THE THIRTY-SEVENTH CHARLES L. DECKER LECTURE IN ADMINISTRATIVE AND CIVIL LAW:* MILITARY LAW IN UNCERTAIN TIMES

EDWIN MEESE III†

General Huston, distinguished guests, ladies, and gentlemen, it is a great pleasure to be with you here and to have the honor of presenting the Decker Lecture. It is indeed a great privilege to be here.

I have known about The Judge Advocate General's Legal Center and School for quite some time. When I was a law professor before going into the Federal Government service, I was on the faculty and a professor of law at the University of San Diego, and our dean was a judge advocate himself. He did his annual duty for training by coming here. We on the faculty always knew when he was about to go on active duty because he shaved his beard.

It is a particular honor to be giving the Decker Lecture because of the distinguished position that Major General Charles L. Decker held in the history of the Judge Advocate General's (JAG) Corps and all that he did.[1] He really was a pioneer of the modern military legal system, and particularly of the modern military legal education. And, of course, he was the founder of the specific institution in which we are gathered today.[2]

I notice that Major General Decker graduated from the United States Military Academy at West Point the same year that I was born. So, I guess I am the next generation to his. In any event, I was particularly impressed that Major General Decker had a lasting effect on military law in the United States, as he was one of the drafters of the *Manual for Courts-Martial*, both

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† Edwin Meese III served as the seventy-fifth United States Attorney General and is currently the Ronald Reagan Distinguished Fellow Emeritus at the Meese Center for Legal and Judicial Studies.

[1] *See generally* THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL'S CORPS, 1775–1975, at 203–41 (1975).

[2] *Id.* at 217–18.

before and immediately after the Uniform Code of Military Justice was promulgated.[3]

When I entered active duty in 1954 as an artilleryman, I was introduced rather immediately to military law. I was introduced to something that was quite different in many ways than how things are today. Because I had had one year of law school at that time, I got all of the legal assignments in my artillery battalion as an extra duty. For example, I was teaching the Uniform Code of Military Justice, which was then a new entity, to recruits. I also had all kinds of "troop information and education" programs, and I got all of those that had anything to do with law. Also, I was appointed as the trial counsel for special courts-martial. In those days, there were, of course, three types of court-martial. There was the summary court-martial, which was a field-grade officer who was both judge and jury. You also had the general court-martial, which was usually a group of high-ranking officers, where the court was composed of usually five to seven of those officers, and you had a law officer. Those were the titles, and those were the functions.

For the special court-martial, no lawyers were involved whatsoever. The members of the court were usually the commanders of the batteries or companies and other senior officers within the battalion or whatever the organization that had a convening authority happened to be. The trial counsel, who was the prosecutor and also had most of the administrative work compiling the necessary forms and reports and so on, and the defense counsel were not lawyers. They were whomever the battalion commander appointed to have those particular tasks. Terms in those days like "military judge" and "military panel," which are common today, were some decades away. Since I had that responsibility, I had to learn a lot about military law in a very short period of time and to make sure that whatever those reports were at the end of the court-martial when it was over, regardless of the verdict, were properly filled out and utilized.

I do not mention this to give you a history lesson or to wallow in nostalgia but to indicate how far the practice of military law has developed over the last sixty years. As we go back to the beginning of our Republic, the Army JAG Corps has had a long and distinguished history. From Lieutenant Colonel William Tudor's initial tenure starting in 1775, as he served as the legal advisor to George Washington, to your current leader, the Army JAG Corps has been side by side with the combat and support troops in every major conflict since the dawn of our country. Unsurprisingly,

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[3] *Id.* at 203–09.

the areas of practice have grown in both scope and sophistication. And they continue to change as the Army itself changes and the circumstances demand.

To a greater extent than ever, judge advocates are now critical advisors to both strategic and tactical decision-making in the field and in the halls of the Pentagon and other command post operations. The breadth of the legal issues that comprise today's Army is truly astounding. As our commanders grapple with day-to-day challenges, such as enforcing good order and discipline, Army judge advocates are there to provide the advice on the latest reforms to the Uniform Code of Military Justice: how to avoid unlawful command influence, how best to investigate and charge a Soldier, and a host of related issues. Those responsibilities have always been the standard fare for military law. Defense counsel, and now the Special Victims' Counsel, work hard to ensure that justice is done and that both the accused and the victims have their rights preserved. And, of course, military judges work to ensure that trials are conducted in a fair and orderly manner, free from unlawful command influence or other taints, whether perceived or actual.

