Terrorism, the Laws of War, and the Constitution

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Debating the Enemy Combatant Cases

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HOOVER INSTITUTION PRESS
Stanford University Stanford, California

www.hoover.org

Hoover Institution Press Publication No. 537

First printing, 2005
12 11 10 09 08 07 06 05 9 8 7 6 5 4 3 2 1

Manufactured in the United States of America

The paper used in this publication meets the minimum requirements of the American National Standard for Information Sciences—Permanence of Paper for Printed Library Materials, ANSI Z39.48-1992. ♾

Library of Congress Cataloging-in-Publication Data
Terrorism, the laws of war, and the Constitution : debating the enemy combatant cases / edited by Peter Berkowitz.
p. cm. — (Hoover Institution Press publication series ; 537)
Includes bibliographical references and index.
ISBN 0-8179-4622-5 (alk. paper)
1. Combatants and noncombatants—Legal status, laws, etc.—United States. 2. War (International law) 3. Constitutional law—United States. 4. Detention of persons—United States. 5. Terrorism—United States. 6. War on Terrorism, 2001– 7. National security—United States. I. Berkowitz, Peter, 1959– II. Series: Hoover Institution Press publication ; 537.
KF7225.T48 2005
343.73′01—dc22 2005003039

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Acknowledgments

The editor is grateful to Jack Goldsmith, who provided valuable comments on several of the chapters, as well as on the Introduction. And it is a pleasure to again thank Hoover Institution director John Raisian and deputy director David Brady for their support.

* * *

The Hoover Institution wishes to acknowledge the generous support of the McCormick Tribune Foundation that made this book possible.

The Institution also wishes to thank supporters of the initiative on National Priorities, International Rivalries, and Global Cooperation, including the Bradley Foundation and Jeronimo and Javier Arango.

Introduction

Peter Berkowitz

AL QAEDA'S SEPTEMBER 11 attack on the United States marked the advent of a new era of warfare. Until that awful day, the dominant view held that only a state could threaten another state's political sovereignty or territorial integrity. But the destruction of the World Trade Center Towers, the assault on the Pentagon, the attempted strike on the Capitol Building or the White House thwarted by the heroic passengers of flight 91, and the murder of more than 3,000 innocent civilians demonstrated that the dominant view was inadequate. Modern technology had placed in the hands of nonstate actors—shadowy terrorist networks and bands of fanatical thugs—the power to bring a state to its knees.

Like all wars, the global war on terror proclaimed by the Bush administration—or better, the U.S.-led worldwide war against Islamic extremists whose weapon of choice is terror—has put strain on the rule of law. This is in part because of the ways in which American constitutional law is entangled with the modern laws of war and their long-standing assumption that the principal actors in war are states. The modern laws of war are a part of the law of nations that emerged in the writings of seventeenth- and eighteenth-century jurists and

political thinkers and that developed in accordance with the evolving practices of modern nation states. In the aftermath of World War II and the founding of the United Nations, those laws have been a subject of increasingly intense interest and elaboration by international human rights lawyers. Specifying the rights and duties laid down by the laws of war can be difficult, because the laws of war stem from diverse sources—treaties, customary state practice, and abstract speculation. But the main cause of difficulty today is that the laws of war were developed with a particular conception of war in mind—involving states with incentives to engage in reciprocal restraint—that does not apply to the conflict with the United States' new adversaries. To further complicate matters, although American jurists generally agree that the laws of war are pertinent under the Constitution, they disagree vigorously on how those laws apply. Still, the central challenge for American constitutional law in the war on terror, as for the laws of war more generally, arises from the nature of a new kind of adversary who controls no territory, defends no settled population, hides among and targets noncombatant civilian populations, and seeks to acquire and use weapons of mass destruction.

In spring 2004, the first set of challenges under the Constitution made its way to the U.S. Supreme Court. These challenges came in the form of three cases concerning the process due to detainees who the United States holds as enemy combatants—those who take up arms and wage war against the United States. All invoked the writ of habeas corpus, the venerable legal means by which a prisoner asks a court to review the legality of his detention. In *Rumsfeld v. Padilla* (124 S. Ct. 2711 [2004]), the least consequential, the Court declined to consider the merits of the case. Jose Padilla, a U.S. citizen arrested in Chicago in May 2002 on suspicion of involvement in an al Qaeda plot to detonate a "dirty bomb" in the United States, had been held as an enemy combatant in a military brig in South Carolina without charges, without trial, and without access to a lawyer. In a lawsuit filed in the Southern District—which includes New York, where

Padilla was initially detained in federal criminal custody—Padilla contended that in detaining him, the government had violated his constitutional rights. The government responded that the war powers entrusted by the Constitution to the executive branch permitted the president to designate Padilla as an enemy combatant and that such designation overrode the rights to criminal due process that Padilla would otherwise enjoy as a U.S. citizen. Refusing to deal with either argument, Chief Justice William Rehnquist's 5–4 majority opinion ruled that Padilla had filed his petition for review of the grounds of his detention in the wrong federal district and would have to refile in the federal district in which he was detained. Writing for the dissenters, Justice John Paul Stevens would have held that the Southern District had jurisdiction and that Padilla was entitled to a review of his detention there.

In *Hamdi v. Rumsfeld* (124 S. Ct. 2633 [2004]), the Court did reach the merits. Yaser Esam Hamdi was seized by Coalition forces on the battlefield in Afghanistan in fall 2001. He was brought to the U.S. naval base at Guantanamo Bay, Cuba, for detention as an enemy combatant, but when the army discovered that Hamdi was a U.S. citizen (he was born in Louisiana, but grew up in Saudi Arabia), he was transferred to a military brig in Virginia and was later moved to one in South Carolina. At the time the Court heard his case, Hamdi had been held for more than two years inside the United States without charge, trial, or access to counsel. Hamdi's lawyers argued that as a U.S. citizen, he was entitled to the full panoply of protections afforded by the Constitution to those accused of criminal offenses. Justice Sandra Day O'Connor wrote for a bare plurality, including Chief Justice Rehnquist, Justice Anthony Kennedy, and Justice Stephen Breyer. She held that Congress had formally authorized the use of military force against al Qaeda and the Taliban, and that under that authorization, the government, as it contended, could detain as an enemy combatant even a U.S. citizen on U.S. soil who had joined the wartime adversary of the United States. But such a designation,

she also ruled, did not altogether nullify citizen Hamdi's constitutional protections: Hamdi had the right to challenge, with the aid of a lawyer and before a neutral decision maker, his designation as an enemy combatant. Justice David Souter's concurring opinion, joined by Justice Ruth Bader Ginsburg, denied that Hamdi's detention had been properly authorized by Congress but affirmed the plurality position that Hamdi was entitled to a meaningful review of the government's reasons for detaining him.

