

## A FOUCAULDIAN CALL FOR THE ARCHAEOLOGICAL EXCAVATION OF DISCOURSE IN THE POST-*BOUMEDIENE* HABEAS LITIGATION

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*A critique does not consist in saying that things aren't good the way they are. It consists in seeing on what type of assumptions, of familiar notions, of established, unexamined ways of thinking accepted practices are based.<sup>†</sup>*

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<sup>†</sup> MICHEL FOUCAULT, *So Is It Important to Think?*, in *POWER* 456 (James D. Faubion ed., Robert Hurley trans., New Press 2000) (1994).

## INTRODUCTION

“On September 11, 2001 . . .”

When a sentence or a story begins with this familiar phrase, its boundaries and its ultimate conclusion are already clear. In the same way that “Once upon a time” immediately embeds the reader or listener in a world of fantasy and possibility, this opening phrase embeds her in a narrative and discourse of national security and terrorism that has emerged from that horrific day. Over nine years later, this discourse has stretched to almost every aspect of today’s society and enveloped innumerable people, institutions, words, and practices. The discourse has spanned two presidential elections and helped fuel a new President’s rise to the Oval Office based on a campaign of change. Within the judicial system, a spate of cases embedded in this discourse have forced the Supreme Court to address aspects of the Constitution and issues of international law that it has had little opportunity to address in the past as well as to reengage with the difficult issues of past wartime precedents.

This Note explores the impact that this discourse has had within the Judicial Branch. Using the terminology outlined by Michel Foucault in *The Archaeology of Knowledge*, this Note describes a troubling judicial perspective in the current Guantánamo habeas litigation and offers a solution. Jacques Derrida famously said, *il n’y a pas de hors-texte*, or “there is nothing outside of the text.”<sup>1</sup> The “text” of post-9/11 jurisprudence is not only the written language of judicial opinions, law reviews, and speeches; it is also the *practices* of speaking: the authority to speak, the referents of speech, and the exclusion of speech.

This Note argues that this text—the narrative, institutional practices, and rhetoric of 9/11—has formed what Foucault calls a “discursive formation,” a unified system of relationships, authority, and exclusion.<sup>2</sup> This post-9/11 discursive formation has actively and inconspicuously constructed a constrained judicial role in the ongoing Guantánamo habeas litigation. Although numerous politicians, democratic theorists, and constitutional scholars have debated the proper role of judges in these habeas cases, they have not examined the power of post-9/11 discourse to construct this role. Speaking from within this discursive formation, without recognizing its power to determine the permissible scope of meaning and the appropriate fields of reference, courts have not engaged the complexity that scholars have recognized.

Foucault’s discursive formation consists, at the most basic level, of an individual unit of discourse, traditionally translated as “statement” or “ut-

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<sup>1</sup> JACQUES DERRIDA, OF GRAMMATOLOGY 158 (Gayatri Chakravorty Spivak trans., corrected ed. 1998) (1967).

<sup>2</sup> See MICHEL FOUCAULT, THE ARCHAEOLOGY OF KNOWLEDGE 31–39 (A.M. Sheridan Smith trans., Random House 1972) (1969).

terance” in *The Archaeology of Knowledge*.<sup>3</sup> However, Foucault himself actually used a distinct term, *énoncé*, to ensure that readers did not conflate the concept with the traditional idea of a sentence or proposition,<sup>4</sup> and some commentators have recognized the difficulty of translating *énoncé* into English in a way that conveys its connection to discourse.<sup>5</sup> For the purposes of this Note, I will use the French *énoncé* in order to convey the unique concept so fundamental to Foucault’s insight. Within a discursive formation, certain *énoncés*—such as “war,” “national security,” and “unlawful enemy combatant” within the post-9/11 discourse—are treated as part of a single unity with a single origin. In the post-9/11 discursive formation, these concepts have been the unexamined foundation upon which the discourse rests. These *énoncés* have led to a widespread acceptance in the D.C. Circuit that it is not the “province of the judiciary to *draft* definitions.”<sup>6</sup> Recognizing the novelty and discontinuity of these terms embedded in the current discursive text, however, demonstrates the error of this proposition and the necessity for the judicial excavation of discourse.

Part I introduces the post-9/11 judicial discourse and argues that it has created a Foucauldian discursive formation. Part I first discusses the framing of 9/11 as the origin of a unified discourse and then considers the Supreme Court’s first attempt to wrestle with the question of whom the President may detain in *Hamdi v. Rumsfeld*.<sup>7</sup> Part I concludes by describing Foucault’s conception of a discursive formation and arguing that the post-9/11 discourse fits within this concept.

Part II describes the judicial discourse concerning the detention of enemy combatants that has followed the Supreme Court’s decision in *Boumediene v. Bush*.<sup>8</sup> These habeas proceedings are especially instructive as to the judicial role because they represent the historical means by which the Judicial Branch has balanced and checked executive power.<sup>9</sup> By contrasting the approaches to defining “enemy combatant” taken by the Fourth Circuit and the D.C. district and circuit courts, Part II demonstrates the power of discourse to constrain the judicial role.

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<sup>3</sup> See *id.* at 79–135.

<sup>4</sup> *Énoncé* is traditionally translated as “statement” in Foucault’s writings, to avoid any confusion with the English idea of a “sentence” or “proposition.” See *id.* at 90–91; *The Intellectual and Politics: Foucault and the Prison*, HIST. PRESENT, Spring 1986, at 1, 21 n.1 [hereinafter Deleuze Interview] (interviewing Gilles Deleuze).

<sup>5</sup> See, e.g., HUBERT L. DREYFUS & PAUL RABINOW, MICHEL FOUCAULT: BEYOND STRUCTURALISM AND HERMENEUTICS 44–48 (2d ed. 1983); ALAN SHERIDAN, MICHEL FOUCAULT: THE WILL TO TRUTH 99–100 (1980); Deleuze Interview, *supra* note 4, at 21 n.1.

<sup>6</sup> *Boumediene v. Bush*, 583 F. Supp. 2d 133, 134 (D.D.C. 2008).

<sup>7</sup> 542 U.S. 507 (2004).

<sup>8</sup> 553 U.S. 723 (2008).

<sup>9</sup> See *id.* at 797 (“Within the Constitution’s separation-of-powers structure, few exercises of judicial power are as legitimate or as necessary as the responsibility to hear challenges to the authority of the Executive to imprison a person.”).

Part III offers further explication of Foucault's insights into the operation of discursive formations and applies them to this habeas litigation. It explores each of the three "spaces" in Foucault's discursive theory that were identified by philosopher Gilles Deleuze—the collateral space, the correlative space, and the complementary space<sup>10</sup>—to demonstrate the effects of the post-9/11 discursive formation on judicial approaches. Finally, Part III argues that the judiciary has been speaking from within this discursive formation and allowing it to construct its judicial province without investigation.

Part IV advocates that judges, in determining the extent of the President's detention power, recognize Foucault's insight and conduct an archaeological excavation of the post-9/11 discourse. This endeavor consists first in excavating its presupposed unities embodied in *énoncés*. After doing so, judges must then examine the remnants and make "controlled decisions"<sup>11</sup> in order to construct basic principles. These principles will give notice to the political branches about the principles that should guide their decisions in the aftermath of 9/11. Perhaps more importantly, though, by conducting such an archaeological excavation, judges will make clear the "plinths,"<sup>12</sup> or foundations, upon which their decisions rest. In doing so, they will promote a dynamic dialogue and criticism about these issues that will sharpen and define the disagreements so that the Supreme Court will be able to see their full extent more clearly when making an ultimate decision. Although the insights of this Note may apply beyond the discourse relating to the detention of enemy combatants, this Note focuses solely on this discourse, exhibited principally in various habeas proceedings.

Whatever outcome these principles then dictate is a question for the individual judge. Without this archaeology, however, the text—the discursive formation—is constructing a judicial province that proscribes the drafting of definitions. This proscription, as Judge J. Harvie Wilkinson pointed out in *al-Marri v. Pucciarelli*,<sup>13</sup> prevents the Judicial Branch from giving notice to the political branches and restricts judicial dialogue about

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<sup>10</sup> GILLES DELEUZE, *FOUCAULT* 4–9 (Seán Hand ed. & trans., 1988) (1986).

<sup>11</sup> *FOUCAULT*, *supra* note 2, at 29.

<sup>12</sup> Deleuze uses this metaphor to describe the foundation of meaning in Foucauldian theory. DELEUZE, *supra* note 10, at 16. "Plinth" refers to the square stone that supports a column or statue. *NEW OXFORD AMERICAN DICTIONARY* 1344 (3d ed. 2010). More importantly, the plinth is traditionally the fundamental support for the column or statue. *See OXFORD ENGLISH DICTIONARY* (online ed. 2011), <http://www.oed.com/view/Entry/145854?redirectedFrom=plinth#> (quoting a 1611 dictionary of French and English as defining "plinthe" as "a flat, and square peece of Masonrie, &c., placed sometimes above, sometimes below, the footstall (*but euer the first of the Basis*) of a pillar." (emphasis added)). Thus, in seeking to unearth the plinths of discourse as this Note advocates, a judge will be seeking to unearth the ultimate foundational ideas that support the *énoncés* on which many judges up to this point have relied.

<sup>13</sup> *See* 534 F.3d 213, 295–303 (4th Cir. 2008) (en banc) (Wilkinson, J., concurring in part and dissenting in part), *vacated as moot sub nom.* *al-Marri v. Spagone*, 129 S. Ct. 1545 (2009) (mem.).

fundamental principles. Part IV concludes by contrasting the two opinions in *Boumediene* by Justices Kennedy and Scalia. While Justice Scalia relied on presupposed unities and refused to excavate the *énoncés* on which his reasoning relied, Justice Kennedy implicitly understood Foucault's insight into the necessity for excavation and archaeology. Justice Kennedy's archaeological excavation of sovereignty and the extraterritorial reach of the writ of habeas corpus in *Boumediene* represents the same approach to the judicial role that Judge Wilkinson displayed in *al-Marri* when determining the definition of "enemy combatants" and the scope of the President's authority to detain.<sup>14</sup> Although the D.C. district court expressly rejected Judge Wilkinson's judicial approach and the D.C. Circuit implicitly declined to adopt it, this Note argues that these judges only did so because they failed to realize the constructive power of discourse. Foucault's insights make apparent the power of this post-9/11 discourse and demonstrate the need for the archaeological excavation this Note advocates.

### I. THE POST-9/11 DISCURSIVE FORMATION

The simple words "September 11th" stand for the proposition, at least in the collective American psyche, that the world has changed.<sup>15</sup> Philosophers have called 9/11 an unnamable event, known only by the date because its terror and trauma exist beyond the ability of language to provide a name.<sup>16</sup> September 11th is the event that everyone identifies as a new beginning, the ultimate reference for almost everything that has followed in American foreign policy and the origin of the "Global War on Terror" (GWOT).<sup>17</sup> Although history is constantly subject to reexamination and revision, public memory has rigidified 9/11 into an iconic form: "an instant memory"<sup>18</sup> that is the fundamental reference point for anything relating to national security or foreign policy. A post-9/11 discourse exists because September 11th is an unmoving foundation, a fixed origin that relates to all aspects of the discursive formation that has resulted.

This Part first explores the discourse about war and detention following 9/11. Next, it illustrates the Supreme Court's reliance in *Hamdi* on historical conceptions of national security as well as its emphasis on

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<sup>14</sup> See *id.*

<sup>15</sup> See Daniel R. Williams, *After the Gold Rush—Part I: Hamdi, 9/11, and the Dark Side of the Enlightenment*, 112 PENN ST. L. REV. 341, 398 (2007).

<sup>16</sup> GIOVANNA BORRADORI, *PHILOSOPHY IN A TIME OF TERROR: DIALOGUES WITH JÜRGEN HABERMAS AND JACQUES DERRIDA* 147 (2003).

<sup>17</sup> See Williams, *supra* note 15, at 401–02 ("So thick is the swirl of rhetoric about 9/11 as instantiating something new, something *sui generis*, something that is decidedly *not* part of some larger narrative, seeing 9/11 from within the United States as a fruition of some trajectory within the currents of our own culture can only seem insane, if not traitorous.").

<sup>18</sup> John Ellis van Courtland Moon, *The Death of Distinctions: From 9/11 to Abu Ghraib*, POL. & LIFE SCI., Sept. 2004, at 2, 10.

“necessity” in its post-9/11 discourse. Finally, utilizing Foucault’s insights into discourse, this Part argues that 9/11 functions as the origin of a “discursive formation,” an entity composed of the interrelated text, authorities, and practices within a discourse.<sup>19</sup>

*A. The Beginnings of the Debate over Presidential Power*

Immediately after the attacks, President Bush and Congress worked together to craft legislative authorization for the use of force against the perpetrators of 9/11. These negotiations resulted in the Authorization for the Use of Military Force (AUMF), which empowered the President to use

all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks . . . , or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.<sup>20</sup>

Initially, the President wanted the authority to “deter and pre-empt any future acts of terrorism or aggression against the United States,” but Congress insisted that the legislation only authorize force against those connected to the 9/11 attacks.<sup>21</sup>

Based on this authorization to use “all necessary and appropriate force” and the President’s inherent powers as Commander in Chief,<sup>22</sup> the Administration concluded that it was “necessary” as part of this war on terror “for individuals subject to this order” to be tried by military tribunals.<sup>23</sup> The Administration turned to the World War II case *Ex parte Quirin*<sup>24</sup> to create a label for individuals subject to detention: “unlawful enemy combatants.” In *Quirin*, the Supreme Court determined that a group of German saboteurs,

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<sup>19</sup> See FOUCAULT, *supra* note 2, at 31–39.

<sup>20</sup> Authorization for the Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001) (codified at 50 U.S.C. § 1541 note (2006)). On September 14, 2001, both houses of Congress approved the AUMF, and on September 18, 2001, President Bush signed it into law. Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2050 n.4 (2005).

<sup>21</sup> See David Abramowitz, *The President, the Congress, and Use of Force: Legal and Political Considerations in Authorizing Use of Force Against International Terrorism*, 43 HARV. INT’L L.J. 71, 73 (2002) (quoting Draft Joint Resolution Authorizing the Use of Force).

<sup>22</sup> U.S. CONST. art. II, § 2.

<sup>23</sup> Detention, Treatment, and Trial of Certain Non-citizens in the War Against Terrorism, 66 Fed. Reg. 57,833, 57,833 (Nov. 16, 2001). This document defined an “individual subject to this order” as any individual for whom there was “reason to believe” that he (1) was a present or past member of al Qaeda, (2) had “engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefor” that “caused, threaten[ed] to cause, or ha[d] as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy,” or (3) “knowingly harbored” such an individual, provided that detention was “in the interest of the United States.” *Id.* at 57,834.

<sup>24</sup> 317 U.S. 1, 45 (1942).

including one who claimed American citizenship, who had surreptitiously entered the United States to detonate explosives, were “unlawful enemy belligerents” according to the laws of war.<sup>25</sup> The Court drew a distinction between those members of an enemy nation’s armed forces who follow the laws of war and those who do not, offering numerous examples of espionage and sabotage to make the distinction clear.<sup>26</sup> In the *Quirin* opinion, the “lawful” aspect of “unlawful” referred to the laws of war governing disputes between two nations, and the terms “combatant” or “belligerent” referred to individuals under the direction of the German army. Using the constructed label “unlawful enemy combatant” after 9/11 to refer to terrorism suspects, then, provided the advantage of a foundation in earlier U.S. case law,<sup>27</sup> an association with the discourse of war, and a broadly applicable term without much definition beyond the unique facts of *Quirin*.

A 2002 letter written by President Bush’s General Counsel to the Department of Defense offered one of the first definitions of the post-9/11 unlawful enemy combatant: “an individual who, under the laws and customs of war, may be detained for the duration of an armed conflict.”<sup>28</sup> The definition did not define exactly who could be considered an unlawful enemy combatant but only provided that the military had authority to detain individuals who were subject to detention based on the laws and customs of war. According to the letter, the authority for this power derived from two distinct places: (1) the power of a nation in war to detain combatants for the duration of hostilities and (2) the language in *Quirin* establishing that “[c]itizens who associate themselves with the military arm of the enemy government, and . . . enter this country bent on hostile acts are enemy belligerents within the meaning of the Hague Convention and the law of war.”<sup>29</sup> Under this framework, once a military officer or administration official de-

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<sup>25</sup> *Id.* at 20–31.

<sup>26</sup> The Court reasoned: “By universal agreement and practice, the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants.” *Id.* at 30–31 (footnote omitted). Speaking of unlawful enemy combatants, the Court offered “[t]he spy who secretly and without uniform passes the military lines of a belligerent in time of war, seeking to gather military information and communicate it to the enemy, or an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property” as “familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of war, but to be offenders against the law of war subject to trial and punishment by military tribunals.” *Id.* at 31. The Court also considered examples of spies before the adoption of the Constitution and during the Mexican and Civil Wars. *Id.* at 31 n.9, 32 n.10.

<sup>27</sup> See Allison M. Danner, *Defining Unlawful Enemy Combatants: A Centripetal Story*, 43 TEX. INT’L L.J. 1, 3 (2007).

<sup>28</sup> LOUIS FISHER, *MILITARY TRIBUNALS AND PRESIDENTIAL POWER: AMERICAN REVOLUTION TO THE WAR ON TERRORISM* 221 (2005) (quoting Letter from William J. Haynes II, Gen. Counsel, Dep’t of Def., to Senator Carl Levin 1–2 (Nov. 26, 2002) [hereinafter Haynes Letter]).