In the meantime, and what really is new to a greater extent, warfighting commanders rely on their staff judge advocates for advice on a range of topics, such as the law of armed conflict, the rules of engagement, and the use of force. They go all the way to detention-related topics today, such as the Geneva Conventions, the interrogation rules, human rights, war crimes, and those other topics that only a few decades ago would have been unheard of. Further, the emerging issues and areas of practice, such as cyber and intelligence law, require the Army JAG Corps to properly train and equip its members with the requisite knowledge to stay ahead on these cutting-edge domains. Finally, at the highest levels of our Government, the combatant commanders, the service chiefs, the Chairman of the Joint Chiefs of Staff, the National Security Council members, and the intelligence community all rely on the legal advice from experienced senior judge advocates from across the services. What you do and the advice you provide on national security issues is critical and enables the national command authority to carry out its constitutional responsibility to protect and defend the United States.

I have heard firsthand of the high quality work that is done by judge advocates, particularly in areas like Iraq and Afghanistan, from my son, who has worked together with some of your leaders there. Particularly, there is one who made his mark for my son, Brigadier General Mark Martins, whom

I believe is known to many of you as one of your top leaders in the field. They worked together, actually, while serving on the staff of General David Petraeus, doing some very important and history-making work in Iraq and Afghanistan.

Today, I would like to discuss with you the topic of what I call "military law in uncertain times." In some ways, uncertainty has always been a constant in a political, governmental, or military environment. But today, the level of "known unknowns," as former Secretary of Defense Donald Rumsfeld once stated, seems higher than we have usually faced. While the Cold War produced many vital concerns, obviously, and a whole series of tough decisions at the highest levels—and I was privileged to watch President Reagan as he was making many of those decisions—at least there was a general common understanding of who the enemy was and what their potentials were, as well as a known history and a relatively predictable set of options for those making the decisions.

By contrast, today, our governmental and military leaders face many novel, difficult situations, which particularly affect legal concepts. To start, our Nation is engaged in the longest continuous armed conflict in history—in the history of the United States, at least—with no clear path to bringing the conflict to a victorious end. Unconventional warfare and the unusual nature of the battlefield—a battlefield virtually without limits—provide complex problems, particularly as they defy the norms and laws of war. Even advances in technology have brought new questions with legal implications. The use of drones, for example, remote targeting, and other things that have advanced the cause of war raise legal and moral issues to be faced by JAG Corps members. Cyberwarfare and electronic surveillance as it is now being practiced invite new litigation and new regulation.

At the same time, the relationships between nations have become more complex and more complicated so that international law and traditional legal principles no longer have an easy application. A good example of this is the increased activity of the International Criminal Court (ICC) and its prosecutorial apparatus, which has created new threats, sometimes even to military personnel potentially in the United States. I will talk a little bit about that later.

To further complicate matters, the Federal courts have adopted new, often inconsistent, approaches to the subject of national defense. This has affected the combat processes as well as the legal jeopardy of our military

personnel. I know that this has had a profound effect on your work and particularly deserves special attention at this school and in these times.

Ignoring historical facts and traditional practice, the Supreme Court has made major changes in recent years, establishing new policy outcomes as guides for decision, which have had serious practical implications for our warfighters. In doing so, the Court has assumed powers that have traditionally been placed within either the executive branch or the legislative branch. All of this has created many new challenges for you, the officials charged with advising our military leaders and providing rules of conduct that will protect our troops from legal jeopardy.

To respond to these challenges requires a sound legal foundation for military lawyers and, for that matter, the rest of the legal and judicial professions. They need this to provide advice and to promulgate legal instruction and directives that can guide commanders and troops working in the field and in garrison. This starts, of course, with a faithful interpretation of our Constitution, which is the bulwark of the rule of law. In an uncertain world, the Supreme Court and the rest of the Federal judiciary must be providing the consistency, the accuracy, and the stability that guides our Nation's legal establishment. Many of the court decisions, particularly some that have been somewhat surprising over the last couple of decades, are directly applicable to you and the exercise of your professional duties. As senior judge advocates, you are on the front lines of our Nation's defense, advising commanders on what the courts have said, or what they might say, in a myriad of circumstances. You do not have the luxury of a lot of time to make decisions, because ever-changing, real-world events on the battlefield require immediate answers, and these answers come from various legal sources. They may come from the Constitution itself, case law, or statutes. Instruction must be placed into directives, regulations, and field manuals to simplify the doctrine contained in those sources. Warfighting decisions are a far cry from those made by civilian judges, including those on appellate courts, who can take all the time they need, safe from harm and thousands of miles away from the battlefield, as they deliberate in the marbled halls of stately courtrooms.

In 1985, when I was at the Department of Justice (DOJ), I was invited to give a keynote address to the House of Delegates of the American Bar Association.[4] I used this exchange to start what I hoped would be a national

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[4] Edwin Meese III, Att'y Gen., Dep't of Just., Address to the American Bar Association (July 9, 1985).

dialogue on the proper role of the judiciary in general, and the Supreme Court in particular, concerning the interpretation of the Constitution. The speech that I gave was framed around then-recent decisions of the Supreme Court, which had taken wild directions away from what had been for many decades settled law. The actual cases are not directly relevant to today's talk, but my broader point is that constitutional decisions should follow a jurisprudence of what I called at the time original intention (i.e., how does the Constitution really read?). As I explained at the time, a jurisprudence that is seriously aimed at the explication of original intention would produce defensible principles of law that would not be tainted by ideological predilection.

