAPHY

Cases and Statutes

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952)
El-Masri v. U.S., 479 F.3d 296 (4th Cir. 2007)


Secondary Sources

“Let There Be Law: The Supreme Court has offered a Chance to Put the War on Terror on Solid Legal Ground.” Washington Post, July 2, 2006.