<sup>29</sup> *Id.* at 222 (quoting Haynes Letter, *supra* note 28, at 1–2 (quoting *Quirin*, 317 U.S. at 37–38)); *accord* Ghrebi v. Obama, 609 F. Supp. 2d 43, 47 (D.D.C. 2009) (acknowledging Haynes’s letter and the *Quirin* language).

terminated that an individual should be designated an enemy combatant, this determination would be sufficient to ensure the label's validity.<sup>30</sup> The judiciary, then, would have no place in the determination.

The Supreme Court rejected this contention in *Hamdi v. Rumsfeld* and insisted that due process dictates that an enemy combatant, at least a U.S. citizen, must receive "notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker."<sup>31</sup> The *Hamdi* Court, in a plurality opinion by Justice O'Connor, specifically noted that it was only answering the "narrow question" of whether the President had the authority under the AUMF to detain an individual who was part of the Taliban forces and had fought against the United States forces on a battlefield.<sup>32</sup> Justice O'Connor later reemphasized the narrowness of the plurality's holding, finding that "[b]ecause detention to prevent a combatant's return to the battlefield is a fundamental incident of waging war, . . . Congress [through the AUMF] has clearly and unmistakably authorized detention in the *narrow circumstances* considered here."<sup>33</sup> However, the Court did note that "[i]f the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, th[e] understanding [that the AUMF allows indefinite detention] may unravel."<sup>34</sup> Despite this clear statement that the analogies to past wars and the historical law of war may "unravel" at some point, most judges after *Hamdi* have declined to examine the "practical circumstances" of the GWOT. Judge Wilkinson of the Fourth Circuit engaged in such an endeavor after the *Boumediene* decision,<sup>35</sup> but the judges of the D.C. federal courts declined to follow his example.<sup>36</sup>

The *Hamdi* Court expressly declined to outline the contours of the unlawful enemy combatant category,<sup>37</sup> relying on the lower courts to attempt the task first and provide some common law adjudication of the issue. The Court also did not elaborate on whether different purposes for detention, other than "to prevent a combatant's return to the battlefield," would also be

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<sup>30</sup> See *Hamdi v. Rumsfeld*, 542 U.S. 507, 537 (2004) (plurality opinion) (recognizing that under the Bush Administration's classification procedures, the "Executive's factual assertions go wholly unchallenged or are simply presumed correct without any opportunity for the alleged combatant to demonstrate otherwise").

<sup>31</sup> *Id.* at 533.

<sup>32</sup> See *id.* at 516.

<sup>33</sup> *Id.* at 519 (emphasis added).

<sup>34</sup> *Id.* at 521.

<sup>35</sup> See *al-Marri v. Pucciarelli*, 534 F.3d 213, 293–97 (4th Cir. 2008) (Wilkinson, J., concurring in part and dissenting in part), *vacated as moot sub nom.* *al-Marri v. Spagone*, 129 S. Ct. 1545 (2009) (mem.).

<sup>36</sup> See *infra* Part III.

<sup>37</sup> See *Hamdi*, 542 U.S. at 516; see also Danner, *supra* note 27, at 4 (noting that the *Hamdi* plurality opinion declined to provide a widely applicable definition of the term).



“fundamental incident[s] of waging war.”<sup>38</sup> In the current habeas litigation, however, the lower courts have failed to address the principles that should determine who is an enemy combatant, instead claiming that it is not the province of the judiciary to draft such a definition, and they have never addressed whether other types of detention are also “fundamental” to war. Instead they have relied on unquestioned analogies and unexplored assumptions that the post-9/11 habeas cases exist within the traditional confines of war.

*B. The Supreme Court’s Post-9/11 Discourse: “Necessity,” “National Security,” and “War” in Hamdi v. Rumsfeld*

The Supreme Court has only addressed the merits of the detention of unlawful enemy combatants one time: in *Hamdi*. The various opinions of the *Hamdi* Court relied on foundational ideas like “national security,” “foreign relations,” and “war” while also emphasizing the radical break of 9/11 and the “necessity” it has created. The foundational terms, or, as I will argue, self-legitimizing *énoncés*, constitute the basic atoms of *Hamdi*’s reasoning and the surrounding discourse. The long history of these terms within the larger discourse concerning the judicial role allows them to dictate institutional power and determine the meaning of the discursive text. At the same time, there is a clear recognition that 9/11 has ushered in a new era disconnected from past realities.

Justice O’Connor’s plurality opinion in *Hamdi* began with the phrase “At this difficult time in our Nation’s history”<sup>39</sup> and then opened its recital of the facts with the familiar “On September 11, 2001 . . .”<sup>40</sup> As Professor Daniel Williams notes, opening the opinion by invoking the idea of a “difficult time” “establishes the mood of, the backdrop to, the opinion’s analysis” and “foreshadows that some departure from a legal norm is to take place and will need to be justified through law.”<sup>41</sup> As Williams persuasively argues, the underlying meaning of this opening and the backdrop of the *Hamdi* opinion as a whole is one of necessity and national security.<sup>42</sup> One can also view this as evidence that the Court perceived 9/11 as an origin that marks a departure into a new discourse.

Continuing, Justice O’Connor acknowledged that the Court “recognize[s] that the national security underpinnings of the ‘war on terror,’ although *crucially important*, are broad and malleable.”<sup>43</sup> The plurality opinion restricted itself on the detention issue to deciding the “narrow ques-

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<sup>38</sup> *Hamdi*, 542 U.S. at 519.

<sup>39</sup> *Id.* at 509.

<sup>40</sup> *Id.* at 510.

<sup>41</sup> Williams, *supra* note 15, at 379 (emphasis omitted).

<sup>42</sup> *See id.* at 379–80.

<sup>43</sup> *Hamdi*, 542 U.S. at 520 (emphasis added); *see also* Williams, *supra* note 15, at 416 (offering an analysis of this statement in the *Hamdi* plurality opinion).

tion” of whether the President had the authority to detain “an individual who . . . was part of or supporting forces hostile to the United States or coalition partners in Afghanistan *and who engaged in an armed conflict* against the United States there,”<sup>44</sup> clearly limiting the decision to the traditional idea that an individual participating in hostilities, even a civilian, becomes a combatant by virtue of this participation.<sup>45</sup>

When addressing the level of process due to enemy combatants, Justice O’Connor recognized the “weighty and sensitive governmental interests”<sup>46</sup> in keeping combatants from returning to battle and claimed that “[w]ithout doubt, our Constitution recognizes that core strategic matters of warmaking” should be left to the “politically accountable” branches.<sup>47</sup> Although Justice O’Connor ruled against the Government on Hamdi’s due process claim, creating a new framework for challenging detention,<sup>48</sup> she made sure to emphasize the traditional deference due to the Executive throughout her opinion and upheld the power of the Executive to detain unlawful enemy combatants under the AUMF.

In support of this deference, Justice O’Connor cited *Department of the Navy v. Egan*,<sup>49</sup> which “not[ed] the reluctance of the courts ‘to intrude upon the authority of the Executive in military and national security affairs.’”<sup>50</sup>

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<sup>44</sup> *Hamdi*, 542 U.S. at 516 (emphasis added) (internal quotation marks omitted).

<sup>45</sup> Under the traditional law of war, when civilians directly participate in hostilities, they become combatants subject to the same treatment as members of an enemy armed force. See NILS MELZER, INT’L COMM. OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 20–26 (2009). Other authorities discuss further what “active part in the hostilities” has meant historically and internationally in this context. See HCJ 769/02 Pub. Comm. Against Torture v. Israel [2006](2) IsrLR 459, 497–99 (stating that a civilian who “supports the hostilities against the armed forces in a *general* matter,” who “sells food or medicines to unlawful combatants,” or who “helps the unlawful combatants with a general strategic analysis and grants them general logistic support, including financial support” does not directly participate in hostilities (emphasis added)); U.S. Dep’t of State, Letter of Submittal (July 13, 2000), in PROTOCOLS TO THE CONVENTION ON THE RIGHTS OF THE CHILD, S. TREATY DOC. No. 106-37, at V, VII (2000) (“The United States understands the phrase ‘direct part in hostilities’ to mean immediate and actual action on the battlefield likely to cause harm to the enemy because there is a direct [causal] relationship between the activity engaged in and the harm done to the enemy.”); Inter-Am. Comm’n on Human Rights, Third Report on Human Rights in Colombia, ch. IV.C.2.d, ¶¶ 53 & 56 (1999), <http://www.cidh.org/countryrep/colom99en/chapter.4a.htm> (“[C]ivilians whose activities merely support the adverse party’s war or military effort or otherwise only indirectly participate in hostilities cannot on these grounds alone be considered combatants. This is because indirect participation, such as selling goods to one or more of the armed parties, expressing sympathy for the cause of one of the parties or, even more clearly, failing to act to prevent an incursion by one of the armed parties, does not involve acts of violence which pose an immediate threat of actual harm to the adverse party.”).

<sup>46</sup> *Hamdi*, 542 U.S. at 531.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 528–35 (applying the balancing test from *Mathews v. Eldridge*, 424 U.S. 319 (1976), to Guantánamo habeas cases).

<sup>49</sup> 484 U.S. 518 (1988).

<sup>50</sup> *Hamdi*, 542 U.S. at 531 (quoting *Egan*, 484 U.S. at 530).

She also cited *Youngstown Sheet & Tube Co. v. Sawyer*<sup>51</sup> for the proposition that military commanders have “broad powers” when “engaged in day-to-day fighting in a theater of war.”<sup>52</sup> These two historical references attempted immediately to establish the role of the judiciary in the case by simple analogy. However, Justice O’Connor did not investigate *why* courts were reluctant to “intrude upon the authority of the Executive” in *Egan* and never examined *what* about the Korean War context of *Youngstown* necessitated broad executive power. In many ways, then, her opinion is a paradox. If 9/11 has put our country into a “difficult time” and mandated new approaches, then reliance on historical examples with little relation to the issue at hand would seem disingenuous. Instead, a more searching excavation of the relationships among these historical examples and of the importance of foundational ideas such as “national security” is necessary.

The other opinions in *Hamdi* also focused on “national security” and “war.” In his dissent, Justice Scalia framed the “difficult time” arising out of 9/11 in his opening paragraph: “This case brings into conflict the competing demands of national security and our citizens’ constitutional right to personal liberty.”<sup>53</sup> Similarly, Justice Thomas, in his dissent, criticized the plurality for “failing adequately to consider basic principles of the constitutional structure as it relates to national security and foreign affairs.”<sup>54</sup> Justice Thomas plainly stated that the plurality erred in conducting a balancing test related to the government’s “war powers” and that it “utterly fail[ed]” to take into account the government’s “compelling interests” and the Court’s own “inability” to weigh competing concerns during wartime.<sup>55</sup>

Thus, although the various Justices in *Hamdi* disagreed vehemently on the proper approach to dealing with the post-9/11 unlawful enemy combatants and the proper separation of powers, all of them made use of preexisting, self-legitimizing unities—including war, national security, governmental interests—as what Foucault would call the “tranquil locus”<sup>56</sup> of their opinions. No Justice questioned whether “national security” had the same intrinsic meaning in this context as it had in past historical contexts. The Justices did not question exactly what relationships, what power dynamics, or what exclusions *énoncés* like “national security” or “foreign affairs” entailed but instead relied on an unmoving, general understanding of the terms. Moreover, the *Hamdi* plurality took the same approach with the concept, or *énoncé*, of “war.” Despite the fact that the GWOT is not a

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<sup>51</sup> 343 U.S. 579 (1952).

<sup>52</sup> *Hamdi*, 542 U.S. at 531 (quoting *Youngstown*, 343 U.S. at 587).

<sup>53</sup> *Id.* at 554 (Scalia, J., dissenting).

<sup>54</sup> *Id.* at 579 (Thomas, J., dissenting).

<sup>55</sup> *Id.*

<sup>56</sup> FOUCAULT, *supra* note 2, at 26.

typical war,<sup>57</sup> the Court utilized the analogy to traditional war without probing its definition and inherent relations within this specific discourse. Justice O'Connor cited *Youngstown*, arguably the most famous constitutional case on the President's war power, but as this Note argues in Part II, "war" as used in the Korean War context of *Youngstown* and "war" after 9/11 may not have the same inherent meaning because they are situated in different discourses. The two "wars" are unified only as the same word, or "syntagm."<sup>58</sup> Using Foucault's insight into discourse, this Note argues that the meaning of "war," like other *énoncés*, is constructed by the various aspects of the discourse in which it is situated, including the power relationships that control who defines the word and the inherent historical and linguistic relationships the word entails. "War" today exists as part of a cohesive post-9/11 discourse that has formed what Foucault calls a "discursive formation."

### C. Post-9/11 Discourse as a Discursive Formation

An origin is a single point of reference, an ultimate beginning that frames an entire discourse.<sup>59</sup> The concept of an "origin" presupposes links of causality and continuity, and "masks both the radical discontinuity of 'emergences' . . . and the discordances separating different series of discourse or practice."<sup>60</sup> While there are many propositions and ideas within a discourse that are in fact new emergences, irreducible to any preexisting formulations, there is only a single origin.<sup>61</sup> In the aftermath of 9/11, a discourse has emerged that traces all causality back to that tragic day. The pa-

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<sup>57</sup> See, e.g., Bruce Ackerman, *This Is Not a War*, 113 YALE L.J. 1871, 1871 (2004) (discussing President Bush's 2004 State of the Union address in which the President said, "I know that some people question if America is really in a war at all"); *id.* at 1872 ("To be sure, the war on terrorism isn't as obvious a rhetorical stretch as the war on poverty." (emphasis added)); Joan Fitzpatrick, *Jurisdiction of Military Commissions and the Ambiguous War on Terrorism*, 96 AM. J. INT'L L. 345, 346-47 (2002) (describing the post-9/11 "war" as "metaphorical" because a state of war cannot exist between the United States and al Qaeda under international ideas of warfare); Jordan J. Paust, *Responding Lawfully to al Qaeda*, 56 CATH. U. L. REV. 759, 760-61 (2007) (arguing that the United States cannot, under internationally accepted definitions of war or armed conflicts, be at war with al Qaeda); *cf.* Williams, *supra* note 15, at 398 ("It would take a near Herculean effort, a sustained conscientious commitment to detach oneself from the incessant chatter of our post-9/11 world about the so-called 'war on terror,' to think that this 'difficult time' might mean something different . . .").

<sup>58</sup> A "syntagm" or "syntagma" is simply a linguistic unit, a collection of linguistic signs, and is used to connote the actual letters or words without referencing the underlying meaning of the word in any way. See NEW OXFORD AMERICAN DICTIONARY, *supra* note 12, at 1762. Its plural is "syntagmata." *Id.* It is necessary to use this linguistic term to differentiate between the *énoncé* "war," which includes its myriad relations to discourse, and the syntagm "war," which is simply the three-letter word itself, divorced from any relationship to discourse and, thus, divorced from meaning itself.

<sup>59</sup> ROGER CHARTIER, ON THE EDGE OF THE CLIFF: HISTORY, LANGUAGE, AND PRACTICES 54 (Lydia G. Cochrane trans., 1997).

<sup>60</sup> *Id.*

<sup>61</sup> See *id.*

radox that is the heart of Foucault's insight, which this Note discusses more fully in Part II, is that the creation of an origin and a discursive formation allows self-legitimizing, historical ideas to exist within the discourse as basic, unexamined atoms, or *énoncés*, of the discourse. Everything within the discourse relates to this singular origin, but this relation disguises the radical discontinuity between historical concepts and the current discourse. These inherent relationships have gone unexcavated.

1. *Post-9/11 Discourse.*—Nine days after the attacks of 9/11, President Bush addressed Congress, saying, “Our enemy is a radical network of terrorists, and every government that supports them. Our war on terror begins with al Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped, and defeated.”<sup>62</sup> In defining the United States' national security strategy, Administration officials used similar language: “The United States of America is fighting a war against terrorists of global reach. The enemy is not a single political regime or person or religion or ideology. The enemy is terrorism . . . .”<sup>63</sup> Later, as the Administration campaigned for the war in Iraq, President Bush said, “We're at war. Iraq is part of the war on terror. It is not the war on terror; it is a theater in the war on terror.”<sup>64</sup> After being reelected, President Bush called Iraq the “latest battlefield” in the war on terror and continued this theme:

The troops here and across the world are fighting a global war on terror. The war reached our shores on September 11, 2001. . . . After September 11, 2001, I told the American people that the road ahead would be difficult and that we would prevail. Well, it has been difficult and we are prevailing.<sup>65</sup>

The narratives of both the initiation of the GWOT after 9/11 and the later Iraq war were woven around the ideology of freedom and Western ideals,<sup>66</sup>

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<sup>62</sup> President George W. Bush, Address to a Joint Session of Congress Following 9/11 Attacks (Sept. 20, 2001), <http://www.americanrhetoric.com/speeches/gwbush911jointsessionspeech.htm>.

<sup>63</sup> WHITE HOUSE, NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA (2002), *reprinted in* AFTER THE WAR IN IRAQ: DEFINING THE NEW STRATEGIC BALANCE 167, 176 (Shai Feldman ed., 2003).

<sup>64</sup> Moon, *supra* note 18, at 3 (quoting President George W. Bush at a press conference on April 13, 2004).

<sup>65</sup> *George W. Bush Delivers Remarks to the Nation About Iraq*, CQ TRANSCRIPTIONS, June 28, 2005 [hereinafter Bush, Remarks to the Nation], *available at* 6/29/05 emediapt 00:39:44 (Westlaw).

