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## The Theoretical Constitutional Shape (and Shaping) of American National Security Law

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## THE THEORETICAL CONSTITUTIONAL SHAPE (AND SHAPING) OF AMERICAN NATIONAL SECURITY LAW

ROBERT F. BLOMQUIST\*

### ABSTRACT

*In order to fathom the theoretical shape of the American national security constitutional system, and to appreciate how that system should be shaped in the future, it is vital to conceptualize the legal field of American national security law as the interaction of four constitutive dimensions. Initially the factual context involves two overarching general concerns: first, the maintenance of the Nation's strategic advantage over challengers, competitors, and threats to America's future; and second, the remarkable strategic responsibility of presidents of the United States to deftly shift from one serious, potentially catastrophic, crisis to the next. The second dimension is the policy trade-offs of American national security law between calculated permutations of liberty, on the one hand, and security, on the other hand. The third dimension of the field entails the threefold characteristics of the values and interests of American national security law—preserving the American nation and its rule of law, protecting the American people and homeland, and defending America's allies and friends from unauthorized violence and natural catastrophes that might destabilize America's strategic advantage. The final dimension of the field entails the legal doctrine of the primacy of the president to fashion national security presiprudence within broad constitutional executive powers, subject to reasonably deferential judicial review.*

*Form and function in the American national security legal system is best understood as flowing from presidential decision and discretion. Three overarching philosophical problems of judicial review of the president's national security decision-making entail the problem of knowledge, the problem of conduct, and the problem of governance. In turn, to flesh out and better understand these problems in concrete cases, the Supreme Court must be cognizant of the various aesthetics of national security law and the multiple*

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*potential types of national security arguments. In resolving problems of American national security law, the Court should refrain from citing foreign judicial precedent and should rely exclusively on American law and precedent for four functional reasons: (1) ethos and American identity, (2) effective dispute resolution, (3) meaningful agenda-setting and constitutional dialogue, and (4) judicial political legitimacy. Nevertheless, the Court should be cautiously open to non-precedential learning of transnational ideas regarding national security issues.*

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## I. PRELIMINARY THEORETICAL CONCERNS

What is the nature of the American national security constitutional system?<sup>1</sup> Given the special American constitutional role of the president as national security sentinel and the uniquely nationalistic praxis of counterterrorism law, what are the key, overarching philosophical problems of judicial review of the president's national security legal work product (what we may call national security *presiprudence*)?<sup>2</sup> In approaching the daunting task of reviewing American national security law, how should Supreme Court Justices and other federal judges envision the shape, or aesthetics, of the field? What are the various types of legal arguments that are instrumental in shaping American national security law? What role, if any, should foreign judicial precedents play in shaping American national security law?

This Article addresses these questions, both generally and by specific examination of the field of American national security law.<sup>3</sup> Angst among American jurists and legal commentators about the legitimacy,<sup>4</sup> method,<sup>5</sup>

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1. In general, the field of national security law is only a few decades old. See NATIONAL SECURITY LAW xxxvii (John Norton Moore & Robert F. Turner eds., 2d ed. 2005). A broad definition of the field involves "a full synergy of international law, international relations, and national law and policy related to the security of the [United States as a nation] and the problem of unauthorized violence in the world." *Id.* The constitutional conundrum of American national security law draws its purpose from the famous dictum: "[T]he Constitution, considered only for its affirmative grants of power capable of affecting [foreign affairs], is an invitation to struggle for the privilege of directing American foreign policy." EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS: 1787–1957*, at 171 (4th rev. ed. 1957).

2. See *infra* Part II.A.

3. Cf. Todd S. Aagaard, *Environmental Law as a Legal Field: An Inquiry in Legal Taxonomy*, 95 CORNELL L. REV. 221, 229 (2010) (arguing that the "explanatory power" of a legal field depends on "the extent to which situations that arise within the field exhibit a recognizable pattern"; "the simplicity of the pattern"; "the extent to which the pattern predominates within the field"; "the extent to which a single pattern explains the various issues that arise within the field"; and, "the scope of situations that arise within the field").

4. See RICHARD A. POSNER, *HOW JUDGES THINK* 347–48 (2008). On one hand, there is a category of American judicial citation of foreign court decisions that is "unexceptionable," and legitimate, consisting of persuasive legal arguments about a vexing subject like abortion; use of foreign law in a contract that specified that the agreement should be interpreted according to the substantive law of another country; reference to international law that is discussed in foreign judicial decisions when the U.S. Constitution or a federal statute authorizes a federal court to enforce criminal or tort claims based on international law violations; and old English decisions used to establish the original meaning of a phrase from the American Constitution. Cf. *id.* at 348. On the other hand, American judicial citation of a foreign decision "cited for its *precedential* effect" by American judges, "searching for a global consensus on an issue of U.S. constitutional law" is problematic. Concerns of legitimacy in American judges citing foreign judicial decisions as precedent include the usurpative imposition of "cosmopolitan values . . . in the name of our eighteenth-century Constitution . . .", and the "undemocratic" extraction of foreign precedent and its injection into the American constitutional system. *Id.* at 352, 353. See also Cheryl Saunders, *Comparative Constitutional Law in the Courts: Is There a Problem?*, 59 CURRENT

transparency,<sup>6</sup> and context of citation of foreign case law<sup>7</sup> in American constitutional adjudication provides a useful foil<sup>8</sup> for describing the shape of

LEGAL PROBS. 2006 91, 108, 126 (2007) (pointing out that while citation to foreign law in constitutional adjudication of countries such as Australia, Canada, Israel, South Africa, and the United Kingdom raise no legitimacy concerns because of these nations' constitutional systems and national self-conceptions, legitimacy is an issue when American judges cite foreign law by virtue of the logic of the American judicial appointment process, which draws its force from the democratic legitimacy of the elected president and Senate).

5. See POSNER, *supra* note 4, at 349–52. Methodological objections of American judicial citation of foreign judicial precedent include “the promiscuous opportunities that such a practice . . . opens up”; the “wasteful ‘arms race’ character” of the practice where, “[i]f one [American] judge starts citing such [foreign] sources, opposing judges are placed under pressure to go digging in the same sources for offsetting citations”; the illusion that “the world’s judges constitute a single community of wisdom and conscience”; and the arrogance and usurpation by “sophisticated cosmopolitans” wearing judicial robes, who misguidingly try to “impose their cosmopolitan values on Americans in the name of our eighteenth-century Constitution.” *Id.*; see also Saunders, *supra* note 4, at 99–100 (analyzing the sophisticated methodological issues in citation to foreign sources of law that are underappreciated or under-theorized including whether the foreign legal citation involves a “conclusion of law, a constitutional or legal norm” or “an argument, a value, a perception, an interpretative approach, or merely a happy turn of phrase”; the various potential stages in a court’s reasoning process when citation to “foreign experience” takes place, for example, “to frame the question,” or “to identify options or more generally to survey the field,” or “to test a hypothesis,” or, “to confirm a conclusion,” or “to explore the consequences of a particular result”).

6. See POSNER, *supra* note 4, at 350. Citation of foreign judicial decisions by American judges is really just “one more form of judicial fig-leaving” whereby judges—timid about speaking in their own voices lest they make legal justice seem too personal—seek to “further mystify the adjudicative process” and to obscure the *real* bases for politically-charged constitutional cases that derive from “their personal experiences, values, intuitions, temperament, reading of public opinion, and ideology.” *Id.*

7. See *id.* at 351–53, 366 (arguing that “foreign [judicial] decisions emerge from a complex social, political, historical, and institutional background of which most [American] judges and [j]ustices are ignorant”; foreign constitutional courts often have incentives to issue “audaciously progressive opinions” because the foreign judges know their constitutional rulings can be nullified by a legislative supermajority vote, while overruling a constitutional ruling by the Supreme Court of the United States requires the arduous amendment process of ratification by three-fourths of the states and two-thirds vote in both houses of Congress; and foreign judicial decisions are often aggressively interventionist policy determinations based on foreign legal systems “alien to our own system” and antithetical to the American historical experience); see also Saunders, *supra* note 4, at 126 (pointing out a “range” of contextual “reasons why references to foreign law in constitutional cases might begin to attract closer, and not necessarily friendly, scrutiny” including “the impact of the new emphasis on differences in comparative private law; the growing nationalism that is a sign of the times, whether as a reaction against increasingly heterogeneous communities, threats of terrorism or globalization; and the mounting hostility to judicial activism”).

8. Indeed, much has been written in recent years about the appropriateness, circumstances and methodology of American courts (particularly the Supreme Court of the United States) citing foreign law or international law in the course of constitutional and other types of adjudication.

American national security law and the forces that should and should not shape this field of law in the future. American national security law is saturated by diverse and profound questions of constitutional interpretation. Since September 11th and the commencement of the American wars in Iraq and Afghanistan a few years ago, there has been a “frenetic pace of developments” in American national security law that is likely to continue into the foreseeable future.<sup>9</sup> The flavor of this torrent trend in the field of national security law is captured by the preface of a recent combined supplement to two law books that highlights the following novel developments:

[N]ew information about the rationale for the war in Iraq, a second decision from the FISA [Foreign Intelligence Surveillance Act] Court of Review . . . , and the latest in a remarkable series of rulings on national security letters . . . . Also included . . . [is] a new Second Circuit decision on the extra-territorial application of the [Fourth] Amendment . . . , the Supreme Court’s decision in a suit for damages alleging mistreatment of a terrorism suspect in custody . . . and a dramatic post-*Boumediene* decision concerning the reach of the writ of habeas corpus to Afghanistan . . . . The election of a new President has, predictably, brought a number of changes as well, and many of those are

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*See, e.g.,* Roger P. Alford, *In Search of a Theory of Constitutional Comparativism*, 52 UCLA L. REV. 639 (2005); James Allan, *Jeremy Waldron and the Philosopher’s Stone*, 45 SAN DIEGO L. REV. 133 (2008); James Allan & Grant Huscroft, *Constitutional Rights Coming Home to Roost? Rights Internationalism in American Courts*, 43 SAN DIEGO L. REV. 1 (2006); Stephen Breyer & Antonin Scalia, *A Conversation Between U.S. Supreme Court Justices: The Relevance of Foreign Legal Materials in U.S. Constitutional Cases: A Conversation Between Justice Antonin Scalia and Justice Stephen Breyer*, 3 INT’L J. CONST. L. 519 (2005); Ruth Bader Ginsburg, “A Decent Respect to the Opinions of [Human]kind”: *The Value of a Comparative Perspective on Constitutional Adjudication*, 64 CAMBRIDGE L.J. 575 (2005); Vicki C. Jackson, *Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 HARV. L. REV. 109 (2005); Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT’L L. 43 (2004); Ken I. Kersch, *The New Legal Transnationalism, the Globalized Judiciary, and the Rule of Law*, 4 WASH. U. GLOB. STUD. L. REV. 345 (2005); David S. Law, *Generic Constitutional Law*, 89 MINN. L. REV. 652 (2005); John O. McGinnis & Ilya Somin, *Should International Law Be Part of Our Law?*, 59 STAN. L. REV. 1175 (2007); Austen L. Parrish, *Storm in a Teacup: The U.S. Supreme Court’s Use of Foreign Law*, 2007 U. ILL. L. REV. 637 (2007); Richard A. Posner, *Foreword: A Political Court*, 119 HARV. L. REV. 31, (2005); Mark C. Rahdert, *Comparative Constitutional Advocacy*, 56 AM. U. L. REV. 553 (2007); Mark Tushnet, *When Is Knowing Less Better Than Knowing More? Unpacking the Controversy Over Supreme Court Reference to Non-U.S. Law*, 90 MINN. L. REV. 1275 (2006); Jeremy Waldron, *Foreign Law and the Modern Ius Gentium*, 119 HARV. L. REV. 129 (2005); Ernest A. Young, *Foreign Law and the Demominator Problem*, 119 HARV. L. REV. 148 (2005).