In a strange pairing, Justice Antonin Scalia, joined by Justice Stevens, drew a bright line, arguing in dissent that the government lacked constitutional authority to hold a U.S. citizen in the United States as an enemy combatant. The Constitution, in Scalia's view, gave the government only two options: It could charge Hamdi with treason, or Congress could suspend the writ of habeas corpus. Justice Clarence Thomas, in dissent, rejected the propriety of the Court's intervention. He argued that although the plurality had properly concluded that the congressional authorization of the use of military force provided the president with the power to designate citizens as enemy combatants, courts nevertheless lacked the information and the expertise to determine whether Hamdi was accurately so designated; therefore, the Court was obligated to leave the matter to the discretion granted to the president in wartime by the Constitution.

In *Rasul v. Bush* (124 S. Ct. 2686 [2004]), a 6–3 majority of the Court went further, revealing still sharper divisions among the justices. Circumventing a half-century-old precedent, it ruled that *alien* enemy combatants captured in Afghanistan and held at the U.S. naval base at Guantanamo Bay were entitled to challenge their detentions in U.S. federal court. Justice Stevens's majority opinion emphasized that although the United States did not exercise "ultimate sovereignty" over Guantanamo Bay, which still belonged to Cuba, the long-term leasing arrangement into which the United States had entered in 1903 brought the territory where the Guantanamo detainees were held under the "plenary and exclusive jurisdiction" of the

United States. Yet Stevens also used language that suggested a more sweeping holding—that alien enemy combatants held by U.S. forces *anywhere* in the world could seek relief in U.S. federal courts. In an angry dissent, joined by Chief Justice Rehnquist and Justice Thomas, Justice Scalia declared that the Court produced a ruling that not only had no foundation in the Constitution or previous law but also that would impose an immense burden on the U.S. military, requiring it to divert time, energy, and resources from battlefields around the world to judicial proceedings in U.S. federal courts.

The enemy combatant cases represent the leading edge of U.S. efforts to devise legal rules, consistent with American constitutional principles and the laws of war, for waging the global war on terror. As the distinguished contributors to this volume demonstrate, *Padilla*, *Hamdi*, and *Rasul* raise crucial questions about the balance between national security and civil liberties in wartime; they generate knotty separation of powers issues; and they call upon the courts, the political branches, and the country to reexamine the complicated connections between the Constitution and international law. Spanning the spectrum of informed legal opinion, the essays gathered here show that debating the enemy combatant cases is indispensable to meeting the legal challenges to come in the long war that lies ahead.

Seth Waxman puts the cases in historical and theoretical perspective. His point of departure is the confidence that Justice O'Connor expresses in *Hamdi* that today's courts will prove up to the task of balancing civil liberties and national security. Although he applauds O'Connor's decision and hopes time will vindicate her confidence, Waxman observes that the Court's conduct during past national security crises scarcely justifies optimism. In late eighteenth-century hostilities with France, during the Civil War, and in World War II, the Court showed a pronounced deference to the executive branch's penchant for overriding the claims of liberty in the name of security. So why has the current Court displayed considerably less deference to the executive branch and provided, in the enemy com-

batant cases, significantly more protection for civil liberties? Waxman offers two paradigms for explaining the departure. One views the enemy combatant cases from the perspective of "crisis jurisprudence" and suggests a variety of explanations: Over time, the Court has learned from its mistakes; civil liberties precedents have achieved a critical mass; as war comes to be seen as a constant feature of the political landscape, judges cannot postpone the preservation of individual liberty to peacetime; and as the immediate threat of September 11 recedes, the Supreme Court has grown less inclined to show deference to national security interests. The other paradigm focuses on changes in the Court's perception of its institutional powers. From this perspective, the Court's enemy combatant decisions may reflect its steadily increasing confidence and assertiveness over the past several decades. Although it is too early to identify accurately the balance of factors involved, in all likelihood, both paradigms are needed to account for the Court's reluctance in the present war to defer to executive branch judgment.

Judge Patricia Wald focuses on the doctrinal puzzles to which the enemy combatant cases give rise. But first she insists that the Court was right to hear the cases. The question of the Court's job in war, she points out, is part of a larger and long-standing political and academic debate about "the appropriate role of the judiciary in the complex social, economic, and moral issues of our national life." Given the civil liberties questions at stake, she applauds the Court's entry into the controversy. Yet she also believes the Court's hand was forced. Had the enemy combatant cases involved the possibility of a solution along federalism lines using the fifty states as laboratories, or had Congress attempted legislative action or even held hearings to explore what should be done with al Qaeda members after they had been captured, or had the executive branch shown greater respect for the process owed detainees under international law, she believes the Court might not have felt compelled to intervene as forcefully as it did. Although Wald largely agrees with the Court's judgments, she

concentrates on elaborating a variety of big questions that remain unanswered by the enemy combatant cases: Does habeas lie for foreign detainees housed elsewhere than at Guantanamo? Does it lie for claims of abuse or violations of international law apart from total innocence of being a combatant at all? Do foreigners have the same rights at a habeas hearing as do American-born defendants? How far can the designation of "enemy combatant" carry beyond the battlefield? Do targets of intelligence covert actions abroad have any rights comparable with enemy combatants? She concludes that these critical questions are not of the kind that the Court can resolve alone. Rather, they demand responses that are, in significant measure, legislative in nature, and so require Congress to accept its responsibility in waging the global war on terror.

Like Judge Wald, John Yoo thinks that the Court alone cannot provide all the solutions to questions posed by the enemy combatant cases. But Yoo believes that the Court did more to limit its involvement than is commonly perceived. According to the conventional wisdom, the cases "dealt the Bush administration a defeat in the war on terrorism." The reality, Yoo argues, is more complicated. In fact, the Court embraced the administration's "fundamental legal approach" by agreeing that the country was at war with a new kind of enemy, that Congress had authorized that war, and that U.S. citizens fighting on al Qaeda's side could be detained as enemy combatants. Yet Yoo also contends that with its rulings in *Hamdi* and *Rasul*, the Court "took a wrong turn and overstepped the traditional boundaries of judicial review." The Court thereby unwisely injected itself into military matters and "thrust the federal courts into the center of policy making in the war on terrorism." The crux of the problem is that compared with the political branches, courts lack competence in foreign policy and national security. Their comparative disadvantage in these areas, Yoo argues, stems both from the nature of the adversarial process and the structure of the federal judiciary. American federal courts present high barriers to access, they

impose severe limits on the acquisition and processing of information, their role is limited to the interpretation of the law, and they are poorly situated to adjudicate issues involving the ambiguities of international law. At the same time, the federal judiciary tends to select for generalists who lack the specialized knowledge that national security and foreign policy questions require; with its ninety-two district courts and thirteen courts of appeals, the federal judiciary is highly decentralized and, therefore, could create a multiplicity of opinions in a domain where the Constitution aims to centralize functions and project a single voice; and the federal judiciary proceeds very slowly, whereas national security and foreign policy questions often require rapid responses. Accordingly, in Yoo's view, the Court ought to refrain from entangling itself any further in the review of the military's handling of enemy combatants and leave the matter to the political branches.