<sup>66</sup> See Williams, *supra* note 15, at 349–50 (“[F]ormer Assistant Attorney General Viet D. Dinh claimed that in our fight against terrorism, ‘the tradeoff between security and liberty is a false choice’ because our pursuit of security is defined by a single motivation, the creation of a secure space for liberty to thrive.” (quoting Viet D. Dinh, Harold Leventhal Talk: Ordered Liberty in the Age of International Terrorism (June 7, 2002), *available at* <http://www.bancroftassociates.net/docLeventhalTalk7-7-02.pdf>)); Bush, Remarks to the Nation, *supra* note 65 (“The terrorists who attacked us and the terrorists we face murder in the name of a totalitarian ideology that hates freedom, rejects tolerance and despises all dissent. Their aim is to remake the Middle East in their own grim image of tyranny and oppression by toppling governments, by driving us out of the region and by exporting

against the “single enemy, terrorism,”<sup>67</sup> thus neatly connecting it all to the origin of 9/11.

Since taking office, President Obama has emphasized 9/11 as well, in part to support a heightened war effort in Afghanistan. In his December 2009 speech at West Point announcing that he would send 30,000 more troops to Afghanistan, President Obama continually referenced the origin of 9/11, noting near the beginning of the speech: “We did not ask for this fight. On September 11, 2001, 19 men hijacked four airplanes and used them to murder nearly 3,000 people.”<sup>68</sup> In his conclusion, he returned to this rhetorical theme: “It’s easy to forget that when this war began, we were united—bound together by the fresh memory of a horrific attack, and by the determination to defend our homeland and the values we hold dear. . . . America—we are passing through a time of great trial.”<sup>69</sup> Clearly, this “time of great trial” began on 9/11, and the unity of that day is a continual reference point for all subsequent military and foreign policy decisions.

2. *Foucault’s Idea of Discourse.*—“Discourse” has traditionally been a linguistic term, denoting a group of statements or dialogues that relate to one another in some way.<sup>70</sup> However, as Professor Stuart Hall points out, Foucault defined discourse as

a group of statements which provide a language for talking about—i.e. a way of representing—a particular kind of knowledge about a topic. . . . Discourse is about the production of knowledge through language. But . . . [s]ince all social practices entail *meaning*, all practices have a discursive aspect. So discourse enters into and influences all social practices.<sup>71</sup>

As Foucault recognized, discourse “constructs the topic” and bridges—or rejects—the traditional divide between speech and practice, between language and conduct.<sup>72</sup> Thus, Foucault was more interested in the referential space (*référentiel*) than in a fixed, permanent object to which a word ostens-

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terror. To achieve these aims, they have continued to kill: in Madrid, Istanbul, Jakarta, Casablanca, Riyadh, Bali and elsewhere. The terrorists believe that free societies are essentially corrupt and decadent and, with a few hard blows, they can force us to retreat. They are mistaken.”).

<sup>67</sup> Moon, *supra* note 18, at 3.

<sup>68</sup> President Barack Obama, Address to the Nation on the Way Forward in Afghanistan and Pakistan (Dec. 1, 2009), available at <http://www.whitehouse.gov/the-press-office/remarks-president-address-nation-way-forward-afghanistan-and-pakistan>.

<sup>69</sup> *Id.*

<sup>70</sup> See, e.g., NEW OXFORD AMERICAN DICTIONARY, *supra* note 12, at 496 (defining discourse as “written or spoken communication or debate,” “a formal discussion of a topic in speech or writing,” and “a connected series of utterances; a text or conversation”).

<sup>71</sup> Stuart Hall, *The West and the Rest: Discourse and Power*, in FORMATIONS OF MODERNITY 275, 291 (Stuart Hall & Bram Gieben eds., 1992).

<sup>72</sup> *Id.*

ibly refers.<sup>73</sup> This referential space contains the rules of possibility for the term within a particular discourse; it is “that set of historical, practical, and discursive conditions which account for the existence of the object.”<sup>74</sup> Discourses are not linguistic entities that serve to organize knowledge, as the dictionary defines them, but rather “practices that systematically form the objects of which they speak.”<sup>75</sup> Discourse theory, then, “affirm[s] the discursive character of all social practices and objects” and recognizes that discourses always construct the exercise of power because they necessarily construct oppositions and define boundaries.<sup>76</sup>

Although we traditionally view the author of an opinion or text as determining the meaning of that text, Foucault argued that the reverse often unconsciously occurs within a discursive formation. The relational space within the text restricts the author’s authority and is the ultimate fountainhead from which meaning emerges. Foucault was not concerned with the construction of meaning through language but with the construction of knowledge and meaning through *discourse*.<sup>77</sup> Foucault attempted to discover “where meaning comes from,”<sup>78</sup> an exercise that judges have not been performing in the post-9/11 context. Undertaking such an analysis is

a task that consists of not . . . treating discourses as groups of signs (signifying elements referring to contents or representations) but as practices that systematically form the objects of which they speak. Of course, discourses are composed of signs; but what they do is more than use these signs to designate things. It is this *more* that renders them irreducible to the language (*langue*) and to speech. It is this ‘more’ that we must reveal and describe.<sup>79</sup>

Foucault suggested that this “more” is the hidden, relational aspect of discourse that most people overlook. Within a discursive formation, the text, the “signs” actually construct the meaning of the discourse and determine the power distribution within it.

3. *Post-9/11 Discourse as Discursive Formation*.—The post-9/11 discourse is analogous to what Foucault calls a “discursive formation”—a unity of discourse that shares a system of relations and collateral space. For Foucault, these shared relations are the provenance of a unified enunciative field from which text within the discursive formation draws its meaning. Thus, in the context of 9/11, the relationships between all aspects of the dis-

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<sup>73</sup> Michael Mahon, *Michel Foucault’s Archaeology, Enlightenment, and Critique*, 16 HUM. STUD. 129, 136 (1993).

<sup>74</sup> *Id.*

<sup>75</sup> FOUCAULT, *supra* note 2, at 49.

<sup>76</sup> See David Howarth & Yannis Stavrakakis, *Introducing Discourse Theory and Political Analysis*, in DISCOURSE THEORY AND POLITICAL ANALYSIS: IDENTITIES, HEGEMONIES AND SOCIAL CHANGE 1, 4 (David Howarth, Aletta J. Norval & Yannis Stavrakakis eds., 2000).

<sup>77</sup> Hall, *supra* note 71, at 73.

<sup>78</sup> *See id.*

<sup>79</sup> FOUCAULT, *supra* note 2, at 49.

course—terrorism, war, national security—are the radices of a field of possible speech on which judges, scholars, and politicians draw, both consciously and unconsciously. This same enunciative field, however, includes inherent historical and institutional relations that contribute to the meaning of the discourse and impose limits on its extent. One can imagine this concept more readily through the example of a book. Although a novel may appear to be a unified and self-contained whole, it actually contains innumerable relations and connections. As Foucault puts it, “The book is not simply the object that one holds in one’s hands; and it cannot remain within the little parallelepiped that contains it: its unity is variable and relative.”<sup>80</sup> Thus, although the GWOT may appear to be a unified whole, this unity must be examined, and the discursive formation must “be regarded in its raw, neutral state as a collection of [énoncés].”<sup>81</sup>

Instead of viewing the world as subjective or objective or formed out of individual consciousness, Foucault posits “a world in which relation is primary; it is *structures* that give their objective faces to matter.”<sup>82</sup> Thus, Foucault’s work recognizes that the relational aspects of discourse are not secondary to meaning but the essential *foundations* of meaning. Foucault’s philosophy is relevant to the post-9/11 discussion because it is a “philosophy of relation.”<sup>83</sup> First, the post-9/11 discourse is premised on the idea of 9/11 as an origin, a radical disruption in discourse that is the ultimate reference point for a new system of relationships. Almost every case involving Guantánamo prisoners or other detainees starts with a description of or reference to the 9/11 attacks.<sup>84</sup> In *Hamdi*, Justice O’Connor, writing four years after 9/11, immediately situated the opinion as arising out of a “difficult time” and proceeded to describe 9/11. This is not to say that Justice O’Connor and other judges *should* not have referenced 9/11; one can barely imagine them not discussing it. Tracing these issues back to their origin is a necessary endeavor. Thus, my contention is that a single shared relationship—a single origin—underlies all of the post-9/11 discourse, including the judicial discourse.

Second, the post-9/11 discourse shares a referential “space in which various objects emerge and are continuously transformed.”<sup>85</sup> A discursive formation exists when “one can discern and describe *one* system of dispersion, *one* type of enunciative distance, *one* theoretical network, [and] *one*

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<sup>80</sup> *Id.* at 23.

<sup>81</sup> SHERIDAN, *supra* note 5, at 95.

<sup>82</sup> CHARTIER, *supra* note 59, at 70 (emphasis added) (quoting PAUL VEYNE, *Foucault révolutionnaire l’histoire*, in COMMENT ON ÉCRIT L’HISTOIRE SUIVI DE FOUCAULT RÉVOLUTIONNE L’HISTOIRE 201, 236 (1978)).

<sup>83</sup> *Id.* (quoting VEYNE, *supra* note 82, at 236).

<sup>84</sup> See, e.g., *supra* Part I.B; *infra* Part III.

<sup>85</sup> FOUCAULT, *supra* note 2, at 32.



field of strategic possibilities.”<sup>86</sup> In other words, Foucault wants to describe the way that one views a science, such as psychology, or a work of art, such as a novel, as a unified whole, but he wants expand this conception to include the entire “text” of the discourse, including practices and institutional power relationships.<sup>87</sup> Everything relates to the other aspects of this whole and appears to form an enclosed, cohesive unity. This description perfectly describes the post-9/11 discourse. As the next Part demonstrates, the issue of the detention of enemy combatants after 9/11 is embedded in this post-9/11 discursive formation. The text of judicial opinions addressing this issue demonstrates agreement on its uniqueness but disagreement over its implications. Although some judges have recognized the need for the excavation of discourse, most have not.

## II. THE JUDICIAL ROLE IN HABEAS LITIGATION POST-BOUMEDIENE

In *Boumediene v. Bush*,<sup>88</sup> the Supreme Court struck down the jurisdiction-stripping provision of the Military Commissions Act of 1996 (MCA).<sup>89</sup> This decision removed the jurisdictional bar and called for district court judges within the D.C. Circuit to hear the merits of the habeas petitions of the Guantánamo prisoners.<sup>90</sup> Although the two parties in *Boumediene* had briefed the issue of the President’s power to detain enemy combatants,<sup>91</sup> the Court, as it had in *Hamdi*, decided not to reach that question, instead leaving “the outer boundaries of war powers undefined”<sup>92</sup> and emphasizing that the “opinion does not address the content of the law that governs petitioners’ detention. That is a matter yet to be determined.”<sup>93</sup> The Court explicitly stated that it would “not address whether the President has authority to detain these petitioners” because “questions regarding the legality of the detention are to be resolved in the first instance by the District Court.”<sup>94</sup> The lower courts were left to interpret the AUMF in the first instance, building on *Hamdi*’s narrow holding that an individual captured on a battlefield with

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<sup>86</sup> CHARTIER, *supra* note 59, at 57 (quoting Michel Foucault, *Réponse au Cercle d’épistémologie, CAHIERS POUR L’ANALYSE*, Summer 1968, at 9, 29).

<sup>87</sup> See SHERIDAN, *supra* note 5, at 93–97 (discussing Foucault’s idea of the discursive formation and its development).

<sup>88</sup> 553 U.S. 723, 732–33 (2008) (holding that section 7 of the MCA “operates as an unconstitutional suspension of the writ [of habeas corpus]”). For more discussion of this case, see *infra* Part III.

<sup>89</sup> 28 U.S.C. § 2241(e) (2006).

<sup>90</sup> See *Boumediene*, 553 U.S. at 732–33.

<sup>91</sup> Brief for the *Boumediene* Petitioners at 33–47, *Boumediene*, 553 U.S. 723 (No. 06-1195).

<sup>92</sup> *Boumediene*, 553 U.S. at 797–98. Justice Kennedy’s majority opinion did note, however, that the Court may not be able to take this same approach in future cases that present the issue more pressingly. *Id.* (“Because our Nation’s past military conflicts have been of limited duration, it has been possible to leave the outer boundaries of war powers undefined. If, as some fear, terrorism continues to pose dangerous threats to us for years to come, the Court might not have this luxury.”).

<sup>93</sup> *Id.* at 798.

<sup>94</sup> *Id.* at 733.

a weapon could be detained as an enemy combatant. Soon after *Boumediene*, the Fourth Circuit addressed the scope of the AUMF's authorization of detention in a petition by a military prisoner held within the United States. Simultaneously, the habeas petitions of Guantánamo detainees were addressed by multiple judges within the D.C. district courts, and the D.C. Circuit eventually decided the detention issue on appeal. Although the courts all faced the task of interpreting the AUMF, the approaches of the two circuits were radically different.

*A. The Fourth Circuit's Approach in al-Marri v. Pucciarelli*

After the *Boumediene* decision "cleared the way," the Fourth Circuit sitting en banc addressed "the scope of the President's authority to detain individuals as enemy combatants"<sup>95</sup> in *al-Marri v. Pucciarelli*.<sup>96</sup> The petitioner, an alleged al Qaeda operative, was attending school in the United States when he was arrested for social security fraud and other allegedly terrorism-related crimes.<sup>97</sup> He was subsequently transferred to military custody within the United States and labeled an "enemy combatant."<sup>98</sup>

A concurring opinion by Judge Motz (one of seven opinions written by the nine judges)<sup>99</sup> held that the petitioner could not be defined as an enemy combatant under the historical laws of war and therefore had to be treated as a civilian.<sup>100</sup> The strongly worded opinion argued that sanctioning executive power to detain particular individuals indefinitely under the term "unlawful enemy combatants" "would have disastrous consequences for the Constitution—and the country" and "would effectively undermine all of the freedoms guaranteed by the Constitution."<sup>101</sup> This opinion based its analysis directly on the mutually exclusive categories of "civilians" and "combatants" under the traditional law of war<sup>102</sup> and on the narrow reasoning of

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<sup>95</sup> *Gherebi v. Obama*, 609 F. Supp. 2d 43, 50 (D.D.C. 2009).

<sup>96</sup> 534 F.3d 213 (4th Cir. 2008) (en banc), *vacated as moot sub nom.* *al-Marri v. Spagone*, 129 S. Ct. 1545 (2009) (mem.).

<sup>97</sup> *See id.* at 219 (Motz, J., concurring in the judgment).

<sup>98</sup> *Id.* at 219–21.

<sup>99</sup> The Fourth Circuit struggled with how to characterize the opinions since the four judges who joined Judge Motz's concurrence held the detention of the petitioner to be unauthorized but did not reach the issue on which the case was eventually remanded: the framework by which the petitioner would be allowed to contest his detention. *See id.* at 253. Thus, this Note refers to the opinions as concurrences and by the authors' names to avoid confusion, although Chief Judge Williams and Judge Wilkinson did refer to Judge Motz's opinion as the plurality. *Id.* at 293 n.8 (Williams, C.J., concurring in part and dissenting in part); *id.* at 293 n.1 (Wilkinson, J., concurring in part and dissenting in part).

<sup>100</sup> *See id.* at 250–53 (Motz, J., concurring in the judgment); *id.* at 217 ("Even assuming the truth of the Government's allegations, they provide no basis for treating al-Marri as an enemy combatant or as anything other than a civilian.").

<sup>101</sup> *Id.* at 252.

<sup>102</sup> *See id.* at 233–35.

*Hamdi*, which it argued did not unsettle this categorical approach.<sup>103</sup> Judge Motz argued strenuously, and likely correctly, that the end result reached by the other five judges, albeit by different means, could not be formally aligned with precedent or with the existing categories in the laws of war. However, Judge Motz did not recognize the novelty of the *énoncés* of “war” and “enemy combatant” within the post-9/11 discursive formation, and she explicitly rejected Judge Wilkinson’s suggestion that the laws of war may have evolved.<sup>104</sup>

In his dissenting opinion, Judge Wilkinson clearly conveyed his conception of the proper judicial approach to the issue at hand and offered an example of the judicial archaeology for which this Note advocates. He argued that 9/11 has obliged judges to “build a framework for this *most dangerous future*.”<sup>105</sup> Although he echoed the “difficult time” rhetoric employed by Justices O’Connor and Scalia in *Hamdi*,<sup>106</sup> Judge Wilkinson also recognized the implications of such radical discontinuity for judicial action:

This need for some legal framework is not just an opportunity. It is our obligation. . . . A principled framework . . . addresses the limits of executive authority. While a minimalist method has much to commend it in many circumstances, it has its drawbacks here. This is not an area where *ad hoc* adjudication provides either guidance or limits, and it leaves the most basic values of our legal system—liberty and security—in limbo.<sup>107</sup>

Judge Wilkinson worried that a failure to thoroughly investigate the issue of the Executive’s power to detain would give no notice of the “permissible boundaries of enemy combatant detentions” and could “inflict[] grave damage to the constitutional fabric at the end that none of us intended at the start.”<sup>108</sup> Thus, although he traced the “most dangerous future” back to the origin of 9/11, he did not allow the unity of this discursive formation to obscure the need to explore the foundational *énoncés* on which it rested, such as “enemy combatant.”

Judge Wilkinson offered an in-depth exploration of the AUMF<sup>109</sup> and the laws of war<sup>110</sup> to construct this principled framework. He responded to the plurality by arguing that the “classical model [of war] is just that: a clas-

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<sup>103</sup> See *id.* at 228–29 (emphasizing the narrowness of *Hamdi*).

<sup>104</sup> See *id.* at 245 n.24.

<sup>105</sup> See *id.* at 295 (Wilkinson, J., concurring in part and dissenting in part) (emphasis added).

