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NATIONAL SECURITY FACT DEFERENCE

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SHOULD judges defer to factual judgments made by the executive branch in litigation involving national security? The executive branch frequently argues that judges should do precisely that, and though courts often express reservations, they often comply in the end.

This practice—what I will refer to as “national security fact deference”—is freighted with constitutional significance. On one hand, it may undermine the capacity of courts to guard against unlawful executive branch actions (in terms of both unjustified assertions of power and violations of individual rights). On the other hand, it may prevent the judicial power from encroaching inappropriately upon executive responsibilities relating to national security, while simultaneously helping to preserve the judiciary’s institutional legitimacy. National security fact deference claims, in short, implicate competing values of great magnitude.

How courts resolve this tension says much about our constitutional order in an age of increasingly ubiquitous national security concerns, yet the practice of fact deference is not widely recognized or studied. Courts and commentators have, of course, long grappled with a variety of related deference concepts.¹ Too little atten-

¹ See, e.g., *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 329 (1936) (calling for deference to executive branch claims of authority to act in the realm of foreign affairs); *Weixum v. Xilai*, 568 F. Supp. 2d 35, 37–38 (D.D.C. 2008) (deferring to executive branch policy judgment regarding immunity of foreign officials); Thomas

tion has been paid, however, to the distinct issues that arise when courts deem national security disputes justiciable and the executive branch then falls back on the position that courts at least should defer to its factual judgments.² I aim to close that gap in this article by developing an account of the nature of national security fact deference claims and, in light of that account, by conducting a probing review of the considerations that might be cited in favor of a deference obligation. Ultimately, I conclude that many arguments in favor of deference are unpersuasive, but that deference nonetheless may be justified in limited circumstances.

Part I opens with a descriptive account of how national security fact deference claims have been litigated and resolved in actual practice. This serves several purposes. First, it illustrates the trans-substantive nature of this practice, with examples ranging from enemy combatant status litigation to environmental suits challenging the Navy's use of sonar during training exercises. Second, the survey demonstrates the significance of national security fact deference claims in terms of individual cases, showing that they can have a dispositive impact on the merits. Finally, and most significantly, it suggests that national security fact deference claims are plagued by doctrinal and theoretical confusion, with courts and litigants alike

M. Franck, *Political Questions/Judicial Answers* (1992) (criticizing the judiciary's special treatment of foreign-relations cases); Michael J. Glennon, *Constitutional Diplomacy* 314–21 (1990) (examining the political question doctrine); 2 Richard J. Pierce, Jr., *Administrative Law Treatise* 768–814 (4th ed. 2002) (surveying the law relating to judicial review of agency factfinding); John O. McGinnis & Charles W. Mulaney, *Judging Facts Like Law: The Courts versus Congress in Social Fact-Finding*, 25 *Const. Com.* 60 (2008) (discussing deference to legislative fact-finding); Eric A. Posner & Cass R. Sunstein, *Chevronizing Foreign Relations Law*, 116 *Yale L.J.* 1170, 1193–217 (2007) (calling for deference to executive interpretations of statutes relating to foreign affairs); David Sloss, *Judicial Deference to Executive Branch Treaty Interpretations: A Historical Perspective*, 62 *N.Y.U. Ann. Surv. Am. L.* 497 (2007) (critiquing deference to executive treaty interpretations based on historical practice). See generally William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 *Geo. L.J.* 1083 (2008) (surveying deference doctrines).

² Notable exceptions include David L. Franklin, *Enemy Combatants and the Jurisdictional Fact Doctrine*, 29 *Cardozo L. Rev.* 1001 (2008); Jonathan Masur, *A Hard Look or a Blind Eye: Administrative Law and Military Deference*, 56 *Hastings L.J.* 441 (2005); Daniel J. Solove, *The Darkest Domain: Deference, Judicial Review, and the Bill of Rights*, 84 *Iowa L. Rev.* 941 (1999).

uncertain as to which considerations should govern and how if at all they ought to be balanced against one another.

Against that backdrop, Part II develops an account of the nature of national security fact deference claims. I suggest that such claims are best understood as a species of “decision rule.” This account, which I derive from the literature of constitutional theory, emphasizes the distinction between the abstract meaning of a legal rule and the practical need to develop an implementation framework—that is to say, decision rules—that will permit a judge to bring that meaning to bear in the particular institutional context of litigation. At a minimum, for example, a judge cannot avoid adopting some standard of proof in the course of determining whether the constituent elements of a legal rule have been satisfied or violated. Where another institution already has made a judgment regarding those predicate questions, the judge also must determine whether to defer to that judgment. From this point of view, resolving a deference claim is a paradigmatic example of decision rule formation.

Viewing national security fact deference claims through the lens of the decision rules literature has practical benefits in terms of identifying and analyzing the considerations that may be relevant to resolving such claims. For present purposes, the most relevant of these considerations can be grouped under four headings. The first is core accuracy, a term that describes the goal of minimizing the net amount of false positives and false negatives generated in the course of implementing the underlying legal rule. This contrasts with the second, weighted accuracy, which considers the possibility that there may be individualized or systemic reasons to prefer more false positives than false negatives in a particular setting, or vice versa. The third, prudential concerns, includes the efficiency of the decision-making process in terms of speed or resource consumption, the potential collateral impact that resolution of the deference question may have on related government activities such as ongoing combat operations or the maintenance of secrecy, the judiciary’s instinct for self-preservation in light of the risk of political blowback, and the prospect that another institution is better suited to exercise final judgment in light of its superior democratic accountability. Finally, formal legitimacy claims involve the concern that the law vests decisionmaking authority in another institution.

Before proceeding to a close analysis of how these justifications may or may not apply in the context of fact deference claims in national security litigation, Part III pauses to address potential objections to this project. One might object, for example, that judicial analysis of these factors constitutes mere window dressing, and that these claims actually turn on the judge's policy or value preferences. And even if one accepts that legal factors play a meaningful role in resolving fact deference claims as a general proposition, one might still object to the notion that the vague concept "national security" will play a substantive role in the analysis. These are serious concerns, to be sure, and they remind us of the need to proceed with great care and nuance in discussing the criteria relevant to resolving fact deference claims. They do not, however, require us to abandon that inquiry altogether.

Part IV is the heart of my analysis. In it, I parse the arguments identified in Part II in order to determine what insights they may yield regarding the resolution of national security fact deference claims. Because these considerations for the most part are sensitive to the circumstances of particular cases, we cannot and should not pursue a one-size-fits-all model for resolving fact deference claims. Nonetheless, the exercise produces a set of observations that collectively can do much to improve the coherence and defensibility of national security fact deference claims. For example, the analysis suggests that fact deference claims primarily turn on comparative institutional accuracy concerns, along with concerns about democratic accountability and institutional self-preservation; that judges conducting comparative accuracy inquiries must account separately for the possibility that the executive has superior access to information and to expertise, and should require a showing that the executive actually and reliably exploited such advantages; that arguments regarding the relative strength of the governmental, private, and social interests at stake in national security litigation frequently will be indeterminate, thus undermining the case for weighting the comparative accuracy inquiry so as to encourage false positives or false negatives; that efficiency and secrecy concerns are better addressed through doctrinal mechanisms other than fact deference; and that arguments involving comparative institutional legitimacy, though quite common, do little or no sepa-

rate work once one accounts for comparative accuracy, democratic accountability, and institutional self-preservation.

These guidelines and insights are unlikely to please either ardent supporters or critics of national security fact deference. They tend to exclude fact deference as unjustifiable in many circumstances, while providing support for it in others. And they certainly do not entirely eliminate disagreement and uncertainty when such claims arise. Indeed, much room for debate and discretion remains. Nonetheless, there is substantial benefit to be had in debunking some of the arguments that arise in this setting and insisting upon a more nuanced and defensible approach to the others.

I. NATIONAL SECURITY FACT DEFERENCE IN PRACTICE

National security fact deference claims arise across an array of doctrinal settings, often with dispositive effect. Unfortunately, a review of how such claims have been addressed in actual practice suggests that litigants and judges lack a shared understanding of the nature of such claims and of the arguments that are relevant to resolving them.³

In the pages that follow, I review the actual practice of national security fact deference by surveying four distinct contexts in which such claims have arisen. These scenarios involve determinations of whether a person was properly classified as an enemy combatant, whether federal criminal charges against an alleged Taliban member should be dismissed on grounds of combatant immunity, whether public disclosure of classified information would harm national security, and whether certain conduct would harm military preparedness. In each setting, litigants and judges have struggled to determine whether and to what extent deference might be warranted.

A. Individual Eligibility for Military Detention

Perhaps the most widely appreciated example of national security fact deference in the post-9/11 era involves the attempt by the government—ultimately unsuccessful—to persuade courts to defer

³ Paul Horwitz recently observed that such under-theorization is a problem more generally for deference as a “transsubstantive tool of constitutional law.” Paul Horwitz, *Three Faces of Deference*, 83 *Notre Dame L. Rev.* 1061, 1066 (2008).

to its judgment that specific individuals have engaged in conduct warranting military detention as enemy combatants.⁴

The case that best illustrates this involved an American citizen named Yaser Hamdi, thought by the government to have fought for the Taliban. The U.S. military took custody of Hamdi in Afghanistan in the fall of 2001, later sending him to Guantánamo and then, after learning of his citizenship, to a military detention facility in the United States.⁵ The government initially argued that Hamdi's habeas petition was not justiciable at all because of his status as a military prisoner. As a fallback position, however, the government also argued that the courts should at least defer to its factual judgment regarding Hamdi's past conduct.⁶

The government offered an array of arguments in support of its deference claim. First, it claimed that separation of powers required deference in this setting, citing the textual allocation to the executive of the commander-in-chief function as well as the Supreme Court's 1936 determination in *United States v. Curtiss-Wright Export Corp.* that the president is the "sole organ" of the government in foreign affairs.⁷ Second, it offered prudential and functional⁸ arguments: failure to defer would harm ongoing military operations by diverting the attention (or even the physical presence) of commanders in the field,⁹ and, in any event, courts lacked the expertise to review questions of enemy combatant

⁴The role of fact deference in this setting has been obscured by debate regarding federal court habeas jurisdiction over Guantánamo detainees. See *Boumediene v. Bush*, 128 S. Ct. 2229 (2008).

⁵For an overview of the facts in Yaser Hamdi's case, see *Hamdi v. Rumsfeld*, 542 U.S. 507, 510–14 (2004).

⁶See Brief for Respondents-Appellants at 11, *Hamdi v. Rumsfeld*, 296 F.3d 278 (4th Cir. 2002) (No. 02-6895), 2002 WL 32728567.

⁷See *id.* at 13.

⁸Here I use "functional" in the sense that Deborah Pearlstein describes as "effectiveness functionalism." See Deborah N. Pearlstein, *Form and Function in the National Security Constitution*, 41 Conn. L. Rev. (forthcoming July 2009), available at <http://ssrn.com/abstract=1159595>, at 6 (describing "purposive" functionalism as the pursuit of arrangements that best serve a larger constitutional goal and "effectiveness" functionalism as the pursuit of "immediate issues of effectiveness, efficiency, and the circumstantial needs of modern government").

⁹See Brief for Respondents-Appellants, *supra* note 6, at 15–16 (citing *Johnson v. Eisentrager*, 339 U.S. 763, 779 (1950)).

status.¹⁰ The government acknowledged that deference, if binding, would preclude the judiciary from acting as much of a check against executive branch abuse, but it argued that when it came to misuse of military power the “Founders” had expected such concerns to be addressed at the ballot box rather than through litigation.¹¹

The United States Court of Appeals for the Fourth Circuit agreed, placing a particular emphasis on functional concerns.¹² “The executive is best prepared to exercise the military judgment attending the capture of alleged combatants,” the panel held, adding that judicial review of detention decisions “must not present a risk of saddling military decision-making with the panoply of encumbrances associated with civil litigation,” and warning that “development of facts may pose special hazards of judicial involvement in military decision-making.”¹³ Yet the court was unwilling to treat the executive’s determination as entirely binding given that the liberty of a citizen was at stake.¹⁴ Instead, the Fourth Circuit directed the district court to develop a procedure on remand that would show appropriate deference to the executive’s position—whatever that might mean in practical terms—in light of these considerations.¹⁵

The government at that point sought to satisfy judicial review of Hamdi’s detention by providing a two-page declaration summarizing the circumstances in which Hamdi had been captured and the process by which he had been classified as an enemy combatant.¹⁶

¹⁰ Id. at 30 (“Not only do courts lack the expertise to evaluate military tactics, but they will often be without knowledge of the facts or standards upon which military decisions have been based.”) (quoting *Tiffany v. United States*, 931 F.2d 271, 278 (4th Cir. 1991)).

¹¹ The government relied upon an earlier decision of the Fourth Circuit that had itself relied upon Federalist No. 26 for the proposition that “if the majority should be really disposed to exceed the proper limits, the community will be warned of the danger [by the minority], and [the community] will have an opportunity of taking measures to guard against it,” and Federalist No. 78 for the notion that the Judiciary has “no influence over either the sword or the purse.” See id. at 32 (citing *Thomasson v. Perry*, 80 F.3d 915, 924 (4th Cir. 1996)).

¹² See *Hamdi v. Rumsfeld*, 296 F.3d 278, 281–84 (4th Cir. 2002).

¹³ Id. at 283–84.

¹⁴ See id. at 283.

¹⁵ See id. at 283–84.

¹⁶ See *Hamdi v. Rumsfeld*, 243 F. Supp. 2d 527, 532–34 (E.D. Va. 2002).

The United States District Court for the Eastern District of Virginia found this inadequate, stressing the need to ensure that deference not become dispositive where individual rights are at stake.¹⁷ The Fourth Circuit reversed, however, again emphasizing functional concerns: the executive wields the relevant “expertise and experience,” the panel wrote, and “courts are ill-positioned to police the military’s distinction between those in the arena of combat who should be detained and those who should not.”¹⁸ Accordingly, the Fourth Circuit held that

no evidentiary hearing or factual inquiry on our part is necessary or proper, because it is undisputed that Hamdi was captured in a zone of active combat operations in a foreign country and because any inquiry must be circumscribed to avoid encroachment into the military affairs entrusted to the executive branch.¹⁹

These well rehearsed arguments next moved to the Supreme Court of the United States,²⁰ which charted a middle course in a splintered opinion.²¹ A plurality rejected the government’s position, giving little regard to the executive’s claim of functional advantages and concluding that separation of powers concerns forbade binding deference.²² Nevertheless, the plurality was sensitive to the pruden-

¹⁷ See *id.* at 532–36.

¹⁸ *Hamdi v. Rumsfeld*, 316 F.3d 450, 463, 474 (4th Cir. 2003). The court also noted prudential concerns regarding disruption of military operations. See *id.* at 465–66 (citing risk of commanders being called into court from the field); *id.* at 471 (citing impact on military “efficiency and morale,” and the sheer logistical difficulties involved in trying “to acquire evidence from far away battle zones”); *id.* at 474 (same).

¹⁹ *Id.* at 473.

²⁰ See Brief for Petitioners at 21–26, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (No. 03-6696) (arguing that deference undermined separation of powers values by emasculating judicial review of executive detention authority); Brief for the Respondents at 25–27, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (No. 03-6696) (arguing that eligibility for detention is a military judgment exclusively allocated to the executive branch, that the executive has superior competence to make such judgments, and that the judiciary lacks the political accountability that ought to attend such determinations).

²¹ *Hamdi v. Rumsfeld* 542 U.S. 507, 528–32 (2004) (citing judicial review as a check on the risk of executive abuse, but also noting that “core strategic matters of warrmaking belong in the hands of those who are best positioned and most politically accountable for making them” and that judicial inquiry into the facts not only runs a risk of disrupting the war effort but also may prove to be in vain).

²² See *id.* at 535–36 (holding that “we necessarily reject the Government’s assertion that separation of powers principles mandate a heavily circumscribed role for the courts in such circumstances. Indeed, the position that the courts must forgo any ex-

tial concerns the government had raised, especially the prospect that review might impose difficult logistical burdens on the government that could interfere with ongoing military operations.²³ “With due recognition of these competing concerns,” Justice O’Connor concluded, “we believe that neither the process proposed by the Government nor the process apparently envisioned by the District Court below strikes the proper constitutional balance”²⁴ Instead, she called for the government to provide Hamdi with a “fair opportunity to rebut the Government’s factual assertions before a neutral decisionmaker,”²⁵ while also endorsing procedural measures designed to ameliorate the collateral burdens potentially imposed by such review, including the use of hearsay evidence or even a presumption of accuracy for the government’s evidence.²⁶

Taken as a whole, the *Hamdi* litigation suggests a lack of consensus regarding the role that certain types of arguments should play in resolving fact deference claims. Most if not all the judges were mindful to at least some degree of the prudential concerns associated with the potential impact of litigation on the ongoing conduct of military operations, but beyond this, agreement broke down. The Fourth Circuit judges placed considerable weight on functional claims relating to the asserted competence advantage of the

amination of the individual case and focus exclusively on the legality of the broader detention scheme cannot be mandated by any reasonable view of separation of powers, as this approach serves only to *condense* power into a single branch of government”); see also *id.* at 536–37 (concluding that “it would turn our system of checks and balances on its head to suggest that a citizen could not make his way to court with a challenge to the factual basis for his detention by his Government, simply because the Executive opposes making available such a challenge”).

²³ See *id.* at 534–35.

²⁴ *Id.* at 532.

²⁵ *Id.* at 533.

²⁶ See *id.* at 533–34. Only Justice Thomas wrote to support the government’s position on deference. See *id.* at 579 (Thomas, J., dissenting) (“This detention falls squarely within the Federal Government’s war powers, and we lack the expertise and capacity to second-guess that decision.”). Justice Thomas argued that courts lack the information available to the executive branch and that “even if the courts could compel the Executive to produce the necessary information, such decisions are simply not amenable to judicial determination because ‘[t]hey are delicate, complex, and involve large elements of prophecy.’” *Id.* at 583 (quoting *Chicago & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948) (calling for deference to Presidential judgments regarding diplomatic consequences of granting a license for international air travel)).

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executive branch, but the Supreme Court plurality gave little regard to that consideration. Some of the judges and Justices thought that it mattered a great deal that constitutional rights were at stake, others appeared not to account for this. And though most of the Justices were uninterested in formalist arguments to the effect that deference should follow from the Constitution's allocation of certain national security and foreign affairs responsibilities to the executive branch, at least one thought this quite important.²⁷

B. Group Compliance with the Law of War

Many of the themes developed in *Hamdi* also were on display in the litigation involving Hamdi's fellow "American Taliban," John Walker Lindh. In Lindh's case, however, the dispute did not concern his *own* past conduct but, rather, the *collective* past conduct of the Taliban itself.

Unlike Hamdi, the government did not hold Lindh as an enemy combatant. Instead, it charged him with an array of federal crimes stemming from his involvement with the Taliban. Lindh subsequently moved to dismiss the indictment, arguing among other things that he was entitled to the affirmative defense of combat immunity.²⁸ "Combat immunity" prohibits a state from applying its domestic criminal law to the actions of an enemy soldier so long as those actions did not violate the law of war.²⁹ To claim it, the person must have qualified at the time of the conduct in question as a privileged belligerent under the law of war.³⁰ According to Lindh, the test for privileged belligerency in turn depends on whether a

²⁷ See *id.* at 580 (Thomas, J., dissenting) (arguing that the Founders intended for the President to have primary responsibility for national security affairs).

²⁸ See Memorandum of Points and Authorities in Support of Motion to Dismiss Count One of the Indictment for Failure to State a Violation of the Charging Statute (Combat Immunity) (Motion #2), *United States v. Lindh*, Crim. No. 02-37-A (E.D. Va. 2002) [hereinafter *Lindh Memorandum*].