Fortunately, my speech and others that followed started a national discussion on the topic of originalism and the proper mode of constitutional interpretation. Legal giants such as the late Judge Robert Bork and the late Justice Antonin Scalia drove that dialogue in the academy and in the appellate courts. There are, of course, many others who have contributed to this movement who are too numerous to mention today. I might say that, when I gave that talk to the American Bar Association, it probably would have stayed on the shelves and never been heard from again had Justice Harry Blackmun not taken offense at some of the things I said. A few months later at Georgetown Law School, he gave a talk trying to refute my ideas that the decisions of the Court ought to be based on the Constitution. Once he made that counterpoint and then I gave a refutation to his points, the battle was on. And so, even in law schools today, originalism as a basis for constitutional interpretation is taught, or at least acknowledged, in many courses, depending on the predilections of the professor.

This belief in a jurisprudence of original intention, or as we know it today, original public understanding, reflects what is a deeply rooted commitment to the idea of democracy. That is that government and laws come ultimately through the various processes of government itself, but ultimately from the people and are responsive to the people.

As I said in 1985, our Constitution represents the consent of the governed.[5] The people of the country are the source for the structures and the powers of government. That comes right from the Declaration of Independence, which holds that legitimate governments must respond to, and must be governed by, the acceptance of the governed themselves.

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[5] *Id.* at 7.

The Constitution, as we know, is the fundamental will of the people, which is why it is fundamental law and why the Constitution, under its own terms, is part of the supreme law of the United States. The other two parts of the supreme law are statues enacted under the Constitution and treaties which are ratified by the Senate.

To allow a court to govern simply by what it views at a particular time as being "fair and decent" rather than what the Constitution actually says is a scheme of government that is no longer "of the people." The essence of democracy would be abandoned if that were the case. The permanent quality of the Constitution also would be weakened. A constitution that is viewed as only what the judges say it is, rather than what it actually says, is no longer a constitution in the true sense of the word. To understand this fully, it is necessary to discuss further the concept of what I call "constitutional fidelity," including adherence to the separation of powers, as the foundation for the Supreme Court jurisprudence. Understanding the genius of our Constitution involves a look at its history.

In 1787, the leaders of what were then the thirteen brand new States were having a hard time accomplishing these functions that were national in scope. They had a hard time defending the country against the armies of other countries—England, France, and others—that were intruding on our borders. They were having a hard time defending our merchant ships at sea from both pirates and the navies of other countries. They had difficulty conducting diplomatic relations abroad, particularly with the European powers.

They were looked down on because international agreements and other diplomatic efforts had to be ratified by all thirteen of the States. They had no real national system for trade and commerce. There was no postal system or national currency. In other words, there were thirteen States, and they could only occasionally achieve unanimity and be able to pass law or take some action which met full agreement. But it was not a successful way to conduct the affairs of a new nation that was entertaining so many different problems.

When they came together in 1787, the leaders faced a dilemma. On the one hand, they wanted to have a central government that would perform the necessary, truly national functions. And it ought to have, as they called it, the energy (i.e., the power) to carry out those functions on a national basis and to have a central body to administer that aspect of government. But, at the same time, they did not want to lose the freedom for which they

had fought so hard during the War of Independence. And so they came up with this solution.

They had studied civilizations going back many centuries and examined other governments around the world. They looked at both the successes and the failures of different structures and legal forms. They determined that the key to protecting freedom was to disperse power as widely as possible. In the Constitution, they separated power vertically and horizontally. They separated it vertically by dividing it between the national Government and the States. Only certain powers enumerated in Section 8 of Article I of the Constitution, as I am sure is familiar to all of you in your legal work, were to be given to the central Government. Unfortunately, many of those "national powers" have, by interpretation, expanded far beyond what the Founders had in mind. But it was the Founders' idea that all other government powers were to be reserved to the States or to the people themselves through their local governments. To further disperse power, the national authorities were divided among three independent and separate branches of the Federal Government: the legislative, the executive, and the judicial.

To make sure that the system worked, the structure and boundaries were further set in the Constitution. The fact that this document was written was a particular achievement, as a written governing charter was unusual in the world at that time. So, the result was a written constitution, a system of checks and balances whereby one branch of Government could be a check on the others, and the limitations of enumerated powers. Furthermore, there was an independent branch of the Government—the judiciary—that had the responsibility of interpreting the Constitution.