Benjamin Wittes explores the variety of institutions and actors that shaped the outcome in the enemy combatant cases. Although he agrees with the conventional wisdom that the cases represent a "stinging rebuke" to the Bush administration, Wittes also agrees with John Yoo that the Court endorsed the administration's "fundamental approach." And though he admires the manner in which the Court balanced constitutional values in *Hamdi*, he is also in agreement with Yoo that it went too far in *Rasul*, sidestepping the governing precedent in an utterly unconvincing manner. But Wittes believes that the Court is far from alone in having failed to rise to the occasion. He does not quarrel with the administration's "desire to use the traditional presidential wartime powers to detain enemy combatants," but he does criticize it for its "Article II fundamentalism"—for acting, that is, as if decisions about enemy combatants were purely a matter of executive discretion and not also legislative in nature. Congress made matters worse by failing to assert its responsibility to legislate in the face of the challenges presented by al Qaeda. Wittes also faults human rights and civil liberties groups. They played a major role by

filing amicus briefs in the cases and presenting the Court with a prominent alternative to the administration's Article II fundamentalism. Unfortunately, Wittes observes, the alternative put forward by these groups embodied an extreme civil liberties fundamentalism that was both unpragmatic and tendentious in its reading of settled doctrine. In the face of this array of failures, Wittes expresses sympathy for the Court's "desire to split the baby between the claims of liberty and the claims of military necessity." But, echoing Judge Wald, Wittes would much prefer "a serious and deliberative legislative process," which would require not only a more engaged and responsible Congress but also an executive branch more attuned to the limits of its powers and a human rights and civil liberties community more appreciative of wartime exigencies and the laws of war.

Mark Tushnet is less sanguine that the Court can be kept in check. This is because of the "perfect Constitution" assumption, which he argues is pervasive in constitutional theory and Supreme Court jurisprudence and indeed "nearly inescapable." According to this assumption, the Constitution, properly construed, "is entirely adequate to meet the perceived needs of contemporary society." This assumption, argues Tushnet, is at work in all the opinions in *Hamdi*. In her plurality opinion, Justice O'Connor concludes both that the Constitution provides the president with all the power he needs to detain an alleged enemy combatant and that the Constitution prescribes a method for determining the process constitutionally due such a detainee. Justice Souter's concurrence adopts the assumption by suggesting that though the president cannot detain a U.S. citizen without express congressional authorization, the Constitution may permit executive detention in times of "genuine emergency." Justice Scalia's sharp dissent draws upon the assumption in arguing that the Constitution gave to the president a perfectly clear choice in responding to a captured citizen enemy combatant: Prosecute for treason or suspend habeas corpus. And Justice Thomas's dissent relied upon it by declaring, "[T]he Federal government has all power necessary to

protect the Nation." Of course, the Court can limit the reach of the perfect Constitution assumption by declaring questions nonjusticiable or properly left for resolution by the political branches. But the justices are inclined to proceed from the assumption, Tushnet argues, because they feel a responsibility to provide solutions to the nation's urgent problems and because, under the cover of the assumption, they can place responsibility for controversial outcomes on those who long ago wrote and ratified the Constitution. However, the cost of the assumption is, in Tushnet's eyes, considerable. Most significantly, it leads the Court to twist constitutional text and its own precedents while depriving the political branches and the public of the opportunity to have their say on weighty questions of national interest.

Ruth Wedgwood brings the volume to a close by examining the questions that the Guantanamo controversy raises about the limits of law, and particularly about the judicial adjudication of legal disputes, in wartime. *Rasul* placed the Court in unfamiliar territory because "the capture and internment of prisoners of war and irregular combatants in overseas military operations has not generally engaged the attention of civilian judges." And the Court did not acquit itself well, in Wedgwood's view. In deciding that enemy combatants held at Guantanamo Bay could challenge their detention in federal court, the Court proceeded with too little regard for precedent, too little attention to the canons of statutory construction, too little thought to whether federal law provided any substantive relief for alien enemy combatants, and too little concern for the implications of its holding for the waging of war. Wedgwood notes that in subsequent litigation, enemy combatants might search for substantive law in a variety of sources: the U.S. Constitution, treaties, customary international law (also called "the laws and customs of war" or "international humanitarian law"), and statutes. But all, she shows, pose significant problems. Accordingly, "federal courts will, at a minimum, need to be aware of their limitations in seeking to draw upon these intricate sources of law, especially in the minefield of military operations."

Despite her serious criticisms of *Rasul*, Wedgwood appreciates the Court's reasons for taking action: the desire of the justices to weigh in on the momentuous legal questions raised by the government's actions taken after September 11; the abuses at Abu Ghraib; and the Office of Legal Council memos, which suggested an almost boundless executive power in the conduct of war. Indeed, she speculates that the Court "may be inclined to maintain a type of 'strategic ambiguity' on questions of review, in order to summon the executive branch and Congress to appropriate moral attention." In the end, though, she believes it should primarily be left to the political branches, by virtue of their superior tools and broader knowledge, to take the lead in crafting a new legal regime for the handling of enemy combatants and such other challenges as are bound to arise in the global war on terror.

The debate that the contributors to this volume have joined is still in its early stages, but thanks to their analysis and arguments, the key issues have come into better focus. Although they differ in their judgments about the proper extent of the Court's involvement in the enemy combatant cases, the other contributors are in agreement with Judge Wald that with the September 11 attacks, the United States found itself engaged "in a new kind of war, with new dilemmas that needed new rules." If they disagree as to the details of the new legal regime that the country is in the process of crafting, all are in agreement that each of the three branches of government must rise to the occasion and that each must perform its constitutional share of the labors, which includes defending against encroachment by other branches. Finally, the contributors are emphatic in agreement that fortifying the rule of law at home is itself both a demand of justice and a national security imperative.