²⁹ See Waldemar A. Solf & Edward R. Cummings, A Survey of Penal Sanctions Under Protocol I to the Geneva Conventions of August 12, 1949, 9 *Case W. Res. J. Int'l L.* 205, 212 (1977) ("[T]hose who are entitled to the juridical status of 'privileged combatant' are immune from criminal prosecution for those warlike acts which do not violate the laws and customs of war but which might otherwise be common crimes under municipal law.").

³⁰ See *id.* at 212-13.

person would qualify for prisoner-of-war (POW) status if captured.³¹

Article 4 of the Geneva Convention (III) Relative to the Treatment of Prisoners of War (GPW) specifies several circumstances under which a person detained in connection with an international armed conflict should be categorized as a POW.³² Article 4(A)(1), for example, extends POW status to the members of the “armed forces” of a party to the conflict, and Article 4(A)(3) clarifies that this rule applies irrespective of whether the detaining power recognizes that party as a government. Article 4(A)(2) extends POW status beyond the members of the armed forces proper, moreover, to members of militias and volunteer corps that fight on behalf of a party,

provided that such militias or volunteer corps, including such organized resistance movements, fulfil [sic] the following conditions: (a) that of being commanded by a person responsible for his subordinates; (b) that of having a fixed distinctive sign recognizable at a distance; (c) that of carrying arms openly; [and] (d) that of conducting their operations in accordance with the laws and customs of war.³³

Lindh invoked all three categories recognized under Article 4 in support of his combat immunity defense.³⁴ He faced a significant hurdle, however, in that President Bush in February 2002 had issued an order concluding that Taliban fighters collectively failed to

³¹ See Lindh Memorandum, *supra* note 28, at 14–15; Memorandum Amicus Curiae Opposing Recognition of ‘Combat Immunity’ for Defendant Lindh in Regard to his Armed Support of Terrorism, *United States v. Lindh*, Crim. No. 02-37-A, at 6–11 (E.D. Va. 2002), available at <http://fedsoc.server326.com/pdf/lindh.pdf> (endorsing this interpretation of the elements of the test, but coming to a different conclusion regarding whether the test was satisfied in this instance).

³² POW status, according to GPW, is available only in connection with an international armed conflict as that phrase is defined in Common Article 2 of the Geneva Conventions. Geneva Convention Relative to the Treatment of Prisoners of War art. 2, Aug. 12, 1949, 6 U.S.T. 3316, 3318.

³³ Geneva Convention Relative to the Treatment of Prisoners of War art. 4, Aug. 12, 1949, 6 U.S.T. 3316, 3320.

³⁴ See Lindh Memorandum, *supra* note 28, at 15 & n.12; cf. Gabor Rona, *Legal Issues in the ‘War on Terrorism’—Reflecting on the Conversation Between Silja N.U. Voneky and John Bellinger*, 9 *German L.J.* 711, 715–18 (2008), available at <http://www.germanlawjournal.com/print.php?id=963> (supporting POW status for Taliban detainees).

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qualify for POW status under any category.³⁵ The reasoning underlying the President's determination can be gleaned from the Department of Justice memoranda that informed the decision.³⁶ In relevant part, these documents advanced a three-step argument. First, the conditions of lawful belligerency specified in Article 4(A)(2) apply equally to POW status claims under Articles 4(A)(1) and (3). Second, compliance with those conditions can be determined at the collective rather than at the individual level. And third, the available evidence suggests that the Taliban collectively failed to satisfy any of the four conditions.³⁷ The first two steps in this argument constitute treaty interpretations and hence are beyond the scope of this article, though they are important and controversial conclusions that warrant further attention.³⁸ The third step, in contrast, involved factfinding.³⁹

As happened in *Hamdi*, the government in *Lindh* responded with both a political question argument and a fact deference argu-

³⁵ Memorandum from George W. Bush, President of the U.S., to Richard B. Cheney, Vice President of the U.S., et al., *Humane Treatment of al Qaeda and Taliban Detainees* (Feb. 7, 2002), *reprinted in* *The Torture Papers: The Road to Abu Ghraib* 134–35 (Karen J. Greenberg & Joshua L. Dratel eds., 2005).

³⁶ See Memorandum from Jay S. Bybee, Assistant Attorney Gen., to Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, Gen. Counsel, Dep't of Def., *Application of Treaties and Laws to al Qaeda and Taliban Detainees* (Jan. 22, 2002) [hereinafter *Bybee Jan. 22 Memo*], *reprinted in* *The Torture Papers*, supra note 35, at 81–117; Memorandum from Jay S. Bybee, Assistant Attorney Gen., to Counsel to the President, *Status of Taliban Forces Under Article 4 of the Third Geneva Convention of 1949* (Feb. 7, 2002), available at <http://www.usdoj.gov/olc/2002/pub-artc4potusdetermination.pdf> [hereinafter *Bybee Feb. 7 Memo*]; Memorandum from John Yoo, Deputy Assistant Attorney Gen., and Robert J. Delahunty, Special Counsel to William J. Haynes II, Gen. Counsel, Dep't of Def., *Application of Treaties and Laws to al Qaeda and Taliban Detainees* (Jan. 9, 2002) (draft), *reprinted in* *The Torture Papers*, supra note 35, at 38–79.

³⁷ See, e.g., *Bybee Jan. 22 Memo*, supra note 36, at 90.

³⁸ For a review of the debate concerning extension of the four conditions to Articles 4(A)(1) and (3) despite the fact that they appear in the text only of Article 4(A)(2), see Robert M. Chesney, *Leaving Guantánamo: The Law of International Detainee Transfers*, 40 U. Rich. L. Rev. 657, 718–28 (2006). On the question of collective versus individual compliance, see *id.* at 728–29; Rona, supra note 34, at 717 (stating that “reasonable scholars differ over whether [noncompliance] . . . disqualif[ies] just the individuals who commit [war crimes] or the entire entity of which they are a part”).

³⁹ See *Bybee Feb. 7 Memo*, supra note 36, at 2–4; Memorandum from John Yoo and Robert J. Delahunty, supra note 36, at 62; *Bybee Jan. 22 Memo*, supra note 36, at 101.

ment.⁴⁰ First, the government argued that the president's order was "not subject to review in this Court" because it constituted a "non-justiciable political question" that "conclusively forecloses any claim that the defendant could have combatant immunity by virtue of membership in the Taliban militia."⁴¹ Second, the government argued that the president's judgment, even if justiciable, "would still be entitled to great deference simply because it involves the interpretation *and application* of a treaty—the GPW."⁴²

At first glance, the political question argument appeared to rest on a formal legitimacy claim that specification of the legal status of the enemy under the laws of war belongs exclusively to the executive branch under the rubric of the President's commander-in-chief and foreign affairs powers.⁴³ On closer inspection, however, the claim reduces to a functional argument emphasizing comparative institutional competence. The government explained that questions involving war and foreign affairs are "of a kind for which the Judiciary has neither aptitude, facilities nor responsibility."⁴⁴ This is particularly true with respect to the Taliban's compliance with the four conditions for lawful belligerency, the government argued, since the President has superior access to information on these subjects.⁴⁵ "Courts, indeed, are singularly ill-equipped to make factual findings about conditions in an area of active combat operations," the government warned.⁴⁶ "While the President has available multiple sources of information and intelligence about organization

⁴⁰ See Government's Opposition to Defendant's Motion to Dismiss Count One of the Indictment for Failure to State a Violation of the Charging Statute (Combat Immunity) (#2) at 2–3, 12, *United States v. Lindh*, Crim. No. 02-37-A (E.D. Va. 2002).

⁴¹ *Id.* at 2–3.

⁴² *Id.* at 12 (emphasis added).

⁴³ *Id.* at 2; see also *id.* at 6–7 (contending that the "status of an armed group" under international humanitarian law "is a question committed exclusively to the President as Commander in Chief" because it "bears directly upon the President's core constitutional authority to conduct military operations in defense of the Nation"); *id.* at 11 ("Military questions such as those involving the status of an armed group under the laws of war are 'textually . . . commit[ted]' by the Constitution to the political branches.") (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1961)).

⁴⁴ *Id.* at 9 (internal quotation marks and citations omitted).

⁴⁵ *Id.* at 11 (quoting *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936) (observing that the President "has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war")).

⁴⁶ *Id.*

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and structure of forces opposing the United States,” for example, “this Court is hardly well equipped to undertake that inquiry.”⁴⁷

The government had much less to say in support of its alternative argument that the court should at least afford “great deference” to the President’s determination even if it is not entirely binding. What it did have to say, however, illustrates the confusion that often plagues the doctrinal manifestation of deference principles. The government might have rested this argument on the very same considerations cited above, reasoning that they afford prudential grounds for caution even if they do not support application of the political question doctrine. But it did not do so. Rather, it pointed out that the President’s determination arose against the backdrop of treaty law, and that there is a doctrine calling for courts to defer to the President’s interpretation of ambiguous treaty language.⁴⁸ But determining whether the Taliban complied with the Article 4(A)(2) conditions is a *factfinding* question. The treaty deference cases simply do not speak to this scenario.

The district court ultimately balked at the suggestion that it was bound by the President’s resolution of the factual issues raised by Lindh’s claim to POW status.⁴⁹ Faced with the government’s institutional legitimacy and comparative competence arguments, the court countered that “it is central to the rule of law in our constitutional system that federal courts must, in appropriate circumstances, review or second guess, and indeed sometimes even trump, the actions of the other governmental branches.”⁵⁰ But it is one thing to insist that there must be some form of judicial review, and quite another to say that such review must be non-deferential.

Having laid down a symbolic marker for judicial independence by rejecting the government’s invocation of the political question doctrine, the court proceeded to conclude that the President’s fac-

⁴⁷ Id. at 19; see also id. at 20 (arguing that courts lack capacity to resolve fact disputes regarding issues such as “the extent of systematic organization and hierarchical command within an armed faction in a distant land”); id. at 23 (“The President has available far superior sources of intelligence and information for evaluating the conduct of a foreign force that poses a military threat to the Nation . . .”).

⁴⁸ See id. at 12–14 (citing, inter alia, *United States v. Stuart*, 489 U.S. 353, 369 (1989)).

⁴⁹ *United States v. Lindh*, 212 F. Supp. 2d 541, 555 (E.D. Va. 2002).

⁵⁰ Id.

tual determination nonetheless deserved substantial deference.⁵¹ The court first referred to the same inapposite treaty interpretation principles noted above, asserting without citation that “deference here is appropriately accorded not only to the President’s interpretation of any ambiguity in the treaty, but also to the President’s application of the treaty to the facts in issue.”⁵² The court then added that this result also “is warranted given the President’s special competence in, and constitutional responsibility for, foreign affairs and the conduct of overseas military operations.”⁵³ The court accordingly rejected Lindh’s bid for POW status and, by extension, his claim of combat immunity. Within a week of the decision, Lindh entered a guilty plea.⁵⁴

C. *The State Secrets Privilege*

Not all national security fact deference claims concern *retrospective* judgments as in *Hamdi* and *Lindh*. The executive branch also seeks deference on national security grounds in connection with *predictions*. Such claims rely on familiar themes of comparative institutional competence, however, and they prompt familiar objections sounding in terms of the judiciary’s checking function. The debate regarding deference in the context of the state secrets privilege provides an apt illustration.

The question of deference in the context of the state secrets privilege arose in *United States v. Reynolds*, a 1953 Supreme Court decision in which the government argued that “only the executive is in a position to estimate the full effects of . . . disclosure,” and that “unless the courts are to interfere in the administration of Government, they must trust in the judgment of the appointed administrator.”⁵⁵ The plaintiffs responded that such deference would be contrary to the separation of powers, since it would leave the

⁵¹ See *id.* at 556.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ See Plea Agreement, *United States v. Lindh*, Crim. No. 02-37A (E.D. Va. July 15, 2002), available at <http://news.findlaw.com/hdocs/docs/lindh/uslindh71502pleaag.pdf>.

⁵⁵ See Brief for the United States at 51–52, *United States v. Reynolds*, 345 U.S. 1 (1953) (No. 21).

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executive branch unchecked.⁵⁶ The Supreme Court, for its part, expressed sympathy for the separation of powers critique, warning that “[j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers.”⁵⁷ It therefore framed the question in terms of the government’s obligation “to satisfy the court” that disclosure might harm security.⁵⁸ But the Court then went on to state that “where necessity is dubious” a mere “formal claim of privilege . . . will have to prevail,” thus implying that judges should in fact give strong deference to the executive’s claim in at least some contexts.⁵⁹

Perhaps not surprisingly, no one appears to know quite what to make of this guidance despite decades of subsequent litigation involving the state secrets privilege. A recent oral argument before the Ninth Circuit in *Hepting v. AT&T*, a civil suit alleging that the telecommunications industry assisted the National Security Agency in conducting illegal surveillance in the United States, illustrates the point:

Judge Harry Pregerson: Well, who decides whether . . . something’s a state secret or not?

Deputy Solicitor General Gregory Garre: Ultimately, the courts do, Your Honor And they . . . apply the utmost deference to the assertion of the privilege and the judgments of the people whose job it is to make predictive assessments of foreign—

Pregerson: Are you saying the courts are to rubberstamp the determination that the Executive makes that there’s a state secret?

Garre: We are not, Your Honor, and we think that the courts play an important role—

⁵⁶ Brief for the Respondents at 11, *United States v. Reynolds*, 345 U.S. 1 (1953) (No. 21).

⁵⁷ *United States v. Reynolds*, 345 U.S. 1, 9–10 (1953). The Court stated that there was no need to address the “constitutional overtones” of these competing positions. *Id.* at 6. It necessarily spoke to them, however, when it resolved the merits.

⁵⁸ *Id.* at 10. Where the plaintiff makes a strong showing of need for the information in question, moreover, the court cautioned that the executive’s judgment “should not be lightly accepted.” *Id.* at 11.

⁵⁹ *Id.* at 11.

Pregerson: What is our job?

Garre: Your job is to determine whether or not the requirements of the privilege have been properly met. And that includes the declaration, the sworn declaration of the head of the agency asserting the privilege, and the assertion that that individual asserting it has personal knowledge of the matter [at hand].

Pregerson: So we just have to take the word of the members of the Executive Branch that tell us it's a state secret.

Garre: We don't—

Pregerson: [Because] that's what you're saying, isn't it?

Garre: No, Your Honor, what this Court's precedents say is the court has to give the utmost deference to the assertion, and the second part of the—

Pregerson: But what does "utmost deference" mean? We just bow to it?

Judge Michael D. Hawkins: It doesn't mean abdication, does it?

Garre: It does not mean abdication, Your Honor, but it means the court gives great deference to the judgments of the individuals whose job it is to assess whether or not the disclosure or non-disclosure of particular information would harm national security⁶⁰

The Ninth Circuit ultimately remanded in *Hepting* without reaching the merits,⁶¹ but the same panel did proceed to the merits in a closely related case. In *Al-Haramain Islamic Foundation v.*

⁶⁰ For the video, see PublicResourceOrg, *Hepting v. AT&T Corp.*, <http://www.youtube.com/watch?v=ppRKfXiXBLM> at 11:40–13:08 (last visited May 17, 2009). For an unofficial transcript, see Oral Argument at 5–6, *Hepting v. AT&T Corp.*, 539 F.3d 1157 (9th Cir. 2008) (Nos. 06-17132 & 06-17137), http://www.eff.org/files/filenode/att/hepting_9th_circuit_hearing_transcript_08152007.pdf.

⁶¹ See *Hepting v. AT&T Corp.*, 539 F.3d 1157, 1158 (9th Cir. 2008).

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Bush, the panel began by asserting the independent nature of judicial review:

We take very seriously our obligation to review the documents with a very careful, indeed a skeptical, eye, and not to accept at face value the government's claim or justification of privilege. Simply saying "military secret," "national security" or "terrorist threat" or invoking an ethereal fear that disclosure will threaten our nation is insufficient to support the privilege.⁶²

The court proceeded, however, to endorse a robust deference obligation: "we acknowledge the need to defer to the Executive on matters of foreign policy and national security and surely cannot legitimately find ourselves second guessing the Executive in this arena."⁶³

This state of affairs has generated sharp criticism,⁶⁴ and may yet result in legislative reforms.⁶⁵ As things currently stand, however, deference in the state secrets scenario closely tracks the practice il-

⁶² *Al-Haramain Islamic Found. v. Bush*, 507 F.3d 1190, 1203 (9th Cir. 2007).

⁶³ *Id.* See also *El-Masri v. United States*, 479 F.3d 296, 305, 312 (4th Cir. 2007) (asserting that "it is the court, not the Executive, that determines whether the state secrets privilege has been properly invoked," but also that "the Executive and the intelligence agencies under his control occupy a position superior to that of the courts in evaluating the consequences of a release of sensitive information," that the "executive branch's expertise in predicting the potential consequences of intelligence disclosures is particularly important given the sophisticated nature of modern intelligence analysis," and that "[i]n assessing the risk that such a disclosure might pose to national security, a court is obliged to accord the 'utmost deference' to the responsibilities of the executive branch").

⁶⁴ See, e.g., *Examining the State Secrets Privilege: Protecting National Security While Preserving Accountability*: Hearing on S. 2533 Before the S. Comm. on the Judiciary, 110th Cong. 2 (2008) (statement of Louis Fisher) (warning that deference—whether framed as "utmost deference" or just "deference" simpliciter—"undermines the principle of judicial independence, the essential safeguard of checks and balances, and the right of private litigants to have a fair hearing in court") (transcript available at http://judiciary.senate.gov/testimony.cfm?id=3091&wit_id=6955); *Reform of the State Secrets Privilege*, Hearing Before the Subcomm. on the Constitution, Civil Right, and Civil Liberties of the H. Comm. on the Judiciary, 110th Cong. 56 (2008) (statement of William H. Webster) (arguing that "[j]udges are well-qualified to review evidence purportedly subject to the privilege and make appropriate decisions as to whether disclosure of such information is likely to harm our national security"), available at <http://judiciary.house.gov/hearings/printers/110th/40454.pdf>.

⁶⁵ See *State Secrets Protection Act*, S. 2533, 110th Cong. (2008), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_bills&docid=f:s2533is.txt.pdf.

illustrated in the other case studies. Courts are conscious that deference has costs in terms of reducing the judicial capacity to check the executive branch, but in some contexts they are loath to question the judgment of executive officials when push comes to shove.

D. Military Exigency and Preparedness

There are many other examples involving deference to predictive judgments in the national security context, including the national security exemption to the Freedom of Information Act (FOIA),⁶⁶ the denial of security clearances,⁶⁷ and the possibility that a detainee will be tortured if transferred to the custody of another state.⁶⁸ But the paradigmatic examples of national security fact deference in the predictive setting involve claims of military necessity and preparedness.

The Supreme Court's 1827 decision in *Martin v. Mott* provides an early illustration of deference to a judgment of necessity.⁶⁹ Jacob Mott refused to serve in the New York militia during the War of 1812 despite an order from President Madison calling forth the militia, and he was tried by court martial and fined for doing so.⁷⁰ In subsequent litigation, Mott contended that Madison's order had been defective because the factual predicate for it—the existence

⁶⁶ See FOIA, 5 U.S.C. § 552b(c)(1) (2006); *Cent. Intelligence Agency v. Sims*, 471 U.S. 159, 176, 179–80 (1985) (concluding that courts should defer to the judgment of the Director of Central Intelligence regarding whether to disclose the identity of intelligence sources in connection with a FOIA request, because courts “have little or no background in the delicate business of intelligence gathering,” are less well positioned to make “complex political, historical, and psychological judgments” about the consequences of disclosure, and are not in the Director's position of being “familiar with ‘the whole picture’”).