To understand constitutional fidelity, you have to begin with the document itself. The Constitution exists as a legal document. We all understand the significance of that fact. A contract, will, warranty, or deed has great legal significance. It must be followed according to what it actually says. Even if a contract may be somewhat ambiguous, the court that is interpreting it has to get back to the original intent of the people who have made the contract initially. In the famous case of *Marbury v. Madison*, John Marshall provided the rationale for judicial review based on the fact that we have a written constitution with a meaning that, as he said, is binding on the judges.[6] He used this phrase: "[I]t is apparent that the framers of the Constitution contemplated that instrument, as a rule for

[6] Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

government of *courts*, as well as of the legislature. Why otherwise does it direct judges to take an oath to support it?"[7]

The Framers chose their words carefully. The language that they chose meant something then and means something today. In some places, it is very specific, such as where it says the Presidents of the United States must be at least thirty-five years of age. In other places, the Constitution expresses principles, such as the right to be free of unreasonable searches and seizures or the guarantees of equal protection under the law and due process of law. The text and the structure of the Constitution is instructive. It contains very little in the way of specific political solutions. Political solutions were left primarily to the elected branches of Government: the Congress and the presidency.

The first three articles set out clearly the scope and limits of three distinct branches of Government, and the powers of each were carefully and specifically enumerated. The Constitution's undergirding premise remains that democratic self-government is based upon the limits of certain constitutional principles, which govern the political process.

A jurisprudence that seeks fidelity to the Constitution is not a jurisprudence of political results. Nor is it one that hinges rulings on popular social theories, moral philosophies, personal notions of human dignity, or preferable policy results. These are matters that elected officials or the people serving under them have the responsibility for deciding. Rather, the Constitution itself is very much involved with process. And it is a jurisprudence that, as I noted, seeks to actually depoliticize the law so that it applies evenly, fairly, and equally to people, regardless of their political disposition.

Originalism has been criticized by some, such as Justice Blackmun, as being old-fashioned or a product of political ideologues who have a cramped view of the Framers' intent. I would disagree with that interpretation or that characterization of the Constitution. The purpose of constitutional limits is to make sure that the Government does not get beyond the control of the people themselves. A jurisprudence that is based on first principles is neither conservative nor liberal. It is neither right nor left. It is a jurisprudence that cares about committing and limiting to each organ of Government the proper ambit of its responsibilities. That may be why Justice Elena Kagan, who had been a law school dean, testified during her Supreme Court

[7] *Id.* 179–80.

confirmation hearing, "[W]e are all originalists."[8] Perhaps it was recognition that it really does make sense to begin one's examination of the meaning of the Constitution by reading the actual words of the text, as is the case of the interpretation of other documents, such as statutes.

With that in mind, let me turn to the role of the judiciary in regard to national security, which is what I am particularly concerned with today. Let us begin with an historical fact. Over the first two centuries of our country, the Supreme Court of the United States has traditionally given great deference to the Commander in Chief on issues of national security. Why was this so? For a variety of reasons, not the least of which is that the Court itself has no particular expertise in national security issues. Most, but not necessarily all, of the justices have not served in the military or the intelligence services. Even today, they do not get routine intelligence briefings like members of the executive branch and select members of Congress. So, they have neither the familiarity with the subject nor the latest information about how matters that are actually transpiring in the world are taking place as far as national defense is concerned.

Nor under the separation of powers principle would it make sense for the Court to have played a major role in the conduct of our Nation's national security. That is because they are the least accountable of the three coequal branches of Government and the least informed as to national security or foreign policy or other geopolitical ramifications of policy decisions. And they are the least equipped to deal with the oftentimes real-time decisions that have to be made in national security.

To sum up this point, I would quote Homeland Security Secretary Mike Chertoff, who gave an important speech at Rutgers University on the ten-year anniversary of 9/11. He entitled it, "The Decline of Judicial Deference on National Security."[9] And he said judges "are not necessarily adapted to weigh the practical exigencies of what happens on the battlefield."[10]

As we know, Article 2 of the Constitution says that the executive power shall be vested in a President of the United States of America. The Founders assigned the President—and the President alone—with the duty

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[8] *The Nomination of Elena Kagan to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 62 (statement of Elena Kagan, Solic. Gen. of the United States).
[9] Michael Chertoff, *The Decline of Judicial Deference on National Security*, 63 RUTGERS L. REV. 1117 (2011).
[10] *Id.* at 1119.

of being the Commander in Chief of the Army and Navy, and today, they would say the Air Force and the other services. This made eminent sense from a structural standpoint, as well as from an accountability and practical standpoint. That is why the President takes an oath, set in the Constitution, to preserve, protect, and defend the Constitution of the United States.[11] But he is also the leader of the executive branch, and he is the one who decides whether, when, and how to use the military in the defense of our national interests. It is in those rare instances when national security issues ever reached the high court that the justices have traditionally, as Mike Chertoff explained, deferred to the executive branch in those legal issues that came before it. They used the political question doctrine, saying that political questions were matters for the executive or the legislative branch and not for the judiciary. They used this on some similar rationale to avoid getting involved in the conduct of war or other activities of our military forces.