<sup>106</sup> See *id.* at 293–96 (noting, among other things, that “we live in an age where thousands of human beings can be slaughtered by a single action and where large swaths of urban landscape can be leveled in an instant” and that “[n]uclear devices capable of inflicting enormous casualties can now fit inside a suitcase or a van”).

<sup>107</sup> *Id.* at 295.

<sup>108</sup> *Id.* at 296.

<sup>109</sup> See *id.* at 297–303.

<sup>110</sup> See *id.* at 315–19.

sical model. War changes. So too the law of war has not remained static.<sup>111</sup> He directly addressed the precedents of *Hamdi*, *Quirin*, and *Ex parte Milligan*<sup>112</sup> and discussed the intricacies of the law of war to formulate three criteria by which to determine the legal status of enemy combatants and the limits of executive power.<sup>113</sup> Because his archaeological approach recognized that the “obligation arises not just to ask whether, but why”<sup>114</sup> in some circumstances, Judge Wilkinson attempted to excavate all of the material relevant to the label “unlawful enemy combatant” and to draft a definition to guide the political branches in their fight against terrorism. He authoritatively said, “I make no apologies . . . for recognizing that there are constitutional limits on the military detention power and for trying to determine what they are.”<sup>115</sup> It was almost as if he anticipated the criticism of this approach that was forthcoming from the D.C. district courts.

### B. *The D.C. District Courts’ Restrained Approach*

With *al-Marri* in the background, most of the district court judges within the D.C. Circuit adopted a much different view of the judicial role than the Fourth Circuit had, informed to a large degree by the approach of Judge Leon in *Boumediene* on remand. Judge Leon, criticizing the approach of Judge Wilkinson and the other Fourth Circuit judges, declined to give in to what he described as the “temptation . . . to engage in the type of judicial craftsmanship . . . exhibited . . . in *al-Marri*.”<sup>116</sup> Judge Leon framed the issue before the court as “what definition of ‘enemy combatant’ should be employed” and admitted that he would likely “end up somewhere in the middle” of the extensive briefings on the issue by both sides.<sup>117</sup> Despite this framing, Judge Leon, “on further reflection,” declined to decide the issue.<sup>118</sup> Instead, he made the statement that became a clarion call for later judges: “I do not believe . . . that it is the province of the judiciary to *draft* definitions.”<sup>119</sup> Despite *Hamdi*’s narrow holding that “force” in the AUMF in-

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<sup>111</sup> *Id.* at 319; *see also id.* at 293 (“[L]aw must reflect the actual nature of modern warfare. By placing so much emphasis on quaint and outmoded notions of enemy states and demarcated foreign battlefields, the plurality . . . misperceive[s] the nature of our present danger, and, in doing so, miss[es] the opportunity presented by *al-Marri*’s case to develop a framework for dealing with new dangers in our future.”).

<sup>112</sup> *See id.* at 312–29.

<sup>113</sup> *See id.* at 325 (proposing that an “enemy combatant,” by definition, “must (1) be a member of (2) an organization or nation against whom Congress has declared war or authorized the use of military force, and (3) knowingly plan[] or engage[] in conduct that harms or aims to harm persons or property for the purpose of furthering the military goals of the enemy nation or organization”).

<sup>114</sup> *Id.* at 312.

<sup>115</sup> *Id.* at 296.

<sup>116</sup> *Boumediene v. Bush*, 583 F. Supp. 2d 133, 134 (D.D.C. 2008).

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

cluded a particular rationale for detention (preventing the combatant's return to battle) and its narrow, fact-based holding that an individual caught with a gun on a battlefield could be considered an enemy combatant, Judge Leon declined to wrestle with these foundational issues, instead adopting a definition from the MCA concerning who would be subject to military commissions.<sup>120</sup> Judge Leon then asked *whether* this congressional definition could be authorized instead of explicating *why* enemy combatants in the GWOT could be subjected to detention based on a broad authorization to use force and what the principles underlying such detention should be.<sup>121</sup> Whereas Judge Wilkinson saw sweeping language and the need for constitutional limitations, Judge Leon did not address the constitutional concerns or excavate the inherent relations in "enemy combatant" and "war." He likely adopted this binary approach of "yes" or "no" because the radical discontinuity of these ideas was obscured by the unity of the post-9/11 discursive formation.

In the first paragraph of *Gherebi v. Obama*, Judge Walton summarized the task before him as an attempt to ascertain "whether the President has the authority to detain individuals as part of its ongoing military campaign . . . and, if so, what is the scope of that authority."<sup>122</sup> However, he then adopted the same approach as Judge Leon, restricting himself to a binary "yes" or "no" decision about *whether* the petitioners met the government's proposed definition, which Judge Walton found justified by the international laws of war and the AUMF, instead of fulfilling Judge Wilkinson's obligation to answer *why* and provide principles that would actually delineate the scope of the Executive's statutory and constitutional authority.<sup>123</sup> The opinion's

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<sup>120</sup> *Id.*

<sup>121</sup> *Id.* ("It is our limited role to determine *whether* definitions crafted by either the Executive or the Legislative branch, or both, are consistent with the President's authority under the [AUMF], and his war powers under Article II of the Constitution. And, if the definitions are consistent with the Constitution and the AUMF, we must interpret the meaning of the definition as it applies to the facts in any given case." (emphasis added) (citation omitted)); *see also id.* at 135 ("I will limit any further discussion regarding this definition to deciding any legal issues that arise in interpreting and applying the definition to the facts in this case.").

<sup>122</sup> 609 F. Supp. 2d 43, 45 (D.D.C. 2009). The new Administration had moved for a stay soon after President Obama's inauguration to reassess what arguments it would make about the President's detention power. *Id.* at 52–53. After this consideration, the Administration slightly altered its detention standard, changing "supporting" to "substantially supported," but it still argued that the court should take a minimalistic, fact-bound approach to the issue. *See id.* at 53 ("However, the government believes that '[i]t is neither possible nor advisable . . . to attempt to identify[ ] in the abstract[ ] the precise nature and degree of "substantial support," or the precise characteristics of "associated forces."' Instead, it opines that 'the contours of the "substantial support" and "associated forces" bases of detention will need to be further developed in their application to concrete facts in individual cases.' The government recommends that the Court look to 'various analogues from traditional armed conflicts' in deciding these individual cases." (alterations in original) (citations omitted)).

<sup>123</sup> *Id.* at 54 ("For the reasons explained at length below, the Court agrees with the government that the AUMF functions as an independent basis in domestic law for the President's asserted detention au-

extensive background section began by invoking that familiar origin, “On September 11, 2001 . . .” and then recounted that “nineteen individuals affiliated with the Sunni extremist movement known as al-Qaeda hijacked four commercial passenger jet airliners in a coordinated terrorist attack against this country.”<sup>124</sup> Following this beginning, the opinion proceeded to describe each individual target of the 9/11 attacks and Congress’s subsequent passage of the AUMF.<sup>125</sup> Judge Walton also earnestly noted that “remnants of the Taliban regime still wield influence” in Afghanistan and Pakistan and that many al Qaeda leaders, including Osama bin Laden, remained at large, albeit operating “with a diminished capacity.”<sup>126</sup>

Judge Bates’s influential opinion in *Hamli v. Obama*<sup>127</sup> appeared at first to take a different approach, beginning with the history of enemy combatants instead of the origin of 9/11. Rather than describing the attacks and their aftermath, Judge Bates began by explaining that, “On March 13, 2009, . . . the government submitted a refinement of its position with respect to its authority to detain those individuals being held at Guantanamo.”<sup>128</sup> The entire background section of this opinion, even the footnotes, discussed the evolving definitions of “enemy combatants” and the scope of the Executive’s detention power from *Hamdi* to the present and offered an exhaustive and impressive discussion of international law.<sup>129</sup> However, the analysis section began with a “premise recently articulated by another judge of this Court: ‘I do not believe . . . that it is the province of the judiciary to *draft* definitions.’”<sup>130</sup> In light of this premise, Judge Bates defined his “limited role,” quoting Judge Leon, as “to determine *whether* definitions crafted by either the Executive or the Legislative branch, or both, are consistent with the President’s authority under the [AUMF].”<sup>131</sup> According to Judge Bates, this approach was “appropriate, if not required, given the singular role of the Executive in matters of foreign affairs and the deference that he is customarily given by courts when resolving matters in that

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thority, and *adopts the basic framework advanced by the government for determining whether an individual is subject to that authority.*” (emphasis added).

<sup>124</sup> *Id.* at 46.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* As support for this claim, Judge Walton cited a journal article that concluded that “[m]uch of [al Qaeda’s] original leadership has been brought to justice in one way or another.” *Id.* (first alteration in original) (quoting Michael Chertoff, *Tools Against Terror: All of the Above*, 32 HARV. J.L. & PUB. POL’Y 219, 219–21 (2009)).

<sup>127</sup> 616 F. Supp. 2d 63 (D.D.C. 2009).

<sup>128</sup> *Id.* at 67.

<sup>129</sup> *See id.* at 67–68.

<sup>130</sup> *Id.* at 68 (alterations in original) (quoting *Boumediene v. Bush*, 583 F. Supp. 2d 133, 134 (D.D.C. 2008)) (calling this statement “[a] starting point for the analysis of this issue”).

<sup>131</sup> *Id.* at 68–69 (alteration in original) (emphasis added) (quoting *Boumediene*, 583 F. Supp. at 134) (internal quotation marks omitted).

realm.”<sup>132</sup> Of course, Judge Bates never examined whether, why, or how the foundational principles (the “plinths”) underlying this “singular role” in past understandings of “foreign affairs” applied in the GWOT.

In so doing, Judge Bates adopted not only an approach that limited the voice of the judiciary but also one that silenced the voices of the habeas petitioners. The petitioners had contended that the government was adopting “new detention standards by ‘analogy to’ the law of war,”<sup>133</sup> and Judge Bates had the opportunity to engage in the iterative process of exploring these analogies and defining principles. Judges often draw on the voice and speech of litigants to derive and hone principles through the adversarial process, but Judge Bates accepted Judge Walton’s exploration of the traditional categories of the law of war and refrained from engaging in an excavation of the analogy.<sup>134</sup> Although Judge Bates did eventually determine that one aspect of the government’s definition did not comport with the traditional law of war,<sup>135</sup> he never addressed possible constitutional limitations or excavated the concept of “enemy combatant” as it existed within the post-9/11 discourse. He followed the binary approach of saying “yes” to part of the government’s definition and “no” to the other without really exploring the *why*, i.e., the animating principles, of the definition itself.

Similarly, in setting forth the scope of the government’s detention power that would govern the merits of the case, Chief Judge Lamberth in *Mattan v. Obama* noted that “[t]he Court’s role here is not to fashion its own framework, but only to determine whether respondents’ proposed framework is, as respondents claim, consistent with domestic law and the laws of war.”<sup>136</sup> As support for this proposition concerning the role of the judiciary, he cited the Government’s brief, which claimed that its detention power was based on the AUMF and informed by the historical categories of the laws of war, as well as Judge Leon’s claim that it is not the “province” of the judiciary to draft definitions.<sup>137</sup>

Two months later, in July 2009, Judge Kollar-Kotelly addressed another habeas petition on the merits.<sup>138</sup> Although she did not cite Judge Leon’s statement or *Mattan*’s rephrasing of it, she framed the issue as whether the petitioner was “lawfully detained in the context of the following standard,” and the standard she quoted was a near-verbatim recounting of the government’s definition, omitting only the “substantial support” provisions that Judge Bates had rejected in *Hamlily*.<sup>139</sup> In September 2009, Judge Hogan,

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<sup>132</sup> *Id.* at 69.

<sup>133</sup> *Id.* at 68 (internal quotation marks omitted).

<sup>134</sup> *See id.* at 69.

<sup>135</sup> *See id.*

<sup>136</sup> 618 F. Supp. 2d 24, 26 (D.D.C. 2009).

<sup>137</sup> *See id.*

<sup>138</sup> *See Al Mutairi v. United States*, 644 F. Supp. 2d 78 (D.D.C. 2009).

<sup>139</sup> *See id.* at 85 & nn.5–6.

addressing a dispute over the framework that would guide the court's inquiry in a similar habeas petition, quoted both Chief Judge Lamberth's statement that the court's *only* role is to "determine whether respondents' proposed framework is, as respondents claim, consistent with domestic law and the laws of war"<sup>140</sup> and Judge Leon's assertion that it is not the role of the judiciary "to *draft* definitions."<sup>141</sup>

Thus, despite the recognition of the existence of "unresolved questions about the scope of the government's detention authority"<sup>142</sup> and the recognition that the Supreme Court has "provided 'scant guidance' as to whom [the President] may lawfully detain,"<sup>143</sup> courts have continued to follow the binary approach of Judge Leon by adopting the government's proposed definition of "enemy combatant" and asking whether it is authorized by the AUMF without addressing constitutional objections to or the nuances of "enemy combatant." The district courts have declined to excavate the foundations of the concepts, such as war and national security, on which they have relied, and they have refused to construct a framework as Judge Wilkinson did. Although the *Hamdi* and *Boumediene* Courts appeared to envision the lower courts defining the limits of executive power and erecting constitutional principles to inform their application,<sup>144</sup> the district courts instead confined themselves to "yes" or "no" answers to the question of *whether*. Only *Gherebi* investigated the "longstanding law-of-war principles"<sup>145</sup> in any significant way, but it did so only to essentially say "no" to the petitioner's arguments.<sup>146</sup> This lack of excavation represents silence on the part of the courts and also silences the contributions of the petitioners and their attorneys. Were the courts to engage in creating a principled framework, they would benefit from each petitioner picking up on these legal principles, testing them, and invoking them in slightly different factual situations.<sup>147</sup> Neither Judge Walton nor any of the other judges attempted to excavate the discourse and construct an affirmative framework.

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<sup>140</sup> *Anam v. Obama*, 653 F. Supp. 2d 62, 63 (D.D.C. 2009) (emphasis added) (quoting *Mattan*, 618 F. Supp. 2d at 26) (internal quotation mark omitted).

<sup>141</sup> *Id.* (quoting *Boumediene v. Bush*, 583 F. Supp. 2d 133, 134 (D.D.C. 2008)).

<sup>142</sup> *Abdah v. Obama*, 708 F. Supp. 2d 9, 13 n.2 (D.D.C. 2010).

<sup>143</sup> *Id.* at 12 (quoting *Al-Bihani v. Obama (Al-Bihani I)*, 590 F.3d 866, 870 (D.C. Cir. 2010)).

<sup>144</sup> See *supra* text accompanying notes 42–55, 90–94.

<sup>145</sup> *Hamdi v. Rumsfeld*, 542 U.S. 507, 521 (2004).

<sup>146</sup> *Gherebi v. Obama*, 609 F. Supp. 2d 43, 55–71 (D.D.C. 2009).

<sup>147</sup> See Justin Florence, *Substantive Detention Law Matters: The Big Questions About Guantanamo the Supreme Court Should Answer*, HARV. L. & POL'Y REV. ONLINE 7 (2008), [http://hlpronline.com/wordpress/wp-content/uploads/2009/12/Florence\\_Substantive\\_Detention\\_Law.pdf](http://hlpronline.com/wordpress/wp-content/uploads/2009/12/Florence_Substantive_Detention_Law.pdf) (arguing that the Supreme Court in *Boumediene* should provide a framework outlining the substantive law of detention so that detainees can develop a legal strategy).



### C. The D.C. Circuit Speaks

Against this backdrop, a panel of the D.C. Circuit addressed the post-*Boumediene* habeas litigation for the first time in *Al-Bihani v. Obama*.<sup>148</sup> At the outset of its analysis, the panel recognized that the case presented an overarching question concerning the detention of Guantánamo detainees. Instead of framing the issue as an analysis of the President's detention power, the court stated only that its first issue "concerns whom the President can lawfully detain."<sup>149</sup> Although the distinction may simply be semantic, this phrasing seems to approach the question more indirectly than flatly asking "whom the President can lawfully detain." The second phrasing implies crafting a definition, while the first only concerns such a definition. The majority opinion concluded its introduction by stating its purpose: "In this decision, we aim to narrow the legal uncertainty that clouds military detention."<sup>150</sup> Thus, from the beginning the court admitted that it would not attempt to clarify the law or even try to eliminate the uncertainty but would only "narrow" the confusion. Instead of conducting the archaeological excavation for which this Note advocates, the court relied on the formal, self-legitimizing *énoncés* of the post-9/11 discourse.

Surprisingly, the majority opinion departed from *Hamdi*'s statement, honored at length by *Gherebi* and the other D.C. district court opinions that the laws of war inform at least some aspects of the detention power under the AUMF.<sup>151</sup> In *Hamdi*, Justice O'Connor had found that the law of war allowed detention, at least for the "duration of the particular conflict,"<sup>152</sup> and though she did not clearly hold that the laws of war limited the President's detention power under the AUMF,<sup>153</sup> she clearly did give them some weight in her interpretation.<sup>154</sup> The court emphatically stated that there is "no indication . . . that Congress intended the international laws of war to act as extra-textual limiting principles for the President's war powers under the

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<sup>148</sup> *Al-Bihani I*, 590 F.3d 866.

<sup>149</sup> *Id.* at 870 (emphasis added).

<sup>150</sup> *Id.*

<sup>151</sup> See *id.* at 885 (Williams, J., concurring in part and concurring in the judgment) (noting that the majority's approach "appears hard to square with the approach that the Supreme Court took in *Hamdi*").

<sup>152</sup> *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004).

<sup>153</sup> See *Al-Bihani v. Obama (Al-Bihani II)*, 619 F.3d 1, 11 (D.C. Cir. 2010) (Kavanaugh, J., concurring in the denial of rehearing en banc) ("*Hamdi* never stated that the AUMF incorporates judicially enforceable international-law limits on the President's authority, which of course would have been a momentous and unprecedented holding."); *id.* at 43 ("Justice O'Connor's plurality opinion in *Hamdi* carefully avoided stating that any action contrary to international-law norms would *not* be authorized under the AUMF.").