⁶⁷ See *Dep't of the Navy v. Egan*, 484 U.S. 518, 529 (1988) (holding that “[p]redictive judgment” about the risks associated with granting a security clearance to an individual “must be made by those with the necessary expertise in protecting classified information,” and that “it is not reasonably possible for an outside nonexpert body to review the substance of such a judgment and to decide whether the agency should have been able to make the necessary affirmative prediction with confidence”).

⁶⁸ Cf. *Munaf v. Geren*, 128 S. Ct. 2207, 2212 (2008) (asserting that “[t]he judiciary is not suited to second-guess . . . determinations” by the State Department regarding the likelihood Iraqi authorities would abuse a prisoner).

⁶⁹ See *Martin v. Mott*, 25 U.S. (12 Wheat.) 19.

⁷⁰ See *id.* at 28–29; see also Stephen I. Vladeck, Note, *Emergency Power and the Militia Acts*, 114 *Yale L.J.* 149, 171–72 (2004).

of an imminent invasion threat—had not been satisfied.⁷¹ The Supreme Court declined to second guess Madison’s judgment, however, on prudential and functional grounds.⁷² First, military discipline and effectiveness might be undermined if the President’s determination were subject to question.⁷³ Second, the President’s determination might rest on intelligence that either would not be admissible in court or could not be disclosed publicly.⁷⁴ Lack of judicial review increased the risk of abuse, Justice Story conceded, but in his view the remedy for that risk lay in a combination of electoral accountability and oversight from the legislature.⁷⁵

We find more recent—and cautionary—examples in the case law relating to the fate of Japanese Americans during World War II.⁷⁶ In *Hirabayashi v. United States* the Supreme Court rejected a constitutional challenge to military orders imposing curfews on persons of Japanese ancestry on the West Coast.⁷⁷ Among other things, the challenge raised the question whether the Court could review the predictive estimates underlying the orders, including the risk that the Japanese military might invade the West Coast, the likelihood that some persons of Japanese ancestry might prove disloyal, and the probability that such persons could be identified through an individualized screening process with enough precision and speed.⁷⁸ The Court refused to closely scrutinize those judg-

⁷¹ See *Martin*, 25 U.S. at 28–29.

⁷² See *id.* at 30–32. The New York Court of Appeals reached the same conclusion in *Vanderheyden v. Young*, 11 Johns. R. 150, 158–59 (N.Y. 1814).

⁷³ See *Martin*, 25 U.S. at 30–31 (“The service is a military service, and the command of a military nature; and in such cases, every delay, and every obstacle to an efficient and immediate compliance, necessarily tend to jeopard[ize] the public interests.”).

⁷⁴ *Id.* at 31.

⁷⁵ See *id.* at 32. Justice Story also emphasized a presumption of virtuous character in high public officials. *Id.* at 32–33.

⁷⁶ *The Prize Cases* provide another early example of deference to executive factual judgment where predictive and policy judgments intersect in a military setting. See 67 U.S. (2 Black) 635, 670 (1862) (holding that “[w]hether the President . . . has met with such armed hostile resistance . . . as will compel him to accord to them the character of belligerents, is a question to be decided by him, and this Court must be governed by the decisions and acts of the political department of the Government to which this power was entrusted”).

⁷⁷ See *Hirabayashi v. United States*, 320 U.S. 81 (1943).

⁷⁸ See *id.* at 89, 93–95; cf. Eric L. Muller, *Hirabayashi: The Biggest Lie of the Greatest Generation* 4–5 (Univ. of N.C. Legal Studies Research Paper 1233682), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1233682 (contending that the military did not in fact believe that there was a serious invasion threat, and that Jus-

ments.⁷⁹ Later, in *Korematsu v. United States*, the Court confronted the same questions in connection with the subsequent military order requiring expulsion of Japanese Americans from the West Coast military district, and it reached the same conclusion.⁸⁰

That the Court did not more closely scrutinize the factual predicates for these actions has occasioned extensive criticism, and understandably so.⁸¹ But the deeper flaw in these cases, arguably, was the Court's failure to recognize that accepting these predicates did not require it to approve the constitutionality of these orders. The Court still could have identified a profound mismatch between the justifications offered by the government and the means selected to address them (that is, mass, long term exclusion on racial grounds without benefit of any individualized inquiry at any stage). Fact deference, even when warranted, does not require a judge to abandon independent judgment in the evaluation of the legal consequences of those facts.⁸²

The particular questions of exigency at issue in *Mott*, *Hirabayashi*, and *Korematsu* fortunately have not arisen again in more recent years.⁸³ But the issue of deference with respect to military judgments continues to arise with some frequency in connection with less dramatic determinations relating to military *preparedness*.⁸⁴ Courts reviewing the constitutionality of the military's

tice Department attorneys were aware of this but nonetheless represented the contrary to the Court).

⁷⁹ *Hirabayashi*, 320 U.S. at 99.

⁸⁰ *Korematsu v. United States*, 323 U.S. 214, 218–19 (1944).

⁸¹ See, e.g., Muller, *supra* note 78, at 65.

⁸² Many scholars have argued against deference in this setting, noting that the government in these cases may have presented false information to the courts. See, e.g., *id.* But non-deferential review is not the only or even the most useful safeguard against such abuse. Intentional misrepresentations to the court are unethical and possibly even criminal acts, subject to an array of sanctions. Such sanctions may not be a perfect mechanism for the detection and deterrence of such misconduct, but they are more plausible checking mechanisms than non-deferential review, and they remain in place even in a deferential framework.

⁸³ Cf. *In re Guantanamo Bay Detainee Litig.*, 581 F. Supp. 2d 33, 37 (D.D.C. 2008) (rejecting executive branch argument that admitting Uighur detainees from Guantanamo Bay Cuba to the United States would pose a security risk), *rev'd*, *Kiyemba v. Obama*, 555 F.3d 1022 (D.C. Cir. 2009) (holding that district court lacked authority to direct the executive branch to bring detainees into the United States or to order their release in the United States).

⁸⁴ Commentators frequently group military preparedness cases under the rubric of “military deference.” See, e.g., Kirstin S. Dodge, *Countenancing Corruption: A Civil*

“Don’t Ask, Don’t Tell” policy, for example, routinely state that they must defer to the judgment of military officers regarding the policy’s impact on military discipline and training in light of both functional and prudential concerns:

The Commander-in-Chief, the Secretary of Defense, the Secretary of the Army, and the generals have made the determination about homosexuality . . . and we, as judges, should not undertake to second-guess those with the direct responsibility for our armed forces. If a change of Army policy is to be made, we should leave it to those more familiar with military matters than are judges not selected on the basis of military knowledge. We . . . should not undertake to order such a risky change with possible consequence[s] we cannot safely evaluate.⁸⁵

Similar themes pervaded the litigation in *Winter v. Natural Resources Defense Council, Inc.*, which involved a challenge under the environmental laws to the Navy’s use of sonar in training exercises off the coast of California.⁸⁶ At the district and circuit levels, judges determined that certain restraints could be placed on the use of the sonar without unduly disrupting the Navy’s capacity to train strike groups and certify them for deployment, despite the

Republican Case Against Judicial Deference to the Military, 5 *Yale J.L. & Feminism* 1, 5–6 (1992); John F. O’Connor, The Origins and Application of the Military Deference Doctrine, 35 *Ga. L. Rev.* 161, 280–83 (2000). Military deference, however, is both narrower and broader than national security fact deference. It is narrower in that national security fact deference extends beyond the military sphere, as illustrated by the discussion of the state secrets privilege. It is broader in that many “military deference” cases do not involve deference to factfinding but rather deference in the looser sense of construing constitutional restraints more permissively in cases involving service members or military installations. See, e.g., *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986) (“Our review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society.”); *Rostker v. Goldberg*, 453 U.S. 57, 64–65 (1981) (“The case arises in the context of Congress’ authority over national defense and military affairs, and perhaps in no other area has the Court accorded Congress greater deference.”); *Greer v. Spock*, 424 U.S. 828, 837–38 (1976) (holding that crimes punishable by courts martial should not be held to the same vagueness standard as would apply to an ordinary criminal statute).

⁸⁵ *Ben Shalom v. Marsh*, 881 F.2d 454, 461 (7th Cir. 1989); see also *Thomasson v. Perry*, 80 F.3d 915, 925–26 (4th Cir. 1996) (citing comparative institutional competence and collateral consequence arguments in support of deference to military judgment regarding “Don’t Ask, Don’t Tell”).

⁸⁶ *Winter v. Natural Res. Def. Council, Inc.*, 129 S. Ct. 365 (2008).

contrary view of the Chief of Naval Operations (CNO).⁸⁷ Ultimately, the Supreme Court sided with the government, emphasizing the “predictive” nature of the Navy officers’ judgment en route to concluding that the lower court erred by not deferring to the CNO’s judgment that the proposed restrictions would undermine naval preparedness.⁸⁸ Justice Breyer foreshadowed that ruling in oral argument when he lamented:

I don’t know anything about this. I’m not a naval officer. But if I see an admiral come along with an affidavit that says . . . that you’ve got to train people when there are [certain oceanic conditions], all right, or there will be subs hiding there with all kinds of terrible weapons, and he swears that under oath. And I see on the other side a district judge who just says, you’re wrong, I then have to look to see what the basis is, because I know that district judge doesn’t know about it, either.⁸⁹

* * *

These case studies suggest considerable uncertainty regarding the justifications for national security fact deference. Whereas the Fourth Circuit and one Supreme Court Justice perceived a near-binding deference obligation in connection with enemy combatant status determinations, a plurality of Justices called for a non-deferential approach mediated by procedural innovations. The district judge in *Lindh* conceded that courts must retain authority to pass judgment on questions such as the Taliban’s past compliance with the conditions of lawful belligerency, yet he gave the President’s determination substantial if not binding weight nonetheless. The Ninth Circuit expressed concern for the independence of the judicial checking function in the state secrets context but ultimately proved unwilling to second guess the predictive estimates of Intelligence Community officials. Both the district court and the court of appeals in *Winter* were willing to disagree with the Navy’s CNO

⁸⁷ See *Natural Res. Def. Council, Inc. v. Winter*, 518 F.3d 658, 703 (9th Cir. 2008) (upholding preliminary injunction).

⁸⁸ *Winter*, 129 S. Ct. at 378–81 (2008).

⁸⁹ Transcript of Oral Argument at 35, *Winter v. Natural Res. Def. Council, Inc.*, 129 S. Ct. 365 (No. 07-1239), available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/07-1239.pdf.

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regarding the impact sonar restrictions might have on training, but the Supreme Court reversed.

This level of disagreement and uncertainty suggests that national security fact deference may be undertheorized; that is, courts and litigants may lack a shared foundation of understanding with respect to the legal nature of fact deference claims and the moves and arguments that accordingly are legitimate in resolving such claims. The rest of this paper aims to address this concern.

II. THE NATURE OF A FACT DEFERENCE CLAIM

What, precisely, is the nature of a fact deference claim, in the national security setting or otherwise? I contend in this Part that such claims are best understood through the lens of the “decision rules” literature in constitutional theory.⁹⁰ The decision rules account nicely maps onto the existing practice of national security fact deference claims as described in the case studies above, helping us to understand why it is legitimate for litigants and judges alike to emphasize functional and prudential considerations.⁹¹ It also draws

⁹⁰ The phrase derives from Mitchell N. Berman, *Constitutional Decision Rules*, 90 *Va. L. Rev.* 1, 9–13 (2004). For a sampling of additional contributions to this line of scholarship, see Richard H. Fallon, Jr., *Implementing the Constitution* 37–44 (2001) [hereinafter Fallon, *Implementing*]; Kermit Roosevelt III, *The Myth of Judicial Activism: Making Sense of Supreme Court Decisions* 11–64 (2006) [hereinafter Roosevelt, *Myth*]; Brannon P. Denning, *The New Doctrinalism in Constitutional Scholarship and *District of Columbia v. Heller**, 75 *Tenn. L. Rev.* 789; Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 *Harv. L. Rev.* 1275 (2006) [hereinafter Fallon, *Judicially Manageable Standards*]; Horwitz, *supra* note 3, at 1140–46; Kermit Roosevelt III, *Constitutional Calcification: How the Law Becomes What the Court Does*, 91 *Va. L. Rev.* 1649, 1658–66 (2005) [hereinafter Roosevelt, *Calcification*]; Catherine T. Struve, *Constitutional Decision Rules for Juries*, 37 *Colum. Hum. Rts. L. Rev.* 659 (2006). Other scholars have objected to the central claim in this literature that there exists a distinction between constitutional meaning and the rules that judges develop to permit implementation of that meaning in particular cases. See, e.g., Roderick M. Hills, Jr., *Mistaking the Window-Dressing for the Window*, 91 *Judicature* 146 (2007) (reviewing Roosevelt, *Myth*, *supra*). Though arguable, the criticism suggests that the distinction collapses because instrumental factors are central to the determination of constitutional meaning, and thus that implementation via “decision rules” is no more than further elaboration of meaning. If that is the case, this objection does not undermine the utility of relying on the decision rules literature as a guide to identifying the key instrumental considerations that might inform national security fact deference claims.

⁹¹ An alternative possibility is that fact deference claims are better understood as turning, in every instance, on the meaning and interrelationship among various consti-

our attention to the nuances associated with those arguments, highlighting the possibility that they have been applied without sufficient rigor in actual practice. That insight in turn provides the foundation for a critical examination of the leading arguments for and against national security fact deference in the next Part.

A. Fact Deference as a Decision Rule (Constitutional or Otherwise)

Constitutional theorists in recent years have paid considerable attention to the “problematics of constitutional doctrine—what it is, how it compares to constitutional meaning, whether it is legitimate, how it should be employed, and what consequences follow.”⁹² Professor Richard Fallon, for example, wrote in 2001 that:

tutional provisions such as the “judicial power” and “Commander-in-Chief” clauses. I find this account less compelling than the decision rules model, but it is worth noting because it might give rise to an originalist objection to reliance on functional and prudential considerations. Cf. Michael D. Ramsey, *The Constitution’s Text in Foreign Affairs* 3 (2007) (contending that original public meaning can shed considerable light on seemingly sparse text relating to foreign affairs); Ingrid Wuerth, *An Originalism for Foreign Affairs? 2–3* (Vand. Pub. Law Research Paper, Working Paper No. 08-13, 2008), available at <http://ssrn.com/abstract=1134887> (urging foreign relations law scholars to take account of methodological debates in the constitutional theory literature). The important point for present purposes is that originalist methods likely would not produce an interpretation sufficient to resolve a fact deference claim, and that some degree of construction—potentially including resort to structural, functional, and prudential methods—thus would still be required. Cf. Randy E. Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* 118–30 (2004) (discussing the propriety of such methods); Keith E. Whittington, *Constitutional Construction: Divided Powers and Constitutional Meaning* 5 (1999) (same); Lawrence B. Solum, *District of Columbia v. Heller and Originalism* 44 Nw. U. L. Rev. (forthcoming 2009), available at <http://papers.ssrn.com/abstract=1241655> (elaborating the interpretation-construction distinction). If that is correct, the construction and decision rules accounts end up directing attention to similar concerns. Cf. Pearlstein, *supra* note 8, at 18 (noting that functionalism at times is unavoidable in resolving separation of powers disputes in the national security realm); Stephen I. Vladeck, *Foreign Affairs Originalism in Youngstown’s Shadow*, 53 St. Louis U. L.J. 29, 31 (2008) (same). Of course, the text would have something to say if fact deference were invoked in the context of a factual question committed to a jury—which may explain why one does not see such attempts in actual practice. See U.S. Const. amends. V, VI, VII; cf. *In re Winship*, 397 U.S. 358, 364 (1970) (deriving a beyond-a-reasonable-doubt requirement from the Fifth Amendment Due Process Clause for the elements of a criminal charge).

⁹² Berman, *supra* note 90, at 5. Metadoctrinalism is not, of course, an entirely novel development. Several scholars credit articles in the 1970s by Henry Monaghan and Larry Sager with reviving interest in the distinction between constitutional meaning in the abstract and the judicially enforceable Constitution. See *id.* at 4–5 (discussing Henry P. Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional*

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judicially prescribed tests do not (and should not) always reflect the Court's direct assessment of constitutional meaning, but sometimes embody the Court's judgment about an appropriate standard of judicial review, indicating the circumstances in which other officials will be held by courts to have failed to meet their primary duties.⁹³

This raised a question as to which considerations legitimately might inform such a judgment. Fallon rejected the notion that constitutional doctrine must seek to approximate constitutional meaning as perfectly as possible in order to be legitimate.⁹⁴ Nonetheless, he "appreciate[d] the urgency of assessing the grounds on which the Court determines whether to" employ its doctrine in a manner that would over- or underenforce constitutional meaning.⁹⁵ Ultimately, these and other considerations led Fallon to endorse a model in which "relatively robust judicial review" of the constitutionality of the actions of other government actors "is generally defensible, but the Supreme Court will sometimes have good reasons, rooted in concerns about the fair allocation of political power and its own comparative competence to reach sound decisions, to decline to displace the judgments of other institutions."⁹⁶ Fallon's work, in

Common Law, 89 Harv. L. Rev. 1, 1–3 (1975); Lawrence Gene Sager, Fair Measure: The Legal Status of Underenforced Constitutional Norms, 91 Harv. L. Rev. 1212 (1978)); see also Horwitz, *supra* note 3, at 1141 (same); Roosevelt, *Calcification*, *supra* note 90, at 1656 (discussing Sager's article). James Bradley Thayer previously had drawn attention to a similar notion when he contended that courts should refrain from striking down a statute as unconstitutional in close cases. See, e.g., *id.* (citing James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 Harv. L. Rev. 129, 139–44 (1893)). Roosevelt notes that Thayer did "not see himself as articulating anything new." See *id.* at 1656 n.18 (citing, *inter alia*, *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 128 (1810)).

⁹³ Fallon, *Implementing*, *supra* note 90, at 5–6 (emphasis omitted); see also Richard H. Fallon, Jr., *The Supreme Court, 1996 Term—Foreword: Implementing the Constitution*, 111 Harv. L. Rev. 54 (1997).

⁹⁴ See Fallon, *Implementing*, *supra* note 90, at 5–6; see also Roosevelt, *Calcification*, *supra* note 90, at 1650–51 (referring to the "fallacy of perfect enforcement").

⁹⁵ Fallon, *Implementing*, *supra* note 90, at 7.

⁹⁶ *Id.* at 10; see also *id.* at 10–11 ("This is especially true when the Court is unusually doubtful about the validity of what otherwise would be its own substantive judgment; when any injustice resulting from deference would not (in its judgment) be very great; and when there is a strong likelihood that independent judicial resolution would prove intensely unacceptable to large numbers of people whose views are not themselves unreasonable.").

short, offered an institutionally contingent account of the formation of constitutional doctrine, one that emphasized comparative institutional competence and comparative institutional legitimacy.