It is worth noting that under our constitutional framework, the President, under Article 2, has independent authority to protect the Nation above and beyond any declaration of war or other statutory authorization for the use of military force. There has been a great deal of debate about this, about what that particular authority involves. But it really is based on the idea that the United States, like all countries, enjoys the inherent right of self-defense. And that is why the President may take such action as he deems necessary to protect the country, including military action. But of course, even that has been somewhat constrained by the War Powers Resolution, in which there are certain reporting requirements and other prescribed relationships between the President and Congress as to how to use that power.[12]

As you all know, there have been many situations in which military troops have been used without any formal declaration of war. You, as judge advocates, are called on to help commanders carry out the President's orders and to make sure that the military's actions are consistent with the laws of war.

There are, of course, certain places where Congress itself has responsibilities and power in relationship to national security. For example, Congress has the power declare war. But in the history of the United States, we have only had eleven instances in which Congress has declared

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[11] U.S. CONST. art. II, § 1, cl. 8. Officers of the Armed Forces must take an oath to "support and defend the Constitution of the United States against all enemies, foreign and domestic" and to "bear true faith and allegiance to the same." 5 U.S.C. § 3331.
[12] 50 U.S.C. §§ 1549–1550.

war, and that was in regard to five different wars.[13] On the other hand, it has also adopted over forty authorizations for the use of military force. Every authorization is unique in its own depth and scope. And, of course, there have been many other instances where military force has been used at the direction of the President.

In 2001, Congress passed the Authorization for the Use Military Force,[14] which I am sure all of you have probably had a hand in applying in your various responsibilities over the years. The use of that authorization against the Taliban and al Qaeda empowered the President "to use all necessary and appropriate force against those nations, organizations, or persons that he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001."[15] Note that this authorization describes, but does not specifically name, the enemies who can be targeted, contrary to the way in which the declaration of war in December 1941 was rather specific in naming the nations that were to be the target of our military forces.[16]

That authorization, along with another one in 2002 that pertained to Iraq,[17] are the primary statutory authorities that we have been operating on since 9/11 against not only Taliban and al Qaeda, but also persons and forces associated with those organizations, and some even beyond that that had only tenuous connections with those two organizations. The Obama and Trump Administrations, following the original Bush Administration, claim that the 2001 authorization has been used to cover other opponents, including ISIS, as you are well aware.

Now, while the statute normally gives the President the authority to make the determination about which persons or organizations fall within the entities that are covered by the authorization, the courts have played a new and major role in defining the scope, most notably through the cases involved in the Guantanamo detainees' habeas corpus litigation. This has

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[13] JENNIFER K. ELSEA & MATTHEW C. WEED, CONG. RSCH. SERV., RL31133, DECLARATIONS OF WAR AND AUTHORIZATIONS FOR THE USE OF MILITARY FORCE: HISTORICAL BACKGROUND AND LEGAL IMPLICATIONS 1 (2014).
[14] Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).
[15] *Id.* § 2(a).
[16] *Compare id.*, *with* S.J. Res. 116, 77th Cong. (1941), *and* S.J. Res. 119, 77th Cong. (1941), *and* S.J. Res. 120, 77th Cong. (1941).
[17] Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498.

been a whole new step for the court to become involved in national defense issues.

As some have noted, rarely in the history of warfare, and certainly not in U.S. history, have prisoners of war been able to challenge their military detention in court. It would have been unheard of, for example, back in World War II, and I am one of the few in the room here that can remember that rather clearly. For example, it would have been unthinkable for the 400,000 German prisoners of war held in the United States in World War II to be able to challenge their detention in court. And where there were challenges in court to our national security policies, they were often dismissed rather rapidly, as I will discuss in looking at the Supreme Court's landmark World War II-era decisions. One was *Ex parte Quirin*;[18] the other was *Johnson v. Eisentrager*.[19] Both illustrate know the practice of deferring to the president was followed in regard to detainee policy.

In *Ex parte Quirin*, the Supreme Court unanimously determined that the President had the authority to try by military commissions eight German saboteurs and deny them a trial in the Federal courts.[20] You remember that they were the men who came up in a submarine off of Long Island and were to carry out various acts of sabotage and espionage within the United States.

In *Johnson v. Eisentrager*, the Supreme Court was confronted with the claims of twenty-one Germans who were being held at the Landsberg prison, which was an American military facility located in the American zone of occupation in postwar Germany.[21] These men had been captured in China, and an American military commission sitting there had convicted them of war crimes involving collaboration with the Japanese after Germany's surrender. The Germans claimed that their detentions violated the Constitution and international law, as they sought a writ of habeas corpus. The case was ultimately sent to the Supreme Court.