<sup>154</sup> See *id.* at 43 (noting the difficulty in interpreting Justice O'Connor's "isolated references" to international law); *id.* at 54–55 (Williams, J., commenting on the denial of rehearing en banc) (distinguishing between international law as domestic law that limits Executive detention and international law as normative law that guides a court's interpretation and arguing that *Hamdi* "use[d] international law as an interpretive tool").

AUMF.”<sup>155</sup> As added support, the opinion noted that Congress has not implemented the law of war domestically and cited the *Third Restatement of Foreign Relations*.<sup>156</sup> Furthermore, the court refused to “quibble” over vague treaties and amorphous customary international law because these laws of war lacked the “controlling legal force and firm definition” that are necessary when “courts seek to determine the limits of the President’s war powers.”<sup>157</sup> In other words, the majority opinion seemed to say that the judiciary must have a firm definition from an outside source and cannot excavate the numerous historical and contemporary sources on both international and domestic law to draft an appropriate definition itself.<sup>158</sup> Thus, the panel implied that it viewed the case as a vehicle to define the limits of the President’s power, but it later retreated, finding “no occasion here to explore the outer bounds”<sup>159</sup> of the definition of an unlawful enemy combatant.

Although it may have been correct in its assertion that international law did not limit the interpretation of the AUMF,<sup>160</sup> the lack of some other law forcing the court to consider extratextual limits would not necessarily imply

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<sup>155</sup> *Al-Bihani I*, 590 F.3d at 871.

<sup>156</sup> *Id.* (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 111(3)–(4) (1987)).

<sup>157</sup> *See id.* (emphasis added).

<sup>158</sup> For an argument that the D.C. Circuit ignores precedent establishing a responsibility to interpret international law that the Supreme Court has recognized since it set out an appendix to guide the capture of prize cases, see John Dehn, *The Relevance of International Law to (the Substantive and Procedural Rules of) Preventive Detention in Armed Conflict—A Rejoinder to Al-Bihani*, OPINIO JURIS (Jan. 29, 2010, 8:37 AM), <http://opiniojuris.org/2010/01/29/the-relevance-of-international-law-to-the-substantive-and-procedural-rules-of-preventive-detention-in-armed-conflict—a-rejoinder-to-al-bihani> (“The Court [has] provided, in what might be viewed as in part an advisory opinion on the law and in part a promulgation of rules of procedure, . . . a heavily referenced mini-treatise . . . of the international[ ] rules governing prize practice, including substantive rules, evidentiary standards and modes of proof. The panel opinion in *al-Bihani* both embraces and ignores this tradition.”). *See also Al-Bihani II*, 619 F.3d at 54 (Williams, J., commenting on the denial of rehearing en banc) (arguing that *Hamdi* followed a long and accepted history of using international law to interpret a statute even if the international law does not have binding force).

<sup>159</sup> *Al-Bihani I*, 590 F.3d at 874.

<sup>160</sup> I call this an assertion because, in the denial of rehearing, seven judges signed a joint statement denying rehearing because they found that the international law aspect of the panel’s decision was not a holding, but merely dicta. *Al-Bihani II*, 619 F.3d at 1 (Sentelle, C.J., concurring in the denial of rehearing en banc) (“We decline to en banc this case to determine the role of international law-of-war principles in interpreting the AUMF because, as the various opinions issued in the case indicate, the panel’s discussion of that question is not necessary to the disposition of the merits.”); *see Al-Bihani I*, 590 F.3d at 885–86 (Williams, J., concurring in part and concurring in the judgment) (calling the international law aspect of the majority opinion dicta). However, the author of the *Al-Bihani I* panel decision, Judge Brown, disagreed with this characterization and argued that this aspect of the opinion was an alternative holding that enjoyed precedential effect. As such, she called the contrary characterization in the joint statement of the other judges a “cryptic statement that exhibits no apparent function other than to mystify.” *Al-Bihani II*, 619 F.3d at 2 (Brown, J., concurring in the denial of rehearing en banc).

that courts should refrain from interpreting an extremely broad statute<sup>161</sup> in order to give it some definition. As Judge Wilkinson recognized, the interpretation of “enemy combatant” is of crucial importance to give notice to Congress and the Executive in their conduct of future hostilities. Although the D.C. Circuit implied it was seeking to “determine the limits,” one may question whether an occasion do so will ever arise under a judicial approach that only engages in such interpretation if forced to do so. Furthermore, the Supreme Court explicitly charged the lower courts with defining the “permissible bounds” of the “enemy combatant” label.<sup>162</sup> The Court likely recognized that avoidance in the lower courts leads to a less robust body of lower court law to mine for an ideal rule.<sup>163</sup>

The petitioner in *Al-Bihani* also argued, somewhat unpersuasively, that his ongoing detention was unjustifiable because the hostilities in which he had allegedly participated had technically ended.<sup>164</sup> In response, the majority opinion emphasized that the determination that hostilities have ceased is a political question on which a court should “defer to the Executive’s opinion.”<sup>165</sup> As support for this proposition, the court cited *Ludecke v. Watkins*, which asked whether the Alien Enemy Act permitted the President to detain a German citizen in 1948 after the actual fighting of World War II had ended.<sup>166</sup> The *Ludecke* Court noted that the termination of a “state of war” with another country is a political question, as it involved “foreign policy” and “national security.”<sup>167</sup> The *Al-Bihani* majority failed to mention, however, that the *Ludecke* Court explicitly distinguished the political determination that a “state of war” had ended from the question of whether active hostilities had ceased.<sup>168</sup> Although a determination of when hostilities end may also be a determination for which deference is due the Executive, for either constitutional or pragmatic reasons, the point is that the majority panel failed to discuss the differences between the historical, formal idea of a “state of war” and the hostilities that are part of this new kind of “war.”

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<sup>161</sup> See *al-Marri v. Pucciarelli*, 534 F.3d 213, 297–98 (2008) (en banc) (Wilkinson, J., concurring in part and dissenting in part) (noting the broad power the AUMF gives the President), *vacated as moot sub nom. al-Marri v. Spagone*, 129 S. Ct. 1545 (2009) (mem.).

<sup>162</sup> See *Hamdi v. Rumsfeld*, 542 U.S. 507, 522 n.1 (2004).

<sup>163</sup> See Michael S. Catlett, Note, *Clearly Not Established: Decisional Law and the Qualified Immunity Doctrine*, 47 ARIZ. L. REV. 1031, 1051 (2005) (“Sometimes a legal issue is better fleshed out when it is considered by multiple judges with differing viewpoints. . . . ‘The many circuit courts act as the “laboratories” of new or refined legal principles . . . providing the Supreme Court with a wide array of approaches to legal issues and thus, hopefully, with the raw material from which to fashion better judgments.’” (quoting J. Clifford Wallace, *The Nature and Extent of Intercircuit Conflicts: A Solution Needed for a Mountain or a Molehill?*, 71 CALIF. L. REV. 913, 929 (1983))).

<sup>164</sup> See *Al-Bihani I*, 590 F.3d at 871.

<sup>165</sup> *Id.* at 874.

<sup>166</sup> *Id.*

<sup>167</sup> *Ludecke v. Watkins*, 335 U.S. 160, 168–69, 170 & n.15 (1948) (citations omitted) (internal quotation marks omitted).

<sup>168</sup> See *id.* at 166–70 & n.10.

Remarkably, as Judge Williams's concurrence noted, the *Al-Bihani* court had no reason to reach the question of what deference was due to the Executive's assertion that hostilities had not ended.<sup>169</sup> Based on common sense and on the international laws of war, which were discussed extensively in the parties' briefs,<sup>170</sup> the hostilities in Afghanistan were still ongoing. Although the court found no occasion to address the *limits* of the President's power, it seemed to endeavor mightily to highlight the deference the judiciary should adopt when approaching such matters. The panel likely felt so constrained because of the "wide deference the judiciary is *obliged* to give . . . with regard to questions concerning national security."<sup>171</sup>

Judge Brown's concurrence epitomizes the passive approach some members of the judiciary have taken in the post-*Boumediene* line of cases. Calling it "fortunate" that the case did not require the court "to demarcate the law's full substantive and procedural dimensions," she essentially pleaded for Congress to legislate on the matter.<sup>172</sup> Her concurrence questioned whether a court-driven process is appropriate where the "cases present hard questions and hard choices, ones best faced directly."<sup>173</sup> The underlying assumption of her argument, then, was that the judiciary should not face such questions directly, neither as a tenet of political theory nor as one of judicial ability. She emphasized that the "legal issues presented by our nation's fight with this enemy have been numerous, difficult, and to a large extent novel,"<sup>174</sup> thus making this difficult time "particularly ripe for Congress to intervene."<sup>175</sup> Echoing the recurring theme that 9/11 is the origin of a new era, Judge Brown concluded with the recognition that "[t]his war has placed us not just at, but already past the leading edge of a new and frightening paradigm, one that demands new rules be written."<sup>176</sup> Thus, even though she realized that war is a challenge to law and that "old wine-skins" and "prior frameworks" were "ill-suited to the bitter wine of this new warfare,"<sup>177</sup> for her this realization meant that the judiciary was helpless and its hands were tied.

Like Judge Leon in *Boumediene*, Judge Brown appeared to believe that the judiciary should not or cannot itself adapt existing precedents and old

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<sup>169</sup> See *Al-Bihani I*, 590 F.3d at 882–83 (Williams, J., concurring in part and concurring in the judgment) (maintaining that the "petitioner's detention is legally permissible by virtue of facts that he himself has conceded" so that the majority had no reason to reach the procedural questions of due process).

<sup>170</sup> See Brief for Appellees at 21–52, *Al-Bihani I*, 590 F.3d 866 (No. 09-5051); see also *Al-Bihani I*, 590 F.3d at 874 (majority opinion) (noting the petitioner's reliance on the laws of war).

<sup>171</sup> *Al-Bihani I*, 590 F.3d at 875 (emphasis added).

<sup>172</sup> See *id.* at 881–82 (Brown, J., concurring).

<sup>173</sup> *Id.* at 882.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

wineskins to new situations. Rather, the judiciary should passively say “yes” or “no” to government definitions. Perhaps she was drawing heavily on the legal process school of thinking, which argues that in times of war or other crises the judiciary should defer to any act passed by both political branches<sup>178</sup> or other arguments based on deference to expert agencies.<sup>179</sup> Later in the denial of rehearing, however, she clearly rejected any notion that the court was giving deference to the Executive’s interpretation of the AUMF because the Obama Administration had argued that international law did play a role in its interpretation.<sup>180</sup> In her original concurrence, she did not cite any of the scholarship on the rationale underlying deference and offered no archaeological defense of this deference but instead relied solely on the applicability of past analogies. However, like Judge Wilkinson, she clearly realized that 9/11 had ushered in a “new and frightening paradigm” and that the post-9/11 habeas litigation demanded “new rules,” implicitly recognizing the radical discontinuity created by 9/11. She perceived this novelty only as a demand on Congress, though, and not as a judicial obligation.

Judge Brown’s concurrence may be the best example of the way that the post-9/11 discursive formation has shaped the role of the judiciary. Although one could disagree with her ideology or legal conclusions, the operation driving these opinions and this approach to the judicial task is deeper than ideology or logical propositions. The discursive formation shapes the judges’ approaches, which in turn reinforce the inherent institutional arrangements within the discursive formation.<sup>181</sup> Foucault’s *The Archaeology*

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<sup>178</sup> See, e.g., Samuel Issacharoff & Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime*, 5 THEORETICAL INQUIRIES L. 1, 35 (2004) (“This is a democratic-process based view that emphasizes that the judicial role in reviewing assertions of power during exigent circumstances should focus on ensuring whether there has been bilateral institutional endorsement for the exercise of such powers—rather than a view that the judicial role should be to determine on its own the substantive content and application of ‘rights’ during wartime. This is not a view that might please more abstract academic ‘rights theorists,’ be they political philosophers or constitutional theorists.”).

<sup>179</sup> 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, 180, 199–205 (2006) (presenting a functionalist argument for deference to Executive Branch interpretations of laws affecting foreign affairs, rather than relying solely on the “solid and undisputed formal pedigree” of such deference); Jide Nzelebe, *The Uniqueness of Foreign Affairs*, 89 IOWA L. REV. 941 (2004) (undertaking a thorough analysis of institutional advantages in dealing with foreign affairs and identifying categories of issues more suited to judicial determination and those on which the judiciary should abstain).

<sup>180</sup> *Al-Bihani II*, 619 F.3d 1, 11 (D.C. Cir. 2010) (Brown, J., concurring in the denial of rehearing en banc) (“Contrary to the government’s claim, its preferred statutory interpretation warrants no deference from this court.”).

<sup>181</sup> See Jenny S. Martinez, *Process and Substance in the “War on Terror,”* 108 COLUM. L. REV. 1013, 1030 (2008) (“Having invited Congress to fix things, for example, the Court has put itself in an institutionally weaker position to later strike down Congress’s fix on rights-based grounds. Moreover, having applied the law of war to al Qaeda detainees, the Court has made it difficult to later find that the ‘war on terror’ may not really be a war at all. And the Court has done so without the benefit of fully

*of Knowledge* describes the way the text of a discourse actually constructs its meaning and distributes institutional power, and his insights expose the way that the post-9/11 discourse has altered the judicial role in these habeas cases. Instead of conducting a principled, archaeological investigation and constructing a framework for executive power, judges believe that they are inherently unable or ill-suited to answer these difficult questions directly. The unexamined foundations of the discourse—the *énoncés*—have compelled this approach because their inherent, referential spaces have defined the meaning of the text and the discourse.

### III. THE *ÉNONCÉ* AND THE POST-9/11 DISCURSIVE FORMATION

Foucault uses the word *énoncé* in *The Archaeology of Knowledge* to represent the basic “atom of discourse”<sup>182</sup> and the foundational element of any discursive formation. Although *énoncé* is typically translated as “statement” or “utterance,” Foucault actually uses this French neologism to avoid any past associations or latent meaning in a word with an already fixed meaning.<sup>183</sup> A sentence, a jumble of letters, or another material enunciation becomes an *énoncé* through an anterior relation that arises from an enunciative field of discourse, a discourse limited and ordered according to a network of interwoven relationships.<sup>184</sup> Even images can become *énoncés* if they become the historical rules and relationships, the individual units, by which a unified discursive formation is held together.<sup>185</sup> While a name designates an individual and a proposition has a referent, an *énoncé* has no correlate:

It is linked rather to a ‘referential’ that is made up not of ‘things’, ‘facts’, ‘realities’, or ‘beings’, but of laws of possibility, rules of existence for the objects that are named, designated, or described within it and for the relations that are affirmed or denied in it. The referential of the statement forms the place, the condition, the field of emergence, the authority to differentiate between individuals or objects, states of things and relations that are brought into play by

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considering the substantive or rights-based arguments.”); Sarah L. Lochner, Comment, *Qualified Immunity, Constitutional Stagnation, and the Global War on Terror*, 105 NW. U. L. REV. 829, 867 (2011) (“[J]udicial avoidance maneuvers can bind the judiciary to a certain decisional path *without* a full deliberative process.”).

<sup>182</sup> FOUCAULT, *supra* note 2, at 80.

<sup>183</sup> See Deleuze Interview, *supra* note 4, at 20–21 & n.1.

<sup>184</sup> See SHERIDAN, *supra* note 5, at 100 (discussing the differences between statements (*énoncés*) and sentences, propositions, and other enunciations).

<sup>185</sup> See ALEC MCHOUL & WENDY GRACE, A FOUCAULT PRIMER: DISCOURSE, POWER AND THE SUBJECT 37 (1993) (discussing the Latin conjugation of *amare* as an *énoncé*, as well as the periodic table and a pricing schedule); J.G. MERQUIOR, FOUCAULT 80–81 (2d ed. 1991) (discussing Foucault’s conception of the *énoncé* and giving the example of a taxonomic table or a genealogic tree as possible *énoncés*).

the statement itself; it defines possibilities of appearance and delimitation of that which gives meaning to the sentence, a value as truth to the proposition.<sup>186</sup>

Thus, one of the principal insights of Foucault's *Archaeology* is its recognition that individual elements within an enclosed discursive formation cannot be analyzed in isolation, separated from the discursive relations they entail. Two identical linguistic expressions, or syntagmata, spoken or written in different times or in different relational contexts, may be two distinct *énoncés*. Foucault offers the simple examples of the claim that the world is round made before and after Copernicus or the claim that species evolve made before and after Darwin<sup>187</sup>: "[I]t is not . . . that the meaning of the words has changed; what changed was the relation of these affirmations to other propositions, their conditions of use and reinvestment, the field of experience, of possible verifications, of problems to be resolved, to which they can be referred."<sup>188</sup> *Énoncés*, then, are "not . . . fixed components" that can be grasped; they can only be understood through the *rules* that govern their appearance and scope within a discourse.<sup>189</sup>

While other philosophers before him argued that language cannot be viewed in isolation from its creation, its author, its unconscious, its history, and its context,<sup>190</sup> Foucault, building on these insights, argues that all of these relations are present in the text of the discourse itself. He suggested that the relations of an *énoncé* to formulations with which it appears, formulations to which it refers, formulations whose subsequent possibility it determines, and formulations that share its status create a "collateral space" that borders, delineates, and, in turn, helps create the discursive formation.<sup>191</sup>

#### A. *The Enunciative Field of the Post-9/11 Discursive Formation*

For Foucault, "a sequence of linguistic elements is a[n] [*énoncé*] only if it is immersed in an enunciative field . . . in which it has a place and a status, which arranges for its possible relations with the past, and which opens up for it a possible future."<sup>192</sup> The philosopher Gilles Deleuze, writing

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<sup>186</sup> FOUCAULT, *supra* note 2, at 91.