Writing in a similar vein, Professor Mitch Berman elaborated that the general category of constitutional doctrine can be subdivided usefully into what he termed “constitutional operative propositions” and “constitutional decision rules.”⁹⁷ Operative propositions, he explained, are doctrinal statements of constitutional meaning.⁹⁸ In order for a judge to resolve a constitutional claim in a litigation setting, however, knowledge of the relevant operative proposition is not enough; operative propositions do not “self-implement” during litigation. A decisionmaker inevitably must determine, often in the face of disputed facts, whether the predicate elements of the operative proposition have been satisfied. In making that determination, the decisionmaker necessarily must employ some decisionmaking framework, including at least a burden of proof, even if only by default.⁹⁹ Ber-

⁹⁷ Berman, *supra* note 90, at 51–60. Berman’s primary purpose was to demonstrate the utility of maintaining the distinction between constitutional operative propositions and constitutional decision rules, despite criticism that constitutional adjudication is pragmatic “all the way up” rather than just at the decision rule stage or its equivalent. See *id.* at 60 (contending that “we can carve up constitutional doctrine into two sorts of rules . . . even while conceding the legitimacy of each, and without staking ourselves to any claims about the sorts of considerations upon which courts might rely in the derivation and formulation of either”); *id.* at 43–50 (summarizing the debate in terms of “whether it is meaningful to carve the universe of constitutional doctrine into conceptually distinct pieces” in light of the possibility that “constitutional adjudication is instrumental ‘all the way up’”) (quoting Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 *Colum. L. Rev.* 857, 873 (1999)). Toward that end, Berman pointed out that deeper awareness of the distinction may enhance our understanding of the extent to which the Court’s constitutional doctrine ought to bind other branches, and may also work against the undesirable tendency to assume that only judges have the capacity or responsibility for engaging in constitutional analysis. See *id.* at 84–87; cf. Paul A. Diller, *When Congress Passes an Intentionally Unconstitutional Law: The Military Commissions Act of 2006*, 61 *SMU L. Rev.* 281, 295–305 (2008) (criticizing legislators who supported legislation they believed to be unconstitutional).

⁹⁸ See Berman, *supra* note 90, at 9.

⁹⁹ *Id.* at 10 (“A court cannot implement [an] operative proposition without some sort of procedure . . . for determining whether to adjudge the operative proposition satisfied,” yet the court “lacks unmediated access to the true fact of the matter.”) (emphasis omitted); *id.* at 10 n.35 (noting that “epistemic uncertainty” on the judge’s part requires selection of a burden of proof). In limited instances, the Constitution itself articulates the decision rule, in which case the distinction between decision rule

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man labels these implementation rules “constitutional decision rules.”¹⁰⁰

Decision rules thus are not direct expressions of constitutional meaning. Rather, they are devices for operationalizing constitutional meaning in the context of a specific institutional setting. *Some* version of a decision rule ordinarily is unavoidable when judges (or, in some instances, juries¹⁰¹) implement constitutional meaning, on this view. The point echoes Professor Richard Markovits’ emphasis on the distinction between a test that embodies the requirements of constitutional meaning and the degree of proof a judge should require in determining whether elements of that test have been satisfied.¹⁰²

This account fits the national security fact deference scenario rather well.¹⁰³ Indeed, the process of generating a decision rule routinely presents the question of whether a judge should give some weight—perhaps even binding weight—to another institution’s decision, since other institutions routinely will have expressed their own view as to whether the predicate elements of an operative proposition are satisfied. That is to say, decision rules routinely manifest in terms of deference. *Superintendent v. Hill*, a Supreme Court decision offered by Berman as an illustration of a constitu-

and operative proposition collapses. This is the case in connection with determinations of fact in criminal prosecutions, for example, where the Constitution mandates use of a beyond-a-reasonable-doubt standard. See Roosevelt, *Calcification*, supra note 90, at 1653. Constitutional silence with respect to the decision rule does not spare the judge the need to have one, however, but simply requires the judge to select the rule without the aid of clear textual direction. See *id.* at 1658.

¹⁰⁰ See Berman, supra note 90, at 9–10; see also Roosevelt, *Calcification*, supra note 90, at 1652–54, 1657–58 (distinguishing between meaning and implementation rules).

¹⁰¹ See Struve, supra note 90 (pointing out that in some litigation contexts, compliance with constitutional operative propositions is determined by the jury rather than the judge, and noting that this may justify distinctive decision rules).

¹⁰² See Richard Markovits, *Matters of Principle: Legitimate Legal Argument and Constitutional Interpretation* 180–81, 215–16, 265 (1998). Markovits notes that these categories frequently are conflated by courts and commentators and points out that a test of meaning can be combined with a deferential standard of proof, or vice-versa. See *id.* at 180–81, 215–16. Solove makes a similar point when he contends that the impact of deference with respect to “factual and empirical evidence tends to override whatever level of scrutiny is applied, and is often dispositive.” Solove, supra note 2, at 955.

¹⁰³ Cf. Fallon, *Implementing*, supra note 90, at 116 (observing that “standards specifying . . . the deference due to other institutions of government cannot be derived directly from the written Constitution”).

tional decision rule,¹⁰⁴ demonstrates the point. In *Hill*, the Court had to determine what standard of review to employ in connection with a procedural due process challenge to a prison disciplinary board's decision to revoke a prisoner's good time credits.¹⁰⁵ The Court determined that procedural due process is satisfied so long as the judge determines that a board had "some evidence" to support its conclusion.¹⁰⁶ Rather than a statement regarding the meaning of due process, Berman argued, this deferential framework makes more sense when viewed as a decision rule reflecting the Court's assessment that judges in most instances should defer to the judgments of prison disciplinary boards, intervening only in clear cases of mistake or malfeasance.¹⁰⁷ Restating things a bit, *Hill* formulated a decision rule requiring judges to defer to the factual judgment of prison disciplinary boards except in extreme instances in which the existence of factual error is relatively clear.

To be sure, many fact deference scenarios do not concern implementation of *constitutional* operative propositions. The operative proposition at issue in *Lindh*, for example, derived from a treaty; the question was whether the Taliban had complied with the conditions of lawful belligerency specified in GPW Article 4.¹⁰⁸ The operative proposition at issue in *Hamdi*—the proposition that the Authorization for Use of Military Force,¹⁰⁹ as informed by the law of armed conflict, empowered the President to detain only certain personnel such as Taliban fighters—sounded primarily in statutory and international law.¹¹⁰ The state secrets privilege puts deference

¹⁰⁴ See Berman, *supra* note 90, at 64–65.

¹⁰⁵ See *Superintendent v. Hill*, 472 U.S. 445, 454–56 (1985).

¹⁰⁶ *Id.* at 455–56. Berman notes that this rule may subsequently have been narrowed to apply only in connection with "insufficiency of the evidence" challenges, as distinct from claims based on alleged bias. See Berman, *supra* note 90, at 65 n.200 (citing *Edwards v. Balisok*, 520 U.S. 641, 648 (1997)).

¹⁰⁷ Berman, *supra* note 90, at 64 (citing Fallon, *Implementing*, *supra* note 90, at 6, 38).

¹⁰⁸ See *supra* text accompanying notes 32–35.

¹⁰⁹ Authorization for Use of Military Force, Pub. L. No. 107-40 (2001).

¹¹⁰ See *supra* text accompanying notes 21–26. The operative proposition at issue in *Hamdi* also can be viewed as a constitutional one if we take the view that it concerns the meaning of the Fifth Amendment's due process requirement. Cf. Roosevelt, *Myth*, *supra* note 90, at 79 (contending that in *Hamdi* the "meaning of the Constitution [i.e., the operative proposition] is that the Executive may detain enemy combatants and not innocents"); Roosevelt, *Calcification*, *supra* note 90, at 1714–15 (same). Determining who counts as a detainable enemy combatant in that setting, however,

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in issue in service of a common law evidentiary privilege, albeit one with strong claims to constitutional roots in at least some contexts. These deference scenarios involved decision rules, then, but not necessarily *constitutional* decision rules.¹¹¹

But it is difficult to see why this distinction should matter for present purposes. The abstract notion that there is a distinction between operative propositions embodying the meaning of legal rules and decision rules permitting judicial implementation of those propositions applies to any type of legal rule, be it constitutional, statutory, or of some other nature. A judge implementing a non-constitutional operative proposition is, after all, still subject to the same institutional restraints and the same epistemic uncertainty with respect to whether the predicate conditions of that proposition have been met. It thus would seem to follow that the insights of the constitutional decision rules literature—particularly insights relating to the process of decision rule formation—ought to apply by extension to other contexts.¹¹² I turn now to a survey of those insights, as a prelude to a close examination of how they might apply in the particular context of national security fact deference claims.

required consideration of the underlying law of war norms as well as the proper interpretation of the statute authorizing the President to use military force after 9/11. Perhaps the best description, then, is that the deference question in *Hamdi* arose at the intersection of a series of related operative propositions, including constitutional, statutory, and international law concerns.

¹¹¹ One might argue that all of these scenarios—indeed that any fact deference scenario—present a constitutional question with respect to the separation of powers. This may be so. The useful insight of the decision rules account, however, is that questions of deference should be examined in relation to the underlying operative proposition that gives rise to the need to resolve the deference question in the first instance, and those operative propositions in many instances will concern sources of law besides the Constitution.

¹¹² Indeed, some such considerations might be *more* defensible in the context of sub-constitutional rules, given that it should be clearer in that context that Congress may override the Court's selection of a particular deference rule. Then again, one of the points of distinguishing operative propositions and decision rules in the constitutional theory literature is to draw attention to the possibility that Congress might have greater capacity to override the latter than the former even in the constitutional context. See Berman, *supra* note 90, at 25–27, 116–27 (emphasizing that decision rules do not share the *Marbury*-shielded nature of operative propositions).

B. Decision Rule Formation and the Issue of Relevant Considerations

There is no comprehensive list of considerations that might legitimately inform the process of developing a decision rule, nor is there clear agreement regarding the criteria that might mark the boundaries of the relevant criteria set. Nonetheless, the recurrence of particular arguments in both the scholarly literature and the case law suggests a degree of consensus regarding the potential relevance of a number of considerations.¹¹³ For our purposes, we can develop these considerations into four distinct clusters: core accuracy, weighted accuracy, prudence, and legitimacy.

1. Core Accuracy

Perhaps the least controversial point about decision rule formation is that in determining how to implement an operative proposition a judge might consider the goal of *core accuracy*.¹¹⁴ That is to say, the judge might select a decision rule designed to maximize the chances of correctly determining whether the predicate conditions for satisfaction of an operative proposition have been met (even if we accept that doctrinal rules ultimately involve more than a quix-

¹¹³ See, e.g., Markovits, *supra* note 102, at 216–18 (identifying “factors that a judge is obligated to consider when deciding how much deference to show to a government decision-maker who has made the choice being challenged in a particular case,” including considerations of accuracy, comparative competence, impact on groups subjected to unconstitutional disadvantages as a historical matter, lack of deliberation, illicit motivations, and the status of the potential deferee); Berman, *supra* note 90, at 93 (providing a non-exhaustive list of “six analytically distinct factors or families of factors that might appeal to a judge considering whether, and how, to form a constitutional decision rule,” including “adjudicatory, deterrent, protective, fiscal, institutional, and substantive” considerations (emphasis omitted)); Roosevelt, *Calcification*, *supra* note 90, at 1658–66 (discussing “institutional competence,” “costs of error,” “frequency of unconstitutional action,” “legislative pathologies,” “enforcement costs,” and “guidance for other governmental actors”).

¹¹⁴ Core accuracy is an aspect of what Berman describes as the “adjudicatory consideration,” which he notes is “[t]he most obvious factor that a decision-rule-maker should consider.” Berman *supra* note 90, at 93. Roosevelt captures core accuracy concerns under the “Institutional Competence” heading. See Roosevelt, *Calcification*, *supra* note 90, at 1659–60. Markovits includes this concern, at least implicitly, under a consideration that could be labeled comparative institutional competence. See Markovits, *supra* note 102, at 216.

otic attempt at perfect implementation of abstract constitutional meaning).¹¹⁵

The pursuit of core accuracy draws our attention to questions of comparative institutional competence.¹¹⁶ If another institution is more likely than the court to resolve the relevant questions accurately, the court might be drawn to a decision rule incorporating deference to that institution's decisions.¹¹⁷ Professor Kermit Roosevelt illustrates the point when he notes that judges "may be poorly suited to gauge the necessities of administration in unusual environments such as prisons," and that it "is generally conceded that [judges] are less able [than legislatures] to resolve complicated factual questions, such as the economic effects of a particular law."¹¹⁸

¹¹⁵ See Roosevelt, *Calcification*, supra note 90, at 1651–52.

¹¹⁶ See id. at 1659–60. Note that comparative competence for accuracy is not a one-size-fits-all proposition; the comparison may vary depending on the nature of the question. See Markovits, supra note 102, at 216 (observing that training, experience, and institutional structure render judges on the whole superior to other government actors at assessing values such as "fundamental fairness," in contrast to the example of Defense Department superiority at collecting and examining "technical facts about national defense"); David Cole, *No Reason to Believe: Radical Skepticism, Emergency Power, and Constitutional Constraint*, 75 U. Chi. L. Rev. 1329, 1135–42 (2008) (reviewing Eric A. Posner & Adrian Vermeule, *Terror in the Balance: Security, Liberty, and the Courts* (2007)) (emphasizing the distinction between balancing competing government and individual interests and determining particular facts that might feed into that analysis).

¹¹⁷ See Roosevelt, *Calcification*, supra note 90, at 1659–61; cf. Christopher L. Eisgruber & Lawrence G. Sager, *Civil Liberties in the Dragons' Domain: Negotiating the Blurred Boundary between Domestic Law and Foreign Affairs after 9/11*, in *September 11 in History: A Watershed Moment?* 163, 174–75 (Mary L. Dudziak ed., 2003) (presenting a comparative institutional competence argument regarding the contrasting epistemic capacities of military and civilian courts, in connection with the proposition that military life is a sphere apart from civilian life and hence that military courts are more likely "to get at the truth in disputes about the conduct of soldiers").

¹¹⁸ Roosevelt, *Calcification*, supra note 90, at 1660 (citing, inter alia, Michael W. McConnell, *Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 Harv. L. Rev. 153, 156 (1997)); cf. Fallon, *Implementing*, supra note 90, at 40–41 (noting that "in the face of uncertainty about whether it understands an institutional context, the Court may conclude that it would be imprudent not to defer to the judgments of others about what is appropriate under the circumstances," and offering the example of deference to military and prison authorities). For empirical evidence suggesting that untrained judges perform poorly compared to trained judges when resolving complicated factual questions in the context of economics, see Michael R. Baye & Joshua D. Wright, *Is Antitrust Too Complicated for Generalist Judges?: The Impact of Economic Complexity & Judicial Training on Appeals* 23–24 (George Mason L. & Econ. Research Paper No. 09-07), available at <http://ssrn.com/abstract=1319888>.

In such circumstances, comparative institutional competence would appear to cut in favor of a deferential decision rule.

It is not enough to say, however, that judges should be alert to the possibility that another institution may have an edge in terms of accuracy. Capacity for accuracy is not a monolithic characteristic. The institutional comparison can and should be refined as much as possible in order to account for the distinct elements that combine to determine an institution's capacity for accurate judgments. These elements include, at a minimum, each institution's relative capacity to access relevant *information*, to access relevant *expertise*,¹¹⁹ and reliably to *integrate* these inputs in a manner that will minimize the risk of misfeasance or malfeasance in the decisionmaking process.¹²⁰

Each of these inquiries can and should be further refined, of course. Reliable integration, for example, constitutes a particularly important inquiry in this context in that it provides an opportunity for judicial review to function as a check against misfeasance or even malfeasance. Under this heading, therefore, one might expect judges to be mindful of red flags such as historical patterns of unreliability in particular contexts,¹²¹ the risk of democratic failure,¹²² and lack of deliberation (whether due to panic or otherwise).¹²³

¹¹⁹ See Solove, *supra* note 2, at 959 (noting the comparative expertise argument for deference claims).

¹²⁰ For an exceptionally rich discussion of the nature of expertise and the dilemmas that arise when non-experts attempt to determine whether to credit the views of experts, see Scott Brewer, *Scientific Expert Testimony and Intellectual Due Process*, 107 *Yale L.J.* 1535 (1998) (unpacking the theoretical foundations of deference to expertise).

¹²¹ See Markovits, *supra* note 102, at 216 (arguing that "courts should defer less" where the decision in question "disadvantages a group, restricts a liberty, or disserves a value" where there is a historical pattern of such harms); *id.* at 217 (calling attention to structural, sociological, and historical evidence of a group's capacity to protect itself in the ordinary political process, and noting that the presence of an illicit motive undermines the case for deference); Roosevelt, *Calcification*, *supra* note 90, at 1663–64 (referring to this as the "Frequency of Unconstitutional Action" consideration).

¹²² See Cole, *supra* note 116, at 1347–52; Roosevelt, *Calcification*, *supra* note 90, at 1664.

¹²³ See Markovits, *supra* note 102, at 216–17.

2. *Weighted Accuracy*

Perfect enforcement is not the only accuracy-related consideration a judge may take into account in formulating a decision rule. Judges also may account for the possibility that the ultimate goal might not simply be to reduce the “sum total of adjudicatory errors”—the net false positives and false negatives—but might instead be to reduce the “sum total of *weighted* errors.”¹²⁴ That is to say, various factors might suggest that the decision rule should be calibrated to overenforce or underenforce the operative proposition rather than to pursue core accuracy. These factors might be specific to the litigants, or they might involve larger institutional concerns.

Consider first the possibility of weighting accuracy based on the interests of the litigants. We are familiar with the notion that in some contexts there may be more harm in a false positive than a false negative (a possibility memorialized in the cliché that it is better that ten guilty go free than one innocent go to jail), or vice-versa. The nature of the competing interests of the litigants in relation to the two types of error, on this view, will have much to say about the question of weighting.¹²⁵ On one hand, an individual’s constitutional or other significant individual rights might be at stake. On the other hand, the government might be acting in pursuit of a particularly compelling interest, such as national defense. At the same time, the judge also should bear in mind societal interests that may not be clearly attributable to the litigants themselves but that nonetheless are directly implicated by the dispute in question, such as the Constitution’s commitment to separated powers and the rule of law.

Accuracy may also be weighted with reference to larger concerns associated with the creation of incentives that will have an impact on institutional behavior over time, though reliance on this

¹²⁴ Berman, *supra* note 90, at 93 (emphasis added); see also Roosevelt, *Calcification*, *supra* note 90, at 1662 (labeling this the “costs of error” consideration).

¹²⁵ The judge must account for such things as “the harm to the individual, the importance of the governmental interest likely to be thwarted, [and] the ability of the government to achieve its legitimate aims by other means.” Roosevelt, *Calcification*, *supra* note 90, at 1662.

consideration may generate stronger legitimacy objections.¹²⁶ A pattern of overenforcement of an operative proposition might have an inappropriate chilling effect on appropriate government behavior, for example, while a pattern of underenforcement might induce inappropriate government action.¹²⁷ Bearing these risks in mind, courts might calibrate a decision rule to avoid them.

3. *Prudence*

Decision rule formation might also take account of factors having little or nothing to do with accuracy.¹²⁸ Several such considera-

¹²⁶ As we move away from core accuracy concerns, legitimacy objections to the consideration of particular factors arguably grow stronger. Cf. Berman, *supra* note 90, at 92 (“Just as only some sorts of moves are supposed permissible when traveling from the Constitution to constitutional meaning, . . . maybe only some moves (albeit different ones) can fairly be relied on to support a given constitutional decision rule.”). The legitimacy issue has been central to the metadoctrinal discourse at least since Monaghan, who appreciated that doctrinal rules presented both separation of powers and federalism questions insofar as they were not derived directly from constitutional meaning yet purported to bind other branches of the federal government or the states. See *id.* at 88–89 (citing Monaghan, *supra* note 92, at 9, 22–23, 34–38). Indeed, Monaghan’s solution—justifying judicially crafted constitutional doctrine as an exercise in specialized federal common lawmaking—prompted criticism along these very lines. See *id.* at 89–90 (citing Thomas S. Schrock & Robert C. Welsh, *Reconsidering the Constitutional Common Law*, 91 *Harv. L. Rev.* 1117, 1126–31 (1978)); cf. Sara Sun Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 *Colum. L. Rev.* 1433, 1520–22 (1984) (concluding that specialized federal common law justified judicial development of doctrinal rules governing litigation procedure but not rules intended to govern extrinsic matters such as police investigative procedures). Some observers, however, presumably would not object to consideration of instrumental factors other than the pursuit of core accuracy. See Berman, *supra* note 90, at 14–15 (commenting on the argument that the task of ascertaining constitutional meaning is itself “shot through with judicial attention to practical, policy-oriented, and interest-balancing sorts of considerations,” in the context of a discussion relating to David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 *U. Chi. L. Rev.* 190 (1988)).