Writing for the Court, Justice Jackson gave the decision in that case, and I might mention that he was very active in this particular field. He had actually taken leave from the Supreme Court to serve as the prosecutor for the Nuremberg trials of leaders of the Nazi and Axis powers for war

[18] *Ex parte* Quirin, 317 U.S. 1 (1942).
[19] Johnson v. Eisentrager, 339 U.S. 763 (1950).
[20] *Quirin*, 317 U.S. at 1.
[21] *Eisentrager*, 339 U.S. at 766.

crimes.[22] Having returned to the Court, he wrote that American courts lacked habeas jurisdiction, writing: "We are cited to no instance where a court, in this or any other country where the writ is known, has issued it on behalf of an alien enemy who, at no relevant time and in no stage of his captivity, has been within its territorial jurisdiction."[23]

This was the case in that particular situation. And he went on to write that nothing in the text of the Constitution extends such a right, nor does anything in our statutes. It was through these two cases that the Supreme Court affirmed the President's broad powers to detain enemy combatants for the duration of the conflict when acting pursuant to a declaration of war. The ruling denied the detainees the right to challenge their detention in Federal court. Wartime detention of enemy combatants was not a matter for judicial interference.

But that all changed after 9/11. The Court has become actively involved in wartime detention decisions, and I have no doubt that what they have done has been set forth in the cases that you have studied in your various courses. Through a succession of decisions—*Hamdi v. Rumsfeld*,[24] *Rasul v. Bush*,[25] *Hamdan v. Rumsfeld*,[26] and *Boumediene v. Bush*[27]—the Supreme Court has interpreted that the 2001 authorization and the law of war constrains, rather than supports, the President's power. Professor Jack Goldsmith at Harvard Law School has done a lot of writing on the subject.[28] He served in the DOJ during President George W. Bush's term and handled much of the initial legal actions on the Iraq War. He said that the courts engaged the President during wartime like never before and issued decisions that narrowed presidential power in unprecedented ways. In my opinion, each of the decisions would have come out differently if the Court had exercised its traditional deference to the political branches, interpreted the statutes as they were actually written, and read history as it is, not as the Court wished it were.

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[22] *See generally* Symposium, *The International Military Tribunal at Nuremberg: Examining Its Legacy Seventy-Five Years Later*, 229 MIL. L. REV. 155 (2021) (discussing Justice Jackson and his role in the International Military Tribunal).
[23] *Eisentrager*, 339 U.S. at 768.
[24] Hamdi v. Rumsfeld, 542 U.S. 507 (2004).
[25] Rasul v. Bush, 542 U.S. 466 (2004).
[26] Hamdan v. Rumsfeld, 548 U.S. 557 (2006).
[27] Boumediene v. Bush, 553 U.S. 723 (2008).
[28] *E.g.*, JACK GOLDSMITH, POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11 (2012).

Ray Randolph is a judge of the Court of Appeals for the District of Columbia, which is the appellate court that has been most involved in many of these cases, including the few that have proceeded to the Supreme Court. Judge Randolph once wrote, "[t]o interpret the Constitution in light of history, which is what originalism amounts to, you have to interpret history"[29]—in other words, what has gone before. "How well you perform the task of the historian will determine how accurately you interpret the Constitution."[30] In *Boumediene*, the issue was whether the statute depriving the Federal courts, judges, and justices of jurisdiction over Guantanamo habeas actions violated the suspension clause of the Constitution. "In *Boumediene*, the first question under the Suspension Clause was how far geographically the writ of habeas corpus reached in 1789."[31] In other words, as far as America was concerned, how far back does it go? And Judge Randolph wrote that decision for that court before the case was taken by the Supreme Court. He noted in a 2010 article that "Guantanamo is not now, and never has been, part of this country's sovereign territory."[32] And if Congress recognized that when it defined the United States to exclude Guantanamo Bay in the Detainee Treatment Act of 2005,[33] an analysis of the geographical scope of the writ should turn on the basis of our common law historical understanding.

The important issue was how far the scope of the writ of habeas corpus extends outside of the United States. As a means of deciding what the Constitution said about its use, particularly its use outside the territorial United States, Judge Randolph went all the way back into 1767 and 1773, to lectures at Oxford, England, and looked at what the view of the writ affected in the early days of our country.[34] He wrote that Lord Chief Justice Mansfield, in eighteenth century England, "delivered a lengthy opinion in 1759 stating that the Habeas Corpus Act of 1679, which Blackstone described as the bulwark of English liberties, provided that the writ of habeas corpus did not extend beyond England's sovereign territories."[35] Relying on that concept, along with other historical material, Judge Randolph held that the constitutional writ should not extend to

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[29] A. Raymond Randolph, *Originalism and History: The Case of* Boumediene v. Bush, 34 HARV. J.L. & PUB. POL'Y 89, 89 (2010).
[30] *Id.*
[31] *Id.* at 91.
[32] *Id.*
[33] Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2739.
[34] Randolph, *supra* note 29, at 91.
[35] *Id.* (citation omitted).