9. *See* NATIONAL SECURITY LAW (4th ed.) & COUNTERTERRORISM LAW (Stephen Dycus et al. eds., Supp. 2009).

reflected here in executive orders, speeches, and materials from the Justice Department.<sup>10</sup>

As an opening theoretical gambit, in expansive and synoptical theoretical terms, “[w]e can conceptualize a legal field as the interaction of four underlying constitutive dimensions of the field: (1) a factual context that gives rise to (2) certain policy trade-offs, which are in turn resolved by (3) the application of values and interests to produce (4) legal doctrine.”<sup>11</sup> The *factual context* of American national security law problems involves two overarching general concerns: first, the maintenance of the Nation’s strategic advantage over challengers, competitors, and threats to America’s future;<sup>12</sup> and second, the remarkable strategic responsibility of presidents of the United States to deftly shift from one serious, potentially catastrophic, crisis to the next.<sup>13</sup> The *policy trade-offs* of American national security law encompass calculated permutations between liberty, on the one hand, and security, on the other hand. The *values and interests* of American national security law are threefold: preserving the American nation and its rule of law, protecting the American people and homeland, and defending America’s allies and friends from unauthorized human violence and natural catastrophes that might destabilize America’s global strategic advantage. Finally, the overarching *legal doctrine* of the field of American national security law is the primacy of the president to

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10. *Id.* at ix. “We expect the frenetic pace of developments to continue for the foreseeable future, with two wars still underway, looming threats in Iran and North Korea, a flood of national security-related litigation working its way through the court system, and the articulation of new policies by the Obama administration.” *Id.* at x.

11. Aagaard, *supra* note 3, at 225.

12. See BRUCE BERKOWITZ, STRATEGIC ADVANTAGE: CHALLENGERS, COMPETITORS AND THREATS TO AMERICA’S FUTURE (2008).

13. See Robert F. Blomquist, *The Jurisprudence of American National Security Presiprudence*, 44 VAL. U. L. REV. 881, 887 & n.34 (2010) [hereinafter Blomquist, *Jurisprudence*].



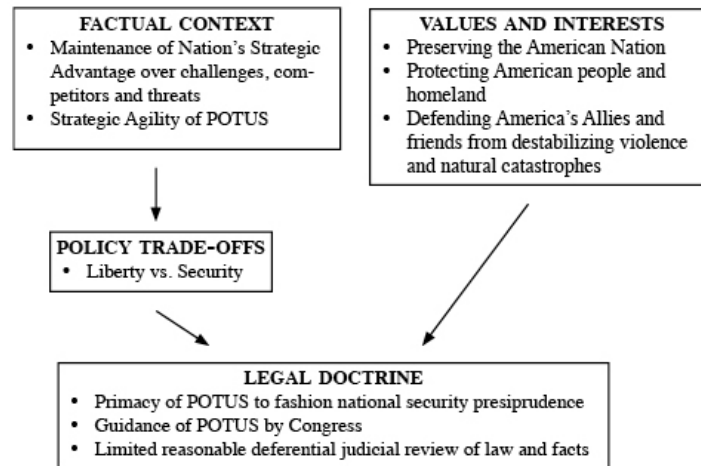
fashion national security prescience within broad constitutional executive powers, subject to reasonably deferential judicial review of facts and law.<sup>14</sup>

14. Cf. Robert M. Chesney, *National Security Fact Deference*, 95 VA. L. REV. 1361 (2009) (arguing that national security fact deference by the judiciary should not entail a “one-size-fits-all solution”). Thus, a nuanced and balanced view of national security fact deference—closely intertwined with the precise legal issue involved in a particular case—leads to the following “key insights”:

- Comparative institutional accuracy arguments *can* favor the executive branch, but judges cannot assume that this is so simply because a factual dispute has national security connotations.
- Comparative accuracy can be a function of superior access to information or expertise, but in any event deference is not appropriate on this ground absent a showing that the decision actually exploited such advantages in a reliable manner.
- Judges should not be too quick to assume that executive agencies hold an advantage over the judiciary with respect to information access; the possibility that information can be passed through to the judge, combined with the potential for new information to emerge in the adversarial process, render this inquiry unmanageable in many if not most instances.
- Special expertise [of the executive branch] is more likely to matter in the context of predictive judgments—which at times shade into opinion or policy judgment—than in the context of retrospective factfinding.
- Cognitive biases are significant concerns for any factfinding process, but it is unclear that judges are in a position to detect their presence. In any event, predicating deference on a showing that the executive reliably employed epistemic advantage may guard indirectly against such concerns, via the third party accountability effect.
- Weighted accuracy concerns driven by the magnitude of the litigants’ interests (the government’s national security concerns, for example, or a private person’s fundamental rights) are likely to be a wash in this setting, in which case it makes more sense to prioritize core accuracy and other prudential concerns.
- Efficiency concerns relating to speed, agenda control, and resource consumption ordinarily should have no impact on the fact deference question, however important they may be in other contexts.
- Prudential concerns regarding the collateral consequences of non-deferential review, including the risk of disrupting military operations or exposing classified information, are legitimate concerns, but they are better addressed through procedural devices such as the state secrets privilege.
- The fact that a national security related claim is justifiable does not mean that institutional self-preservation concerns drop out of the picture; fact deference provides a tempting—and not very transparent—opportunity for a judge to accommodate such prudential concerns.
- Democratic accountability concerns are weak with respect to retrospective factfinding, but they can be strong with respect to predictive judgments—particularly where the latter involves elements of opinion or policy judgment.
- Legitimacy concerns, understood as claims of formal allocation of authority to the executive branch, do no independent work in this context; on close inspection legitimacy arguments collapse into one another of the functional and prudential concerns described above.

The relationship among these broad components of the field of American national security law can be illustrated by a conceptual diagram:<sup>15</sup>

FIGURE 1:  
CONCEPTUAL DIAGRAM OF AMERICAN NATIONAL SECURITY LAW



On a second preliminary theoretical level, we should be cognizant of the experimentation and innovation, within the domain of American law, that has transpired during the first decade of the twenty-first century by American lawyers, executive branch officials, and judges in processing difficult cases that have emerged in the field of American national security law—a trend that is likely to continue in the future. As noted by Professors Chesney and Goldsmith, by way of an important illustration of American national security law experimentation and innovation, the models of criminal justice versus the military detention approach for responding to terrorists have been converging.<sup>16</sup> As they explain: “During [recent] years, the military detention system has instituted new rights and procedures designed to prevent erroneous detentions, and some [American] courts have urged detention criteria more oriented toward individual conduct than was traditionally the case.”<sup>17</sup> But

*Id.* at 1432–33. *But see*, RICHARD A. POSNER, COUNTERING TERRORISM: BLURRED FOCUS, HALTING STEPS 173 (2007) (“[V]ery few judges other than the handful assigned to the two foreign intelligence courts have security clearances, or . . . know anything about national security, including the scope and gravity of the terrorist threat and the best methods of combating it.”).

15. I am indebted to Todd S. Aagaard for the inspiration of this conceptual diagram which he applied to the field of environmental law. Aagaard, *supra* note 3, at 279.

16. Robert Chesney & Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 STAN. L. REV. 1079, 1080–1081 (2008).

17. *Id.* at 1081.

interestingly, “the criminal justice system has diminished some traditional procedural safeguards in terrorism trials and has quietly established the capacity for convicting terrorists based on criteria that come close to associational status.”<sup>18</sup> While “neither model as currently configured” presents a final answer to “the problem of terrorist detention,”<sup>19</sup> the trend of convergence “does identify areas of [American] consensus about detention criteria and procedural safeguards and highlights the outstanding issues that any serious detention reform must face.”<sup>20</sup> Given the silence of what particular international treaty-based detention criteria apply to non-international armed conflicts (NIACs)—the type of conflict epitomized by terrorist attacks on Americans in the last decade or so—detention criteria have properly been subject to discretionary experimentation and innovation by American legal officials.<sup>21</sup>

A third preliminary theoretical matter involves the nature and limits of “constitutional borrowing”<sup>22</sup> of ideas from foreign legal sources in the development of the field of American national security law. “[C]onstitutional borrowing is the practice of importing doctrines, rationales, tropes, or other legal elements from one area of constitutional law into another for persuasive ends.”<sup>23</sup> One facet of constitutional borrowing is “cross-border appropriation of ideas, and often within a single area of constitutional law.”<sup>24</sup> In the field of American national security law there exists a vexing question of “fit”<sup>25</sup>—

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18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.* at 1086–87. Cf. Michael Chertoff, *The Responsibility to Contain: Protecting Sovereignty Under International Law*, 88 FOREIGN AFF. 130, 130–32 (2009) (arguing against the subordination of “established U.S. laws and even U.S. constitutional provisions” to “international legal mandates and ‘customary’ international law—in which ‘custom’ is not traditionally interpreted, as being on the actual practices of states, but instead is dictated by the policy preferences of foreign judges or, worse yet, international scholars and academics”; arguing for the eventual creation of a “modern international legal order” entailing “individual states assum[ing] reciprocal obligations to contain transnational threats emerging from within their borders so as to prevent them from infringing on the peace and safety of fellow states around the world”; but the new international legal framework “will be successful only if sovereign consent of individual nations,” in international treaties or conventions, “remains the bedrock of international law and only if” the trend is resisted by the United States to have “broad and abstract norms through undemocratic means” imposed on its development of national security law).

22. See Nelson Tebbe & Robert L. Tsai, *Constitutional Borrowing*, 108 MICH. L. REV. 459 (2010).

23. *Id.* at 461 (footnote omitted).