¹²⁷ See Berman, *supra* note 90, at 93–94 (discussing protective and deterrent considerations); Solove, *supra* note 2, at 1009 (noting risk that “hindsight” criticism may “result in government paralysis in times of great urgency”); cf. Roosevelt, *Calcification*, *supra* note 90, at 1666–67 (contending that “[u]ncertainty on the part of governmental actors may lead either to excessive timidity or to wasted resources when a good faith attempt to comply with constitutional demands is later held invalid”).

¹²⁸ See Berman, *supra* note 90, at 10 n.35 (observing that accuracy related considerations are “unavoidable,” but “it does not follow that decision rules must be designed for the sole purpose of minimizing total [or weighted] adjudicatory errors that epistemic uncertainty produces”).

tions can be gathered under the umbrella of prudential concerns, including efficiency, collateral impact, institutional self-preservation, and democratic accountability concerns.

Under the heading of efficiency, for example, a judge might formulate a decision rule in an effort to take advantage of another institution's comparative advantage in factors such as speed (the amount of time required to resolve a dispute) or resource consumption (the monetary and other resources required to resolve a dispute).¹²⁹ Some disputes may be particularly time or resource intensive, and some might even be beyond the reach of judicial proof under any realistic assessment of available private or public resources.¹³⁰ In addition, decision rules might be crafted in hopes of optimizing such costs. Second, decision rules might be crafted to account for the collateral impact of litigation on other concerns such as related government operations or maintaining the secrecy of classified information.¹³¹

A third prudential consideration focuses on the possibility that adoption of a particular decision rule may tend either to shield the judiciary from or to expose it to institutional harms in the form of lost prestige, legitimacy, or political capital.¹³² Such blowback might flow directly from the "interbranch friction" generated by non-

¹²⁹ See *id.* at 94–95 (discussing the "fiscal consideration" (emphasis omitted)).

¹³⁰ Roosevelt accounts for similar concerns under the label "enforcement costs." See Roosevelt, *Calcification*, *supra* note 90, at 1665 ("Some constitutional operative propositions may require courts to decide questions that they simply cannot, or that they cannot without burdensome or intrusive evidence-gathering."); see also Solove, *supra* note 2, at 1007–08 (discussing the difficulty justification).

¹³¹ See Roosevelt, *Calcification*, *supra* note 90, at 1665 (discussing "enforcement costs" and related issues of "burdensome or intrusive evidence-gathering"). For a classic example of this argument in practice, see *Johnson v. Eisentrager*, 339 U.S. 763, 779 (1950) (emphasizing the intolerability during hostilities of causing military commanders to lose "prestige" or servicemembers to leave their stations to participate in litigation).

¹³² Berman labels this the institutional consideration. See Berman, *supra* note 90, at 95. Berman notes that Alexander Bickel famously provided an institutional justification to support justiciability doctrines, though he also observes that Bickel's account generated substantial criticism. See *id.* (citing Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 184 (2d ed. 1986); Gerald Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 *Colum. L. Rev.* 1 (1964); Herbert Wechsler, *Book Review*, 75 *Yale L.J.* 672 (1966) (reviewing Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (1962), and Alexander M. Bickel, *Politics and the Warren Court* (1965)).

deferential judicial review of the actions of other branches,¹³³ or it might simply result from negative public reaction to perceptions of inappropriate judicial intervention in some particular area even in the absence of retaliation or threatened retaliation by another branch. On this view, awareness of the checking capacities of the other branches—and sensitivity to prevailing political opinion notwithstanding the judiciary’s theoretical insulation from politics—may contribute to decision rule formation.

Finally, a judge might formulate a decision rule in a manner that accounts for democratic accountability concerns. More specifically, a judge might conclude that ultimate responsibility for certain decisions—particularly those that shade into policy judgments—ought to rest with an institution that, unlike the judiciary, is subject to direct (or at least relatively direct) electoral accountability.¹³⁴ As Professor Paul Horwitz observes in connection with the general phenomenon of judicial deference, the Supreme Court from time to time “has justified its deference to [the elected] branches on the grounds that they are more closely tied to the mechanisms of political accountability that legitimize and constrain the policy choices they make.”¹³⁵ The democratic accountability concern collapses back into an institutional self-preservation argument insofar as a judge accounts for this factor simply as a proxy for the risk of political blowback. But giving weight to superior democratic accountability is not necessarily a question of institutional self-preservation. It is entirely possible for a judge to have regard for the value of democratic accountability even in the complete absence of retaliation fears.

4. *Legitimacy*

A final consideration involves comparative institutional *legitimacy*.¹³⁶ Scholarship treating the general topic of deference fre-

¹³³ Berman, *supra* note 90, at 95.

¹³⁴ See Horwitz, *supra* note 3, at 1080–83.

¹³⁵ *Id.* at 1082–83.

¹³⁶ Berman identifies a further factor that may influence decision rule formation, labeling it the “substantive consideration.” See Berman, *supra* note 90, at 95 (emphasis omitted). This category refers to the possibility that “judges could conclude, based on their own substantive value or policy judgments, that a particular constitutional provision, properly interpreted, carries its underlying norm or principle too far or not far

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quently emphasizes the significance of comparative legitimacy, sometimes citing it alongside comparative accuracy as the most pertinent factors in the analysis.¹³⁷ It is not obvious, however, that this inquiry contributes something independent to the analysis in every instance.

In the context of a dispute between institutions regarding the allocation of decisionmaking authority, “legitimacy” could refer to a formal claim that some relevant source of law directly resolves the dispute. For example, one might argue that Article I, section 8 of the Constitution explicitly allocates to Congress the decision whether to declare war, and that Congress therefore is the legitimate decisionmaker when it comes to declaring war even if functional and prudential arguments would favor giving the President that decision. We might call that a “hard” legitimacy claim.

But “legitimacy” also might be used in conclusory fashion, as a mere label applied to the institution that prevails after an analysis that turns on factors other than formal claims of authority. To argue that one institution is a more legitimate decisionmaker than another in this sense is simply a shorthand way of saying that various functional or prudential factors warrant giving the authority to that institution.¹³⁸ And, of course, some would say that all or at least most hard legitimacy claims on close inspection turn out to be of the soft variety.¹³⁹

* * *

Not surprisingly, neither litigants nor judges in actual practice systematically canvass these decision rule criteria when national

enough. And they might, as a consequence, create a decision rule designed simply to better effectuate that norm.” *Id.*

¹³⁷ See, e.g., Horwitz, *supra* note 3, at 1079–85 (citing, *inter alia*, Gary Lawson & Christopher D. Moore, *The Executive Power of Interpretation*, 81 *Iowa L. Rev.* 1267, 1278 (1996)).

¹³⁸ Cf. Horwitz, *supra* note 3 at 1082–83 (categorizing democratic accountability concerns under the guise of comparative legitimacy).

¹³⁹ Cf. Posting of Roderick M. Hills, Jr. to *Prawfsblawg*, Horowitz on Deference, Hills on Pragmatism, <http://prawfsblawg.blogs.com/prawfsblawg/2008/03/horowitz-on-def.html> (Mar. 10, 2008, 9:25 EST) (arguing, in response to Horwitz, *supra* note 3, that the distinction between comparative accuracy and comparative legitimacy collapses insofar as the criteria that define epistemic accuracy are the product of a normative choice that is in turn contingent upon the allocation of legal authority).

security fact deference disputes arise.¹⁴⁰ This in itself is not necessarily problematic. Not all of these criteria would be pertinent in every instance, and in any event it would not be that remarkable for parties and courts to concentrate their attention on those criteria that seem most pertinent. The problem, instead, is the superficial treatment afforded those criteria that do receive consideration. Core accuracy concerns under the heading of comparative institutional competence arise frequently, for example, but rarely generate discussion beyond conclusory assertions of the executive's epistemic advantages vis-à-vis the courts. The same can be said for many if not all of the other considerations. This is not an appropriate state of affairs given the impact fact deference claims may have on the merits of litigation.

III. OBJECTIONS

Proposing to examine national security fact deference through the lens of the decision rules criteria might give rise to a number of objections, including objections to the very notion that legal concepts drive the decisions in this setting and objections to the role that the vague concept "national security" might play in resolving such disputes.

A. Window Dressing Objections

First, one might object that formal legal argument as a general proposition is mere window dressing, especially in connection with politically sensitive settings such as cases implicating national security. This objection comes in both weak and strong varieties.

The weak window dressing objection arises in relation to the pragmatist critique of the distinction between operative propositions and decision rules. Some scholars have objected to that distinction in the constitutional context on the ground that instrumental considerations—such as comparative epistemic competence and the prudential interest in preserving institutional prestige—are central to the task of determining constitutional meaning, and hence that there is no true distinction between operative propositions and

¹⁴⁰ See *supra* Part I.

decision rules.¹⁴¹ By extension, one might argue that this Article's normative project to mine the decision rules literature in order to develop principles to guide resolution of national security fact deference claims is muddled. Even if the pragmatist critique is valid, however, it goes only to the surface and not the substance of my analysis. Insofar as instrumental considerations pervade legal analysis, this merely tends to confirm the need to engage in a nuanced way with core accuracy, weighted accuracy, prudence, and legitimacy concerns.

The strong window dressing critique, in contrast, is problematic. Or at least it is problematic if one brings the attitudinal model perspective to bear. That model "holds that the Supreme Court decides disputes in light of the facts of the case vis-à-vis the ideological attitudes and values of the justices."¹⁴² On this view, Supreme Court Justices are largely, if not entirely, at their liberty to pursue their policy or value preferences (consciously or not),¹⁴³ while lower court judges may be equally free to do so at least in the absence of authority on point. It is a view that might have particularly strong explanatory force as the relevant legal materials grow more indeterminate¹⁴⁴ and as the political salience of the underlying fact pattern increases. Both of these considerations may be characteristic of the national security fact deference scenario, suggesting there may be little point in deconstructing the factors involved in decision rule formation in that setting—aside perhaps from improving the quality of the window-dressing.

¹⁴¹ See, e.g., Hills, *supra* note 90, at 147; Hills, *supra* note 139.

¹⁴² Jeffrey A. Segal & Harold J. Spaeth, *The Supreme Court and the Attitudinal Model Revisited* 86 (2002). For a summary of the debate relating to the merits of the attitudinal model, see Howard Gillman, *What's Law Got to Do With It?: Judicial Behavioralists Test the "Legal Model" of Judicial Decision Making*, 26 *Law & Soc. Inquiry* 465, 468–76 (2001) (reviewing Harold J. Spaeth & Jeffrey A. Segal, *Majority Rule or Minority Will: Adherence to Precedent on the U.S. Supreme Court* (1999)).

¹⁴³ See, e.g., Jeffrey A. Segal & Harold J. Spaeth, *The Influence of Stare Decisis on the Votes of United States Supreme Court Justices*, 40 *Am. J. Pol. Sci.* 971, 983 (1996); Donald R. Songer & Stefanie A. Lindquist, *Not the Whole Story: The Impact of Justices' Values on Supreme Court Decision Making*, 40 *Am. J. Pol. Sci.* 1049, 1061 (1996).

¹⁴⁴ Cf. Michael J. Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* 4–5 (2006) (suggesting that discretion to indulge policy or value preferences relates inversely to the determinacy of the relevant legal materials).

The attitudinal model has its critics, of course, including those who defend the salience of legal concepts as a restraint on judicial decisionmaking.¹⁴⁵ But the extent to which one side or the other has the better of the argument is well beyond the scope of this Article. I proceed on the assumption that for at least some judges the various factors associated with decision rule formation might indeed carry weight when the national security fact deference scenario arises.

B. Definitional Objections to “National Security”

A second set of potential objections accepts the relevance of legal analysis in relation to fact deference claims, but questions the role that might be played in that analysis by the concept “national security.” This objection also takes two forms.

First, one might object to the use of “national security” to define a distinct subset of fact deference claims on the ground that there is nothing sufficiently distinctive about national security cases to warrant separate treatment. Litigation relating to public health or the national economy, for example, might involve equally high stakes or political sensitivity. But national security litigation might still be distinguished from these other scenarios in that the issues perceived as involving “national security” are more likely to generate questions regarding the legitimacy of judicial intervention.

Second, one might object that the meaning of “national security” in any event is too indeterminate to perform a distinguishing function. The phrase is vague in the sense that reasonable people will disagree regarding the range of matters that fall within its scope. Many observers have noted that the realm of “national security” extends beyond traditional concerns with military and espionage threats posed by other states, to include, for example, a variety of unconventional strategic concerns ranging from threats of violence

¹⁴⁵ See, e.g., Brian Tamanaha, *The Realism of Judges Past and Present*, 56 *Clev. St. L. Rev.* (forthcoming 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1024747# (discussing beliefs among judges during the “legal realism” era regarding the constraining effect of legal constructs, by way of exploring current debates regarding the attitudinal model).

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from non-state actors to issues such as pandemic preparedness, resource shortages, and economic crises.¹⁴⁶

Even if we were to narrow our focus to the traditional precincts of military and intelligence affairs, vagueness remains an issue. That definition no doubt would encompass combat operations, for example, but would it also extend to “military” matters such as a contract dispute relating to the purchase of military equipment or the regulation of “payday lending” on the outskirts of military facilities? Boundary disputes would still abound.

In light of these concerns, it would of course be unwise to let the label “national security” dictate outcomes when it comes to resolving fact deference claims. Fortunately, however, the mode of analysis developed in Part II avoids that error. The decision rule model calls for the judge to account for the nature of the government action or interest involved, to be sure, but it does so in a nuanced and particularized way. Categorizing a fact deference claim in terms of “national security” does not drive or predetermine the analysis, but instead simply frames and contextualizes the discussion, reminding us that the role of the judiciary is particularly contested in at least some such cases.¹⁴⁷

IV. TESTING THE JUSTIFICATIONS FOR NATIONAL SECURITY FACT DEFERENCE

The criteria for decision rule formation described in Part II cut against a one-size-fits-all model for resolution of national security

¹⁴⁶ See Office of Dir. of Nat'l Intelligence, *Vision 2015: A Globally Networked and Integrated Intelligence Enterprise 4* (2008), http://www.dni.gov/Vision_2015.pdf (observing that “the list of national security . . . concerns” must expand “to include infectious diseases, science and technology surprises, financial contagions, economic competition, environmental issues, energy interdependence and security, cyber attacks, threats to global commerce, and transnational crime”); see also Joseph J. Romm, *Defining National Security: The Nonmilitary Aspects* (1993); Michael Chertoff, *The Responsibility to Contain*, 88 *Foreign Aff.* 130, 138 (Jan./Feb. 2009) (emphasizing emergence of stateless and transnational threats and the interdependence of states with respect to security); John C. Gannon, Chairman, Nat'l Intelligence Council, *Defining US National Security for the Next Generation*, Speech at the Conference on the Role of Foreign Assistance in Conflict Prevention (Jan. 8, 2001), available at http://www.dni.gov/nic/speeches_definingsecurity.html (defining national security with reference to a variety of unconventional security threats).

¹⁴⁷ Thus much, if not most, of the discussion below would apply by extension to fact deference claims having little or no relation to national security.

fact deference claims (or any other category of fact deference claim, for that matter). Many of these criteria are, after all, deeply dependent on case-specific elements such as the features of the decisionmaking process actually employed, the nature of the interests of the litigants, and the nature of the underlying operative proposition. Further parsing of these criteria as they might apply to a fact deference claim can, however, yield a number of useful insights. Together, these insights go some way toward shifting the analysis of such claims onto more coherent and defensible ground. By extension, these insights contribute to the larger project of assisting courts in defining an appropriate role in the national security setting.

A. Core Accuracy and Comparative Institutional Competence

Perhaps the single most important argument advanced in support of national security fact deference claims involves core accuracy. The government contends—and courts frequently agree—that the executive branch as an institution has a comparative advantage over the judiciary in terms of producing accurate judgments when it comes to at least some national security matters.¹⁴⁸ Unfortunately, discussions of comparative accuracy all too often treat this inquiry superficially. Courts at times frame this question in a simplistic manner, with “the executive” and “the judiciary” treated in unrealistically monolithic terms,¹⁴⁹ and “accuracy” itself examined without reference to its constituent elements.¹⁵⁰ A more appropriate inquiry would account for a number of complicating considerations, including: the distinct elements that comprise epistemic competence, the distinction between retrospective and prospective factual judgment, and the complexities of decisionmaking procedures as they actually operate within the many distinct insti-

¹⁴⁸ See also Fallon, *Judicially Manageable Standards*, supra note 90, at 1301.

¹⁴⁹ Cf. Solove, supra note 2, at 1010–11 (criticizing monolithic depictions of institutions in connection with deference analyses, something he describes as characteristic of the legal process school).

¹⁵⁰ For a related critique, see Pearlstein, supra note 8, at 14, 63 (criticizing willingness of commentators to assume the existence of the executive’s claimed functional advantages in terms of efficiency and accuracy).

tutions that collectively comprise “the executive.”¹⁵¹ Disaggregating the comparative accuracy argument in this manner yields a more nuanced conclusion than conventional wisdom supplies.

1. Information Access

Consider first the question of access to information. All things being equal, an institution with superior ability to obtain relevant information should produce more accurate decisions than less well informed competitors. At first glance, this factor would seem to weigh heavily in favor of the executive branch.¹⁵² The executive branch contains a multitude of information gathering agencies. These include more than a dozen distinct agencies constituting the Intelligence Community,¹⁵³ bringing vast technical and manpower resources to the task of information collection. They also include: the Office of the Director of National Intelligence, the various intelligence fusion centers, the Defense Department with its global network of geographic and functional commands, the State Department with its array of foreign service officers and embassies, the Justice Department with its growing network of overseas legal attachés, the Energy Department, the Commerce Department, and more than a few others as well.¹⁵⁴ Indeed, it is no exaggeration to

¹⁵¹ Scholars including Christina Wells and Deborah Pearlstein have observed in commenting on comparative accuracy arguments in related contexts that this requires attention to be paid to the details of organizational structure and institutional incentives. See Christina E. Wells, *Questioning Deference*, 69 *Mo. L. Rev.* 903 (2004); Pearlstein, *supra* note 8.

¹⁵² See, e.g., Julian Ku & John Yoo, *Hamdan v. Rumsfeld: The Functional Case for Foreign Affairs Deference to the Executive Branch*, 23 *Const. Comment.* 179, 199–200 (2006) (observing that “courts have access to limited information in foreign affairs cases,” in part because they “do not actively gather information” and in part because the information provided by parties “must survive rules that impose tests for relevance, credibility, and reliability that are designed to ensure fairness toward the contending parties”).

¹⁵³ The “Intelligence Community” is an interagency organizational concept that refers in practical terms to a host of agencies housed within a number of executive branch departments that are subject to a limited degree of centralized management and control in pursuit of the National Intelligence Program. For the list of components, see *Members of the Intelligence Community: Who They Are*, <http://www.intelligence.gov/1-members.shtml> (last visited May 18, 2009).

¹⁵⁴ Of course, there is no guarantee that the information available to different departments and individuals in the executive branch will be pooled effectively (or at all). See Pearlstein, *supra* note 8, at 47–49. (discussing the stovepiping problem). Ques-

say that a considerable portion of the executive branch's efforts are devoted to the acquisition of information. Much of this information relates to "national security" even if that phrase is defined narrowly in terms of military threats, much more so if that phrase is construed broadly.