<sup>187</sup> *Id.* at 103.

<sup>188</sup> *Id.*

<sup>189</sup> See MCHOUL & GRACE, *supra* note 185, at 38.

<sup>190</sup> See, e.g., JACQUES LACAN, *The Function and Field of Speech and Language in Psychoanalysis*, in *ÉCRITS: A SELECTION* 31, 84 (Bruce Fink trans., 2006) ("For the function of language in speech is not to inform but to evoke."); ED PLUTH, *SIGNIFIERS AND ACTS: FREEDOM IN LACAN'S THEORY OF THE SUBJECT* 29–32 (2007) (discussing Lacan's separation of Saussure's "sign" and "signifier" and his emphasis on the relation of language and the unconscious); LUDWIG WITGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* 7, 75, 148 (G.E.M. Anscombe trans., 3d ed. 2001) (seeking to bring into prominence the fact that the speaking of language is part of an activity, or a "form of life," and not simply a representative function).

<sup>191</sup> See FOUCAULT, *supra* note 2, at 97–99.

<sup>192</sup> *Id.* at 99.

about Foucault's insights, outlines the three forms of "spaces" that are discursively incorporated in an *énoncé*: the "collateral space," which is formed from other statements that are a part of a discursive formation,<sup>193</sup> the "correlative space," which consists of "certain intrinsic positions" associated with the statement,<sup>194</sup> and the "complementary space," which consists of nondiscursive formations, including social practices and the "institutional milieu."<sup>195</sup> This section demonstrates that these three spaces are all present within the post-9/11 discursive formation, but judges have barely acknowledged their existence, much less excavated their influence on the discourse, in the current habeas litigation.

*1. Post-9/11 Énoncés and Collateral Space.*—Within the post-9/11 discursive formation, one *énoncé* that has consistently appeared is the idea of "national security." Justice O'Connor's plurality opinion in *Hamdi* and the multiple opinions in *al-Marri* emphasized the traditional deference to the Executive in matters of national security, and most of the habeas cases in the district courts picked up this idea as well. Judge Brown's majority opinion for the D.C. Circuit in *Al-Bihani* clearly based its deference to the Executive on the historical idea of national security, noting the "wide deference" due when national security is at issue.<sup>196</sup>

The collateral space of 9/11 is a vastly different collateral space than the collateral space in which "national security" has historically been situated, as the references to *Egan* and *Youngstown* in Justice O'Connor's opinion demonstrate. Similarly, the *énoncés* of war and unlawful enemy combatants are now embedded in the collateral space of this post-9/11 discourse, which is distinct from the space delineating the discourse during *Quirin* and other wartime contexts. The terrorist activities and structure of al Qaeda, presidential action in this GWOT, the political and cultural debates surrounding Guantánamo and military trials, and the role that the judiciary has assumed within this discursive formation are all components of this collateral space that contribute to the *référentiel* and the enunciative field that construct the meaning of these terms. Although the Obama Administration has officially dropped the terms "enemy combatants"<sup>197</sup> and "Global War on Terror,"<sup>198</sup> the removal of these syntagmata from the offi-

<sup>193</sup> See DELEUZE, *supra* note 10, at 4–5.

<sup>194</sup> *Id.* at 6.

<sup>195</sup> *Id.* at 9.

<sup>196</sup> See *Al-Bihani I*, 590 F.3d 866, 875, 878 (D.C. Cir. 2010).

<sup>197</sup> See *Hamlily v. Obama*, 616 F. Supp. 2d 63, 66 n.2 (D.D.C. 2009); Del Quentin Wilber & Peter Finn, *U.S. Retires 'Enemy Combatant,' Keeps Broad Right to Detain*, WASH. POST, Mar. 14, 2009, at A6.

<sup>198</sup> See Scott Wilson & Al Kamen, *'Global War on Terror' Is Given New Name*, WASH. POST (Mar. 25, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/03/24/AR2009032402818.html> ("In a memo e-mailed this week to Pentagon staff members, the Defense Department's office of security review noted that 'this administration prefers to avoid using the term "Long War" or "Global War on Terror." Please use "Overseas Contingency Operation."").



cial discourse does not entail the extinction of the *énoncés* within the discursive formation.

For the Obama Administration, the *énoncé* of “enemy combatant” had become too unwieldy, too heavily imbued with relations to international law, Bush Administration policies, Supreme Court cases, and the judicial system itself. New relations and exclusions had altered the enunciative field it inhabited and, as a result, altered the locations of its authority and privilege. Therefore, the Obama Administration, beginning with *Hamliily*, simply offered a definition of “those individuals” that may be detained pursuant to the AUMF.<sup>199</sup> In other words, as Foucault envisioned, the Obama Administration altered the language, the syntagmata used, but the *énoncé* has survived. The Obama Administration is relying on the same concept, “those individuals being held at Guantanamo,” without using the words “enemy combatant.”<sup>200</sup> The *énoncé* is still present in the discourse and continually interacting within the discursive formation.

In the same way, scholars who regard discourse as a creation of individual actors have viewed the post-9/11 discourse as the active creation or interpretation of the Executive Branch during this period.<sup>201</sup> However, Foucault’s conception of a discursive formation does not involve a “subject” or “author” of a discourse. Although some may characterize the Bush Administration as purposefully having chosen rhetoric and language in order to carve out more executive power, Foucault “places [at] centre stage . . . [the] discursive formations.”<sup>202</sup> He inverts the traditional perspective of a subject or source creating knowledge or defining language and instead focuses on the way the impersonal discourse creates subjects.<sup>203</sup> “Discourses and practices . . . are seen as having a dynamic and momentum of their own, through their principle of organization. It is this dynamic and organization which becomes the target of study.”<sup>204</sup> The collateral space inherent in the post-9/11 discourse, then, contributes to the meaning and enunciative field of the *énoncés*. Although the statements and policies of Presidents Bush and Obama are obviously a part of this collateral space, so are all of the other elements and relationships within the post-9/11 discursive formation. “National security,” “war,” and “enemy combatants” cannot be fully understood without unearthing and analyzing all of these relationships.

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<sup>199</sup> See *Hamliily*, 616 F. Supp. 2d at 67; see also *id.* at 73 (“[T]he government no longer seeks to detain petitioners on the basis that they are ‘enemy combatants.’”).

<sup>200</sup> *Id.* at 67.

<sup>201</sup> See, e.g., Jennifer Bond, *The Language of War: A Battle of Words at Guantanamo Bay*, 10 APPEAL: REV. CURRENT L. & L. REFORM 70, 73–75 (2005).

<sup>202</sup> MARGARET WETHERELL & JONATHAN POTTER, MAPPING THE LANGUAGE OF RACISM: DISCOURSE AND THE LEGITIMATION OF EXPLOITATION 82 (1992).

<sup>203</sup> See *id.*

<sup>204</sup> *Id.*

For instance, what does “national security” mean in relation to the idea of terrorism, arguably another *énoncé* within the discourse? Despite the fact that concerns about national security have served as a backdrop to all of this litigation, the district courts have thus far deemed a particular individual’s threat to national security inapplicable to the analysis of the extent of detention authorized by the AUMF. After recounting other court decisions, Judge Hogan held in *Anam v. Obama* that national security had no impact on the President’s detention power because “mention of the threat the individual poses to the national security” was “[a]bsent” from the discourse.<sup>205</sup> Because the historical, formal idea of executive detention did not include this consideration and the “conflict ha[d] not ended,” Judge Hogan impotently concluded that “the Court’s hands are tied.”<sup>206</sup> Another case echoed this approach, noting that the “question of whether the petitioner poses a threat to the United States’ national security is one the district courts have not found determinative, or even relevant, in ruling on the merits of habeas petitions.”<sup>207</sup> To be sure, this kind of individualized threat to national security is distinct from a more general understanding of the threat posed by terrorism to national security. Arguably, though, the phrase “national security” has an added dimension when viewed within the post-9/11 discursive formation that includes terrorism, al Qaeda, and radical Islam.<sup>208</sup> Courts have refrained from determining whether it does have an added dimension and have refused to recognize the powerful effect the collateral space of a discursive formation can have.

2. *Post-9/11 Énoncés and Correlative Space.*—Historical references and other relationships outside of the post-9/11 discursive formation compose the correlative space that informs these *énoncés*. The history of the linguistic syntagm “unlawful enemy combatants” offers insight into the transformative power of discourse. In *Quirin*, the “law” root of the word “unlawful” referred (Foucault might say “related”) to the laws of war as they applied to soldiers in an enemy force;<sup>209</sup> these laws were considered part of the collateral space within the same discursive formation. Within the context of the *Quirin* opinion, by necessity, the term “unlawful” excluded any relation to civil war or other noninternational armed conflict and

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<sup>205</sup> *Anam v. Obama*, 696 F. Supp. 2d 1, 4 (D.D.C. 2010).

<sup>206</sup> *Id.*

<sup>207</sup> *Al-Adahi v. Obama*, 698 F. Supp. 2d 48, 53 (D.D.C. 2010).

<sup>208</sup> See, e.g., Joseph Margulies, Opinion, *The Myth of the Superhuman Terrorist*, NAT’L L.J., Nov. 23, 2009, at 31. Professor Margulies discusses the way that a common perception of al Qaeda terrorists has taken form within the consciousness of the American public: “Within days of the Sept. 11, 2001, attacks, an image of the Muslim terrorist took shape in American society. He is less than human—a barbarian who has renounced the conventions of civilized behavior. Yet he is also more than human. At special camps and schools, he has trained his mind and body to perfection. He has the strength of Hercules and the skill of Houdini.” *Id.*

<sup>209</sup> See *supra* text accompanying notes 24–29.

explicitly existed only within the discourse of international war, specifically in relation to World War II. The post-9/11 discursive formation retained the general relation to war as part of the correlative, historical space but also incorporated the numerous relations and exclusions already present in the enunciative field of post-9/11 discourse, i.e. the collateral space composed of terrorism, national security, al Qaeda, and the rest of the post-9/11 discursive formation. While the term “unlawful enemy combatant” under the historical understanding necessarily included the category of a lawful combatant as an antithesis, the term within the post-9/11 discursive formation appears to have no such correlate.

A discursive formation with its specific enunciative field may, despite the “most manifest semantic, grammatical, or formal identities, define a threshold beyond which there can be no further equivalence, and the appearance of a new [énoncé] must be recognized.”<sup>210</sup> One may argue that “national security” and “unlawful enemy combatants” before and after 9/11 are identical énoncés, but as this Note argues, no judge has actually made the effort to determine this identity. Instead, the unity of the linguistic syntagmata is assumed and the terms become self-legitimizing “atom[s] of discourse”<sup>211</sup> beyond which no one probes more deeply. Anytime one of these énoncés appears within the post-9/11 discursive formation, it includes this historical correlative space, which, in turn, constructs the possibilities of its meaning.

3. *Post-9/11 Énoncés and Complementary Space.*—Finally, the “complementary space” refers to the nondiscursive institutions and practices that also form part of the text of a discursive formation. One of the chief contributions of Foucault’s methodology, and one of the reasons it is so applicable to the post-9/11 judicial role, is Foucault’s realization that the words themselves define the power relations, which, in turn, construct the meaning of a term. The enunciative field includes certain institutional power relationships and the authority to speak, which are influenced, in turn, by the collateral and correlative spaces. The complementary space determines who has the power to control the application of an énoncé like “national security” or “unlawful enemy combatant” in practice. Thus this aspect of the enunciative field sets the rules for who can define the term, contains the possibilities inherent in the label, and consequently excludes other potential authorities or possibilities.

For example, the term “unlawful enemy combatant,” based on *Quirin* and other precedent, has thus far operated as an unexamined énoncé, an atom of discourse that has constructed the power relations between the branches of government. The énoncé imports a historical set of institutional

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<sup>210</sup> FOUCAULT, *supra* note 2, at 103; *see also* DELEUZE, *supra* note 10, at 7–8 (noting that the “discursive object” of an énoncé is “defined precisely by the limits to the lines of variation”).

<sup>211</sup> FOUCAULT, *supra* note 2, at 80.

relationships into the discursive formation as part of its complementary space in the same way it imports discursive relationships as part of its collateral and correlative spaces. The term constructs the institutional relationships between detainees and the government, excludes potential existing relationships (such as criminal to prosecutor), and ultimately determines both who has the authority to speak and the limits of such speech.

One such limit inherent in the post-9/11 discursive formation is the exclusion of the criminal discourse. Each discursive formation necessarily entails exclusions of other discourses and other referential fields by its allocation of power. Although some officials within the Clinton Administrations in the 1990s began to advocate military action against al Qaeda, terrorism was almost universally considered a crime before 9/11.<sup>212</sup> Furthermore, the detention and trial of *individual* terrorists for individual terrorist acts in the United States and other countries was almost exclusively handled in the civilian criminal context until 9/11.<sup>213</sup> Crime focuses on conduct, on specific actions, not membership in a military or other group,<sup>214</sup> but the detainees in Guantánamo (who cannot be “prisoners” because that label is excluded by the complementary space of the discursive formation) are part of or associated with an organization that is the target of U.S. military action. To understand the exclusion one only has to imagine a soldier who kills an enemy soldier on a battlefield; such a soldier cannot be guilty of murder because he is only fulfilling the duty of war. There can be no crime when such an action occurs within the discourse of war.

At least one judge attempted to excavate this exclusion and draw attention to the impact of discourse. After the Court in *Rasul v. Bush* gave the lower courts jurisdiction to hear habeas petitions from Guantánamo detai-

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<sup>212</sup> See, e.g., Upendra D. Acharya, *War on Terror or Terror Wars: The Problem in Defining Terrorism*, 37 DENV. J. INT’L L. & POL’Y 653, 664–73 (2009) (tracing the development of the international definition of terrorism as a criminal act before and after 9/11, despite the shift in the United States’ conception); *id.* at 670 (“The subsequent open endorsement and naked pursuit of a ‘War on Terror’ is a convenient and expedient shift from terrorism as a crime to terrorism as an act of war.”); Robert Chesney & Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 STAN. L. REV. 1079, 1094–96 (2008) (explaining that, although there had been “a growing realization that modern terrorism warranted military responses based on military authorities,” 9/11 was the true point at which the criminal and military models converged).

<sup>213</sup> See Danner, *supra* note 27, at 8 (“[M]ost assumed the law of war simply did not apply to terrorist activities. The United Kingdom, for example, stated when ratifying Additional Protocol I that ‘it is the understanding of the United Kingdom that the term “armed conflict” of itself and in its context denotes a situation of a kind which is not constituted by the commission of ordinary crimes including acts of terrorism whether concerted or in isolation.’” (quoting Letter from Christopher Hulse, HM Ambassador of the U.K., to the Swiss Gov’t (Jan. 28, 1998), available at <http://www.icrc.org/ihl.nsf/NORM/OA9E03F0F2EE757CC1256402003FB6D2?OpenDocument>)).

<sup>214</sup> Chesney & Goldsmith, *supra* note 212, at 1084 (“The laws of war traditionally emphasize pure associational status as the primary ground for detention; individual conduct provides only a secondary, alternative predicate.”).

nees,<sup>215</sup> detainees began challenging the constitutional adequacy and procedures of the Combatant Status Review Tribunals (CSRTs) set up by the Bush Administration. In one such case, *In re Guantanamo Detainee Cases*, Judge Green sharply criticized the CSRTs.<sup>216</sup> Judge Green held that detainees were entitled to assert due process rights and, therefore, the CSRTs were subject to review concerning their constitutionality under the *Hamdi* model.<sup>217</sup> In her opinion, Judge Green also questioned the aspects of the CSRT enemy combatant definition<sup>218</sup> that were associational (an element of the discourse of war but not crime),<sup>219</sup> granting that the detainees had a viable argument that this definition “violates long standing principles of due process by permitting the detention of individuals based solely on their membership in anti-American organizations rather than on actual activities supporting the use of violence or harm against the United States.”<sup>220</sup>

This same type of exclusion can be seen in the scholarly and political debate over whether this conflict is an international conflict or a noninternational conflict. Even though the United States overthrew the reigning government of a sovereign nation (Afghanistan) as part of an attack on a “single enemy, terrorism,” parts of the subsequent conflict have been held not to be an international conflict, but a noninternational conflict, a category originally conceptualized in reference to civil war and insurrection.<sup>221</sup> Like

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<sup>215</sup> 542 U.S. 466, 470 (2004) (“These two cases present the narrow but important question whether United States courts lack jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at the Guantanamo Bay Naval Base, Cuba.”); *id.* at 485 (“What is presently at stake is only whether the federal courts have jurisdiction to determine the legality of the Executive’s potentially indefinite detention of individuals who claim to be wholly innocent of wrongdoing. [We] [a]nswer[] that question in the affirmative . . .”).

<sup>216</sup> 355 F. Supp. 2d 443, 450–52, 467–81 (D.D.C. 2005).

<sup>217</sup> *See id.* at 465; *see also* Chesney & Goldsmith, *supra* note 212, at 1113 (explaining Judge Green’s decision).

<sup>218</sup> Judge Green noted that the Order creating the CSRTs appeared to be the first official definition of “enemy combatant.” *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d at 450. The Order stated: “[T]he term ‘enemy combatant’ shall mean an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.” Memorandum from Paul Wolfowitz, Deputy Sec’y of Def., to Sec’y of the Navy, Order Establishing Combatant Status Review Tribunal 1 (July 7, 2004), *available at* <http://www.defenselink.mil/news/Jul2004/d20040707review.pdf>.