24. *Id.* at 467 n.15. Indeed, while cross-border constitutional borrowing is only one type of constitutional borrowing, since “all manner of legal appropriations, both between different legal systems and within . . . a single political order” are possible, *id.* at 467, cross-border constitutional borrowing is probably the most controversial to Americans.

25. *Id.* at 495–99.

”[h]ow well different bodies of constitutional knowledge fit together.”<sup>26</sup>—because “the rule of law requires that material taken across boundaries bear a defensible relationship to existing cultural practices and political commitments.”<sup>27</sup> Moreover, there is also a troublesome issue of “transparency”<sup>28</sup> in cross-border constitutional borrowing in the field of American national security law when foreign precedents might be covertly cited without “revealing [their] genesis or evolution,”<sup>29</sup> without a nuanced discussion of their “pedigree,”<sup>30</sup> and without a “painstakingly”<sup>31</sup> thorough discussion of context.<sup>32</sup>

The remaining portions of this Article proceed as follows: In Part II, attention is first focused on the form and function of the American national security system and the systematizing device of American national security presiprudence. Then, I delineate key philosophical problems facing the American judiciary in reviewing national security presiprudence (the problem of *conduct*, the problem of *knowledge*, and the problem of *governance*). This analysis is followed by a discussion of the four aesthetics of American national security law (grid, energy, perspectivist, and disassociative) that are explained and elaborated in relation to five types of potential national security legal arguments (text, intent, precedent, tradition, and policy). Part III of the Article applies the concepts that are fleshed out in Part II to the specific question of whether and how American judges should use foreign judicial precedent in reviewing presidential national security law decisions—if you will, a dimension of the jurisprudence of American national security presiprudence.

## II. FORM AND FUNCTION IN THE AMERICAN NATIONAL SECURITY LEGAL SYSTEM

### A. *American National Security Presiprudence*

As the early twentieth-century jurisprude, Rudolf von Jhering, once remarked: “Form is rooted in the innermost essence of law.”<sup>33</sup> Taking

26. *Id.* at 495.

27. *Id.* at 497.

28. Tebbe & Tsai, *supra* note 22, at 499.

29. *Id.*

30. *Id.*

31. *Id.*

32. Cf. Michael Kirby, *The Common Law and International Law—A Dynamic Contemporary Dialogue*, 30 *LEGAL STUD.* 30 (2010) (discussing the fit and transparency of constitutional borrowing in countries like South Africa, India, and Canada, where constitutional provisions have stimulated the change, and in commonwealth countries like Australia, where a framework or tradition of constitutional borrowing is extant).

33. ROBERT S. SUMMERS, *FORM AND FUNCTION IN A LEGAL SYSTEM: A GENERAL STUDY* 3 (2006) (footnote omitted).

inspiration from this abstract observation, Professor Robert S. Summers introduced his book-length study of legal form by arguing:

Many leading scholars and theorists of law in the twentieth century including H.L.A. Hart and Hans Kelsen, viewed a legal system as essentially a system of rules. In developed Western societies, however, a legal system is far more than this. It is made up of diverse functional units only one major variety of which consists of rules. These diverse units are, in turn, duly organized in complex ways to form a system. To grasp the nature of a legal system, it is first necessary to understand the diverse functional units of the system. These include institutions, such as legislatures and courts [and executives], legal precepts such as rules and principles, nonpreceptual species of law such as contracts and property interests, interpretive and other legal methodologies, sanctions and remedies and more. A discrete legal unit does not function independently. It must be combined and integrated with other units.<sup>34</sup>

Summers goes on to theoretically describe “the overall form of a legal system as whole” as “a highly complex purposive systematic arrangement designed to govern in accord with law a population typically residing in a geographically contiguous area.”<sup>35</sup> He asserts the importance of “systematizing devices” of a robust legal system that include, among others, the following: “the centralization and hierarchical ordering of legislatures, courts, administrative bodies and other entities operating *within* their own jurisdictional spheres”;<sup>36</sup> “specification of systematic priorital relations as *between* first-level legislative, judicial, administrative and other jurisdictional spheres . . . specifying how general types of conflicts between otherwise valid rules, between other law, and between officials and their actions are to be resolved”;<sup>37</sup> “codification, consolidation, or other continuing systematization of first-level rules and other law, into one field after another, into coherently ordered bodies of law”;<sup>38</sup> and “adoption of *uniform* interpretive . . . and other first-level methodologies”<sup>39</sup> to create coherence and hierarchically-ordered institutional arrangements.<sup>40</sup>

Energized by Professor Summers’ overarching systematic legal theory, I developed an account of what I call *American national security presiprudence*.<sup>41</sup> *Presiprudence*—the legal work product of the presidents of

34. *Id.* at 3–4 (footnotes omitted).

35. *Id.* at 305.

36. *Id.* at 308.

37. *Id.*

38. *Id.*

39. SUMMERS, *supra* note 33, at 308.

40. *Id.* at 309.

41. Robert F. Blomquist, *American National Security Presiprudence*, 26 QUINNIPIAC L. REV. 439 (2008), reprinted in TOP TEN GLOBAL JUSTICE LAW REVIEW ARTICLES 55 (Amos N. Guiora ed., 2009) [hereinafter Blomquist, *Presiprudence*].

the United States—is a concept I formulated based on the Presidential Oath Clause in Article II, Section 1 of the Constitution<sup>42</sup> that prescribes a unique oath to be taken by the presidents-to-be before assuming the executive power of the national government and which contemplates a *special responsibility* of American presidents to articulate, safeguard, and watch over the American national interest.<sup>43</sup> My premise in an earlier article was “that, in the spirit of existing scholarly fields of endeavor which attempt to systematize and critique the coherence and robustness of the judiciary’s legal work product (*jurisprudence*) and the legislature’s legal work product (*legisprudence*),” it is appropriate to begin to develop related attention to the legal work product of the president (*presiprudence*).<sup>44</sup>

American national security presiprudence, therefore, is a type of systematizing device, described by Summers’ form and function legal theory,<sup>45</sup> that constitutionally instantiates the president as the American national security sentinel based on a broad—but not unlimited—interpretation of presidential power.<sup>46</sup> This broad interpretation—giving rise to the logic of the presidential American maximum security state, in appropriate circumstances—derives from the intellectual roots of the American Presidency (those antecedents in political philosophy and legal history, the lessons of ancient history and of Colonial and Revolutionary experience) that demonstrate that the Founders fashioned that unique institution with the contextual logos that presidents have expansive powers to pursue the American national interest.<sup>47</sup> Moreover, this broad interpretation of presidential national security power flows from the preponderance and prestige of strong executive advocates among the Founders coupled with the historical precedents of strong and powerful presidential

42. U.S. CONST. art II, § 1, cl. 7.

43. Robert F. Blomquist, *The Presidential Oath, The American National Interest and a Call for Presiprudence*, 73 UMKC L. REV. 1, 51 (2004), cited in *McCreary Cnty., Ky. v. ACLU of Ky.*, 545 U.S. 844, 886 (2005) (Scalia, J., dissenting) [hereinafter Blomquist, *Presidential Oath*].

44. Blomquist, *Presiprudence*, *supra* note 41, at 440; Blomquist, *Presidential Oath*, *supra* note 43, at 52 (“The Presidential oath is properly understood as the constitutional keystone of the American Republic: it commands the President of the United States to preserve, protect and defend—as well as articulate, pursue and achieve—the *legal embodiment of the American national interest*. A new field of inquiry, which I have coined *presiprudence*, may help scholars elaborate theoretical insights on the President’s pursuit of the legal national interest.”). Cf. Richard M. Pious, *Inherent War and Executive Powers and Prerogative Politics*, 37 PRESIDENTIAL STUD. Q. 66, 74 (2007) (“The relationship between the oath of office (requiring that the president to execute the office, and preserve, protect, and defend the Constitution, but not mentioning execution of the law) and the clause that requires the president to ‘take care that the laws be faithfully executed’ leaves open the possibility that a president, in fulfilling his oath, may decide that specific laws need not or cannot be executed, especially in emergency situations.”).

45. See *supra* notes 33–40 and accompanying text.

46. Blomquist, *Presiprudence*, *supra* note 41, at 441.

47. *Id.* at 441–48.

actions to preserve, protect, and defend the Nation from the time of George Washington to modern-era presidents.<sup>48</sup> New geopolitical realities during the first decade of the Twenty-First Century (the September 11th attacks and subsequent terrorist attacks around the globe) add force to the necessity and justification of our presidents to engage in careful “articulating, planning, and managing an array of law and policy measures to protect the American homeland, including surveilling and interdicting those who seek to harm American national security, broadly defined.”<sup>49</sup>

*B. Three Overarching Philosophical Problems of Judicial Review of American National Security Presiprudence*

In approaching the question of judicial review of American national security law and policymaking by the presidents of the United States (what I call American national security presiprudence), the judiciary must resolve three overarching philosophical problems.<sup>50</sup> First, the *problem of knowledge* (developed within the fields of epistemology and metaphysics) raises issues of the judiciary’s access to global intelligence on threats facing the United States; the judiciary’s baseline knowledge of past, present, and future security concerns; the experience of judges in understanding, imagining, intuiting, and reasoning about American national security; and the judiciary’s skill in making, assessing, and second-guessing probabilistic evidence and pattern recognition dealing with both concrete and abstract national security matters such as intelligence functions (collection, analysis and dissemination, covert action, counterintelligence and liaison) and homeland security regimes (nuclear nonproliferation, maritime security, public health, and other matters).

48. *Id.* at 448–57. This is not to say, however, that presidents have *preclusive* power to wage war in the face of contrary congressional statutes—the so-called “lowest ebb” of the president’s authority as Commander in Chief. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring). See David J. Barron & Martin S. Ledermann, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 691 (2008); David J. Barron & Martin S. Ledermann, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, 121 HARV. L. REV. 941 (2008).

49. Blomquist, *Presiprudence*, *supra* note 41, at 457. Of course, presidential national security actions will be subject to potential checking legislation by Congress. *Id.* at 481. Still, the president could “openly declare his constitutional objection to . . . congressional micromanaging of national security,” or, in a less confrontational strategy, “work around certain congressional restrictions by administrative finesse and creative interpretation” like use of “necessary and proper constructions of the legislation, enabling the president and designated administrative agencies to fulfill the duties expressly required by the legislation according to the norms of administrative efficiency.” *Id.* (footnotes omitted) (internal quotation marks omitted).

50. I am indebted to Daniel Robinson for suggesting this philosophical framework. DANIEL N. ROBINSON, *THE GREAT IDEAS OF PHILOSOPHY* 1 (2d ed. 2004).