The data collection process in federal court is, of course, quite different.¹⁵⁵ Judges by and large do not directly engage in information collection and do not have the budget, personnel, or technology to do so on any significant scale even if they were so inclined. Instead, they depend on the litigants to collect and pass on information that may be relevant to resolving a factual dispute. This resource disparity suggests that the judiciary is at a distinct disadvantage. At least where the executive branch participates in the litigation, however, this distinction may be overstated.

Two factors complicate this institutional comparison. First, the relevant consideration is not an institution's capacity to acquire information in the first instance, but rather its capacity to access information at the point when factfinding occurs. To the extent that the executive branch is willing to share with the court the information that it has collected, a judge ultimately might stand in the same position as would an executive branch decisionmaker in terms of the quantity and quality of data available to it.

To this one might object that the executive branch is unlikely to pass on the complete body of information available to it. Where information derives from classified sources or methods, the executive branch reasonably may fear that disclosure in litigation will cost it the ability to use that source or method in the future. Assume, for example, that a single decisionmaker faces this question. That person can be expected to consider this risk in comparison to the benefits that would follow from prevailing in the litigation, taking into account how withholding the information might impact the chances of prevailing. On at least some occasions, we can expect

tions remain regarding the efficacy of the information "fusion" center created after 9/11 in connection with topics such as counterterrorism and counterproliferation. Cf. Nathan Alexander Sales, *Share and Share Alike: Intelligence Agencies and Information Sharing* 78 *Geo. Wash. L. Rev.* (forthcoming 2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1392917# (discussing problems associated with interagency information sharing through the lens of public choice theory).

¹⁵⁵ See Ku & Yoo, *supra* note 152, at 199–205.

such a person to err on the side of protecting the information. Complicating matters, the choice may not be consolidated in the hands of a single decisionmaker, or at least not in the hands of a decisionmaker with a perceived stake in the success of the litigation. Indeed, it is possible that the decision will be in the hands not only of Justice Department officials (who have an institutional interest in pursuing litigation success) but also Intelligence Community officials (who have an institutional interest in preserving the confidentiality of intelligence sources and methods). Even within the Justice Department, in fact, there may be tension between the immediate interests associated with litigation success and the long-term interests associated with intelligence collection.¹⁵⁶ Absent intervention at senior levels of the interagency process, therefore, initiative lies in the hands of the agency with control over the information in the first instance—which is to say that the information will not necessarily be released even when the litigation benefits of doing so might outweigh other costs.¹⁵⁷ In a few instances, moreover, the decision may be affected by other use restrictions, as when a foreign intelligence agency provides information to the executive branch on condition that the information not be used in judicial proceedings or otherwise be made known to the public.

A second consideration further complicates the picture. Even if we assume that the executive branch as an initial matter has an informational advantage due to restraints on its ability to pass information through to the judge, this advantage could be offset thanks to information gathering advantages of the adversarial process. That process ensures the presence of a litigant other than the executive branch with substantial incentive to identify and present contrary information to the court. Even if we assume that the ex-

¹⁵⁶ See, e.g., Gregory S. McNeal, *Organizational Theory and Counterterrorism Prosecutions: A Preliminary Inquiry* 21 *Regent U. L. Rev.* 307 (2009) (discussing such tensions in connection with Justice Department's National Security Division); Ari Shapiro, *As Domestic Spying Rises, Some Prosecutions Drop*, *NPR Morning Edition*, (July 11, 2008), available at <http://www.npr.org/templates/story/story.php?storyId=91968094> (describing FBI's transition to a focus on intelligence-gathering).

¹⁵⁷ Cf. Jonathan M. Fredman, *Intelligence Agencies, Law Enforcement, and the Prosecution Team*, 16 *Yale L. & Pol'y Rev.* 331, 338 (1998) (discussing "discovery rights and the commensurate obligations that they place on prosecutors in cases that may involve Intelligence Community information").

ecutive branch's own information collection resources are employed in a neutral manner such that available and relevant information will be collected regardless of whether it is consistent with a preferred outcome, we cannot also assume that its capacities are so broad as to acquire all information that an opposing litigant might be able to generate.

Since we cannot actually quantify and compare any of these gaps on a systemic basis, it becomes impossible to say with any certainty that the executive branch automatically has a comparative advantage over the judiciary with respect to access to information. Insofar as conventional wisdom assumes otherwise, it is too hasty. In some cases the executive will have such an advantage, in others it will not. The balance in a particular case depends on the extent to which executive branch decisionmakers have access to relevant information that they cannot or will not share with the court, and whether any resulting gap is offset by the court's access to additional information brought forward through the adversarial nature of the litigation process. Even when analyzed on a case-specific basis, it may prove impossible for a judge to determine with much confidence that one institution or the other has superior information access. Taken together, this cuts against placing much, if any, weight on this element in most instances.

2. *Expertise*

Accuracy does not turn solely on access to information, of course. Expertise matters as well.¹⁵⁸ Here too conventional wisdom posits a substantial advantage for the executive branch. As with comparative information access, however, the comparative expertise inquiry turns out to be more complicated than conventional wisdom assumes.

As an initial matter, we must be clear regarding the precise identity of the decisionmakers subject to comparison on this dimension. Framing the question at a generic institutional level—"the executive branch" versus "the judiciary"—sheds little light, given that

¹⁵⁸ For an insightful discussion of the progressive era roots of deference to expertise, and subsequent influences, see Solove, *supra* note 2, at 995–1003 (arguing that development of a deference principle facilitated application of constitutional restraints in the context of the emerging administrative state without thereby bogging down the courts in supervisory obligations).

factfinding is not literally carried out at that high a level of generality. Greater specification is needed, though it is not always supplied in actual practice.¹⁵⁹

In the judicial branch, factfinding decisions are made either by a judge or by a jury. Because deference arguably would present constitutional problems if employed in connection with questions committed to a jury (particularly in a criminal case),¹⁶⁰ however, the question of national security fact deference arises primarily if not exclusively in the context of decisions made by a judge. As commentators and courts often observe, judges are generalists who typically have not studied, trained, or obtained practical experience in national security matters.¹⁶¹ Their epistemic competence, on this view, rests primarily on their generic intellectual assets, though it may be supplemented in some instances by expert witnesses put forward by the litigants or retained directly by the court.¹⁶² The executive branch, in contrast, contains a vast array of subject matter experts.¹⁶³ Conventional wisdom holds that the executive branch prevails in this comparison, at least in the realm of national security affairs.

And that may well be correct. But does subject matter expertise always actually matter in resolving factual disputes? At times it will, and at times it will not. One cannot simply assume that it does and conclude on that basis that the executive has a comparative accuracy advantage.

Expertise often will matter a great deal when it comes to predictive factfinding in the national security setting, for example, just as

¹⁵⁹ Such underspecification is a recurring problem in comparative institutional competence arguments. Cf. Adrian Vermeule, *Many-Minds Arguments in Legal Theory*, 1 *J. Legal Analysis* 1, 24–26, 35–38 (2009) (discussing the problem of underspecification in connection with arguments relating to majority rule, and noting that institutional comparisons frequently fail to account for the actual mechanisms of how decisions are made within institutions).

¹⁶⁰ See *supra* note 91 (discussing constitutional restraints on deference in connection with questions committed to a jury).

¹⁶¹ See, e.g., Ku & Yoo, *supra* note 152, at 199–205.

¹⁶² For a sophisticated analysis of the theoretical obstacles non-experts face in assessing expert opinion in the trial setting, see Brewer, *supra* note 120; cf. Meredith Fuchs & G. Gregg Webb, *Greasing the Wheels of Justice: Independent Experts in National Security Cases*, 28 *Nat'l Security L. Rep.* 1 (Nov. 2006) (discussing the appointment of special masters to remedy a judge's lack of expertise in national security affairs).

¹⁶³ See, e.g., Ku & Yoo, *supra* note 152, at 200–05.

it does in other complex contexts.¹⁶⁴ Specialized judgment lies at the heart of questions such as whether disclosure of a particular secret would be harmful to national security or whether a particular restraint on training would have an impact on military preparedness. Indeed, predictive judgments at times can be difficult to distinguish from *policy* judgments, in which case the comparative accuracy argument begins to intersect more overtly with the prudential concern for democratic accountability in the making of policy decisions and the closely related argument regarding “soft” legitimacy.¹⁶⁵ *Retrospective* factfinding, in contrast, may be less likely in the ordinary case to require resort to special expertise. There are frequent exceptions, of course, as when a tort suit implicates complex questions of causation. But the paradigmatic questions of historical fact—who, what, where, when, and why—typically are within the ken of lay jurors and generalist judges.¹⁶⁶ Notably, judges from time to time emphasize the predictive nature

¹⁶⁴ Julian Ku and John Yoo, for example, have argued that courts are especially bad at acquiring information relating to “broader political, economic, and social events and trends.” Julian Ku & John Yoo, *Beyond Formalism in Foreign Affairs: A Functional Approach to the Alien Tort Statute*, 2004 Sup. Ct. Rev. 153, 195; see also Donald L. Horowitz, *The Courts and Social Policy* 274–84, 298 (1977) (describing ways in which institutional characteristics limit the reliability of judicial assessments of mutable “social facts,” and commenting, in connection with the subject of judicial injunctions addressing complex social problems, that it may be “the inability of courts to see how their policies work out, or the difficulty of dealing with unusually fluid or broad problems in an episodic and narrow framework, that stamps the judicial process as more limited for some policy problems than other institutions are”); cf. Solove, *supra* note 2, at 962 (observing that “[c]ourts readily defer to legislatures when a statute involves forecasts and predictions”).

¹⁶⁵ Jack Goldsmith makes a similar point when he observes that judges are ill-suited to determine the content of U.S. foreign relations interests or the extent to which particular actions by states or other entities might run contrary to those interests. Jack L. Goldsmith, *The New Formalism in United States Foreign Relations Law*, 70 U. Colo. L. Rev. 1395, 1416–17 (1999). Goldsmith emphasizes that such inquiries “lack precise content” and that judges “lack the tools to make accurate and intelligent judgments in this context.” *Id.* at 1417; cf. Curtis A. Bradley, *Chevron Deference and Foreign Affairs*, 86 Va. L. Rev. 649, 661–62 (2000) (observing that “courts often defer to the executive branch’s assessment of United States foreign relations interests”). Much the same can be said about judicial review of any decisions that might best be described as turning on policy judgment.

¹⁶⁶ Cf. Roosevelt, *Calcification*, *supra* note 90, at 1715 (observing that Hamdi’s status was “a factual question courts seem quite capable of answering”); Roosevelt, *Myth*, *supra* note 90, at 231 (concluding that “[c]ourts are generally good at . . . deciding narrow factual questions”).

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of an executive judgment in the fact deference context, but one never sees an emphasis on the retrospective nature of such judgments.¹⁶⁷

None of this is to say that the comparative expertise inquiry can be resolved simply by identifying the factual dispute as forward- or backward-looking. Some predictions on close inspection will not depend upon expertise, and some retrospective judgments will. The historical/predictive distinction may be useful, but it cannot substitute for a contextualized inquiry into whether the nature of a particular dispute depends in some meaningful way on subject matter expertise. It does suggest, however, that judges should be especially sensitive to the possibility that some seemingly factual judgments have elements of policy discretion that trigger not just expertise concerns, but also accountability and legitimacy concerns as well.

3. Reliable Exploitation of Epistemic Resources

Having an institutional advantage in underlying epistemic resources, without more, does not ensure a superior factfinding process. Superior access to information or expertise contributes nothing to accuracy, after all, unless the decisionmaker actually exploits them, and does so reliably.¹⁶⁸ This exploitation concern is a familiar insight in the context of the law of evidence and its treatment of expert witness testimony,¹⁶⁹ yet it often goes unconsidered when comparative accuracy claims are made in the fact deference context.

¹⁶⁷ See supra Part I.

¹⁶⁸ See Markovits, supra note 102, at 217 (calling for less deference where a decisionmaker “did not actually investigate despite [its] capacity to do so” and noting that “circumstance and inclination as well as inherent skills affect the quality of decision-making”).

¹⁶⁹ See Fed. R. Evid. 702 (“If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.”).

a. Non-Exploitation

Exploitation issues can arise in at least two ways. First, a decisionmaker may fail altogether to exploit an epistemic advantage. Consider, for example, how this might occur in a context in which the executive branch has an apparent advantage in terms of expertise. Indulging in generalization, we might say that factfinding decisions in the executive branch in theory can occur at the line level, the managerial level, the policymaking level, or even at the cabinet or presidential levels.¹⁷⁰ Any one decisionmaker *may* have relevant expertise, but there is no guarantee at any of these levels that this will be so. Where the decisionmaker does not have personal expertise, of course, he or she can at least render a decision based on the recommendations or views of subordinates or other contributors who do have it.¹⁷¹ Again, however, one cannot simply assume that this has occurred. And we could say much the same thing with respect to whether the decisionmaker had access to relevant information. A comparative accuracy claim thus requires not just a showing of superior information or expertise, but also a case-specific showing that the decisionmaking process actually exploited such advantages.

b. Weighted or Unreliable Exploitation

Even if such a showing can be made, a second exploitation concern arises. Employing epistemic advantages means little, from a core accuracy perspective, if the decisionmaking process does not

¹⁷⁰ In the context of the state secrets privilege, courts require formal consideration of the issue by the executive branch official heading the agency with responsibility for the information in question. See *United States v. Reynolds*, 345 U.S. 1, 7–8 (1953).

¹⁷¹ The prospect of multiple subject matter experts contributing to a factfinding judgment raises the question of whether any executive branch factfinding advantage should be deemed to be enhanced by virtue of the Condorcet Jury Theorem or other such “many-minds” arguments. See Vermeule, *supra* note 159. The better view is no. As Adrian Vermeule persuasively argues, commentators frequently err in assuming the presence of a “many-versus-one” scenario when conducting institutional competence comparisons. See *id.* at 33–38. The error lies in failing to recognize “epistemic bottlenecks.” *Id.* at 34–35 (“[T]he hierarchical structure of the executive usually implies that at some point a decision supported by many experts or mid-level officials will be funneled upward to a chokepoint, coming to rest on the desk of a single mind The fact that one or few minds must unavoidably make the decision, with limited epistemic competence, whether and when to accept the counsel of many minds is precisely what constitutes the epistemic bottleneck.”).

actually aspire to core accuracy or if it suffers from defects that undermine its capacity to reach accurate judgments despite those advantages. Institutional incentive structures by happenstance or by design might tend to incentivize inaccurate factfinding, for example, while cognitive biases might undermine the reliability of individual and group decisionmaking even in the absence of such distorting motivations.¹⁷²

Consider first the possibility that an institution's incentive structure might purposefully or incidentally motivate decisionmakers to err on the side of false positives or negatives. A hypothetical example illustrates the point. Assume that there is an executive branch official who must determine whether a particular individual ought to be placed on a terrorism watch list. Let us assume further that the decision is a close one on the merits, but all things being equal the official would determine on the merits that the person does not satisfy the relevant criteria. Will the official make that determination if he or she perceives substantial career risk in the event of a false positive, but little or no consequences in the event of a false negative? At least some officials in that scenario can be expected to err on the side of self-interest, consciously or not.¹⁷³ In that sense, incentive structures might produce judgments that differ from the dictates of expertise standing alone.¹⁷⁴

¹⁷² See, e.g., Cole, *supra* note 116, at 1342–58; Pearlstein, *supra* note 8, at 29–55; Geoffrey R. Stone, *Civil Liberties v. National Security in the Law's Open Areas*, 86 *B.U. L. Rev.* 1315, 1328 (2006); Wells, *supra* note 151, at 921–35. But see Eric A. Posner & Adrian Vermeule, *Terror in the Balance: Security, Liberty, and the Courts* 64–75, 91–115 (2007); Ku & Yoo, *supra* note 152, at 199–205; Robert J. Pushaw, Jr., *Defending Deference: A Response to Professors Epstein and Wells*, 69 *Mo. L. Rev.* 959, 968–70 (2004); but cf. Adrian Vermeule, *Judging under Uncertainty: An Institutional Theory of Legal Interpretation* 77 (2006) (observing, in the context of interpretation, that the “general rubric of interpreters’ capacities can be broken down into motivational and cognitive components”).

¹⁷³ See, e.g., McNeal, *supra* note 156, at 22–23 (discussing incentives encouraging risk of false positives and discouraging risk of false negatives).

¹⁷⁴ Judges, in contrast, enjoy a degree of institutionalized protection against this type of concern. Most notably, their jobs cannot be taken from them except upon impeachment, and their salaries may not be diminished. That protection is by no means complete—it is no salve to a judge's conscience in the event of a catastrophic false negative, for example—but it is a notable institutional distinction nonetheless. Judicial decisionmaking also is distinct in that it is relatively transparent to the public (most rulings are public and accompanied by a reasoned explanation), and also in that it is subject to further review from other judges. These features produce direct and indirect forms of accountability, which in turn may constitute an additional institu-

Indeed, we should not be surprised if organizations purposefully establish or knowingly tolerate such imbalanced incentive structures in circumstances in which the harms associated with a false negative are perceived to greatly outweigh the harms associated with a false positive—a scenario that might be especially likely to arise in settings related to national security.¹⁷⁵ This is, of course, a type of weighted accuracy argument. And weighted accuracy arguments do have an important role to play in the resolution of fact deference claims, as I discuss in more detail in the next Section. But for present purposes the important point is that an argument for deference to the results produced by a weighted decisionmaking system must be defended on weighted accuracy grounds, not core accuracy.

A separate concern involves the unwitting influence of cognitive bias. Professor Christina Wells has emphasized this concern in her work critiquing the quality of decisionmaking by executive branch officials in the related context of emergency decisionmaking, and her concerns might well be extended to the national security fact deference scenario.¹⁷⁶ Wells draws attention to the availability heuristic, which suggests that individuals are more likely to overestimate the chances an event will occur as that event becomes more “available” to them, measured with respect to how easy it is to call the event to mind.¹⁷⁷ This risk is particularly acute in some national security settings, according to Wells, because the availability effect is stronger when the event in question is vivid or involves an “intense emotion such as fear.”¹⁷⁸ Wells notes that individual judgment

tional safeguard against the temptation to depart from the judge’s best judgment in light of concern for the personal consequences of a decision.

¹⁷⁵ Cf. Posner & Vermeule, *supra* note 172, at 85–86 (conceding that such weighted determinations inevitably will occur on an individual basis, but denying that they necessarily will occur on a systemic basis).

¹⁷⁶ See, e.g., Wells, *supra* note 151, at 907–08 (drawing on the “psychology of risk assessment—i.e., the study of how people determine the likelihood of uncertain events” to support the claim that, “contrary to the claim of proponents of judicial deference, executive officials are not inherently adept at assessing or reacting to national security threats”) (citing Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, in *Judgment Under Uncertainty: Heuristics and Biases* 3, 3 (Daniel Kahneman et al. eds., 1982)).

¹⁷⁷ *Id.* at 922 (quoting Tversky & Kahneman, *supra* note 176, at 11).

¹⁷⁸ *Id.* at 922–23, 925. Wells notes that intense emotions not only may contribute to overestimates of whether an event will occur, but may lead a person to disregard the

also may be disrupted by such mechanisms as confirmation bias,¹⁷⁹ overconfidence bias,¹⁸⁰ and overestimation of risks that are “dreaded” (potentially fatal, involuntary, and over which there is no control) or “unknown” (new, unobservable, lacking immediacy, and not understood).¹⁸¹ Wells also observes that cognitive bias can distort the accuracy of group based decisionmaking.¹⁸² Information cascades, for example, involve the risk that the presence of a person in a group holding a strong opinion “may influence others in the group who are less sure or who simply trust that individual’s judgment.”¹⁸³ Reputational cascades, in turn, involve self-silencing of dissent in a group based on concern for one’s reputation with other group members.¹⁸⁴ Reputation cascades, Wells adds, can contribute to the pathology of “groupthink” in which “strivings for unanimity override . . . motivation to realistically appraise alternative courses of action.”¹⁸⁵ This risk is higher, moreover, when a group (i) is “insulated from outside influence,” (ii) is homogenous, (iii) “lack[s] an impartial leader,” (iv) “lack[s] systematic proce-

prospects for occurrence altogether in favor of “focusing on the possible harm from the outcome.” *Id.* at 925; cf. Ron Suskind, *The One Percent Doctrine: Deep Inside America’s Pursuit of Its Enemies Since 9/11*, at 65 (2006) (describing the eponymous principle, allegedly embraced by Vice President Cheney, to the effect that certain threats were of a sufficient magnitude that “[i]f there was even a one percent chance of such an act occurring, we must act as if it’s a certainty”).