<sup>219</sup> *See In re Guantanamo Detainee Cases*, 355 F. Supp. 2d. at 475–76.

<sup>220</sup> *Id.* at 475.

<sup>221</sup> The Supreme Court did not find it necessary to answer the question of whether the war against al Qaeda should be classified as an international armed conflict because it found that Common Article 3 of the Geneva Convention provided the necessary information and applied to “conflict[s] not of an international character”; thus, it applied to the war on terrorism. *See Hamdan v. Rumsfeld*, 548 U.S. 557, 629–30 (2006). The D.C. Circuit court had held previously that Common Article 2 did not apply because the conflict was not an international armed conflict between High Contracting Parties. *Hamdan v. Rumsfeld*, 415 F.3d 33, 41 (D.C. Cir. 2005), *rev’d*, 548 U.S. 557 (2006). The D.C. Circuit had also held that Common Article 3 did not apply because the conflict was not a noninternational conflict (a “conflict not of an international character occurring in the territory of one of the High Contracting Parties”) because

the construct of unlawful enemy combatant, noninternational armed conflict has a historical basis and a complex set of relations that belong to a different discourse than the one surrounding 9/11. By asserting that the conflict was noninternational, the Supreme Court necessarily excluded the voluminous discourse concerning international armed conflict and the treatment of civilians, prisoners, and combatants. Whether that entire discourse is relevant or not is debatable, but the Court should at least address the fact that the unique GWOT may not fit neatly into historical categories. The Court should excavate the preexisting discursive relationships and exclusions that these imperfect analogies import into the current controversies and determine transparently whether such relationships and exclusions are appropriate.

*B. The Discursive Formation as the Allocation of Power and Authority*

This Note's argument is not that harnessing aspects of imperfect analogies is not proper. Instead, it seeks to point out that the discursive formation, which is composed of *énoncés* and all of the referential space embedded in them, constructs the ways in which these analogies may be interpreted and determines who has the authority to make such interpretations. Within the post-9/11 discourse, as exemplified in the post-*Boumediene* habeas litigation in the D.C. district courts, judges have occupied a constrained role, asking *whether* instead of undertaking the obligation to answer *why* that Judge Wilkinson perceived. A limited role for the judiciary may be the proper approach in this new kind of war, but courts have not excavated the discourse and made this argument. They have instead relied on unexamined *énoncés* and historical analogies.

The exclusions and collateral, correlative, and complementary spaces of the *énoncés* of the post-9/11 discursive formation have constructed institutional power relationships, instead of the other way around. Judge Leon's resistance to the temptation of the "judicial craftsmanship" "exhibited" by the Fourth Circuit in *al-Marri* and his statement that the province of the judiciary does not allow it to draft definitions<sup>222</sup> is appealing at first because it seems to posit the proper role of the judiciary as the interpreter, but not the drafter, of law. His statement also appears on its face to echo the tradition of deference to the Executive Branch in matters of foreign policy and during wartime.<sup>223</sup> Probably for these reasons, this apparently innocuous, un-

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the conflict was international in scope. *Id.* ("Common Article 3 applies only to armed conflicts confined to 'a single country.'" (quoting INT'L COMM. RED CROSS, COMMENTARY: III GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 37 (1960))).

<sup>222</sup> See *supra* Part II.B.

<sup>223</sup> See, e.g., Eric A. Posner & Cass R. Sunstein, *Chevronizing Foreign Relations Law*, 116 YALE L.J. 1170 (2007) (detailing the history of judicial deference to the Executive in matters of foreign relations and arguing that, in some circumstances, the judiciary should treat executive interpretations of statutes with the same deference with which it examines administrative interpretations under *Chevron*).

controversial statement has been explicitly asserted or implicitly accepted as the basis for almost all decisions in the habeas litigation within the D.C. Circuit following *Boumediene*.<sup>224</sup>

For example, the Constitution explicitly bestows upon Congress the power to “define and punish . . . Offences against the law of nations,”<sup>225</sup> but in a discursive formation that has excluded single offenses or acts from its purview in its focus on association and war, the detention (not punishment) of detainees (not prisoners) does not implicate this doctrine. Although the definition of “unlawful enemy combatants” and thus the legal standard for detention proposed by the Executive Branch borrowed explicitly from a statute making it a crime to materially support terrorism,<sup>226</sup> the discursive formation does not allow both the criminal and military to coexist; it excludes the idea of “crime” in the unity of “war.” Courts could argue that the AUMF is a proper delegation of power even if they accepted that the definition of an enemy combatant is essentially the definition of someone who commits the crime of terrorism, but they have not conducted such an excavation of the unlawful enemy combatant *énoncé*.

Informed by Foucault’s methodology, this Note argues that Judge Leon and many other members of the judiciary are speaking from a role constructed by the discursive formation itself. The text of the discursive formation determines the meanings of and inherent relationships among terms such as “war” or “enemy combatant” and, consequently, the role of the judiciary in analyzing questions involving those terms. As Foucault explains, “Such discourses as economics, medicine, grammar, the science of living beings give rise to certain organizations of concepts, certain regroupings of objects, certain types of enunciation, which form, according to their degree of coherence, rigour, and stability, themes or theories . . . .”<sup>227</sup> The themes and theories of the post-9/11 discursive formation, then, define where the power and authority of speech lie and what categories of speech are even possible.

Foucault’s insights demonstrate that “[p]ower develops through ‘normalization’, through defining what is usual and habitual and to be expected, as opposed to the deviant and exceptional.”<sup>228</sup> The discursive formation that has developed after 9/11 postulates the attacks of that day as the origin, as a break with all previous discourses and the cause of all that has followed, but it also includes numerous historical unities that distribute power relationships according to their normative content. The GWOT is a new kind of war, calling for new kinds of warfare, but it still includes within it the historical unity of “war.” “Unlawful enemy combatants” are a new type of

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<sup>224</sup> See *supra* Part II.B–C.

<sup>225</sup> U.S. CONST. art. I, § 8, cl. 10.

<sup>226</sup> See Chesney & Goldsmith, *supra* note 212, at 1122–26.

<sup>227</sup> FOUCAULT, *supra* note 2, at 64.

<sup>228</sup> WETHERELL & POTTER, *supra* note 202, at 84.

enemy that require new measures, but this label has existed since *Quirin* and continues to contain its relationships to its historical antecedent and its referential space. In this way, the discursive formation has employed historical discourses, each with a complex referential space that “is defined by the rules of formation and transformation of the mobile and multiple objects that those discourses construct and posit as their referents.”<sup>229</sup> Therefore, instead of focusing on the radical discontinuity of the emergence of post-9/11 unlawful enemy combatants, courts have felt bound by the historical rules of the label’s formation and definition. Similarly, since 9/11 is seen as reconstituting all discourses, “terrorism,” which was previously located in the criminal discourse and accompanied by rules excluding it from the discourse of war,<sup>230</sup> has now been reconceptualized and incorporated into an entirely different discursive formation. These discursive interrelationships have gone unexplored and unaccounted for in judicial opinions. Thus, the problem that this Note finds with the approach of many courts considering habeas petitions after *Boumediene* is the same problem confronted by Foucault, and this Note calls for the same solution: archaeology.

#### IV. AN ARCHAEOLOGY OF THE POST-9/11 DISCURSIVE FORMATION

Judges should engage in archaeological methodology when deciding fundamental questions about the separation of powers and the applicability of old precedents to this “difficult time.” The archaeology described below is necessary because *énoncés* are not immediately perceptible but are typically hidden among the phrases and propositions of a discourse. Therefore, the courts rely on these self-legitimizing foundational terms and concepts without actually exploring whether they are, in fact, new emergences within the post-9/11 discursive formation. The plinth, the base supporting a statute or column, must be unearthed and “polished—even fashioned or invented.”<sup>231</sup> One of the principal reasons Foucault advocates this archaeology is his desire to focus on the radical discontinuity of emergences instead of situating them within a larger historical narrative. At the same time, Foucault seeks to eliminate the idea that “historical development . . . is organized like a necessary continuity; that events are linked together, the one engendering the other in an uninterrupted flow that permits decreeing one the ‘cause’ or ‘origin’ of the other.”<sup>232</sup>

In law, then, Foucault’s insight and proposed methodology are extraordinarily valuable because they force a judge to wrestle with the way that words and concepts shift depending on their discursive relations. Not only is this archaeological excavation of discourse a valuable practice in and of

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<sup>229</sup> CHARTIER, *supra* note 59, at 57.

<sup>230</sup> See *supra* text accompanying notes 212–14.

<sup>231</sup> DELEUZE, *supra* note 10, at 16.

<sup>232</sup> CHARTIER, *supra* note 59, at 54.



itself, but it also provides the full blueprint of the structure of argumentation so that another judge who disagrees can respond on a more fundamental level. For example, in the Fourth Amendment context, the Supreme Court relied on the historical ability of police officers to make warrantless arrests of individuals who commit felonies to uphold the constitutionality of an arrest in *United States v. Watson*.<sup>233</sup> In dissent, Justice Marshall pointed out that “felony” as the majority used it included a much wider swath of crimes than it had historically, and he argued that the majority opinion had thus failed to be faithful to historical practice.<sup>234</sup> He was asserting that although the syntagm of “felony” remained the same, the *énoncé* of “felony” constituted something far different in the current discourse than it had historically. Had the majority recognized this discursive point as well, it would have been forced to present an archaeological argument that “felony” as used today should be treated in the same way that “felony” has been treated historically. In the same way, the post-9/11 habeas cases present judges with the opportunity to engage in such an archaeological excavation with the post-9/11 *énoncés*. In so doing, the courts would provide a principled framework, built upon the plinths underlying the discourse, with which others could disagree on the same fundamental level.

In the cases outlined above, some courts have approached the historical development since 9/11 as a necessary continuum, each development built upon a prior event and existing within a self-enclosed discourse. Many of the opinions start with 9/11 as both the origin and ultimate cause of each subsequent event. “On September 11, 2001,” the world changed unalterably and nothing can be viewed except in its relation to 9/11. Foucault’s discussion of the place of the French Revolution within the discourse of the Enlightenment could easily be mistaken for one about 9/11:

The idea of a single break suddenly, at a given moment, dividing all discursive formations, interrupting them in a single moment and reconstituting them in accordance with the same rules—such an idea cannot be sustained.

. . . .  
 . . . [T]he French Revolution . . . does not play the role of an event exterior to discourse, whose divisive effect one is under some kind of obligation to discover in all discourses; it functions as a complex, articulated, describable group of transformations that left a number of positivities intact, fixed for a

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<sup>233</sup> 423 U.S. 411, 418 (1976) (“The cases construing the Fourth Amendment thus reflect the ancient common-law rule that a peace officer was permitted to arrest without a warrant for a misdemeanor or felony committed in his presence as well as for a felony not committed in his presence if there was reasonable ground for making the arrest.”).

<sup>234</sup> *Id.* at 441–42 (Marshall, J., dissenting) (“[T]he only clear lesson of history is contrary to the one the Court draws: the common law considered the arrest warrant far more important than today’s decision leaves it.”).

number of others rules that are still with us, and also established positivities that have recently disappeared or are still disappearing before our eyes.<sup>235</sup>

The tragedy of 9/11 has created a “sudden break” in all discourses, a fact recognized by many judges in the judicial discourse. However, the event is not “exterior” to the preexisting discourses so that it has had no influence over their underlying meaning. The discursive formation that has resulted presumes that many previously existing legal constructs have been “left intact” without addressing the question of why. As Foucault says of the French Revolution, the proposition that 9/11 occurred and interrupted everything only to put everything back in “accordance with the same rules” cannot be sustained. In ushering in this “difficult time,” 9/11 has also established a new discursive formation, with new rules, new *énoncés*, and a new *référentiel* consisting of its own collateral, correlative, and complementary spaces.

However, the plinths of the post-9/11 judicial discourse—such terms as “national security,” “war,” and “enemy combatants”—are being used regularly by judges who either do not see the interrelationships within the discursive formation that have reconstructed their meaning or feel powerless to address them. Instead of acknowledging the radical discontinuity between the historic use of these terms and their use within the post-9/11 discursive formation, or even recognizing the possibility of such a discontinuity, most judges have relied on their unity.

Judges can only understand the construction of the definitions and power relationships and determine who has the authority to “speak,” i.e. to draft definitions, by unearthing these *énoncés* and exploring their relational spaces. Thus, judges must attempt to excavate the plinths of this post-9/11 discursive formation. An understanding of this discursive construction is necessary to form new principles, or plinths, upon which to base a decision about fundamental questions of the separation of powers and international law in the post-9/11 world. Therefore, judges should excavate the discursive formation and then, by means of what Foucault termed “controlled decisions,” address the *why* of the foundational elements and institutional relationships of the discursive formation.

#### A. *Drafting the Definitions by a Series of “Controlled Decisions”*

Archaeology studies “human history . . . through the excavation of sites and the analysis of artifacts and other physical remains”<sup>236</sup> and constructs a picture of past culture from these basic remnants. Foucault chose this analogy to describe his discursive methodology and defined his version of archaeology:

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<sup>235</sup> FOUCAULT, *supra* note 2, at 175, 177.

<sup>236</sup> NEW OXFORD AMERICAN DICTIONARY, *supra* note 12, at 82 (defining “archaeology”).

What, in short, we wish to do is to dispense with ‘things’. To ‘depresentify’ them. . . . To substitute for the enigmatic treasure of ‘things’ anterior to discourse, the regular formation of objects that emerge only in discourse. To define these *objects* without reference to the *ground*, the *foundation of things*, but by relating them to the body of rules that enable them to form as objects of a discourse and thus constitute the conditions of their historical appearance.<sup>237</sup>

Thus, to escape the inertia of the post-9/11 discursive formation, the judiciary must define its role and the constitutional principles that define it without reference to the “foundation,” i.e. self-legitimizing *énoncés* such as “war” and “foreign relations.” In *Hamdi v. Rumsfeld*, Justice O’Connor cited *Youngstown* and *Egan* for the proposition that the Judicial Branch has historically deferred to the Executive in matters of national security and foreign relations,<sup>238</sup> but she did not relate these assertions to the “conditions of their historical appearance” as Foucauldian archaeology would require. Thus, she did not answer the question of whether her use of the phrases “national security” and “foreign relations” were the same *énoncés* as the identical phrases in those Korean War-era cases.

The phrase “foreign relations,” when related to judicial deference, has traditionally referred to the relations of our singular government to the government of other countries or to different international bodies.<sup>239</sup> Within the present discourse, however, the same syntagm is being used to refer to a nebulous idea of presidential power that is defined and constructed in part by the collateral space of the post-9/11 discourse. In other words, courts are currently using “foreign relations” to describe particular events, such as a war against an undefined group of multinational terrorists, that would not be encompassed by its pre-9/11 *énoncé*. As Judge Wilkinson realized, it is not self-evident that the constitutional considerations and policy justifications used to rationalize deference to the Executive in those past circumstances also justify the present deference when the Executive acts directly on foreign individuals; the unity must be established by a principled, rigorous, archaeological investigation.

Foucault opens *The Archaeology of Knowledge* by advocating for the suspension of all unities, all “pre-existing forms of continuity,” and demands that these “syntheses that are accepted without question” be reexamined.<sup>240</sup> He urges that “the tranquility with which they are accepted must be disturbed; we must show that they do not come about of themselves, but

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<sup>237</sup> FOUCAULT, *supra* note 2, at 47–48.

<sup>238</sup> See *supra* notes 49–52 and accompanying text.

<sup>239</sup> See, e.g., Posner & Sunstein, *supra* note 223, at 1202 (“Deference to the executive in foreign relations cases is traditionally based on both constitutional and functional considerations. . . . Courts say that the nation must speak in ‘one voice’ in its foreign policy; the executive can do this, while Congress and the courts cannot.”); *id.* at 1205 (“Litigation produces entanglement problems when the decision on the merits is likely to offend a foreign sovereign, perhaps leading it to withdraw cooperation in some area of foreign relations . . .”).

<sup>240</sup> FOUCAULT, *supra* note 2, at 25.

are always the result of a construction.”<sup>241</sup> In the legal sphere, Foucault’s methodology is vital because, by undertaking to show the “construction” of these purported syntheses, a judge makes transparent the fundamental principles on which her decision rests. Creating more transparent judicial decisions within the post-9/11 discourse will, in turn, create the opportunity for disagreement and debate concerning the excavation and the foundational plinths relied upon by each judge. This kind of dynamic, principled debate, with no inherent assumptions or relationships, seems to be what the Supreme Court contemplated when it said, “The legal category of enemy combatant has not been elaborated upon in great detail. The permissible bounds of the category will be defined by the lower courts as subsequent cases are presented to them.”<sup>242</sup>

Foucault’s insight demonstrates that a thorough, archaeological investigation of the post-9/11 discourse, like that of any discourse or discipline, cannot be undertaken without scrutinizing the justifications for the parallels and analogies it contains. To scrutinize the presupposed unity of terms, we must endeavor “to tear away from them their virtual self-evidence . . . ; to recognize that they are not the tranquil locus on the basis of which other questions . . . may be posed, but that they themselves pose a whole cluster of questions.”<sup>243</sup> The judiciary, then, must tear all of the self-legitimizing unities of post-9/11 discourse—national security, war, foreign relations, enemy combatants, etc.—away from their “virtual self-evidence.” In the post-*Boumediene* habeas litigation, most courts have been using these terms as the tranquil locus of their reasoning, but they have not recognized that these discursive constructs pose numerous questions in and of themselves. Most significantly, are they the same *énoncés* used in historical judicial discourse such that their invocation in the post-9/11 context should bring about the same legal outcome?