1. The Combatant Detention Trilogy Through the Lenses of History

Seth P. Waxman

HIDDEN WITHIN Justice Sandra Day O'Connor's opinion in *Hamdi v. Rumsfeld* is a remarkable sentence that has gone largely unnoticed in early commentaries on the decision. Concluding her discussion of the process a lower court might require when considering a habeas corpus petition from an alleged enemy combatant, Justice O'Connor wrote:

> We have no reason to doubt that courts faced with these sensitive matters will pay proper heed both to the matters of national security that might arise in an individual case and to the constitutional limitations safeguarding essential liberties that remain vibrant even in times of security concerns.[1]

Although this passage is not essential to the Court's holding or reasoning, it is nonetheless important and surprising. Prior to the announcement of the combatant detention decisions, few judges, lawyers, or scholars would necessarily have shared Justice O'Connor's expression of confidence in the courts' ability to balance liberty and security in moments of crisis. In fact, before *Hamdi*, *Padilla*, and

1. *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2652 (2004).

Rasul, conventional wisdom was that the courts, including the Supreme Court, were poor guardians of liberty during periods of perceived threats to national security.

Yet Justice O'Connor seemed wholly unsurprised that the Court could maintain the difficult and delicate equilibrium between national security and individual liberty. If her confidence was justified—as I hope time will show it was—why did the Court act differently in these cases than it has during previous national security crises? In this essay, I explore two paradigms for answering that question.

The first paradigm places the combatant detention decisions in the context of earlier cases involving individual liberties during war. Several judges and scholars have suggested that the Supreme Court's behavior in these episodes has followed a disappointing cycle of giving excessive weight to national security concerns while a military conflict is active, correcting only partially and regretfully for the damage to individual liberties once security has been restored. The combatant detention cases—coming fewer than three years after September 11, with U.S. troops still fighting two wars overseas, yet striking a strong note of restraint on executive power—seem to break this cycle. But if they do, where does the explanation lie? In the unusual nature of the war in which the nation is engaged? In the executive branch's political and legal overreaching? In the Court's having learned from its earlier mistakes? Or perhaps the very premise of the question is wrong, and there has been no cycle from which the recent cases diverge.

A second lens through which to view these cases is that of interbranch relations and the institutional confidence of the Supreme Court. On this view, the most illuminating points of comparison are not earlier wartime decisions, but rather the nonnational security cases that illustrate the Court's growing self-confidence since World War II in its relations with the other branches of the national government. Perhaps the Court's affirmation of individual rights in the

combatant detention cases is a product of this broader rise in judicial assertiveness. The current Court has often accomplished this expansion of its power through a strategy of "judicial minimalism," the practice of circumscribing the specific holdings of individual cases.[2] The detainee cases can be seen as products of a powerful, though restrained, Court.

I.

The view that the Court's wartime jurisprudence reflects a cycle of excessive deference to the executive branch's national security concerns followed by belated affirmations of individual rights has been shared by observers across the political spectrum. For example, Justice William Brennan and Chief Justice William Rehnquist—an unlikely pair of intellectual bedfellows—have been two of the most thoughtful proponents of this cycle thesis. In a 1987 lecture at Hebrew University in Jerusalem, Justice Brennan said:

> The trouble in the United States . . . has been not so much the refusal to recognize principles of civil liberties during times of war and national crisis but rather the reluctance and inability to question, during the period of panic, asserted wartime dangers with which the nation and the judiciary [are] unfamiliar. . . . After each perceived security crisis ended, the United States has remorsefully realized that the abrogation of civil liberties was unnecessary. But it has proven unable to prevent itself from repeating the error when the next crisis came along.[3]

Chief Justice Rehnquist echoed the same theme in his intriguing book, *All the Laws but One: Civil Liberties in Wartime*. When discussing the application of Cicero's famous adage, *inter arma silent*

2. Cass Sunstein, One Case at a Time: Judicial Minimalism on the Supreme Court (1999).

3. Willam J. Brennan, Jr., *The Quest to Develop a Jurisprudence of Civil Liberties in Times of Security Crises*, Isr. Yearbook on Human Rights, 11, 16–17 (1988).

leges, "during war law is silent," to the American experience, the Chief Justice wrote:

> [T]he maxim speaks to the timing of a judicial decision on a question of civil liberty in wartime. If the decision is made after hostilities have ceased, it is more likely to favor civil liberty than if made while hostilities continue. The contrast between the *Quirin* and the Japanese internment decisions on the one hand and the *Milligan* and *Duncan* decisions on the other show[s] that this, too, is a historically accurate observation about the American system. . . . There is no reason to think that future wartime presidents will act differently from Lincoln, Wilson, or Roosevelt, or that future Justices of the Supreme Court will decide questions differently from their predecessors.[4]

Both Brennan and Rehnquist cogently described a recurring cycle in American history: a government crackdown on civil liberties during the crisis that is sustained by the courts, followed by a judicial reconsideration once the crisis has passed, and then forgetfulness when the next crisis emerges.

This cyclical pattern first appeared in the early days of the Republic. In 1798, only fifteen years after the end of the Revolutionary War and less than a decade after ratification of the Constitution, the young United States found itself embroiled in an international crisis. With war between the United States and France looming, the Federalist-dominated Congress passed a series of laws that severely restricted individual rights, especially those of the political opposition. The Sedition Act, in particular, made it a federal crime to "write, print, utter or publish . . . any false, scandalous and malicious writing or writings against the government of the United States, or the President of the United States, with the intent to defame . . . or to bring them . . . into contempt or disrepute."[5]

4. William H. Rehnquist, All the Laws But One: Civil Liberties in Wartime 224 (1998).

5. Act of July 14, 1798, ch. 74, § 2, 1 Stat. 596. The companion Alien Act and

These acts quickly became weapons to silence Thomas Jefferson's emerging pro-French Republican Party. The government initiated more than two dozen prosecutions under the Sedition Act—all against members of the political opposition, including four leading Republican newspaper editors and three Republican officeholders. In the most famous case, Congressman Matthew Lyon spent four months in prison for publishing materials criticizing President John Adams.[6]

Consistent with the pattern Justice Brennan and Chief Justice Rehnquist have described, the courts refused to protect freedom of expression during this early crisis period. Although the Supreme Court never ruled on the Sedition Act, several lower-court judges, including three Supreme Court justices sitting on circuit, upheld the law.[7] The Federalist-dominated judiciary sometimes even aided the prosecution. During Lyon's trial, for example, the judge told the jury that it only had to decide two issues: whether Lyon had published the pieces and whether the pieces were seditious. In one representative case, the judge instructed the jury that "[i]f a man attempts to destroy the confidence of the people in their officers, their supreme magistrate, and their legislature, he effectually saps the foundation of the government."[8]

Once the quasi war with France cooled off, public hostility to the acts helped to defeat the Federalists and bring Jefferson and his party to power in the elections of 1800. Jefferson quickly pardoned those who had been convicted under the acts, and the new Congress refused to renew the acts when they were reconsidered in 1801.