Guantanamo.[36] The case went from the Court of Appeals in the District of Columbia to the Supreme Court. There were many briefs filed, and none cited a single case, or any contemporary commentary, that indicated that habeas reached beyond the Nation's sovereign territory in 1789. Therefore, it should not reach beyond our sovereign territory today or apply to Guantanamo.

Nevertheless, the Supreme Court ruled that the writ of habeas corpus did extend to detainees in Guantanamo.[37] This opinion caused great concern, even among other justices of the Court. Justice Scalia dissented and, as you may have read various dissents of his, you know he often did not mince words. In this case, he wrote, "Today, for the first time in our Nation's history, the Court confers a constitutional right to habeas corpus on alien enemies detained abroad by our military forces in the course of an ongoing war."[38] He went on to write, "The writ of habeas corpus does not, and never has, run in favor of aliens abroad; the Suspension Clause thus has no application, and the Court's intervention in this military matter is entirely *ultra vires*."[39] Justice Scalia was so enraged by this decision that he said it represented an inflated sense of judicial supremacy. And he predicted dire results, even to the point of saying it would almost certainly cause more Americans to be killed.[40]

This type of judicial decision-making has continued to add to the uncertainty of military combat and the legal aspects surrounding it. What is clear, though, is that the cases that I mentioned before, *Rasul*, *Hamdi*, *Hamdan*, and *Boumediene*, have signaled the Supreme Court's departure from the doctrine of *Eisentrager*, where Justice Jackson himself, in his opinion, approved deference to the executive branch on matters relating to the conduct of war. And he did that because to do otherwise, he said, would hamper the war effort and bring aid and comfort to the enemy.[41]

Nevertheless, these cases control today. And they have created something of a morass of legal questions. These cases seem to ignore some of the practical implications of the use they made of habeas corpus and the way in which they are treating enemy aliens that have been captured. Other judges and scholars have commented on this. For example, Judge Janice

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[36] Boumediene v. Bush, 476 F.3d 981, 988–94, *rev'd*, 553 U.S. 723 (2008).
[37] *Boumediene*, 553 U.S. at 723.
[38] *Id.* at 826–27 (Scalia, J., dissenting).
[39] *Id.* at 827.
[40] *Id.* at 827–28.
[41] Johnson v. Eisentrager, 339 U.S. 763, 776 (1950).

Rogers Brown, recently retired from the D.C. Court of Appeals, talked about the practical consequences of having habeas corpus review in Guantanamo as it affects the battlefield. What she said is that the process at the tail end—that is, after they have been captured and moved to Guantanamo—is now impacting the front end because when you conduct combat operations, you now have to worry not just about protecting yourself and your buddies, not just about winning the war, winning the battle, accomplishing the mission, but now you have to start collecting evidence.

The habeas corpus idea has also been criticized by others. Another judge at that same court said it seems that the result "gives the military an incentive to avoid custody when possible."[42] Another scholar on this subject, Ben Wittes, recently picked up on that idea. In his book, *Detention and Denial*, he argues that the courts have now created an incentive system to kill rather than to capture.[43] And you can understand in many ways the military results of that kind of incentive. Whatever the result, the conduct of war and dealing with its aftermath will continue to require fresh thinking for those emerging problems that have been coming from the new doctrines that result from these very important decisions.

Let me turn to another serious issue that does face you and your colleagues and will perhaps be even more serious in terms of its potential impact in the future: this whole matter of the ICC. As you know, the United States has never become a party to that court, even though some Presidents thought that might be a good idea.[44] The opposition to the United States becoming involved is concern over the power that is given to the prosecutor and other aspects of the ICC, which are far different from those of courts we have in the United States or in most nations of the free world. And that is why the United States' leadership has wisely avoided becoming entangled in the ICC's web.

The Declaration of Independence tells us that legitimate governments derive their just powers from the consent of the governed. I mentioned that a little while ago in looking back to what the Founders had to say in 1787. What it means is that a legitimate legal system capable of administering criminal law and taking action that deals with the lives and liberty of the people on whom it is imposed have several requirements.

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[42] Doe v. Mattis, 928 F.3d 1, 42 (D.C. Cir. 2019) (Henderson, J., dissenting).
[43] *See generally* BENJAMIN WITTES, DETENTION AND DENIAL (2010).
[44] *E.g.*, JENNIFER K. ELSEA, CONG. RSCH. SERV., RL31495, U.S. POLICY REGARDING THE INTERNATIONAL CRIMINAL COURT (2006).

First, it must have a specific political body with authority to impact criminal laws. The ICC was established by treaty, to which the United States is not a party.[45] Also, any criminal law system has to have legislation or statutes or some written body of law that defines two things. First of all, jurisdiction and due process—what group of people does it encompass, and what is the process by which facts and law can be combined to make decisions? Second, it has to be able to define the specific conduct that is prohibited. Otherwise, there is no basis on which to judge people's actions or to determine whether those actions violate specific laws. Also, there must be some opportunity for appellate review.