Second, the *problem of conduct* (the domain of ethics and moral philosophy) implicates the need for judges to probe the consequences of their review of sensitive national security determinations by the presidents and their advisers—consequences to the litigants, consequences to the efficacy and efficiency of the national security process of the Nation, consequences to the coherence and integrity of the rule of law, and consequences to the foreign relations of the United States.

Finally, the *problem of governance* (expanded by political theory, political science, public policy, and systematic legal analysis) triggers questions of conflict—between human and civil rights, government officials, branches of government (executive, legislative, and judicial), and competing legal principles—and questions of hierarchy among types of government (federal, state, local, multi-national, and international).

### C. *Potential Aesthetics and Legal Arguments of American National Security Law*

In attempting to delve into concrete cases involving American national security law, judges can gain clarifying insight in deciding upon their proper role by considering four key aesthetics of national security law and five potential types of national security legal arguments that lawyers could conceivably fashion.

#### 1. Aesthetics of American National Security Law

Professor Pierre Schlag offered an incisive comment in his 2002 landmark article, *The Aesthetics of American Law*: “Law is an aesthetic enterprise. Before the ethical dreams and political ambitions of law can be articulated, let alone realized, the aesthetics of law have already shaped the medium within which those projects will have to do their work.”<sup>51</sup> Schlag convincingly moved beyond what he characterized as “a conventional understanding of aesthetics as the province of beauty and fine art” to his articulation of a “description of those recurrent forms that shape the creation, apprehension, and identity of the law.”<sup>52</sup>

While Professor Schlag’s project has a widespread illuminating power to clarify many areas of American law,<sup>53</sup> his general four-part aesthetic of American law is robustly apt for unpacking national security law. First, there is a *grid aesthetic*:

51. Pierre Schlag, *The Aesthetics of American Law*, 115 HARV. L. REV. 1047, 1049 (2002).

52. *Id.* at 1050–51.

53. See, e.g., Robert F. Blomquist, *Re-Enchanting Torts*, 56 S.C. L. REV. 481, 490–505 (2002) (applying Schlagian aesthetics to American tort law).



[The grid is a] two-dimensional area divided into contiguous well-bounded legal spaces. These spaces are divided into doctrines, rules, and the like. Those doctrines, rules, and the like, are further divided into elements, and so on and so forth. The subjects, doctrines, elements, and the like are cast as “object-forms.” They exhibit the characteristic features of objects: boundedness, fixity, and substantiality. They have insides and outsides that are separated by well-marked boundaries. The resulting structure—the grid—feels solid, sound, determinate. Law is etched in stone. The grid aesthetic is the aesthetic of bright-line rules, absolutist approaches and categorical definitions.<sup>54</sup>

Modern American national security law has four key axes: the U.S. Constitution, congressional enactments providing a statutory gloss and interpretation of the Constitution, presidential decision-making processes that invoke national security, and key judicial decisions by the Supreme Court.<sup>55</sup> Interspersed along these four axes are an assortment of specific subjects, doctrines, and elements. Enumerated constitutional powers (and limitations) involve: federal governmental powers found in the Preamble,<sup>56</sup> congressional powers in Article I,<sup>57</sup> presidential powers in Article II,<sup>58</sup> the federal judiciary’s

54. Schlag, *supra* note 51, at 1051.

55. Some might argue that a fifth axis of modern American security law is the Charter of the United Nations and the Statute of the International Court of Justice (1945) in particular provisions of the U.N. Charter dealing with the Security Council, U.N. Charter arts. 23–32; the provisions dealing with the pacific settlement of disputes, *id.* arts. 33–38; the provisions addressing action with respect to threats to the peace, breaches of the peace, and acts of aggression, *id.* arts. 39–51; and the provisions dealing with regional arrangements for maintenance of international peace and security, *id.* arts. 52–54. See, e.g., MICHAEL BYERS, *WAR LAW: UNDERSTANDING INTERNATIONAL LAW AND ARMED CONFLICT* 147–55 (2005) (asserting the paramount importance of the United Nations Security Council). I contend, however, that the best way to conceive of the U.N. Charter and the Security Council is not in terms of the grid aesthetic of clear-cut rules and categorical definitions, see *supra* notes 53–54 and accompanying text, but in terms of two other, less fixed and determinate, aesthetics—the perspectivist aesthetic and the dissociative aesthetic, see *infra* notes 93–127 and accompanying text.

56. U.S. CONST. pmb. (“We the People of the United States, in order to form a more perfect union, . . . insure domestic tranquility, provide for the common defense . . . do ordain and establish this Constitution for the United States of America.”).

57. *Id.* art. I, § 8, cl. 4 (uniform naturalization power); *id.* cl. 10 (power “[t]o define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations”); *id.* cl. 11 (power “[t]o declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water”); *id.* cl. 12 (power “[t]o raise and support Armies”); *id.* cl. 13 (power “[t]o provide and maintain a Navy”); *id.* cl. 14 (power “[t]o make Rules for the Government and Regulation of the land and naval Forces”); *id.* cl. 15 (power “[t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions”); *id.* cl. 16 (power “[t]o provide for organizing, arming and disciplining the Militia . . . and the Authority of training the Militia”); *id.* cl. 17 (power over the District of Columbia and “to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines,

Article III powers over cases or controversies,<sup>59</sup> the federal Supremacy Clause in Article VI,<sup>60</sup> the non-delegated police powers of the States in the Tenth Amendment,<sup>61</sup> and the individual liberties fleshed out in the Bill of Rights and subsequent amendments.<sup>62</sup> The axis of congressional enactments that provide a statutory gloss and interpretation of the Constitution's national security provisions includes: the War Powers Resolution,<sup>63</sup> the National Security Act of 1947, as amended,<sup>64</sup> the Foreign Intelligence Surveillance Act of 1978 (FISA),<sup>65</sup> the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot) Act of

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Arsenals, dock-Yards and other needful Buildings"); *id.* cl. 18 (power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States or in any Department or Officer thereof").

58. *Id.* art. II, § 1, cl. 1 ("The executive Power shall be vested in a President of the United States of America"); *id.* cl. 8 ("Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation: 'I do solemnly swear (or affirm) that I will faithfully execute the Office of the President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States'"); *id.* § 2, cl. 1 ("The President shall be the Commander in Chief of the Army and Navy of the United States, and of the Militia of the several states . . ."); *id.* cl. 2 ("He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties . . ."); *id.* § 3 ("[He] shall . . . take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States").

59. *Id.* art. III, § 2 ("The judicial Power shall extend to all Cases . . . arising under this Constitution, the Laws of the United States, and Treaties made . . . to Controversies to which the United States shall be a Party . . .").

60. *Id.* art. VI, cl. 2 ("The Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made . . . under the Authority of the United States, shall be the supreme Law of the Land . . .").

61. *Id.* amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

62. *See, e.g.,* U.S. CONST. amend. I (freedoms of speech, press, assembly, and to petition the government); *id.* amend. II (right to bear arms); *id.* amend. III (no quartering of troops in any house with limited exceptions); *id.* amend. IV (right to be free of unreasonable searches and seizures and warrant requirements); *id.* amend. V (due process required for deprivation of life, liberty or property, eminent domain limitations); *id.* amend. VI (right to speedy and public criminal trial, right of confrontation, right of compulsory process, right of assistance of counsel); *id.* amend. VIII (no excessive fines or bail, no cruel or unusual punishment to be inflicted by government); *id.* amend. IX (other rights contemplated).

63. War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified at 50 U.S.C. §§ 1541-1548).

64. National Security Act of 1947, Pub. L. No. 80-253, 61 Stat. 495 (codified as amended at 50 U.S.C. § 401 *et seq.* (2006)).

65. Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (codified as amended at 18 U.S.C. §§ 2511, 2518-2519 and 50 U.S.C. §§ 1801-1811).

2001,<sup>66</sup> the Military Commissions Act of 2006,<sup>67</sup> and other enactments. The axis of presidential decision-making processes that invoke national security includes: presidential directives regarding bioterrorism,<sup>68</sup> presidential counterintelligence directives,<sup>69</sup> presidential directives regarding homeland security,<sup>70</sup> intelligence law presidential directives,<sup>71</sup> rules of engagement for military force and delegated subordinate military orders issued by the president,<sup>72</sup> Memoranda of Notification (MONs) for the use of covert action,<sup>73</sup> and presidential national security directives.<sup>74</sup> Finally, the axis of key Supreme Court decisions addressing national security includes the following essential corpus: the twenty-first century decision in *Boumediene v. Bush*,<sup>75</sup> the twentieth century decisions in *Navy v. Egan*,<sup>76</sup> *Dames & Moore v. Regan*,<sup>77</sup> *United States v. Snepp*,<sup>78</sup> *United States v. Nixon*,<sup>79</sup> *Youngstown Sheet & Tube Co. v. Sawyer*,<sup>80</sup> *Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp.*,<sup>81</sup> *United States v. Curtiss-Wright Export Corp.*,<sup>82</sup> *The Paquete Habana*,<sup>83</sup> and the nineteenth century decisions in *Totten v. United States*<sup>84</sup> and *The Prize Cases*.<sup>85</sup>

Second, there exists the *energy aesthetic* of American law: “law is cast in the image of energy. Conflicting forces of principle, policy, values, and politics collide and combine in sundry ways.”<sup>86</sup> Here, “[p]recedents expand or contract in accordance with the push and pull of policy and principle. Legal

66. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified in scattered sections of the U.S.C.).

67. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified as amended in scattered sections of 10, 18, 28, and 42 U.S.C.) (declared partially unconstitutional).

68. JAMES E. BAKER, IN THE COMMON DEFENSE: NATIONAL SECURITY LAW FOR PERILOUS TIMES 285–86 (2007).

69. *Id.* at 147.

70. *Id.* at 250.

71. *Id.* at 127, 129–30, 134–35.

72. *Id.* at 225–30.

73. *Id.* at 153.

74. BAKER, *supra* note 68, at 105–10.

75. *Boumediene v. Bush*, 553 U.S. 723 (2008).

76. *Dep’t of the Navy v. Egan*, 484 U.S. 518, 527 (1988).

77. *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

78. *Sneep v. United States*, 444 U.S. 507 (1980).

79. *United States v. Nixon*, 418 U.S. 683 (1974).

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

81. *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103 (1948).

82. *United States v. Curtiss-Wright Export Co.*, 299 U.S. 304 (1936).

83. *The Paquete Habana*, 175 U.S. 677 (1900).

84. *Totten v. United States*, 92 U.S. 105 (1875).

85. *The Prize Cases*, 67 U.S. 635 (1862).