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the Alien Enemies Act gave the president the power to deport aliens suspected of activities posing a threat to the national government and to imprison all subjects of warring foreign nations as enemy aliens (Act of July 6, 1798, ch. 58, 1 Stat. 571).

6. *See* Michael Kent Curtis, Free Speech, "The People's Darling Privilege:" Struggles for Freedom of Expression in American History 80–85 (2000).

7. Geoffrey R. Stone et al., The First Amendment 8 (1999).

8. Curtis, at 90.

Although these laws were quickly denounced as working outrageous deprivations of liberty, the courts did not officially redeem themselves until 1964, when, in *New York Times Co. v. Sullivan*, the Supreme Court concluded that "[a]lthough the Sedition Act was never tested in the Court, the attack upon its validity has carried the day in the court of history"[9] (footnote omitted).

The court of history took a long time to render its verdict, though, because during America's next major national security crisis, the Civil War, the government again took several actions that threatened basic constitutional rights in the name of national security. Over the course of the war, President Abraham Lincoln's suspension of the writ of habeas corpus and imposition of martial law led to the arrest of more than 13,000 civilians. At first, these presidential orders were restricted to areas near lines of combat, but they were soon expanded to encompass the entire country.[10]

Apart from the slight wrinkle of *Ex parte Merryman*, which I address later, the Supreme Court did not have an opportunity to review these measures until after Robert E. Lee had surrendered at Appomattox. In *Ex parte Milligan*, decided more than a year after the war had ended, the Court finally condemned the deprivations that took place during the war. All nine justices agreed that President Lincoln lacked the constitutional authority to suspend the writ and establish a system of military justice in areas where civilian courts were open and operating. In sweeping language, the Court said, "Martial law . . . destroys every guarantee of the Constitution. . . . Civil liberty and this kind of martial law cannot endure together; the antagonism is irreconcilable; and, in the conflict, one or the other must perish."[11] At the same time, however, the Court acknowledged its own institutional limitations in times of crisis. Almost sheepishly, the *Milligan* Court confessed:

9. *New York Times Co. v. Sullivan*, 376 U.S. 254, 276 (1964).
10. Daniel Farber, Lincoln's Constitution 157–63 (2003).
11. *Ex parte Milligan*, 71 U.S. 2, 124–25 (1866).

> During the late wicked Rebellion, the temper of the times did not allow that calmness in deliberation and discussion so necessary to a correct conclusion of a purely judicial question. *Then*, considerations of safety were mingled with the exercise of power; and feelings and interests prevailed which are happily terminated. *Now* that the public safety is assured, this question, as well as all others, can be discussed and decided without passion or the admixture of any element not required to form a legal judgment.[12]

With its self-conscious recognition that the Court was only able to offer those protections because peace and a sense of security had been reestablished, *Milligan* stands as a symbol of both judicial strength and judicial weakness in the face of executive national security claims.

The Brennan/Rehnquist cycle repeated itself during World War I. Shortly after the United States entered the war, President Woodrow Wilson persuaded Congress to enact the Espionage Act of 1917. The act made it a crime to make "false statements with the intent to interfere with the operation or success of the military or naval forces of the United States" or "to cause insubordination, disloyalty, mutiny or refusal of duty" in the military or interfere with military recruitment.[13] One year later, Congress bolstered the government's powers by passing the Sedition Act, which made it illegal to willfully "utter, print, write, or publish any disloyal, profane, scurrilous, or abusive language about" the U.S. form of government; its Constitution, flag, military forces, or uniform; "or any language intended to bring the [same] into contempt . . . or disrepute."[14]

More than 2,000 individuals were prosecuted under these laws. Many of the victims were socialists who had simply denounced the war as a capitalist plot. In several cases, the only evidence used to

12. *Id.* at 109.
13. Espionage Act of 1917, ch. 30, § 3, 40 Stat. 217, 219.
14. Sedition Act of 1918, ch. 75, § 3, 40 Stat. 553.

demonstrate the falsity of the defendant's statements were speeches to the contrary by President Wilson or Congress's resolution supporting the war.[15]

The Supreme Court upheld the constitutionality of the Espionage Act in three terse opinions issued on the same day in 1919. Those decisions were announced a year after World War I had ended but in the midst of another crisis, the first "Red Scare," orchestrated in response to the Russian Revolution. In the leading case, *Schenck v. United States*, Justice Oliver Wendell Holmes wrote:

> The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a *clear and present danger* that they will bring about the substantive evils that Congress has a right to prevent. . . . When a nation is at war many things that might be said in times of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right.[16] (emphasis added)

When the Court applied this clear-and-present-danger test to both the Espionage and Sedition Acts, it affirmed the convictions of defendants like Charles Schenck, Eugene V. Debs, and Jacob Abrams—men who did nothing more than distribute pamphlets criticizing the draft, write in opposition to the war, or, at worst, urge those drafted to disobey the selective service order.[17]

In 1969, the Supreme Court finally corrected for this rights-restrictive application of the clear-and-present-danger test. In *Brandenburg v. Ohio*, the Court held that the government may not prohibit "advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless

15. Brennan, at 15.

16. *Schenck v. United States*, 249 U.S. 47, 52 (1919).

17. *Id.*; *Debs v. United States*, 249 U.S. 211 (1919); *Abrams v. United States*, 250 U.S. 616 (1919).

action and is likely to incite or produce such action."[18] This more protective test has survived until today as a robust guarantor of the right to free expression. Coming so long after the World War I panic had ended, though, the *Brandenburg* test also demonstrates how the crisis cycle again held true: The Court needed the wisdom of hindsight and the cloak of peacetime to enable it to strongly defend basic civil liberties.

My final example, *Korematsu v. United States*, is the case most commonly associated with the cycle. The history of the Japanese internment and the Supreme Court's tragic response is so well known that a brief description will suffice. During the Second World War, President Franklin Roosevelt signed Executive Order 9066, authorizing curfews and the removal of all people of Japanese descent from the Pacific coast. Under this order, more than 120,000 people were transported to "relocation centers," where some remained for up to four years.[19] Japanese internment was, as Eugene Rostow wrote in 1945, "the worst blow our liberties ha[d] sustained in many years."[20]

As war raged, the Supreme Court found the curfews and exclusion of citizens of Japanese ancestry to be constitutional. Upholding the president's executive order, Justice Hugo Black wrote that the court was "unable to conclude that it was beyond the war power of Congress and the Executive to exclude those of Japanese ancestry from the West Coast war area at the time they did." He further stated:

> [W]e are not unmindful of the hardships imposed by it upon a large group of American citizens. But hardships are part of war, and war is an aggregation of hardships. All citizens alike, both in and out of uniform, feel the impact of war in greater or lesser

18. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

19. Philip Tajitsu Nash, *Moving for Redress*, 94 YALE L.J. 743, 743 (1985) (reviewing JOHN TATEISHI, AND JUSTICE FOR ALL: AN ORAL HISTORY OF THE JAPANESE AMERICAN DETENTION CAMPS [1984]).