As far as the United States is concerned, these crucial elements are lacking in the ICC. I do not believe there is anything worse for people authorized to use lethal force in combat, as Soldiers do, than having a vigorous and unfettered prosecutor roaming the world looking for work.

How to meet these various challenges that we have talked about today: the way in which the international community works, the new technologies, the way in which the courts have dealt with detainees and through that the prosecution of the war, and the ICC. These are the kinds of challenges that face the legal community, particularly the military legal community, now and in the future. They require careful analysis of existing law and doctrine, as well as a detailed exposition of battlefield situations and the problems that are created by these recent Court decisions and potential exigencies that I have discussed today.

I believe that Congress itself must assume a greater role to exercise its prerogatives under the Constitution, to at least clarify the policies of the United States and determine what the law should be in regard to its implementation. Now, it is true that Congress tried with the Detainee Treatment Act. They have also tried with the Military Commissions Act. But, unfortunately, they have been thwarted by the Court. I think they should continue to exercise legislative responsibility, using what the Court has said as initial guidance, but then fashion corrective legislation, which would solve the problems that I have mentioned. To do that requires considerable strategic thinking to develop imaginative and innovative legal answers to the emerging judicial questions.

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[45] Rome Statute of the International Criminal Court, 17 July 1998, U.N. Doc. A/CONF.183/9 (2002).

An example of imaginative thinking and action occurred while I was in the DOJ; there was a case in which Congress had acted during the 1980s. A statute for the first time provided extraterritorial jurisdiction for the United States if one of our citizens had been harmed overseas, which gave the military the authority to take action against those who had violated the rights and, in some cases, the lives of American citizens.

There was a particular case where terrorists had taken over a Royal Jordanian aircraft, kidnapped the passengers and crew, including some Americans, and blew up the airplane.[46] Through a series of informants, the Central Intelligence Agency was able to determine one of the major leaders of the particular plot against this aircraft was a man by the name of Fawaz Younis. The Federal Bureau of Investigation (FBI) was able to locate him, but how were they able to arrest him? They were particularly anxious to arrest him under the provisions of this new act so that it could be tested as a legal matter in the United States. It was different from trying to get action by the local governments in the nation where this occurred or to achieve justice overseas. The DOJ wanted to handle this not as a military action but as a civilian arrest and prosecution.

Instead, the military became involved, in cooperation with the legal authorities, but the DOJ and the FBI were the responsive authorities. When they found Younis, he had changed his criminal occupation. He was no longer a terrorist, but was now a drug dealer. They established communication with him through a confidential informant. They told Younis that there was a particular drug kingpin who had a yacht and was interested in making a major drug deal with Fawaz.[47] As a result, they were able to lure him out to this yacht which the FBI had rented. He came on board while the yacht was at sea off the territorial limits of the foreign country.

Younis was now on board the yacht, waiting to meet with the drug kingpin, but the drug kingpin happened to be the Hostage Rescue Team of the FBI. Under this new law, the terrorist leader was arrested by U.S. agents, but they had to make sure they could get the criminal to the United States without invading the sovereignty of any other country or raising some issue of international law that might preclude his proper conviction in the United States. They took him by a Navy boat and put him on an aircraft carrier, where there was a plane waiting for him and his captors. They took him

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[46] 101 CONG. REC. S4208–09 (daily ed. Mar. 15, 1989) (statement of Sen. Arlen Specter).
[47] *See id.* at S4208.

aboard the plane and flew directly to the United States. It was something like a thirteen-hour flight, and it required aerial refueling en route.

They were able to get Younis from an arrest on the high seas to Washington, D.C., without invading any other country. That precluded any attacks on the ultimate conviction for reasons relating to foreign jurisdiction. Ultimately, the terrorist was prosecuted, convicted, and sentenced to thirty years in prison.[48] He served sixteen of those thirty years and was then deported back to Lebanon. This was a classic example of imaginative and innovative thinking which involved good legal and operational cooperation. In this case, the DOJ, the Central Intelligence Agency, investigative officers, the FBI, and the United States Navy all worked together to achieve a good result.

To conclude, let me just say that military law is in uncertain times. That brings with it unprecedented responsibilities and challenges for both lawyers and operational commanders. I appreciate that at this particularly fine institution, The Judge Advocate General's Legal Center and School, you are doing the necessary research and strategic thinking. You are sharpening the skills that will enable the Army to meet those challenges that I mentioned, with integrity and with expertise. I recognize that your branch insignia, having the sword and the quill, represents the profession of arms and the profession of law with long and noble traditions. I certainly wish you well as you continue to bring honor to both of those professions.

Thank you.

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[48] United States v. Yunis, 924 F.3d 1086, 1090 (D.C. Cir. 1991), *aff'g* 681 F. Supp. 891 (D.D.C. 1988), *and* 681 F. Supp. 896 (D.D.C. 1988).