¹⁷⁹ Wells, *supra* note 151, at 923 (“When people make tentative decisions, they tend to seek out confirmatory evidence to the exclusion of disconfirmatory evidence when finalizing that decision.”).

¹⁸⁰ See *id.* at 923–24 (describing a tendency to overestimate the accuracy of one’s own judgment, a tendency that grows more pronounced as the subject matter becomes less determinate and also in proportion to the expertise of the decisionmaker).

¹⁸¹ *Id.* at 924.

¹⁸² *Id.* at 926–29. For an interesting analogue, consider Marc Sageman’s account of the cognitive pathologies that may arise in the context of small group radicalization relating to the global jihad movement. See Marc Sageman, *Leaderless Jihad: Terror Networks in the Twenty-First Century* 13–28 (2008). But see Cass R. Sunstein, Misery and Company, *New Republic*, Oct. 22, 2008, at 39, 42–43 (reviewing Marc Sageman, *Leaderless Jihad: Terror Networks in the Twenty-First Century* (2008)) (critiquing Sageman’s argument).

¹⁸³ Wells, *supra* note 151, at 926.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 928 (quoting Irving L. Janis, *Groupthink: Psychological Studies of Policy Decisions and Fiascoes* 9 (2d ed. 1982)).

dures for evaluating evidence, and (v) “make[s] decisions in times of great stress.”¹⁸⁶

These are serious concerns for any factfinding process, especially insofar as predictive judgments are concerned.¹⁸⁷ There are several reasons to be cautious before relying upon them to discredit executive claims of a comparative epistemic advantage over courts, however. First, some observers have cautioned that the results of cognitive bias studies might not generalize across institutional settings, and that it therefore may be unwise to premise legal reforms on those results.¹⁸⁸ Second, executive branch entities in at least some circumstances consciously structure decisionmaking in a manner that seeks to account for the flaws that might be introduced by such pathologies, as appears to be the case with at least some analytic activity within the Intelligence Community.¹⁸⁹ And third, we lack an account explaining why such flaws might have an impact on

¹⁸⁶ *Id.* (citing Janis, *supra* note 185, at 176–77, 242–59); cf. Heidi Kitrosser, *Classified Information Leaks and Free Speech*, 2008 U. Ill. L. Rev. 881, 910 (contending that the “lack of an institutionally open, dialogic structure for executive branch decision making lends itself to a culture of ‘groupthink’ that secrecy fosters and exacerbates”).

¹⁸⁷ All of the mechanisms identified by Wells could impact predictive judgments, but only two of them (the Confirmation Trap and Overconfidence Bias) clearly would apply to retrospective determinations as well.

¹⁸⁸ See Charles L. Barzun, *Rules of Weight*, 83 *Notre Dame L. Rev.* 1957, 1993 (2008) (“Recently, scholars have criticized not only the normative and methodological premises on which the heuristics and biases research program is based, but also the assumption that its findings apply uniformly across social and institutional contexts and thus unproblematically justify proposals for legal reform.”) (citing Gerd Gigerenzer & Peter M. Todd, *Fast and Frugal Heuristics: The Adaptive Toolbox*, in *Simple Heuristics that Make Us Smart* 3, 5 (Gerd Gigerenzer et al. eds., 1999); Jonathan J. Koehler, *The Base Rate Fallacy Reconsidered: Descriptive, Normative and Methodological Challenges*, 19 *Behav. & Brain Sci.* 1, 1 (1996)); Gregory Mitchell, *Mapping Evidence Law*, 2003 *Mich. St. L. Rev.* 1065, 1082 (2003).

¹⁸⁹ A review of materials made available to the public by the Central Intelligence Agency and the Defense Intelligence Agency reveals several studies informing analysts of these risks and advising how to minimize them, including Richards J. Heuer, Jr., *Ctr. For the Study of Intelligence*, *Cent. Intelligence Agency, Psychology of Intelligence Analysis* (1999), <https://www.cia.gov/library/center-for-the-study-of-intelligence/csi-publications/books-and-monographs/psychology-of-intelligence-analysis/PsychofIntelNew.pdf>; Jeffrey R. Cooper, *Ctr. For the Study of Intelligence*, *Cent. Intelligence Agency, Curing Analytical Pathologies: Pathways to Improved Intelligence Analysis* (2005), <http://www.fas.org/irp/cia/product/curing.pdf>. In a conversation with a knowledgeable official who asked not to be named, I was told that the Heuer text in particular is employed in training courses within the Intelligence Community.

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executive branch judgments but not judicial judgments. Judges too are subject to cognitive pitfalls, after all, and thus the existence of a cognitive bias may not have an impact on the *comparative* accuracy inquiry.¹⁹⁰

In addition to these concerns, the question arises whether it is possible for a judge to operationalize concern for the distorting impact of cognitive bias.¹⁹¹ Put simply, it is not clear how a judge would go about detecting the presence of cognitive bias in connection with a particular executive branch factual judgment. Both Christina Wells and Deborah Pearlstein have argued, however, that there may be a way to guard against the influence of cognitive bias on a systematic, untargeted basis.¹⁹² According to the literature exploring the effects of third party accountability on decisionmaking performance, decisionmakers who are aware that their judgments will be reviewed by an outsider under certain circumstances are more likely to:

- (a) survey a wider range of conceivably relevant cues; (b) pay greater attention to the cues they use; (c) anticipate counter arguments, weigh their merits relatively impartially, and factor those that pass some threshold of plausibility into their overall opinion or assessment of the situation; and (d) gain greater awareness of their cognitive processes by regularly monitoring the cues that are allowed to influence judgment and choice.¹⁹³

The accountability dynamic, in other words, incentivizes decisionmakers to self-police against the influence of cognitive biases and inappropriate institutional incentives of the type described above. To achieve this effect, research suggests that the decisionmakers

¹⁹⁰ See Wells, *supra* note 151, at 942; cf. Posner & Vermeule, *supra* note 172, at 75 (making a related argument about the mutual influence of “panic” on executive officials and judges). Note that group-based decision making can occur in both executive branch and judicial settings. Courts of appeals involve multiple members, for example, and there is reason to believe that their judgments can be influenced by group dynamics. See Sunstein, *supra* note 182, at 42 (discussing literature demonstrating polarization effects when judicial panels have ideological uniformity).

¹⁹¹ Cf. Posner & Vermeule, *supra* note 172, at 74–86 (conceding the potential for misfeasance or malfeasance on an ad hoc basis, but denying that the case has been made for systemic predisposition to error or abuse).

¹⁹² Wells, *supra* note 151, at 936; Pearlstein, *supra* note 8, 55–65.

¹⁹³ Wells, *supra* note 151, at 938 (quoting Jennifer S. Lerner & Philip E. Tetlock, Accounting for the Effects of Accountability, 125 *Psychol. Bull.* 255, 263 (1999)).

“must know in advance . . . that they will be accountable,” the “audience’s views on the topic must be unknown,” the “audience must be interested in *process rather than outcome*,” “the [reviewing] audience must be perceived as legitimately inquiring into the decision makers’ judgments,” and the audience must not be “easily tricked.”¹⁹⁴ Where these conditions are met, Wells concludes, the resulting accountability dynamic “can improve the care that decisionmakers take and alleviate decisionmaking biases—even if the audience is less knowledgeable and subject to the same biases that plague the decisionmaker.”¹⁹⁵

The third party accountability dynamic arguably finds expression in the “hard look” review doctrine in the administrative law context, pursuant to which judges reviewing administrative agency rulemaking examine the reliability of the rulemaking *process* rather than its substantive result.¹⁹⁶ Professor Matthew Stephenson has argued that “hard look” review makes judicial deference contingent on an agency’s willingness to engage in costly signaling in the form of constructing a sophisticated written record,¹⁹⁷ and that this signaling account might extend to other deference scenarios involving claims of comparative institutional accuracy, such as judicial review of legislative factfinding¹⁹⁸—or, we might add, the national security fact deference scenario. Indeed, Wells argues for a “hard look” approach in the context of judicial review of executive decisionmaking in the emergency setting,¹⁹⁹ and Professor Jonathan Masur argues explicitly for the direct incorporation of administrative law principles, including hard look review, when the executive seeks deference to its military judgment.²⁰⁰

¹⁹⁴ See *id.* at 940, 946 (emphasis added).

¹⁹⁵ *Id.* at 942 (quoting Mark Seidenfeld, *Cognitive Loafing, Social Conformity, and Judicial Review of Agency Rulemaking*, 87 *Cornell L. Rev.* 486, 509 (2002)) (internal quotation marks omitted).

¹⁹⁶ See *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (describing a form of review focused on whether the agency “examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made”) (internal quotation marks omitted).

¹⁹⁷ See Matthew C. Stephenson, *A Costly Signaling Theory of “Hard Look” Judicial Review*, 58 *Admin. L. Rev.* 753, 757–75 (2006).

¹⁹⁸ See *id.* at 793–800.

¹⁹⁹ See Wells, *supra* note 151, at 945 (citing Seidenfeld, *supra* note 195, at 508–25).

²⁰⁰ See Masur, *supra* note 2, at 501–19.

What precisely would the court look for in conducting a process-oriented review? Judges can at least screen for evidence that the executive did make use of its purported epistemic advantages in reaching its judgment.²⁰¹ A court could do this, for example, by requiring the executive branch to provide an express account of the decisionmaking process that produced the factual judgment. Courts already employ a variant of this procedure, in fact, in the context of the state secrets privilege. Courts may not accept a state secrets privilege claim without receiving a declaration from the official in charge of the responsible agency making clear that the official personally considered the question before concluding that disclosure of the information would pose an undue risk of harm to national security.²⁰² Generalizing this approach, courts could require comparable declarations focused on the nature of the underlying decisionmaking process as a precondition to deference across the range of national security fact deference scenarios.

The benefits of such a screening process should not be overstated. Declarations no doubt would cast underlying decisionmaking processes in the best possible light, perhaps at substantial variance with events as they actually unfolded on the ground. Portions of them may have to be filed on an *ex parte* basis, moreover, as is done routinely in the context of the state secrets privilege. But they nonetheless would have some tendency to guard against deference claims that cannot truly be justified in terms of the executive's epistemic advantages.²⁰³

²⁰¹ This approach has an analogy in the context of judicial review of administrative agency factfinding. For the most part, judicial review of facts found by an administrative agency is deferential. Compare Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (2006), with § 706(2)(E) (specifying, respectively, that a court may set aside agency actions that are arbitrary and capricious or actions that are not supported by "substantial evidence"). But APA, 5 U.S.C. § 706(2)(F) does open the door to non-deferential, *de novo* review where the agency's factfinding procedure was not itself reliable. See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971).

²⁰² See *United States v. Reynolds*, 345 U.S. 1, 7–8 (1953).

²⁰³ Consider, in that regard, the fact that enemy combatant status determinations are made not by panels of experts having specialized knowledge of the jihad movement or other relevant expertise, but by panels of ordinary military officers. This may constitute a scenario in which the executive decisionmaker does not actually make use of information or expertise advantages that exist elsewhere in the executive branch.

B. Weighted Accuracy

The decision rules literature draws attention to the possibility that a judge may account for weighted accuracy considerations when determining how to respond to a national security fact deference claim. Such considerations may cut in either direction. That is to say, they may cut against deference in a scenario in which deference might otherwise seem appropriate on other grounds such as core accuracy. Or they may cut in favor of deference in a scenario in which other justifications for deference are lacking. Either way, however, weighted accuracy considerations are likely to prove difficult to assess in the national security setting.

Let us assume that a judge believes that the executive branch is *less* likely than the court to produce an accurate factual determination or at least that the executive is no more likely than the court to get the decision right in core accuracy terms. In the national security setting, we can expect the executive to argue that the court nonetheless should defer on weighted deference grounds. Specifically, the executive is likely to argue that it should receive extra latitude given the ostensible magnitude of its interest in preserving national security interests, and thus that the judge should adopt a decision rule, in the form of deference, that errs on the government's side. Consider, for example, the watch list scenario described above, in which the executive might claim that it is much more important to avoid a false negative than a false positive. That argument would carry no weight with a judge interested in pursuing core accuracy, as noted above, but it could prove dispositive for a judge open to a weighted accuracy argument in light of the government's claim that the stakes are especially high in that setting.

There are two potential problems with this line of reasoning. First, not all "national security" cases are alike, as noted earlier, and the interests potentially brought within the scope of that capacious phrase vary markedly in significance. Some interests may truly be paramount, others quite ordinary. Complicating matters, the comparative advantage the executive *might* have in terms of epistemic resources (discussed in the preceding section) may well come into play in the process of assessing the magnitude of a particular government interest, particularly insofar as such judgments have predictive or even policy judgment elements. A judge, in

short, may have difficulty determining just what to make of the executive's claim.

Second, and perhaps more significantly, there often will be weighted accuracy considerations cutting *against* a deferential posture. This is most obviously the case when the factual dispute pertains to the fundamental constitutional rights of a litigant,²⁰⁴ though it could be equally true for some rights claims of a different legal order, such as a physical liberty interest rooted in statute or treaty. More generally, the larger interest of society in ensuring that the government complies with the rule of law may also enter into the balance in the clash of competing weighted interest considerations.

In both respects, these tensions find an echo in the long running debate regarding the propriety of judicial deference to the factual judgments agencies make in the course of administrative adjudication. In 1932, the Supreme Court in *Crowell v. Benson*, held that while courts should defer entirely to agency resolutions of most adjudicatory facts (at least where the agency employed fair procedures), courts should not defer at all when reviewing disputed facts upon which the agency's jurisdiction specifically depended.²⁰⁵ *Crowell* also stated in dicta, moreover, that "[i]n cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of that supreme function."²⁰⁶ *Crowell's* "jurisdictional fact" holding has been sharply criticized over the years, leading to questions as to its continuing vitality.²⁰⁷ Some contend, however, that at least the "constitutional fact" doctrine remains viable; indeed, Professor

²⁰⁴ Cf. Solove, *supra* note 2, at 946 n.19, 966–67 (observing that deference is "most problematic" in cases involving fundamental constitutional rights).

²⁰⁵ See *Crowell v. Benson*, 285 U.S. 22, 56–58 (1932).

²⁰⁶ *Id.* at 60–61 (citing *Ng Fung Ho v. White*, 259 U.S. 276, 285 (1922) (holding that deportee claiming citizenship in habeas proceeding has right to independent judicial review of disputed facts)).

²⁰⁷ See, e.g., Henry P. Monaghan, *Constitutional Fact Review*, 85 *Colum. L. Rev.* 229, 260 (1985); Reuel E. Schiller, *The Era of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law*, 106 *Mich. L. Rev.* 399, 438 (2007) (asserting that by the 1940s "federal courts treated *Crowell* as if it had never been decided").

David Franklin concludes on this basis that fact deference is inappropriate in the enemy combatant scenario.²⁰⁸

In light of this discussion, a judge confronted with strong individual rights interests unopposed by strong governmental interests may well employ weighted deference as a justification for not deferring to the government even in circumstances where core accuracy concerns standing alone would have justified doing so. Whether the same is true when the government does have a strong competing interest, however, is much less clear. In that circumstance, it may be best to set weighted accuracy concerns aside altogether, lest the judge confront the unenviable—and potentially impossible—task of assigning relative weights to the interests in issue and then determining whether the resulting differential between those interests, if any, somehow justifies a particular modification to whatever level of deference might otherwise have been applied.

C. Prudence

The third cluster of potentially relevant factors involves prudential considerations independent of accuracy. Under this heading we find comparative institutional efficiency arguments, as well as concerns regarding the collateral impact a non-deferential decision rule might have on related government operations, the risk that the elected branches or the public will react to non-deferential review in a manner that could harm the judiciary as an institution, and related questions of democratic accountability. On close inspection, the efficiency and collateral impact inquiries prove to have little bite in the fact deference setting. The political blowback and democratic accountability concerns cannot be so easily dismissed,

²⁰⁸ See Franklin, *supra* note 2, at 1021–23; cf. Judah A. Schechter, Note, *De Novo Judicial Review of Administrative Agency Factual Determinations Implicating Constitutional Rights*, 88 *Colum. L. Rev.* 1483, 1497–98 (1988) (reexamining traditional justifications for deferential review in the context of the CIA). This may be attributable to the apparent vitality of the constitutional fact doctrine in the context of appellate review of trial court factfinding in the First Amendment context. See, e.g., *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 508 & n.27 (1984) (invoking constitutional fact doctrine to justify *de novo* review of factual disputes related to applicability of First Amendment protections). It may also reflect, however, continuing interest in the view that non-deferential factfinding remains an essential feature of the federal judicial power at least when constitutional rights are predicated upon such findings.

however, particularly in circumstances in which the “factual” dispute in issue shades into policy judgment.

1. Efficiency Concerns

The decision rules literature notes that judges may account for efficiency considerations in the course of decision rule formation, including the possibility that resolution of some issues will impose daunting fiscal or other resource requirements.²⁰⁹ The case studies draw attention to a distinct set of efficiency concerns by illustrating that the government and courts occasionally emphasize the executive’s comparative advantage in terms of such efficiency features as speed.²¹⁰ These efficiency concerns do have relevance in many settings. National security fact deference, however, is not one of them.

As an initial matter, the national security fact deference scenario does not automatically implicate concerns for the efficient allocation of fiscal or other resources—at least it is no more likely to do so in the abstract than any number of other litigation scenarios. The fact of the matter is that resolving factual disputes through litigation routinely involves a substantial commitment of resources by both the litigants and the public. Absent extraordinary circumstances, this factor standing alone does little to support the case for deference.

Other efficiency arguments are similarly unhelpful in this setting. When executive power is at issue, one frequently encounters com-

²⁰⁹ See supra text accompanying notes 129–31.

²¹⁰ See supra text accompanying note 75–80. Writing about the role of comparative institutional competence arguments in connection with the allocation of government power during emergencies—a topic not unrelated to the issue of fact deference in national security cases—Philip Bobbitt offered the following observation:

Even if we agree . . . that an attentiveness to the institutional capacities of the three branches would yield us a neutral principle of decision from which to derive rules for future disputes, how do we know that the Constitution is committed to making sure that the most efficient agency act in national emergencies? This seems plausible enough, but the design of the Constitution . . . as well as its imposition of various cumbersome requirements on governmental action, suggests that a good many values are to be preferred to the calculus of administrative efficiency.

Philip Bobbitt, *Constitutional Fate: Theory of the Constitution* 55 (1982). Bobbitt aimed merely to show that one cannot easily escape inquiry into Constitutional purpose even when employing a non-purposive interpretive theory (because of the need to justify resort to that mode of argument), not to delegitimize consequentialism in general or efficiency arguments in particular.

parative efficiency arguments to the effect that decisions relating to national security must be made quickly or that it is important to have flexibility in taking up an issue as an initial matter or in revisiting a previous decision in light of changed information. Such claims have their roots in the Federalist No. 70, in which Alexander Hamilton famously defended the model of a singular president by pointing out that “[d]ecision, activity, secrecy, and dispatch will generally characterize the proceedings of one man in a much more eminent degree than the proceedings of any greater number.”²¹¹ These “Hamiltonian virtues,” as Pearlstein labels them,²¹² have long been cited as reasons to allocate authority to the executive branch in foreign and military affairs.²¹³ But however relevant these virtues may be to such debates, we must resist the temptation to assume that they somehow shed light also on the national security fact deference scenario.