86. Schlag, *supra* note 51, at 1051.

rules, principles, policies, and values have magnitudes that must be quantified, measured and compared. Movement and flux are the orders of the day.”<sup>87</sup>

Modern American national security law is characterized by constantly shifting forces of policy, values, and principles that coalesce and recombine in many ways. Among these energy aesthetics are legal and policy dynamics of four key forces involving “immediate and potentially catastrophic threats”<sup>88</sup> to the United States: (1) “the threat of terrorist attack using a weapon of mass destruction (WMD)”;<sup>89</sup> (2) national over-reaction by “measures that degrade the quality of our democracy”;<sup>90</sup> (3) the pressure to make convenient compromises that “fail to fully protect against a WMD attack or to preserve those values that underpin both our security and our liberty” because “we may not agree as a society on the nature of the [security] threat and therefore the nature of the response”;<sup>91</sup> and (4) assorted resource, organizational, political, and strategic costs “because we are distracted or divided, or . . . exhausted from guarding against the threat of the next terrorist attack on the American homeland or coping with foreign wars” to degrade our ability to address the century’s other certain threats such as “nuclear proliferation, instability in the Middle East, pandemic disease, environmental degradation, and energy and economic rivalry.”<sup>92</sup>

Third, there is a *perspectivist aesthetic* of American law whereby:

The identities of law and laws *mutate in relation to point of view*. As the frame, context, perspective, or position of the actor or observer shifts, both fact and law come to have different identities. Accordingly, the social or political identity of the legal actor or observer becomes the crucial situs of law and legal inquiry.<sup>93</sup>

87. *Id.* at 1051–52.

88. BAKER, *supra* note 68, at 1.

89. *Id.* A WMD might entail any one or combination of the following: “a chemical, biological, radiological, or nuclear device.” *Id.*

90. *Id.*

91. *Id.* In the evolving world of existential terrorist threats, the United States must also contemplate low-technology attacks like the mass gunmen attacks on civilians in Mumbai India during November 2008, and the murderous rampage by gun at Fort Hood, Texas in November 2009. See *Gunman Kills 12, Wounds 31 at Fort Hood*, MSNBC.COM (Nov. 5, 2009), [http://www.msnbc.msn.com/id/33678801/ns/us\\_news-crime\\_and\\_courts/t/gunman-kills-wounds-fort-hood/](http://www.msnbc.msn.com/id/33678801/ns/us_news-crime_and_courts/t/gunman-kills-wounds-fort-hood/). And, of course, there was the Christmas 2009 “underwear bomber” plot. See Tim Starks, *Making Them Talk*, CQ WEEKLY, Jan. 11, 2010, at 102–08 (discussing Christmas bombing plot of December 2009 in the wider context of American national security). Most recently, the failed “Times Square Terror” car bomb attack by a U.S. citizen is of concern. See Yochi Dreazen & Evan Perez, *Suspect Cites Radical Imam’s Writings*, WALL ST. J., May 7, 2010, at A6.

92. BAKER, *supra* note 68, at 1.

93. Schlag, *supra* note 51, at 1052 (emphasis added).

Twenty-first century American national security law is subject to a multitude of different—and frequently conflicting—points of view. By way of some limited illustrations, public international lawyers and United Nations devotees see the need for the primacy of the United Nations Charter, the Security Council, collective security, and norms of treaty and customary international law;<sup>94</sup> members of the United States Congress tend to look at the federal legislature as the national fiduciary in matters of war and peace, with the president as a mere executive branch official (who happens to live in a fancy mansion and have access to a big jet and a powerful helicopter) whose national security responsibilities are authorized and controlled by Congress;<sup>95</sup> and American military soldiers, sailors, marines, and air force members are fixated on the constitutional chain of command (from the President, as Commander-in-Chief at the top, down to the Secretary of Defense, the relevant Combatant Commander to the hierarchical functional commanders of the ground element and support element of United States forces).<sup>96</sup> The president has his or her own unique and lonely perspective of American national security law—from the presidential oath of office and other constitutional powers in Article II<sup>97</sup> to the formal and informal processes of the National Security Council (NSC);<sup>98</sup> from the input of executive department secretaries of State, Defense, Justice, Homeland Security, the Director of National Intelligence, and the president's military advisers on the Joint Chiefs of Staff to the Situation Room staff<sup>99</sup> and close White House advisers like the Vice President<sup>100</sup> and the Chief of Staff.

Finally, the *dissociative aesthetic* is disorienting and confusing when:

[I]dentities collapse into each other. Nothing is what it is, but is always something else. Any attempt to refer to X is frustrated, as even the most minimal inquiry reveals that X is an unstable glomming-on of many other

94. See generally BAKER, *supra* note 68, at 192–225 (discussing international law treaties and principles involving resort to force, and methods and means of warfare).

95. See generally *id.* at 176–92 (discussing constitutional powers of Congress over war and national security, history of presidential use of force with and without congressional authorization, and the enactment of the War Powers Resolution of 1973 requiring presidents to consult, report and resolve military engagements according to congressional guidelines).

96. See generally *id.* at 225–39 (discussing the American constitutional military chain of command, the nine unified combatant commands and an appraisal of the military chain of command structure).

97. See generally Blomquist, *Presiprudence*, *supra* note 41, at 441–82 (explanation of relevance is encouraged).

98. See generally BAKER, *supra* note 68, at 105–19 (discussing the formal framework of the NSC, the National Security Council staff, and informal and ad hoc NSC processes).

99. See generally *id.* at 127, 142, 225–30 (discussing various executive departments' inputs to the president on national security issues).

100. See generally *id.* at 119–21 (discussing the various roles played by recent vice-presidents in advising presidents on national security issues).

things that cannot be subsumed or stabilized within any one thing. The crucial contributions of the prior aesthetics—the grid (and its fixed identities), energy (and its quantifiable magnitudes), and perspective[ist] (and its identifiable relations)—have all collapsed. No determinable identities, relations, or perspectives survive.<sup>101</sup>

In the realm of American national security law, the Supreme Court's fractured opinions in *Boumediene v. Bush*<sup>102</sup> (reflecting the collapse of coherent legal discourse) are Exhibit A for the dissociative aesthetic. The holding of the Court was simple: foreign detainees at the Guantanamo Bay Naval Base in Cuba "have the constitutional privilege of habeas corpus," and this privilege cannot be withdrawn "except in conformance with the Suspension Clause."<sup>103</sup> Concluding that the procedures provided in the Detainee Treatment Act of 2005 (DTA)<sup>104</sup> were not "an adequate and effective substitute for habeas corpus,"<sup>105</sup> the majority held that the jurisdiction-eliminating subsection of the Military Commissions Act of 2006 (MCA)<sup>106</sup> unconstitutionally suspended the ancient writ.<sup>107</sup>

Interestingly, Justice Kennedy engaged in extensive historical analysis in an attempt to shed light on the original understanding of the English writ of habeas corpus at the time the U.S. Constitution went into effect in the late eighteenth century. While Kennedy cited old, pre-1789 English cases for the unobjectionable purpose of construing the Founders' intent in crafting the Suspension Clause,<sup>108</sup> he also cited post-1789 English cases that were of questionable relevance in the Court's original understanding exercise.<sup>109</sup> With the exception of a mild and oblique rebuke by Justice Scalia,<sup>110</sup> none of the nine Justices saw the Court's opinion as controversial, no doubt because the English case citations were not being cited as foreign precedent, but rather to uncover the historic evolution of habeas corpus during English history so that the meaning of habeas corpus in the collective minds of the American Founders might be discerned.<sup>111</sup> But in several other respects, the Justices in their respective majority opinion, concurring opinions, and dissenting opinions

101. Schlag, *supra* note 51, at 1052.

102. *Boumediene v. Bush*, 553 U.S. 723 (2008).

103. *Id.* at 732.

104. Detainee Treatment Act of 2005, Pub. L. No. 109-148, tit. 10, 119 Stat. 2680 (codified in part at 10 U.S.C. § 801 note (2006) (Detainee Policies)).

105. *Boumediene*, 553 U.S. at 732, 733.

106. 28 U.S.C. § 2241(e) (2006).

107. *Boumediene*, 553 U.S. at 732, 733.

108. *See, e.g., id.* at 746.

109. *See, e.g., id.* at 753–54.

110. *Id.* at 827 (Scalia, J., dissenting) (criticizing majority opinion's analysis of British caselaw).

111. *See supra* notes 5–6 and accompanying text.

seemed to be talking past one another. A few examples will suffice to show the disassociation among the Justices. One aspect of collapse—or legal meltdown—is Justice Souter’s assertions, in his concurring opinion, that the “Court’s exercise of responsibility to preserve habeas corpus [involves] something much more significant . . . than pulling and hauling between the judicial and political branches”<sup>112</sup> and that “today’s decision is no judicial victory, but an act of perseverance in trying to make habeas review, and the obligation of the courts to provide it, mean something of value both to prisoners and to the Nation.”<sup>113</sup>

A second example of the play of the dissociative aesthetic in *Boumediene* is Chief Justice Roberts’ broadside attack on the majority opinion with scorching comments like: “[t]he Court rejects [‘the most generous set of procedural protections ever afforded aliens detained by this country as enemy combatants’] . . . out of hand, without bothering to say what due process rights detainee possess, without explaining how the statute fails to vindicate those rights, and before a single petitioner has even attempted to avail himself of the law’s operation”;<sup>114</sup> the Court’s decision [is] “an awkward business”;<sup>115</sup> “[t]he majority’s overreaching . . . is egregious”;<sup>116</sup> and “[i]f the Court can design a better system for communicating to detainees the substance of . . . classified information relevant to their cases, without fatally compromising national security interests and sources, the majority should come forward with it,” but “[i]nstead, the majority fobs that vexing question off on district courts to answer down the road.”<sup>117</sup>

Justice Scalia’s dissenting opinion in *Boumediene* provides a third instantiation of disassociation on the Supreme Court over national security law.<sup>118</sup> Scalia’s dissent, indeed, strongly epitomizes what Professor Schlag has described as “the *sensation*” of the dissociative aesthetic in American law “of *conceptual quicksand*, of distinctions that dissipate—a kind of virtual jurisprudential reality in which identities morph into each other” when compared to the *Boumediene* majority.<sup>119</sup>

Consider the following Scalian romp through what must feel like the conceptual quicksand of the majority’s opinion: (1) “The writ of habeas corpus does not, and never has, run in favor of aliens abroad; the Suspension Clause thus has no application, and the Court’s intervention in this military matter is

112. *Boumediene*, 553 U.S. at 800 (Souter, J., concurring).

113. *Id.*

114. *Id.* The Chief Justice was joined by Justices Scalia, Thomas and Alito.

115. *Id.* at 808.

116. *Id.*

117. *Id.*

118. *Boumediene*, 553 U.S. at 825–84 (Scalia, J., dissenting). Justice Scalia was joined by the Chief Justice and by Justices Thomas and Alito.