20. Eugene V. Rostow, *The Japanese American Cases—A Disaster*, 54 YALE L.J. 489, 490 (1945).

> measure. Citizenship has its responsibilities as well as its privileges, and in time of war the burden is always heavier.[21]

Even the order's base racial distinctions were not enough to overcome the pressure to support repressive wartime policies justified on national security grounds. To this day, *Korematsu* stands as the Court's greatest failure to protect civil liberties during a crisis.

Once the crisis had ended, the judiciary retrospectively corrected in part for the excesses of *Korematsu*. In 1946, the Supreme Court considered a case arising out of the wartime imposition of martial law in Hawaii. Following Japan's surrender, and more than a year after martial law had been terminated, the Court heard an appeal in *Duncan v. Kahanamoku*, arising from a civilian's court-martial conviction for assaulting U.S. Marine officers. Citing *Milligan*, Justice Black, the author of *Korematsu*, found that the imposition of martial law had been unlawful. "Our system of government," the Court now felt comfortable to say, "clearly is the antithesis of total military rule and the founders of this country are not likely to have contemplated complete military dominance within the limits of a territory made part of this country and not recently taken from an enemy."[22] In effect, the Court reaffirmed the important principle that the judiciary must protect citizens' constitutional rights and protect the separation of powers, even under conditions of war. It only did so, however, after the war had ended.[23]

21. *Korematsu v. United States*, 323 U.S. 214, 217, 219 (1944).

22. *Duncan v. Kahanamoku*, 327 U.S. 304, 322 (1946).

23. More symbolically, in 1984, a district court granted a rare writ of *coram nobis* and vacated Fred Korematsu's conviction. Relying on the report of a congressional commission formed to study the Japanese internment and provide remedies for its victims, the court found that the government had supplied the Supreme Court with incorrect facts about the Japanese-American threat. It then concluded with words that are characteristic of the curative, cathartic portion of the cycle:

> *Korematsu* remains on the pages of our legal and political history. As a legal precedent it is now recognized as having very limited application. As historical precedent it stands as a constant caution that in times of war or declared military necessity our institutions must be vigilant in

And then came September 11, which one might have expected to trigger another iteration of this historical cycle. When the Supreme Court heard arguments in the three combatant detention cases, the United States was still embedded in a national security crisis. Almost daily, the front pages warned of impending al Qaeda attacks on American targets. In fact, on April 20, 2004—the day the Guantanamo cases were argued—the *Washington Post* published an article entitled: "Precautions Raised for Preelection Terrorism; Al Qaeda Intends to Strike, Officials Say."[24] The Department of Homeland Security's threat advisory levels consistently stood at yellow or orange. American troops were still actively engaged in both Afghanistan and Iraq. Only days before the government submitted its brief in the *Padilla* case, al Qaeda affiliates launched their devastating March 11 attacks in Madrid. Osama bin Laden and several of his deputies remained at large and continued to issue threats against the United States and its allies. What President George W. Bush told the country on September 20, 2001—"Americans should not expect one battle, but a lengthy campaign"—had not changed almost three years after the opening salvos of the war on terror.[25] In short, the crisis was active, dangerous, and ongoing.

If the patterns of the past were to be repeated, one might have expected a set of Supreme Court opinions that undervalued civil lib-

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> protecting constitutional guarantees. It stands as a caution that in times of distress the shield of military necessity and national security must not be used to protect governmental actions from close scrutiny and accountability. It stands as a caution that in times of international hostility and antagonisms our institutions, legislative, executive and judicial, must be prepared to exercise their authority to protect all citizens from the petty fears and prejudices that are so easily aroused."

Korematsu v. United States, 584 F. Supp. 1406, 1420 (N.D. Cal. 1984).

24. John Mintz, *Precautions Raised for Preelection Terrorism; Al Qaeda Intends to Strike, Officials Say*, WASH. POST, Apr. 20, 2004, at A3.

25. George W. Bush, address to a Joint Session of Congress and the American People (Sept. 20, 2001), available at http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html.

erties in a classic wartime tradeoff with national security. The Brennan/Rehnquist cycle would have predicted decisions that upheld the constitutionality of the indefinite detention of American citizens as "enemy combatants." If the cycle had unfolded as it had in the examples discussed earlier, the Court would have agreed with the government that the Commander-in-Chief Clause or Congress's Authorization for the Use of Military Force (AUMF) in Afghanistan broadly empowered the president to hold Jose Padilla and Yaser Hamdi without charge, trial, or access to counsel. An opinion consistent with the cycle would have held that Article III courts lacked jurisdiction to hear habeas cases brought by those held at Guantanamo Bay or by any other noncitizen detained outside the territorial jurisdiction of the United States. We would have had to wait until the crisis passed for corrective decisions.

Both the rhetoric and the substance of the combatant detention decisions, however, were far more protective of civil liberties than continuation of the cycle would have foretold. One cannot readily imagine past Courts following through on Justice O'Connor's declaration in *Hamdi* that "a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens."[26] On the surface, at least, these cases do not fit neatly into the cyclical historical pattern. The decisions do not give in to the executive branch's views about the demands of national security (or offer repentant post hoc protection for civil liberties). Instead, in what the Court understood to be the midst of a "war," the decisions explicitly account for the substantial competing interests that lie on both sides of the constitutional scale.

In *Hamdi*, the plurality first offered a circumscribed holding on the threshold question of whether the executive has the authority to detain citizens as "enemy combatants." Justice O'Connor and the three justices who joined her found that the congressional resolution

26. *Hamdi*, 124 S. Ct. at 2650 (2004).

authorizing military force did, in fact, permit such detentions. The plurality was careful, however, to limit the scope of that authorization to citizens who are "'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"[27] (emphasis added).

Unlike in past cases decided in the midst of a war, both sides could find favorable aspects of this holding. On the one hand, the executive could take comfort in the fact that the Court held not only that the AUMF authorized the detention of certain U.S.-citizen enemy combatants, but also that it satisfied 18 U.S.C. § 4001, a previously little-known statute that provides that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." Attorneys for both Hamdi and Padilla had forcefully argued that Section 4001 barred the detention of their clients because the AUMF lacked a clear congressional statement authorizing their imprisonment. Justice O'Connor's opinion rejected this position:

> It is of no moment that the AUMF does not use specific language of detention. Because detention to prevent a combatant's return to the battlefield is a fundamental incident of waging war, in permitting the use of "necessary and appropriate force," Congress has clearly and unmistakably authorized detention in the narrow circumstances considered here.[28]

So, however narrow the category may be, the Court did find a category of individuals who could be detained as enemy combatants. Finally, the Court also accepted the government's argument that citizenship did not bar detention as an enemy combatant.