After this suspension of seemingly self-evident syntheses, a judge will be able to excavate the post-9/11 discursive formation and construct a new edifice with its plinths and fundamental construction transparent to all. According to Foucault, this archaeological endeavor occurs in three stages. First, “the systematic erasure of all given unities enables us . . . to restore to the statement the specificity of its occurrence.”<sup>244</sup> Foucault wants to examine the “event,” “[h]owever banal,” of a concept entering a discourse, which is linked not only to its causes and consequences, but also to the “[*énoncés*] that precede and follow it.”<sup>245</sup> Foucault says, “[W]e must grasp the statement in the exact specificity of its occurrence; determine its conditions of existence, fix at least its limits, establish its correlations with other

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<sup>241</sup> *Id.*

<sup>242</sup> *Hamdi v. Rumsfeld*, 542 U.S. 507, 522 n.1 (2004).

<sup>243</sup> FOUCAULT, *supra* note 2, at 26.

<sup>244</sup> *Id.* at 28.

<sup>245</sup> *Id.*

statements that may be connected with it, and show what other forms of statement it excludes.”<sup>246</sup> Second, the initial suspension of self-evident unities allows one to “leave oneself free to describe the interplay of relations” both within and outside the discursive formation.<sup>247</sup> Finally, Foucault argues that this suspension, “by freeing [a description of the facts of discourse] of all the groupings that purport to be natural, immediate, universal unities,” allows an individual to describe new unities “but this time by means of a group of controlled decisions.”<sup>248</sup>

In the post-*Boumediene* habeas litigation, then, suspending the historical unity of these *énoncés* will allow judges to first excavate the discursive formation and the inherent relations and exclusions within the post-9/11 discourse. By confronting the imperfections of historical analogy, the different discursive relationships, and the exclusions the complementary space entails, judges will be free to describe these relationships, both inside and outside of the post-9/11 discourse. In other words, they will be forced to enumerate what the differences are in this post-9/11 era and be free to describe how the historical ideas and post-9/11 discourse relate to one another. Most importantly, undertaking this excavation will then allow each judge to make controlled, principled decisions about the implications of these differences and to construct a framework that other judges can critique and refine. This kind of archaeological excavation will not only give notice to the current and future members of the political branches about the principles that should govern this new kind of war but will also create a dynamic, constructive dialogue between judges themselves. Because this proposal is somewhat abstract, the following section offers the *Boumediene* opinions of Justices Kennedy and Scalia as an example of the contrast between the archaeological excavation for which this Note argues and the reliance on self-legitimizing *énoncés* that has characterized the habeas litigation to this point. Justice Kennedy’s opinion undertakes the three phases of excavation and construction outlined above and represents a superb model of Foucauldian archaeology, but Justice Scalia’s opinion emphasizes the “difficult time” of the post-9/11 era and relies on unexamined *énoncés* to support his arguments.

#### B. Justice Kennedy’s *Boumediene* Opinion as an Archaeological Endeavor

Discussing the applicability of the “great writ” of habeas corpus in his majority opinion in *Boumediene*, Justice Kennedy offered an example of Foucauldian archaeology. His opinion opened with the specific factual scenario of the case: “Petitioners are aliens designated as enemy combatants and detained at [Guantánamo].”<sup>249</sup> His background section explained the

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<sup>246</sup> *Id.*

<sup>247</sup> *Id.* at 29.

<sup>248</sup> *Id.*

<sup>249</sup> *Boumediene v. Bush*, 553 U.S. 723, 732 (2008).

specific legal context instead of beginning with the 9/11 attacks: “Under the [AUMF], the President is authorized ‘to use all necessary and appropriate force . . . .’”<sup>250</sup> Justice Kennedy then began his excavation, offering an exhaustive analysis of the historical role of habeas corpus under English common law and U.S. practice.<sup>251</sup> In examining the extraterritorial reach of habeas, Justice Kennedy did not assume that “sovereignty” in the historical discourse and “sovereignty” in the post-9/11 discourses were the same *énoncé*<sup>252</sup> but suspended all presupposed syntheses and unearthed all of the fundamental plinths of the historical place of habeas proceedings.

This fulfilled Foucault’s first goal of recognizing the emergence of an *énoncé* and the historical context surrounding it. Indeed, Justice Kennedy recognized new emergences—“the unique status of Guantanamo Bay and the particular dangers of terrorism in the modern age”—and accepted that “common-law courts simply may not have confronted cases with close parallels to this one.”<sup>253</sup> Toward the close of his opinion, Justice Kennedy noted that “[o]fficials charged with daily operational responsibility for our security may consider a judicial discourse on the history of the Habeas Corpus Act of 1679 and like matters to be far removed from the Nation’s present, *urgent* concerns.”<sup>254</sup> He clearly recognized not only the novelty of the situation but also the fact that such novelty meant terms such as “sovereignty” were situated in a new discursive formation and needed to be utilized.

The opening of Justice Scalia’s dissent, however, sounded in stark contrast to the legal doctrine that began Justice Kennedy’s opinion as well as to the usual methodology of Justice Scalia’s opinions.<sup>255</sup> He opened his discussion by abruptly announcing, “America is at war with radical Islamists” and then proceeded to detail the number of deaths caused by each of a series of terrorist attacks.<sup>256</sup> He reached a crescendo with, “On September 11, 2001, the enemy brought the battle to American soil, killing 2,749 at the Twin Towers in New York City, 184 at the Pentagon in Washington, D.C., and 40 in Pennsylvania.”<sup>257</sup> This statement, no less than *Hamdi*’s “difficult time,” immediately situated the discussion that followed within a particular discourse, alerting the reader that the considerations that followed were inseparable from the discourse of 9/11 and based on more than legal principles. In these opening paragraphs, Justice Scalia continued his vivid

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<sup>250</sup> *Id.* at 733 (citation omitted).

<sup>251</sup> *See id.* at 739–71.

<sup>252</sup> *See, e.g., id.* at 748–55.

<sup>253</sup> *Id.* at 752.

<sup>254</sup> *Id.* at 797 (emphasis added).

<sup>255</sup> *Id.* at 827 (Scalia, J., dissenting) (“Contrary to my usual practice, however, I think it appropriate to begin with a description of the disastrous consequences of what the Court has done today.”).

<sup>256</sup> *Id.*

<sup>257</sup> *Id.*

description of the “difficult time,” claiming that “one need only walk about buttressed and barricaded Washington, or board a plane anywhere in the country, to know that the threat is a serious one.”<sup>258</sup> Adopting a somewhat fatalistic tone, he stridently criticized the Court’s decision on an extralegal basis by predicting that the “devastating” decision would “almost certainly cause more Americans to be killed.”<sup>259</sup> Touching on enemy combatants, war, and national security in one sentence, Justice Scalia argued that the “blunders” of the majority opinion “make[] unnervingly clear [that] how to handle enemy prisoners in this war will ultimately lie with the branch that knows least about the national security concerns that the subject entails.”<sup>260</sup>

Justice Kennedy agreed that proper deference should be accorded to the political branches in the realm of foreign affairs, citing *United States v. Curtiss-Wright Export Corp.*,<sup>261</sup> a classic case that immediately conjures the principle of inherent foreign relations power.<sup>262</sup> However, these statements came only after he conducted the archaeological investigation of the discursive formation for which this Note advocates; he conducted an excavation to determine how the fundamental constitutional and policy judgments the historical principles contain related to the specific scenario confronting the Court.

For example, Justice Kennedy’s discussion of sovereignty clearly contrasts with the automatic deference based on the unexplored idea of “national security” in Justice Scalia’s opinion. His excavation of “sovereignty” demonstrates an innate understanding of Foucault’s insights about the need for investigation and archaeology. Justice Kennedy began with the recognition that the “Court has held that questions of sovereignty are for the political branches to decide,”<sup>263</sup> but then unearthed the plinth on which this deference was traditionally based. Recognizing that “[s]overeignty’ is a term used in many senses and is much abused,”<sup>264</sup> he proceeded to note that the historical deference was based on a reference to “sovereignty in the narrow, legal sense of the term”<sup>265</sup> and not a reference to the “general, colloquial sense, meaning the exercise of dominion or power.”<sup>266</sup> By suspending the unity of past issues of war, national security, and sovereignty on which Justice Scalia relied in his dissent, Justice Kennedy left himself free to de-

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<sup>258</sup> *Id.*

<sup>259</sup> *Id.* at 828.

<sup>260</sup> *Id.* at 831.

<sup>261</sup> 299 U.S. 304 (1936).

<sup>262</sup> *See id.* at 319 (“In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation.”).

<sup>263</sup> *Boumediene*, 553 U.S. at 753.

<sup>264</sup> *Id.* at 754 (alteration in original) (quoting 1 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 206 cmt. b (1986)) (internal quotation marks omitted).

<sup>265</sup> *Id.* (citing 1 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, *supra* note 264, § 206 cmt. b).

<sup>266</sup> *Id.* (citing WEBSTER’S NEW INTERNATIONAL DICTIONARY 2406 (2d ed. 1934)).

scribe the “interplay of the relations”<sup>267</sup> inside and outside of the discursive formation.

After excavating the roots of the discourse about habeas and describing the historical, institutional, and social relationships that he found important, Justice Kennedy could then construct a new framework based on controlled, principled decisions. For example, Justice Scalia relied heavily on *Johnson v. Eisentrager*,<sup>268</sup> a World War II case that held that the Court did not have jurisdiction to hear the habeas petitions of German citizens who were held on a U.S. base in Germany and who sought to challenge their conviction of war crimes by a military commission.<sup>269</sup> In Justice Kennedy’s discussion of the case, though, he noted that the “historical context and nature of the military’s mission” was “far different” in that case.<sup>270</sup> By suspending all of these unities, Justice Kennedy freed himself from the “natural, immediate” unities that Foucault describes and was able to construct new unities by a series of “controlled decisions.” Justice Kennedy excavated the collateral, correlative, and complementary spaces that are present within the *énoncés* and the enunciative field of the post-9/11 discourse. He recognized the radical discontinuity of the historical and modern definitions of “sovereignty” despite the self-legitimizing unity of the term.

By contrast, Justice Scalia’s dissent emphasized that Justice Kennedy had failed to distinguish *Eisentrager* and had thus overruled its holding without explicitly saying so. Although his point may be correct as a formal matter, it can only be so if one accepts the self-legitimizing unities of the discourse, e.g., the historical unity of World War II and the GWOT and the unity of the idea of sovereignty in the two cases. Whether or not one agrees with Justice Kennedy’s conclusion that these unities do not exist, he at least addressed the issue on the fundamental discursive level of the *énoncé* and offered an argument that can be disputed by others, such as Justice Scalia or the political branches.<sup>271</sup>

Justice Kennedy approached the issue of the extraterritorial application of habeas using the same archaeological method with which Judge Wilkin-

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<sup>267</sup> See *supra* note 247 and accompanying text.

<sup>268</sup> 339 U.S. 763 (1950); see *Boumediene*, 553 U.S. at 834–42 (Scalia, J., dissenting).

<sup>269</sup> See *Eisentrager*, 339 U.S. at 765–66, 768.

<sup>270</sup> *Boumediene*, 553 U.S. at 769 (majority opinion).

<sup>271</sup> Shortly after the opinion came down, one commentator remarked that “[i]n one sense the dissenters’ rhetoric is fairly standard stuff, albeit unbecomingly vitriolic. But there’s an issue here that goes beyond mere rhetoric: I think in this case the dissenters may actually misunderstand the majority’s conception of how deference ought to work.” Julian Davis Mortenson, *Deference Reconsidered*, OPINIO JURIS (June 17, 2008, 11:40 AM), <http://opiniojuris.org/2008/06/17/deference-reconsidered>. Mortenson recognized that Justice Kennedy was not forsaking deference altogether in “insist[ing] on setting the essential terms of review itself,” but just defining the type of deference that would be appropriate in this new discursive context. See *id.* (“[I]t seems clear to me from the tone and approach of the *Boumediene* majority that a serious and systematic effort [by the political branches] to lay down rules . . . governing preventive detention is likely to be respected by this Court.”).



son approached the detention issue in *al-Marri*. Both judges refused to let the origin and radical discontinuity of 9/11 obscure the fact that other radical new emergences may be occurring within the discourse as well. After excavating the discourse, both chose to construct new edifices that transparently rested on the plinths they had unearthed. As Judge Wilkinson recognized, this thorough excavation, recognition of new emergences, and reconstruction of foundational principles constitute the obligations of the judicial branch.

#### CONCLUSION

This Note contends that judges in the Guantánamo habeas cases, and in future cases presenting “hard questions,” must engage the issues directly, on a fundamental discursive level. One of the principal purposes of the Judicial Branch is to control the excesses of the Executive and Legislative Branches in order to protect individual liberties, especially during wartime. The ancient writ of habeas corpus is one of the most salient examples of this role.<sup>272</sup> In recent habeas proceedings, however, the courts have spoken from within the post-9/11 discursive formation and based their decisions on foundational *énoncés* that necessarily preclude this power. Taking all “necessary and appropriate” measures in a discursively unified conception of “war” may historically have included a fundamental power to detain combatants, but the inquiry should not end there. The judiciary may have a historical practice of deferring to the Executive in matters of “national security” and “foreign affairs,” but that should not be the final word. Only by exploring these self-legitimizing terms that carry so many inherent relationships to history, institutional practice, and the current discourse can a judge both provide notice to the political branches and engage in the kind of dynamic, constructive dialogue that will hone and test the issues confronting the judiciary today.

Professor Daniel Williams observed that it seems “as if the ontology of ‘enemy combatants’ was foisted upon us by 9/11.”<sup>273</sup> He uses figurative language to describe the way that the discourse obscures the fact that “‘enemy combatant’ is a construct we have injected into our cultural milieu.”<sup>274</sup> This description of the way it seems is actually a description of reality. There is no subject, no “we,” that created this “construct.” Instead, the post-9/11 discursive formation has “foisted” upon the governmental branches certain power relations and defined who has the authority to speak under specific circumstances. As such, the discourse has constructed the

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<sup>272</sup> See *Boumediene*, 553 U.S. at 739–45 (offering a detailed history of the Suspension Clause and concluding that “[i]t ensures that, except during periods of formal suspension, the Judiciary will have a time-tested device, the writ, to maintain the ‘delicate balance of governance’ that is itself the surest safeguard of liberty” (quoting *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004))).

<sup>273</sup> Williams, *supra* note 15, at 387.

<sup>274</sup> *Id.*

term “enemy combatants” by excluding other discourses and delineating which actors have the authority to define it. The text of this discursive formation incorporates legal constructs—such as national security, noninternational conflict, unlawful enemy combatants, war, crime, and terrorism—that all have significant collateral, correlative, and complementary spaces. Collectively, these *énoncés* construct the enunciative field from which the post-9/11 discursive formation arises.

Judges hearing these habeas cases must tear the presupposed unity of concepts like “war,” “national security,” and “enemy combatants” away from their virtual self-evidence and excavate the discourse to examine and wrestle with the “material remains,” the basic atoms (*énoncés*), of the discursive formation at their fundamental level. They should follow the example of Justice Kennedy in *Boumediene*, as well as that of Judge Wilkinson in *al-Marri*. They must dissect the collateral space by exploring the relationships among the various concepts within this discursive formation, unearth the correlative space by examining historical relationships and unities in light of the radical discontinuity of 9/11, and expose the complementary space by explicitly discussing the institutional milieu and its distribution of power. Then, and only then, can judges, by a series of “controlled decisions” draft a definition of “enemy combatants” and define the constitutional and statutory principles that should govern this new kind of war. Whatever principles of deference and detention this archaeology establishes—whether they grant broad power to the Executive or institute significant judicial review—will rest on plinths that have been firmly constructed out of the partial remnants of former edifices. Although Judge Brown, among others, has called for a legislative solution to this problem,<sup>275</sup> judges should “make no apologies”<sup>276</sup> for attempting to construct principled answers. This archaeological excavation is “emphatically the province and duty of the judicial department.”<sup>277</sup>

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<sup>275</sup> See *Al-Bihani I*, 590 F.3d 866, 882 (D.C. Cir. 2010) (Brown, J., concurring) (“But the circumstances that frustrate the judicial process are the same ones that make this situation particularly ripe for Congress to intervene pursuant to its policy expertise, democratic legitimacy, and oath to uphold and defend the Constitution. These cases present hard questions and hard choices, ones best faced directly. Judicial review, however, is just that: *re*-view, an indirect and necessarily backward looking process. And looking backward may not be enough in this new war. The saying that generals always fight the last war is familiar, but familiarity does not dull the maxim’s sober warning.”).

<sup>276</sup> *Al-Marri v. Pucciarelli*, 534 F.3d 213, 296 (4th Cir. 2008) (en banc), *vacated as moot sub nom. al-Marri v. Spagone*, 129 S. Ct. 1545 (2009) (mem.).

<sup>277</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); see also *Noriega v. Pastrana*, 130 S. Ct. 1002, 1002–03 (2010) (Thomas, J., dissenting from denial of certiorari) (“This duty [to say what the law is] is particularly compelling in cases that present an opportunity to decide [constitutional and statutory issues] . . . in time to guide courts and the political branches in resolving difficult questions concerning the proper ‘exercise of governmental power.’ . . . It is incumbent upon us to provide what guidance we can . . . [O]ur opinion will help the political branches and the courts discharge their responsibilities over detainee cases, and will spare detainees and the Government years of unnecessary litigation.” (quoting *Hamdan v. Rumsfeld*, 548 U.S. 557, 637 (2006) (Kennedy, J., concurring in part))).