119. Schlag, *supra* note 51, at 1097 (emphasis added).

entirely *ultra vires*”;<sup>120</sup> (2) “America is at war with radical Islamists,” and they have “threatened further attacks against our homeland; one need only walk about buttressed and barricaded Washington, or board a plane anywhere in the country, to know that the threat is a serious one”;<sup>121</sup> (3) “[t]he game of bait-and-switch that today’s opinion plays upon the Nation’s Commander in Chief will make the war harder on us” and “[i]t will almost certainly cause more Americans to be killed”;<sup>122</sup> (4) it is “incredibl[y] difficult[ ] [to] assess[ ] who is and who is not an enemy combatant in a foreign theater of operations where the environment does not lend itself to rigorous evidence collection,” but “[a]stoundingly, the Court today raises the bar, requiring military officials to appear before civilian courts and defend their decisions under procedural and evidentiary rules that go beyond what Congress has specified”;<sup>123</sup> (5) “What competence does the Court have to second-guess the judgment of Congress and the President . . . ? None whatsoever. But the Court blunders in nonetheless,” and “[h]enceforth, as today’s opinion makes unnervingly clear, how to handle enemy prisoners in this war will ultimately lie with the branch that knows the least about the national security concerns that the subject entails,”;<sup>124</sup> (6) “[t]he fundamental separation-of-powers principles that the Constitution embodies are to be derived not from some judicially imagined matrix, but from the sum total of the individual separation-of-powers provisions that the Constitution sets forth”;<sup>125</sup> (7) “Manipulation of the territorial reach of the writ [of habeas corpus] by the judiciary poses just as much a threat to the proper separation of powers as manipulation by the Executive,” and “manipulation is afoot here”;<sup>126</sup> and (8) the summary of his dissent at the culmination of his opinion:

Today the Court warps our Constitution in a way that goes beyond the narrow issue of the reach of the Suspension Clause, invoking judicially brain-stormed separation-of-powers principles to establish a manipulable “functional” test for extraterritorial reach of habeas corpus . . . . It blatantly misdescribes important precedents, most conspicuously Justice Jackson’s opinion for the Court in *Johnson v. Eisentrager*. It breaks a chain of precedent as old as the common law that prohibits judicial inquiry into detentions of aliens abroad absent statutory authorization. And, most tragically, it sets up our military commanders the impossible task of proving to a civilian court, under whatever standards this Court devises in the future, that evidence supports the confinement of each and every enemy prisoner.

120. *Boumediene*, 553 U.S. at 827 (Scalia, J., dissenting).

121. *Id.*

122. *Id.*

123. *Id.* at 829.

124. *Id.* at 831.

125. *Id.* at 832 (internal quotation marks omitted).

126. *Boumediene*, 553 U.S. at 834 (internal quotation marks omitted).



The Nation will live to regret what the Court has done today. I dissent.<sup>127</sup>

## 2. Five Types of National Security Legal Arguments

The four aesthetics of national security law that I have discussed—the *grid aesthetic*, the *energy aesthetic*, the *perspectivist aesthetic*, and the *dissociative aesthetic*—relate to, and interact in interesting ways with, what Professor Wilson Huhn calls *The Five Types of Legal Arguments*.<sup>128</sup>

According to Huhn: “Legal arguments may be based upon *text*, *intent*, *precedent*, *tradition*, or *policy analysis*.”<sup>129</sup> In overarching terms, he explains that “[t]he five types of legal arguments *represent different conceptions of what law is*.”<sup>130</sup> Thus:

Law may be considered to be a legal text itself. It may be regarded as what the text meant to the people who enacted it into law. Law may be conceived as the holdings or opinions of courts setting forth what law is. It may be thought of as the traditional ways in which members of the community have conducted themselves. Finally, law may be understood as the expression of the underlying values and interests that the law is meant to serve. The five types of legal argument arise from these different sources of law.<sup>131</sup>

Professor Huhn provides more specificity to the five types of legal argument in ways that can be helpful in unpacking the theoretical normative form and function of American national security law. First, as he points out, “[t]he primary source of law in our [American] society is legal *text*.”<sup>132</sup>

Legal text includes the Constitution of the United States and the state constitutions, federal and state statutes, municipal ordinances, administrative regulations, and any other public writings that have the force of law. The term “legal text” also includes privately written documents such as contracts, wills, deeds, checks, and promissory notes. Although these private documents are

127. *Id.* at 849. The dissociative aesthetic also exists when “global legalists,” in Eric Posner’s words, speak past the realities of self-interested nation-states in matters of war and peace. See ERIC POSNER, *THE PERILS OF GLOBAL LEGALISM* 36–37 (2009) (the U.N. charter is viewed by global legalists as encompassing *jus cogens* norms that “supersede all other international law, and that states may not opt out of or change these norms” but “[t]he problem with this view is that states, including leading states,” and others violate these norms on occasion, such as the “military intervention in Kosovo by NATO forces in 1999” that “violated the U.N. charter and was clearly illegal,” leading many international lawyers to engage in the doublespeak that the war was “illegal but legitimate”).

128. WILSON HUHN, *THE FIVE TYPES OF LEGAL ARGUMENT* 13 (2d ed. 2008).

129. *Id.*

130. *Id.* (emphasis added).

131. *Id.*

132. *Id.* at 17 (emphasis added).

not law in and of themselves, they are legal texts because they create or alter legal rights.<sup>133</sup>

Second, another type of legal argument and “source of law is the *intent* of the people who wrote the text. This principle is applicable to every area of the law, but it is called by different names in each area.”<sup>134</sup> Thus, there is an intent behind constitutional provisions, statutes, regulations, and wills of testators.<sup>135</sup> “Evidence of intent may be drawn from the text of the law itself, from previous versions of the text, from its drafting history, from official comments, or from contemporary commentary.”<sup>136</sup>

A third type of legal argument and source of law is *precedent* of judicial “decisions of higher courts within the same jurisdiction and appl[ication] [of] the doctrine of *stare decisis* to previous decisions of the same [authoritative] court.”<sup>137</sup> Moreover, the aforementioned controlling, or binding, precedent is to be distinguished from merely persuasive authority that typically is a function of “the location, level, and reputation of the court issuing the [non-binding] decision.”<sup>138</sup>

A fourth type of legal argument and source of law is *tradition*. As Professor Huhn opines, “[t]radition often exerts a silent influence on legal reasoning. Our traditions establish ‘baselines,’ which are background assumptions that favor the status quo and place the burden of proof on any person who seeks to change the existing order.”<sup>139</sup> And, “[s]imilar to baselines are ‘cognitive schemas,’ which are unexamined and often unspoken assumptions about human potential that purport to explain existing social relationships.”<sup>140</sup>

Fifth, a final type of legal argument and source of law is *policy*. As explained by Huhn, legal arguments based on policy analysis are different in fundamental ways from arguments based on text, intent, precedent, and tradition.<sup>141</sup>

The distinctive feature of policy arguments is that they are consequentialist in nature. The other four types of arguments are appeals to authority, but the core of a policy argument is that a certain interpretation of the law will bring about a certain state of affairs, and this state of affairs is either acceptable or unacceptable, in the eyes of the law. Deriving rules of law from text, intent, precedent and tradition is inherently conventional; such rules represent specific

133. *Id.* at 17.

134. HUHNS, *supra* note 128, at 31 (emphasis added).

135. *Id.*

136. *Id.* at 34.

137. *Id.* at 115.

138. *Id.* at 119.

139. *Id.* at 49 (footnote omitted).

140. HUHNS, *supra* note 128, at 49–50 (footnote omitted).

141. *Id.* at 51.

choices that our lawgivers have already made. Deriving rules from policy arguments, on the other hand, is inherently open-ended; the specific choice has not yet been made. Text, intent, precedent and tradition look principally to the past for guidance; policy arguments look to the future for confirmation.<sup>142</sup>

In the realm of American national security law, Professor Huhn's five essential legal arguments—of text, intent, precedent, tradition, and policy—involve interesting permutations. *Textual language* of the U.S. Constitution focuses national security powers on the president through a number of expansive, but ambiguous, provisions. Congress, too, is given textual constitutional powers that can—if the powers are actually exercised—check a president's national security actions. Occasionally Congress finds it politically expedient to pass statutory restrictions on presidential national security discretion. Presidents tend to rhetorically resist these statutory textual limits, on one level, but try to placate Congress as much as possible, on other levels. In the realm of American national security law and policy, the key legal arguments involve a constitutionally sanctioned “invitation to struggle [over the text of the Constitution] for the privilege of directing American foreign policy,”<sup>143</sup> to protect the nation from hostile existential threats, and to preserve the homeland against catastrophic attack.

The *intent* of the Founders strongly suggests that when they invented the unique institution of the American Presidency, they fully expected the president to be the national security sentinel who would be counted on to take the lead in planning for and implementing the armed defense of the nation. First, “the intellectual roots of the American presidency—those antecedents in legal history and political philosophy, the lessons of history, and the lessons of Colonial and Revolutionary experience—... indicate, that, the Founders fashioned the institution with the contextual expectation and goal for Presidents to have expansive powers to pursue American national security.”<sup>144</sup> Second, the predominant number and gravitas of Founders favored a strong

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142. *Id.*

143. CORWIN, *supra* note 1, at 171.

144. Blomquist, *Presiprudence*, *supra* note 41, at 441–42. This contextual intent of the Founders consists of their familiarity and support for the great commentators of English law and English constitutional custom of extensive “kingly command” to conduct foreign relations, make war or peace and to suppress insurrections; the Founders’ support for political theory of a strong executive to sometimes push the limits of the law in order to preserve the nation; historical lessons regarding the importance of robust executive powers, flexibly administered, to preserve public order and public liberty; and the Colonial and Revolutionary experience of frustration with a multiplicity of executives in the Continental Congress and state governments trying—often at cross-purposes—to win the war against Great Britain and, subsequently, to govern after independence had been achieved. *Id.* at 442–48.

executive to respond to and deal with unknown national exigencies and emergencies.<sup>145</sup>

*Tradition* is the customary exercise of “unspecified but real powers,” exercised by American presidents from George Washington onward, pursuant to the “positive grant” of the vesting of all executive power in the president<sup>146</sup>—to “preserve, protect and defend,” according to the Presidential Oath Clause,<sup>147</sup> the constitutional sovereignty of the United States. It is a powerful national security law argument for expansive presidential power, subject to limited checking by Congress through clear statutory restrictions.<sup>148</sup> Justice Felix Frankfurter identified the importance of tradition in gauging the scope of presidential national security powers. In *Youngstown Sheet & Tube Co. v. Sawyer*, he stated:

Deeply embedded traditional ways of conducting government cannot supplant the Constitution or legislation, but they give meaning to the words of a text or supply them. It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them.<sup>149</sup>

*Precedents* for interpreting American national security policy are derived from three principal bodies of law: the handful of key U.S. Supreme Court decisions on the constitutional nature of executive and congressional powers to protect the nation;<sup>150</sup> the corpus of presidential security directives, memoranda and rules of engagement;<sup>151</sup> and the compilation of congressional enactments on national security affairs in the United States Code.<sup>152</sup> While judicial precedents are well known and recognized, it is important to recognize and understand the importance of what Professor Michael J. Gerhardt calls “nonjudicial precedent,”<sup>153</sup> exemplified by congressional and presidential actions and non-actions in the face of national security crises.