At the same time, *Hamdi* was more protective of civil liberties than past cases decided during a national security threat had been. For example, in addition to limiting its holding to active, enemy

27. *Id.* at 2639.
28. *Id.* at 2641.

soldiers captured in Afghanistan, the Court avoided the question of whether the president's Article II commander-in-chief powers provided him with the authority to detain Hamdi. When given an opportunity to issue a broad endorsement of executive power in this crisis, the Supreme Court abstained. Moreover, the Court demonstrated a special concern for the prospect of indefinite detention. It specifically rejected one of the government's leading justifications for the continued detention of Yaser Hamdi and other enemy combatants: an ongoing need to extract intelligence information from captured al Qaeda members. The Court stated that "indefinite detention for the purpose of interrogation is not authorized" by the AUMF.[29] Instead, the Court again limited its holding to the facts of the case, finding that detention is authorized only as long as active combat operations continue in Afghanistan.

One of the more provocative aspects of Justice O'Connor's plurality opinion is its explication of the process that is constitutionally owed to a detained enemy combatant. Here, the very methodology applied by the Court signals a profound departure from past midcrisis decisions. The Court turned to the handy *Mathews v. Eldridge* calculus, under which a court explicitly balances the private interests that will be affected by a proposed process with the government's own interests, including the cost to the government for providing a greater process. By employing this test, the Court imposed upon itself a framework that would take into account both the liberty and the security interests at stake in the case.

More important, the plurality's opinion thoughtfully carries out this balancing. The Court held that a citizen detainee was entitled, at minimum, to notice of the factual basis for his classification as an enemy combatant, an opportunity to rebut that classification before a neutral decision maker, and, probably, access to counsel during these proceedings. Refusing to accept the executive's appeal to overriding security concerns, the plurality wrote:

29. *Id.*

> Nor is the weight on this side of the *Mathews* scale offset by the circumstances of war. . . . [A]s critical as the Government's interest may be in detaining those who actually pose an immediate threat to the national security of the United States during ongoing international conflict, history and common sense teach us that an unchecked system of detention carries the potential to become a means for oppression and abuse of others who do not present that sort of threat.[30]

In fact, this passage conspicuously cites *Milligan*—a case from the later, corrective phase of an earlier cycle—for support.

However, the plurality opinion does not completely ignore the important national security side of the balance. It explicitly recognized that "aside from these core elements, enemy-combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict."[31] In the end, while the Court found the government's proposed "some evidence" standard to be inadequate, it also allowed for a presumption in favor of the government, the admission of hearsay evidence, or even the use of military tribunals to decide the fate of alleged enemy combatants.[32] As I discuss below, the exact practical effects of this balancing remains to be seen. But the product of the *Hamdi* balancing is a set of minimum constitutional requirements that differ strikingly from those that appeared in past examples of the Brennan/Rehnquist cycle.

Likewise, in determining that the Guantanamo Bay detainees could petition for habeas corpus in federal courts, *Rasul v. Bush* was also more protective of civil liberties than the cycle might have predicted. Even Justice Anthony Kennedy's concurrence, which applied *Johnson v. Eisentrager* to find jurisdiction over the detainees based on America's de facto sovereignty over Guantanamo Bay, represented a

30. *Id.* at 2647.
31. *Id.* at 2649.
32. *Id.*

considerable departure from the Court's earlier wartime rulings. That Justice John Paul Stevens's opinion for the Court went beyond Justice Kennedy's proposed constitutional holding was especially surprising.

The majority found jurisdiction on the basis of the habeas statute, finding that the statute did not distinguish between Americans and aliens held in federal custody. In particular, the Court stated that "there is little reason to think that Congress intended the geographical coverage of the statute to vary depending on the detainee's citizenship."[33] Because the government conceded that the courts would have jurisdiction over *citizens* held at Guantanamo Bay, the majority concluded that the habeas statute must also confer jurisdiction over *aliens* held there.[34] The Court also drew support from the historical reach of common-law habeas corpus, which traditionally had extended beyond the sovereign territory of the crown to other areas under the sovereign's control.[35] In the end, resisting Justice Antonin Scalia's prediction that its decision would have a "potentially harmful effect upon the Nation's conduct of a war," the Court acted to protect the civil liberties of citizens and noncitizens alike.[36]

Finally, while the Court's holding in *Rumsfeld v. Padilla* is superficially the most progovernment of the three, it too differs from decisions like *Abrams* and *Korematsu*. In *Padilla*, the Court agreed with the government that a district court in New York lacked jurisdiction over Jose Padilla because the habeas statute requires a detainee to sue his immediate custodian. The Court did not uphold

33. *Rasul v. Bush*, 124 S. Ct. 2686, 2696 (2004).

34. *Id.*

35. *Id.* at 2696–97.

36. *Id.* at 2710 (Scalia, J., dissenting). The *Rasul* majority opinion, if it is interpreted broadly, may reach much farther than Guantanamo Bay. In fact, Justice Scalia's sharp dissent suggested that the Court's interpretation of the habeas statute would apply to military detainees in Afghanistan and Iraq. It remains to be seen whether this statutory jurisdiction extends to those held on American bases overseas or even to occupied territories. Even without that extension, however, it seems safe to say that this decision does not follow the patterns of past crisis jurisprudence.

the constitutionality of Padilla's detention; its opinion simply required Padilla to refile his petition in South Carolina. Although *Padilla* postponed the ultimate consideration of executive authority and due process, it seems certain that *at least* the logic of *Hamdi* will one day be applied to the circumstances of this case. This suggests that the government's victory in *Padilla* is likely to be short-lived. Any judicial surrender to executive prerogatives found in this jurisdictional holding cannot compare with the examples from the 1790s, 1860s, 1910s, or the 1940s.

What, then, explains the disjunction between the recent terrorism cases and the historical patterns that Justice Brennan and Chief Justice Rehnquist and others have observed? I offer four considerations.

1. One explanation draws on the work of Mark Tushnet and David Cole. In different ways, these scholars have proposed that repeated experience with the cycle can affect the way courts act during later iterations. Justice Brennan grounded the cycle on the fact that the United States had only faced episodic security threats for much of its history. As a result, he believed, decision makers, including judges, tended to get swept away by irrational fears and lacked the experience or expertise to critically evaluate executive claims of necessity. Tushnet and Cole's works encourage us to consider how the accumulation of knowledge from past cycles might affect judges in the present day.