It is true, for example, that the executive branch can move far more quickly than can Congress or the courts.²¹⁴ This is a relevant consideration insofar as the question at hand involves some need for alacrity, for example, whether the executive branch requires au-

²¹¹ The Federalist No. 70, at 392 (Alexander Hamilton) (Clinton Rossiter ed., 1961). The Hamiltonian Virtues play a key role in the *Curtiss-Wright* decision insofar as it awards inherent foreign affairs powers to the executive branch.

²¹² Deborah Pearlstein, *The Constitution and Executive Competence in the Post-Cold War World*, 38 Colum. Hum. Rts. L. Rev. 547, 555 (2007).

²¹³ See Goldsmith, *supra* note 165, at 1397 (noting that “[c]onventional wisdom offers a functional justification for political branch hegemony in foreign relations”); Robert H. Knowles, *American Hegemony and the Foreign Affairs Constitution* 36 (N.Y. Univ. Pub. Law and Legal Theory Working Papers, Paper 111, 2009), available at <http://lsr.nellco.org/cgi/viewcontent.cgi?article=1111&context=nyu/plltwp> (describing these features, along with comparative expertise, as “the pillars of special deference” to the executive in foreign affairs); Wells, *supra* note 151, at 906 (noting frequent reliance on the Hamiltonian virtues in support of deference claims); cf. Harold Hongju Koh, *The National Security Constitution: Sharing Power after the Iran-Contra Affair* 118–19 (1990) (observing that the structural features of the presidency renders that office “institutionally best suited to initiate government action,” and that the president’s “decision-making processes can take on degrees of speed, secrecy, flexibility, and efficiency that no other governmental institution can match”); Posner & Vermeule, *supra* note 172, at 16 (concluding that “both Congress and the judiciary defer to the executive during emergencies because of the executive’s institutional advantages in speed, secrecy, and decisiveness”).

²¹⁴ See generally Posner & Vermeule, *supra* note 172, at 5, 18 (emphasizing the contrast along these dimensions); Ku & Yoo, *supra* note 164, at 188, 193–94 (same); Pushaw, *supra* note 172, at 968 (contrasting executive efficiency with a judiciary that “by design acts far more slowly than either political branch”).

thorization from Congress before it can carry out some military function. But authority to act in exigent circumstances is not the question presented by national security fact deference. The executive's ability to render judgments more quickly than the judiciary does not speak to the question whether a judge adjudicating a claim should defer to the executive's previous factual judgment.

Much the same is true for the executive's agenda-setting advantages. These advantages attach at both the front and back ends of the decisionmaking process, yet neither does much to advance the case for national security fact deference. On the front end, the executive's advantage in terms of agenda control has to do with the possibility that courts simply will not have an occasion to reach an issue in the first instance because they must await a case or controversy presented by a litigant with standing.²¹⁵ The executive, in contrast, can act at its own discretion and therefore address disputes as the need arises. This advantage has no relevance in the national security fact deference scenario, however, insofar as that scenario presupposes that the executive already has rendered its decision and that the particular issue has now come before a court in a posture suitable for adjudication.

The executive's other agenda-setting advantage similarly fails to advance the case for fact deference. On the back end—that is, subsequent to an original decision—the executive branch as a general proposition has discretion to revisit decisions, whether in response to new information, new policies, or for no particular reason at all.²¹⁶ The judiciary, in contrast, can revisit decisions only insofar as may be warranted by developments in actual cases, which in practical terms may mean relatively few such opportunities. The executive thus can engage in error correction more readily than can the

²¹⁵ See, e.g., Ku & Yoo, *supra* note 164, at 182–83 (adding that litigation requires not just a willing and qualified litigant, but also one with sufficient resources to contest the case appropriately); Pushaw, *supra* note 172, at 968; cf. Posner & Vermeule, *supra* note 172, at 5 (describing the executive as flexible, the judiciary as rigid).

²¹⁶ We see the executive employing this capacity, for example, in conducting annual reviews regarding the status of Guantánamo detainees who already have been classified, in the government's eyes at least, as enemy combatants. For an overview of the "administrative review board" process, see Memorandum from Gordon R. England, Deputy Sec'y of Def., to Sec'ys. of Military Dep'ts (July 14, 2006), available at <http://www.defenselink.mil/news/Aug2006/d20060809ARBProceduresMemo.pdf> (describing ARB procedures).

judiciary, which may experience a form of dead hand control simply as a result of the fact that no litigant has sought (or can seek) to reopen a question.²¹⁷ But this advantage is inapposite to fact deference claims. Indeed, by emphasizing the virtues of a revisitation power in the abstract, the argument tends to reinforce the claim that original executive branch judgments may be flawed and in need of subsequent review. In any event, the fact that the executive itself can revisit the issue tells us nothing about whether the judiciary should be able to do so as well.

2. *The Collateral Impact of Non-Deferential Review*

Advocates of deference at times also emphasize the collateral consequences that non-deferential judicial review of executive branch factual judgments might have on related government operations or activities. On this view, the benefits of judicial review—measured in terms of enforcement of separation of powers values or even enhancement of accuracy—in some circumstances may be outweighed by collateral costs entailed by the very process of non-deferential, or insufficiently deferential, review.

When precisely does this argument come into play? Advocates of deference do not contend that collateral costs outweigh potential benefits in *all* national security related litigation. Indeed, the argument played no significant role in most of the examples surveyed in Part I. Most if not all judicial review of government action, after all, entails some degree of disruption to government operations. Government personnel, for example, often are obliged to spend some amount of time and resources participating, directly or indirectly, in the process of litigation, whether by serving as witnesses in a formal sense, gathering and reviewing documents, speaking informally with attorneys or investigators, and so forth. These litigation related activities to some extent are bound to disrupt the performance of ordinary government functions.

But some such disruptions are more serious than others. Disruption of military activity, for example, may impose unusually high costs. So said Justice Jackson in *Johnson v. Eisentrager*,²¹⁸ a post-World War II decision denying habeas rights to a group of Ger-

²¹⁷ See Ku & Yoo, *supra* note 164, at 183, 188–89, 192, 196–97.

²¹⁸ See *Johnson v. Eisentrager*, 339 U.S. 763 (1950).

mans convicted of war crimes and detained in a U.S. controlled facility in Germany. Jackson gave many reasons for the decision, but placed particular emphasis on the undesirable practical consequences that would, in his view, follow from permitting *any* judicial review in this setting. These included: disruption of ongoing military operations, expenditure of scarce military resources, distraction of field commanders, harm to the prestige of commanders, and comfort to armed enemies.²¹⁹ The government not surprisingly emphasized such concerns in the *Hamdi* litigation as well, though with much less success; and similar arguments continue to play a significant role today as courts grapple with still unresolved questions regarding the precise nature of habeas review of military determinations of enemy combatant status.²²⁰

But even in the enemy combatant setting, where disruption concerns arguably are near their zenith, this argument does not necessarily point in the direction of fact deference as the requisite solution. It did not persuade the Supreme Court in *Hamdi* to defer to the government's factual judgment, nor did it do so in the more recent decision in *Boumediene v. Bush* dealing with noncitizen detainees held at Guantánamo. The impact of the argument in those cases instead was to prompt the Court to accept *procedural innovations* designed to ameliorate the impact of judicial review, rather than seeking to avoid that impact via deference.²²¹ This is a useful reminder that even when the executive branch raises a legitimate concern in support of a fact deference argument, it does not follow automatically that deference is the only mechanism by which the judiciary can accommodate the concern.

This leaves the matter of secrecy. Secrecy relates to the collateral consequences inquiry in the sense that failure to maintain secrecy with respect to national security information can have extralitigation consequences for government operations—as well as for

²¹⁹ See *id.* at 778–79.

²²⁰ See *supra* text accompanying notes 7–11.

²²¹ There may be circumstances in which collateral consequences of this sort might not be capable of amelioration through procedural devices aside from deference. Arguably *Mott*, involving President Madison's determination of the need to call forth the militia, provides such an example. Then again, a case such as *Mott* might more easily be explained in terms of a combination of the comparative accuracy argument discussed above and the political blowback and democratic accountability concerns discussed below.

individuals or even society as a whole—ranging from the innocuous to the disastrous. Without a doubt this is a significant concern. But, again, it is not clear that deference is required in order to address it. Preservation of secrecy is precisely the reason that the state secrets privilege exists, of course, and it also is the motive for the Classified Information Procedures Act, which establishes a process through which judges work with the parties to develop unclassified substitutes for evidence that must be withheld on secrecy grounds.²²²

3. *Institutional Self-Preservation*

Judicial involvement in national security litigation, as noted at the outset, poses unusual risks for the judiciary as an institution. Such cases are more likely than most to involve claims of special, or even exclusive, executive branch authority. They are more likely than most to involve a perception—on the part of the public, the government, or judges themselves—of unusually high stakes. They are more likely than most to be in the media spotlight and hence in view of the public in a meaningful sense. These cases are, as a result of all this, especially salient as a political matter. And therein lies the danger for the courts. Because of these elements, an inappropriate judicial intervention in national security litigation is unusually likely to generate a response from the other branches or the public at large that might harm the institutional interests of the judiciary, either by undermining its prestige and authority or perhaps even by triggering some form of concrete political response.

This concern traditionally finds expression through the political question doctrine, which in its prudential aspect functions to spare judges such risks. But just because a court determines that a case or an issue is justiciable does not mean that the institutional self-preservation concern has gone away or that a judge has lost sensitivity to it. National security fact deference provides a tempting opportunity for judges to accept the responsibility of adjudication

²²² Classified Information Procedures Act, Pub L. No. 96-456 (1980) (codified as amended at 18 U.S.C. app. §§ 1–16 (2006)); cf. Richard B. Zabel & James J. Benjamin, Jr., *Human Rights First, In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts* 88–89 (2008), available at <http://www.humanrightsfirst.info/pdf/080521-USLS-pursuit-justice.pdf> (disputing claim that sensitive information was leaked during terrorism prosecutions in the 1990s).

while simultaneously reducing the degree of interbranch conflict and hence the risk of political blowback. We cannot expect judges to attribute deference decisions to this motivation, of course, but we must account for the possibility—even the likelihood—that such concerns will play some role.

4. *Democratic Accountability*

Federal judges are not subject to electoral accountability and are relatively insulated from other political constraints. The executive branch, in contrast, has a relatively strong democratic pedigree. The President is elected, may face reelection, and in some respects grows stronger or weaker in accordance with the polls. Other executive officials partake of this accountability to some extent, at least, by virtue of their own accountability, be it direct or indirect, to the President. On this view, executive branch decisions as a general proposition enjoy a stronger democratic pedigree than judicial rulings.

Ordinarily nothing follows from this. In some cases, however, the judge may believe that this disparity makes an important difference. In particular, the judge may conclude that some decisions ought to be left in the hands of a more politically accountable institution. It is an argument that arises from time to time in national security fact deference litigation.

One way to understand the role of such arguments is to view them simply as manifestations of the institutional self-preservation concern discussed above. That is, judges may cite the superior democratic accountability of the executive branch as a reason to believe that non-deferential review would generate an unacceptable risk of political blowback. But it is possible to conceive of a judge giving weight to comparative democratic accountability even in the absence of blowback concerns, reflecting a sincere belief that some questions are better left with more accountable institutions. That raises the question whether we can develop an account that may explain which kinds of factual disputes most plausibly implicate the democratic accountability concern.

It is helpful at this point to recall the distinction—emphasized above in connection with the discussion of comparative access to relevant expertise—among retrospective historical facts, predictions of future events, and matters that are best described as turn-

ing on opinion or policy judgment. It is difficult to see the democratic accountability argument for deference to determinations of historic facts. At the same time, it is easy to see the democratic accountability argument for deference to opinion and policy judgments. The hard cases involve predictive judgments of fact, which in at least some instances can be difficult to distinguish from opinion or policy judgment. Suffice to say, perhaps, that the line between factual determinations and opinion or policy judgment is a continuum, and that the democratic accountability argument begins weak but grows stronger as the opinion or policy elements wax.²²³

Judges contemplating the democratic accountability concern also must avoid indulging unrealistic assumptions about the degree to which an executive decision actually implicates democratic accountability. Consider, for example, the decisionmaking role of the Administrative Review Board (ARB) mechanism for Guantánamo detainees. The purpose of the ARB is not to determine the past conduct of a military detainee, but rather to predict what might happen should the detainee be released. As a predictive judgment, this scenario might be thought to implicate democratic accountability concerns. But the nature of the ARB's composition (with a panel of appointed military officers) and the non-transparent nature of its work (despite the intense public interest in the Guantánamo issue, few if any members of the public are aware of the ARB process in general, let alone of any particular decision an ARB might make) call into question whether there is a meaningful nexus between ARB decisions and democratic accountability. As a general proposition, executive branch decisionmakers will vary widely in terms of exposure to political incentives,²²⁴ and the issues

²²³ The two justifications are not coextensive, however. The core accuracy argument, for example, requires a showing that epistemic advantages actually were employed, something that is not a relevant consideration for the democratic accountability inquiry.

²²⁴ See Fallon, *Implementing*, supra note 90, at 9 (observing that "most decisions that are subject to judicial review are not made by legislatures but by low-level officials and administrative agencies that lack any strong democratic mandate," where "the actual prospect of democratic intervention is often small"); Solove, supra note 2, at 1015 (noting lack of transparency and accountability in administrative decision-making).

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they resolve will vary at least as widely in terms of their transparency and salience in the public's eye.²²⁵

D. The Derivative Nature of Legitimacy

A final consideration that may inform the deference issue is one that arises frequently in actual practice: comparative institutional *legitimacy*.²²⁶ On close inspection, however, this inquiry proves to have no content independent of the functional and prudential considerations discussed above.

When the executive branch argues for fact deference on legitimacy grounds, it is making a claim regarding the *formal* allocation of decisionmaking authority as between it and the judiciary. That is to say, it is arguing that some dispositive source of law vests it with authority to resolve a factual dispute, regardless of whether this allocation makes sense from a functional or prudential perspective. And in theory, this could be the case. One can imagine constitutional text, for example, expressly allocating factfinding authority to the executive for some particular issue.²²⁷

But the Constitution does not formally commit any particular factual questions to the executive, let alone a broader set of "national security" fact disputes. It certainly does not do so as a textual matter, and no such allocation can be derived through consideration of the "essential" qualities of the executive branch without reverting to the functional and prudential arguments previously explored.²²⁸ Arguments from formal legitimacy in this sense generate more confusion than insight. In the final analysis, the concept of "legitimacy" is better understood as a label to be attached to the

²²⁵ See Pearlstein, *supra* note 8, at 22 n.102.

²²⁶ Cf. Solove, *supra* note 2, at 1003–04 (observing, in the course of recounting affirmative arguments for deference, that "opinions involving deference depict judicial evaluation of factual judgments as an intrusion into the discretion of the officials and institutions under review").

²²⁷ The Constitution arguably does commit some *legal* and *policy* decisions to the President, of course. Formal legitimacy thus might be a useful model for understanding why judges in some settings should not supplant executive branch *policy* judgments.

²²⁸ I do not mean to suggest that the executive branch cannot make and act upon factual judgments. Obviously it does so constantly. The point instead is that the judiciary is not categorically excluded from reaching independent judgments when disputed facts relating to national security arise in a justiciable litigation setting.

institution that prevails in the functional and prudential analysis, not as an institutional quality that preexists such inquiries.²²⁹

* * *

Given the range, complexity, and indeterminacy of the considerations canvassed above, we can better appreciate why judges and litigants at times have struggled and spoken past one another in the national security fact deference context. The situation is not entirely hopeless, however. Careful parsing of these arguments does much to help us sketch the outline of a more coherent and defensible approach to resolving such claims. The key insights include:

- 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, renders this inquiry unmanageable in many if not most instances.
- Special expertise 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

²²⁹ Cf. Fallon, *Judicially Manageable Standards*, *supra* note 90, at 1291–92 (arguing that “judgments of nonjusticiability . . . tend to conjoin reasoning that emphasizes judicial incompetence with suggestions that the disputed questions are assigned to other branches”).

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epistemic advantages 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 justiciable 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 or another of the functional and prudential concerns described above.

These insights are not a panacea for the problem of confusion in connection with national security fact deference claims (or fact deference claims more generally, for that matter). They leave much room for disagreement in particular cases. But they make a useful contribution nonetheless. Some frequently cited arguments simply are not relevant in this context; drawing attention to this helps to

dissuade future reliance upon them. Other arguments are potentially relevant, yet have a more limited reach than is often appreciated; drawing attention to this helps to produce more focused and relevant analyses. Together, these correctives can do much to decrease the cross-talk and uncertainty that currently plague fact deference claims.

CONCLUSION

The judicial role in national security affairs evolves constantly, reflecting the inevitable tension between the judiciary's reluctance to overstep its bounds in such a sensitive area and its obligation to adjudicate claims and thereby act as both guarantor of individual rights and as a check on the political branches. National security fact deference is a small but important thread in that larger tapestry, one that has become more significant in recent years. Unfortunately, it is not well understood, compounding the larger problem of uncertainty concerning the proper judicial role in this most significant of settings.

All of which would be of only mild interest, perhaps, if the pattern of arguments and outcomes in the actual resolution of national security fact deference claims gave reason to believe that litigants and judges shared at least a baseline understanding as to the nature of such claims and the sorts of considerations that might be relevant to resolving them. But that is not at all the pattern suggested by actual cases. One sees instead a hodgepodge of inchoate arguments with ample evidence of outright confusion and uncertainty. At the same time, a review of the role of fact deference claims in actual litigation suggests that such claims can have a dispositive impact. This is a poor state of affairs, to say the least.

The first step in shifting national security fact deference disputes onto a firmer foundation is to identify the nature of such claims. That inquiry is more complex than might appear at first glance. The most plausible account, however, depicts fact deference in general as a species of "decision rule," as that concept has been developed in the literature of constitutional theory. And that conclusion draws our attention to a series of arguments that scholars have identified as potentially relevant to the process of decision rule formation in general, including arguments that can be clustered

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under the headings of (i) core accuracy, (ii) weighted accuracy, (iii) prudence, and (iv) legitimacy.

Examining these arguments as they may apply in the context of a national security fact deference claim does not yield a one-size-fits-all solution. Indeed, one of the core lessons of viewing such claims through the lens of the decision rules literature is that the deference question is deeply dependent on context, including the nature of the particular legal rule giving rise to the factual dispute, the nature of the interests of the litigants and of society that may be at stake in the case, and, especially, the precise nature of the “fact” in issue and the process by which the executive made a judgment concerning it. But parsing these factors nonetheless does yield insights that collectively can serve to shift the resolution of such claims onto much firmer ground. In brief, this approach calls for a de-emphasis on considerations such as formal legitimacy claims, comparative institutional efficiency, and collateral consequences for other government operations, and heightened (and more nuanced) attention to claims of comparative institutional accuracy and democratic accountability. This approach also highlights the unspoken role that institutional self-preservation concerns likely play in connection with many national security fact deference claims.

This article paints a complicated picture of the considerations that ought to inform resolution of national security fact deference claims, and purposefully so. One of the worst aspects of current practice is the tendency to oversimplify these arguments. At the same time, however, its insights simplify the analysis as a whole by clearing away a considerable amount of underbrush consisting of irrelevant or confused considerations. The net result is a more coherent and defensible approach to the deference question. And if the national security fact deference debate can be viewed as a microcosm of the larger tensions associated with the judicial role in national security affairs—and I think that it can—this would be a very welcome development indeed.