Finally, *policy* arguments about the potential consequences of institutional competence and authority, effective deterrence and interdiction of enemies foreign and domestic, as well as national safety and well-being are critical in the realm of national security legal interpretation. Indeed, the new geopolitical

145. *Id.* at 448–51.

146. FORREST McDONALD, *THE AMERICAN PRESIDENCY: AN INTELLECTUAL HISTORY* 220 (1994); *see* U.S. CONST. art. II, § 1.

147. Blomquist, *Presidential Oath*, *supra* note 43, at 52; *see supra* notes 43–44 and accompanying text.

148. *See* Blomquist, *Presiprudence*, *supra* note 41, at 451–57.

149. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring).

150. *See supra* notes 68–74 and accompanying text.

151. *See supra* notes 63–67 and accompanying text.

152. *See supra* notes 78–82 and accompanying text.

153. MICHAEL J. GERHARDT, *THE POWER OF PRECEDENT* 111 (2008).

realities facing the United States in the aftermath of September 11th and the global jihad instigated and organized by al Qaeda and other terrorist groups and affiliated rogue nation states illustrate the importance of fortifying and enhancing the American national security legal system to better anticipate and manage these threats in the future.<sup>154</sup>

### III. THE PROBLEM WITH AMERICAN JUDICIAL RELIANCE ON FOREIGN JUDICIAL PRECEDENT IN NATIONAL SECURITY ADJUDICATION

It is unwise for United States Supreme Court Justices to cite transnational judicial precedent—opinions in cases decided by national or sub-national courts other than the United States, international tribunals like the International Court of Justice (ICJ), or the European Court of Human Rights—in any matter before the Supreme Court involving American national security. National Security law cases that come to the Supreme Court will deal expressly, or by implication, with a matrix of decisions by the presidents of the United States. These presidential decisions will involve core Article II presprudential national security determinations<sup>155</sup> that may be augmented or limited by core Article I congressional powers over war, military provision, and regulation of foreign affairs.<sup>156</sup> Supreme Court Justices can resolve national security problems of knowledge<sup>157</sup> by reading background books, articles, and government documents.<sup>158</sup> Judicial resolution of the separate national security problems of conduct<sup>159</sup> and problems of governance<sup>160</sup> should be prudentially limited to *American* sources of law—the U.S. Constitution, federal statutory law, presidential decision orders, and past U.S. Supreme Court precedent.<sup>161</sup> Our Justices should seek, as much as practicable, to make judicial rulings and supporting judicial opinions by privileging the president's perspective on national security needs carefully balanced by Congress' perspective<sup>162</sup> as revealed by clearly-stated, specific textual statutory enactments.<sup>163</sup> In difficult cases of apparent national security conflict between the President and Congress, the Court should rely on past Supreme Court cases<sup>164</sup> that interpret the grid aesthetic<sup>165</sup> with the energy aesthetic.<sup>166</sup> The most relevant Supreme

154. See Blomquist, *Presprudence*, *supra* note 41, at 467–75.

155. See *supra* notes 41–49, 58 and accompanying text.

156. See *supra* note 57 and accompanying text.

157. See *supra* note 50 and accompanying text.

158. See Blomquist, *Jurisprudence*, *supra* note 13.

159. See *supra* note 50 and accompanying text.

160. *Id.*

161. See *supra* notes 55–85 and accompanying text.

162. See *supra* notes 68–74 and accompanying text.

163. See *supra* notes 63–67 and accompanying text.

164. See *supra* notes 75–85 and accompanying text.

165. See *supra* note 55 and accompanying text.

Court precedent in this regard is and will remain the various opinions in the *Youngstown* case.<sup>167</sup>

Four specific functional reasons<sup>168</sup> militate in favor of Supreme Court reliance on exclusively American law and precedent in national security disputes and against citation of foreign judicial precedent as persuasive authority in cases and controversies dealing with American national security: (a) ethos and American identity, (b) effective dispute resolution, (c) meaningful agenda-setting and constitutional dialogue, and (d) judicial political legitimacy.

#### A. *Ethos and American Identity*

The ethos of American national security law is predicated on the unique, vast, and disproportionate financial and human burden endured by the American people over the last century in responding to aggressive wars by other nations and terrorist acts by non-state and state actors.<sup>169</sup> Moreover, American constitutional systemic form and function establishes the President of the United States as the national security sentinel with great discretion in deciding how to preserve, protect, and defend the American nation.<sup>170</sup> Also, our Supreme Court Justices cannot forget that, unlike other national constitutions (e.g. Germany and South Africa) that expressly invite the reception of international and comparative law in domestic courts, the American constitutional tradition is much more conservative in allowing the use of foreign law.<sup>171</sup> Thus, the national security policy established by the President and Congress on behalf of the American people is distinctive and arguably *sui generis* in the world given the context of great burdens carried by the United States in the name of global security over the last century.

The “whole American fabric,” identified by Chief Justice John Marshall in support of the Court’s decision in *Marbury v. Madison*<sup>172</sup> and the related

166. See Schlag, *supra* note 51, at 1051.1051–52.

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

168. My analysis at this juncture relies upon GERHARDT, *supra* note 153, at 147–76 (chapter 5, entitled, *The Multiple Functions of Precedent*).

169. See, e.g., SAMUEL ELIOT MORISON, *THE OXFORD HISTORY OF THE AMERICAN PEOPLE* 848–87, 987–1045, 1065–73 (1965) (American role in World War I, World War II, and Korean war); JAMES T. PATTERSON, *GREAT EXPECTATIONS: THE UNITED STATES, 1945–1974*, at 510–13, 593–636 (1996) (Vietnam War); JAMES T. PATTERSON, *RESTLESS GIANT: THE UNITED STATES, FROM WATERGATE TO BUSH V. GORE* 230–38 (2005) (Gulf War I).

170. See *supra* notes 33–49 and accompanying text.

171. See Jan M. Smits, *Comparative Law and Its Influence on National Legal Systems*, in *THE OXFORD HANDBOOK OF COMPARATIVE LAW* 514–30 (Mathias Reimann & Reinhard Zimmermann eds., 2006).

172. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803).

national ethos argument by Marshall in *McCulloch v. Maryland*,<sup>173</sup> invoking the American “Constitution intended to endure for ages to come,”<sup>174</sup> parallel the nationally distinctive constitutional imperative to acknowledge the distinctive national security authority of the President, as balanced by Congress, in making and applying national security law. Such a unique American national security apparatus is part of our nation’s collective identity and must, in the words of Justice Oliver Wendell Holmes, Jr., “be considered in light of our whole experience . . .”<sup>175</sup> as a nation for over two centuries in enduring various wars, emergencies, and threats.

It is a red herring argument for proponents of judicial cosmopolitanism to contend that citations of foreign judicial decisions are not in the nature of binding precedent but, merely, persuasive precedent.<sup>176</sup> Indeed, persuasive precedent—especially when cited and blessed by United States Supreme Court judicial opinions—can take on the functional gravitas of binding precedent. By way of a useful analogy, Michael Dorf explained the “functional notion of precedent” in the context of disputing the formalist doctrine that civil law jurisdictions—in Europe and elsewhere—do not recognize precedent. According to Professor Dorf, other scholars have joined his view that the “civil law jurisdictions *do* have a doctrine of precedent.”<sup>177</sup> Moreover:

The proliferation in recent years of trans-European and other international courts that publish their judgments accompanied by lengthy opinions in the “American” style—and that adjudicate cases for both common law and civil law countries—only further erodes the notion that high-profile adjudication can proceed without a functional notion of precedent.<sup>178</sup>

173. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

174. *Id.* at 415.

175. *Missouri v. Holland*, 252 U.S. 416, 433 (1920) (involving the Court’s interpretation of the federal government’s treaty-making power versus state power regarding the international issue of migratory bird conservation).

176. See, e.g., Justice Kennedy’s conclusion in *Roper v. Simmons* “that foreign experience merely confirmed the conclusions he and his colleagues would have otherwise reached independently . . . .” Michael C. Dorf, *Dynamic Incorporation of Foreign Law*, 157 U. PA. L. REV. 103, 169 n.188 (2008). In Justice Kennedy’s own words: “The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation of our own conclusions.” *Roper v. Simmons*, 543 U.S. 551, 578 (2005).

177. Dorf, *supra* note 176, at 159, 159 n.162 (citing MIRJAN R. DAMASKA, *THE FACES OF JUSTICE AND STATE AUTHORITY* 36–38 (1986) (“While formally free to disregard legal opinions of their superiors, [civil law] judges continued to look to high courts for guidance.”); PETER GOODRICH, *READING THE LAW: A CRITICAL INTRODUCTION TO LEGAL METHOD & TECHNIQUES* 39 (1986) (“The status of jurisprudence as law is informally recognized in that reference to previous decisions containing interpretations of the law is made during the course of legal argument [in civil law courts], and may be found in notes and commentaries made about the code.”)).

178. Dorf, *supra* note 176, at 159.

Thus, applying Dorf's pragmatic insight to the potential citation of foreign judicial decisions by U.S. Supreme Court Justices as persuasive precedent in American national security cases, these so-called non-binding precedents have the significant potential of morphing into functionally binding American precedents notwithstanding the different ethos of foreign national security precedent. This development would be profoundly unwise given that "[p]recedents are integral to the nation's understanding of itself and how the [American] public and public authorities conceive the nation,"<sup>179</sup> and American national security Supreme Court precedents are, like other core American precedents in areas such as civil rights and equal protection, "essential elements of our distinctive national identity."<sup>180</sup> In a related way, Supreme Court national security precedents are important symbols<sup>181</sup> of the American constitutional ethos of "a common defense."<sup>182</sup>

### B. *Effective Dispute Resolution*

To resolve disputes that come before the Supreme Court, it is advisable for the Justices "to proceed, as Chief Justice Roberts suggested . . . from the 'bottom up' by which he means incrementally, one case at a time, and on the narrowest grounds possible."<sup>183</sup> According to Michael J. Gerhardt's penetrating analysis of "bottom up" judging in *The Power of Precedent*, this approach to dispute resolution "means that the Court ought to decide particular cases based on what it can learn from other actors and experience," so that "[b]y deciding cases from the bottom up, the Court leaves more room for the other branches [the Executive and the Congress] to operate and positions itself to learn from its and other constitutional actors' experiences."<sup>184</sup>

Citation of transnational judicial precedent in national security cases by Supreme Court Justices would constitute a troublesome variation of top-down judging. In the process of such citation, Supreme Court Justices would be "impos[ing] on lower courts or other authorities principles directly inferred from the Constitution,"<sup>185</sup> utilizing foreign judicial precedent as a "reassurance" that the Supreme Court was in the mainstream of other prestigious foreign courts in discerning normative principles of national security governance that regulate how far the executive can go in protecting the nation and how much oversight and checking authority the national legislature should enjoy over national security affairs. But top-down judging

179. GERHARDT, *supra* note 153, at 171.

180. *Id.*

181. *See id.* at 169–70 (discussing the symbolism functional purpose of precedent).

182. U.S. CONST. pmb1.

183. GERHARDT, *supra* note 153, at 151.

184. *Id.*

185. *Id.*



in this fashion allows the Supreme Court “no margin of error” since “the Court has to get it right from the start or risk having its error perpetuated and spread through the enforcement of its decisions.”<sup>186</sup> Moreover, the risk of error is exacerbated by a misguided citation of foreign judicial precedent that may have been taken out of the context of the foreign legal system where the precedent originated.

By withholding citation to foreign judicial precedent in American national security disputes as well as restraining itself from directly inferring broad principles from the Constitution, “the Court minimizes the risks of error, so it can avoid overreaching its competence, not unduly interfere with other branches’ constitutional decision-making [over national security issues], and learn from its own mistakes and the mistakes of other institutions.”<sup>187</sup> Indeed, “[a]mong the things [the Court] will learn over time,” by engaging in bottom-up judging in national security cases, “is how much, or little, it should explain the reasons for its decisions.”<sup>188</sup> One suspects that the political costs of citing foreign judicial precedent in American national security disputes—and over theorizing transnational norms of executive and legislative power discretion—would always outweigh whatever minor benefits exist in advancing the cause of judicial cosmopolitanism.

### C. *Meaningful Agenda-Setting and Constitutional Dialogue*

Since 2004, the Supreme Court has sent “important signals to litigants, lower courts, and other public authorities”<sup>189</sup> that have invited litigation against presidential and congressional legal arrangements to address the “war on terror,” otherwise known as radical Islamic insurgencies against the United States in Iraq and Afghanistan. By accepting certiorari petitions and ruling against the President and Congress in a line of decisions—including *Rasul v. Bush*,<sup>190</sup> *Hamdan v. Rumsfeld*,<sup>191</sup> and *Boumediene v. Bush*<sup>192</sup>—the Court has

186. *Id.*

187. *Id.*

188. *Id.*

189. GERHARDT, *supra* note 153, at 154.

190. *Rasul v. Bush*, 542 U.S. 466, 484 (2004) (holding that the federal habeas statute extends to aliens at Guantanamo), *superseded by statute*, Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2739.

191. *Hamdan v. Rumsfeld*, 548 U.S. 557, 567 (2006) (holding that a military commission set up to try an accused al Qaeda conspirator violated the Uniform Code of Military Justice and the Geneva Conventions), *superseded by statute*, Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600.

192. *Boumediene v. Bush*, 553 U.S. 723, 791 (2008) (holding that foreign detainees at the Guantanamo Bay Naval Base in Cuba “have the constitutional privilege of habeas corpus” and that such a privilege cannot be withdrawn “except in conformance with the Suspension Clause” and finding that the review procedures outlined in the Detainee Treatment Act of 2005, *supra* note 104, were not an adequate substitute for habeas corpus and that the jurisdiction-stripping

established precedent that will invite further litigation that seeks to challenge American national security jurisprudence. Moreover, the line of cases that commenced in 2004 has been vague and vigorously contested, resulting in splintered Court opinions. Indeed, *Boumediene* “adopted an uncertain and malleable test” and “the Court’s holding leave many questions unanswered and could allow an administration that is determined to keep detainees beyond the jurisdiction of U.S. courts to use other avenues of accomplishing its ultimate goal.”<sup>193</sup>

In light of the wrenching changes in American national security that have transpired since September 11th, it is salutary that the Court has used a line of precedent to set a judicial agenda for constitutionally scrutinizing novel national security legislation and presidential policy making. Thus far, the Court’s agenda-setting on habeas corpus and national security has led to and facilitated a constitutional dialogue about the meaning of prior U.S. Supreme Court holdings that have interpreted constitutional text.<sup>194</sup> The *Rasul-Hamdan-Boumediene* line of precedent has framed, informed, and guided a constitutional dialogue among American judges, lawyers, presidents, members of Congress, academics, military officers, and the public at large. This dialogue has pragmatically focused on *American* sources of law. As Robert Post has argued, “constitutional law and culture are locked in a dialectical relationship, so that constitutional law both arises from and in turn regulates [American] culture.”<sup>195</sup> It would be antithetical to the ongoing national conversation about American national security jurisprudence in the post September 11th era, in general, and counterproductive to the national conversation on habeas corpus and national security, in particular, to have Justices cite foreign judicial precedents. The American national security constitutional culture is wrapped up in and defined by the American experience, American values, and American interests. It would be incendiary for a U.S. Supreme Court Justice to cite a foreign judicial precedent in the

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provision of the Military Commissions Act of 2006, 28 U.S.C. § 2241(e) (2006), unconstitutionally suspended the writ).

193. *The Supreme Court-Leading Cases: Extraterritorial Reach of Writ of Habeas Corpus*, 122 HARV. L. REV. 395, 396 (2008).

194. In particular, *Boumediene* involved a contest of meaning regarding *Johnson v. Eisentrager*, in which the Supreme Court held that German war criminals confined in a U.S.-administered prison in Germany were not entitled to habeas. *Johnson v. Eisentrager*, 339 U.S. 763, 790 (1950). Based on the *Boumediene* majority’s review of *Eisentrager* and its other extraterritoriality opinions, the Court found three factors relevant in determining the Suspension Clause’s reach: “(1) the citizenship and status of the detainee and the adequacy of the process through which the status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner’s entitlement to the writ.” *Boumediene*, 553 U.S. at 765.

195. Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 8 (2003).

ongoing post-September 11th national debate on national security and the Constitution.

#### D. *Judicial Political Legitimacy*

A final functional reason for urging Supreme Court Justices to avoid citation of foreign judicial precedents in reviewing American national security presiprudence is for the Court to maintain its political legitimacy. Indeed, political legitimacy for the Court is very fragile and vulnerable in the realm of constitutional review of national security policy. First, Supreme Court decisions depend on the “social acquiescence” of the American people and particular elites within American society.<sup>196</sup> The Court has suffered a strong backlash from its *Boumediene v. Bush* decision from an editorial in a national newspaper<sup>197</sup> to the reaction of a presidential candidate.<sup>198</sup> How much stronger would the backlash have been if the *Boumediene* Court had cited a foreign judicial precedent in support of its holding?

Second, “a precedent,” in order to achieve and maintain political legitimacy, “has to receive the genuine, enduring commitment of political institutions” to the principles articulated in the Supreme Court opinion.<sup>199</sup> Foreign judicial precedents that are incorporated by reference in Supreme Court national security opinions risk alienating significant numbers of members of Congress, the President, and the American military.

Third, the political legitimacy of a Supreme Court opinion also depends on sound persuasion. The Supreme Court opinion needs “to be grounded in sufficiently persuasive reasoning, argumentation, rhetoric, or imagery as to cultivate, maintain, and win the longstanding support of at least the Court and the leadership of other [American] public institutions.”<sup>200</sup> Citation of a foreign judicial precedent by a Supreme Court Justice in an American national security presiprudence case is likely to be a “shot from the hip” with little, if any, rhetorical salience to the meaning and protection of American national security.

#### CONCLUSION

The form and function of the American national security system posits an invitation to struggle between the President and Congress, with the Supreme

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196. GERHARDT, *supra* note 153, at 153.

197. See, e.g., Editorial, *President Kennedy*, WALL ST. J., June 13, 2008, at A14 (“We can say with confident horror that more Americans are likely to die as a result.”).

198. Senator John McCain called *Boumediene* “one of the worst decisions in the history of this country.” *The Supreme Court-Leading Cases: Extraterritorial Reach of Writ of Habeas Corpus*, *supra* note 193, at 395 n.10 (citation omitted).

199. GERHARDT, *supra* note 153, at 153.

200. *Id.*

Court as constitutional arbiter. The Supreme Court, in turn, faces problems of knowledge, conduct, and governance whenever the Court engages in judicial review of national security cases. The aesthetics of American national security law, while reticulated by a grid of textual constitutional provisions, statutory enactments, presidential directives, and Court precedent, is predominantly shaped by the energy of the push and pull between (and often within) the three branches of the federal government and the differing perspectives of government officials within American government. On occasion, when extraordinarily important national security issues call out for resolution, government officials dissociate from robust interchange and engagement with one another and end up talking past one another.

American sources of law and policy are appropriate for conceptualizing and analyzing problems of American national security. It would be unwise for our Supreme Court to cite foreign judicial precedent to resolve American national security problems for the fourfold reasons: (1) that ethos and American identity is implicated by American national security cases; (2) that effective national security dispute resolution should not utilize a top-down judicial resolution by the Court's looking to foreign precedent to reassure itself that its inference of broad constitutional principles are correct; (3) that meaningful agenda-setting and constitutional dialogue concerning American national security law in the post-September 11th era is best achieved by prudent, respectful, and diligent exchange of American-derived legal arguments from the wide panoply of American national security texts, precedents, traditions, and policies; and (4) that the imperative of the Supreme Court to maintain political legitimacy is particularly important in the national security arena where the Constitution has assigned a predominant role to presidents to develop American national security prescience and to Congress to act as a junior partner in this existential enterprise.

All of this is not to suggest that the Supreme Court should foreclose good, potential ideas from transnational experience and theory that address twenty-first century national security problems. But the Court should eschew citation of transnational *precedent*. When considering the power and fit of transnational national security ideas, the Court should mention the books, articles, papers, statutes, case opinions, and the like as bearing on diverse *policy perspectives*, not persuasive *precedent*.<sup>201</sup>

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201. Cf. VICKI C. JACKSON, CONSTITUTIONAL ENGAGEMENT IN A TRANSNATIONAL ERA (2010) (arguing for cautious engagement by the Supreme Court with transnational sources of law in interpreting the American Constitution).