Professor Tushnet wrote about the influence of social learning on our contemporary understandings of crises.[37] He suggested that lessons of history can tacitly shape contemporary actions. For instance, if we recognize that officials have exaggerated threats in the past or if we now believe that the courts were once mistaken, we may learn to become progressively more critical when confronted with the

37. Mark Tushnet, *Defending* Korematsu*?: Reflections on Civil Liberties in Wartime*, 2000 WIS. L. REV. 273 (2000).

next crisis. This hindsight wisdom thereby adjusts our *current* understandings of the balance between civil liberties and national security, even when we are still in the crisis phase of a cycle.

Tushnet discussed how the current universal condemnation of *Korematsu* might have influenced some of the actions, if not the legal arguments, that the Bush administration has pursued. This process of social learning might actually apply with greater force to judges. Supreme Court justices, like any other human beings, look back and learn from the Court's mistakes. They care about their reputations today and how history will remember them tomorrow. They are held to a higher standard, precisely because they are seen as being most responsible for protecting civil liberties. In these recent cases, then, the Supreme Court may have internalized the widely accepted legal and cultural norm that they must avoid another *Korematsu*. The Court's statement in *Hamdi* that "history and common sense teach us that an unchecked system of detention carries the potential to become a means for oppression and abuse of others who do not present that sort of threat" supports this view.[38]

David Cole made a related argument.[39] He contended that current descriptions of the cycle underestimate the prospective legal impact of the decisions made after the crisis has ended. He argued that the precedential authority of decisions that may have "come too late" can nonetheless set the legal terms for the future. Cases like *Milligan*, *Duncan*, and *Brandenburg* impose important limits on the government and courts during the *next* crisis, even if they failed to do so in the preceding one. According to Professor Cole, the common-law method is especially conducive to placing restraints on future courts. Over time, the requirement that judges write opinions and give reasons can serve to restrain the worst violations of civil

38. *Hamdi*, 124 S. Ct. at 2697.

39. David Cole, *Symposium: Judging Judicial Review:* Marbury *in the Modern Era: Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis*, 101 MICH. L. REV. 2565, 2571–77 (2003).

liberties during the next emergency. Cole, then, encouraged us to take a long view of crisis jurisprudence and to examine the ways in which decisions made in one cycle may influence the next.

The three terrorism decisions offer some support for Coles's thesis. Decisions such as *Milligan* and even *Braden v. 30th Judicial Circuit of Kentucky*—on which the *Rasul* Court relied to distinguish *Eisentrager*—were used at key points in the combatant detention opinions to support the Court's most rights-protective conclusions. The dissenters also discussed these peacetime decisions extensively, and the plurality was forced to address their arguments in its own opinion. What is more, we may never be able to know the extent to which *uncited* decisions nevertheless exerted a subtle influence on the justices in these cases, providing important boundaries for their reasoning even though they did not appear in the actual opinions.

2. A second possible reason why the terrorism cases do not fit neatly within the cycle is something I would call "the Israeli explanation." In contrast to the American experience of *episodic* exposure to national security threats, Israel has faced nearly continuous threats for as long as it has existed. Unlike their American counterparts, Israeli judges have experienced the need to act in a context of a crisis seemingly without end. And by and large their developed jurisprudence is substantially more rights-protective than are U.S. wartime decisions.

Living in a state of never-ending threat—and perhaps also having all served in the military—Israeli judges have been far less inclined to accept at face value claims of national security necessity. For example, in 1999, the Israeli Supreme Court barred the Israeli Security Services from using certain physical interrogation techniques, such as sleep deprivation or "shak[ing]."[40] Similarly, that court decided a case in the spring of 2004 dealing with the military's procedures for detaining "unlawful combatants" in the West Bank. Regulations spec-

40. H.C.J. 500/94, *Public Comm. Against Torture v. Israel*, 1999 ISR. L. REPORTS 1, 38 (Sept. 9, 1999).

ified that the army could detain alleged combatants without judicial review or access to counsel for up to eighteen days and could delay its investigation of the detainees for up to eight days. The court found this period to be too long. It stated that "delays must not exceed a few days" and that even an unlawful combatant "is to be brought promptly before a judge." The Court struck down the eight-day waiting period for investigations, holding that they must begin immediately. It held that counsel must be provided after four days, unless a case-by-case analysis determined that further delay was necessary.[41] On balance, this ruling provided strong safeguards for civil liberties—far stronger, in fact, than those found in the U.S. Supreme Court's combatant detention decisions.[42]

In his 2002 *Harvard Law Review* foreword, Israeli Chief Justice Aharon Barak explained the approach that animates these decisions. Dismissing any possibility of cyclical behavior, he wrote that in Israel,

> [t]he line between war and peace is thin—what one person calls peace, another calls war. In any case, it is impossible to maintain this distinction over the long term. Since its founding, Israel has faced a security threat. As a Justice of the Israeli Supreme Court, how should I view my role in protecting human rights given this situation? I must take human rights seriously during times of both peace and conflict. I must not make do with the mistaken belief that, at the end of the conflict, I can turn back the clock.[43]

41. H.C. 3239/02, *Marab v. IDF Commander in the W. Bank*, 57(2) P.D. 349 (2003).

42. The Israeli Supreme Court's recent decision on the "separation fence" is another example of Israeli courts upholding human rights in the face of executive claims of national security necessity. The Court ordered the Israeli army to remove a twenty-mile portion of the security fence and to reroute other sections to minimize the harms imposed on Palestinians. The Court explicitly acknowledged that the decision might make it easier for terrorists to attack Israel, but it also confidently stated that "[s]atisfying the provisions of the law is an aspect of national security." Dan Izenberg, *High Court Rejects Security Fence Route*, JERUSALEM POST, Jun. 28, 2004, at 1.

43. Aharon Barak, *A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 149 (2002).

Since there is no opportunity for post hoc correction in Israel, Barak went on to say, the basic struggle for a judge is to always preserve the proper balance between national security and the freedom of the individual.

Although it has been only three years since September 11, it is worth considering whether the justices of the U.S. Supreme Court have developed an outlook similar to Justice Barak's. The *Hamdi* plurality opinion clearly recognized that the war with al Qaeda and similar groups was an "unconventional war" that might last for more than a generation. The Court, for example, cited the government's concession that this was not a war that would end with a formal cease-fire. Justice O'Connor specifically stated that "the national security underpinnings of the 'war on terror,' although crucially important, are broad and malleable."[44] It is possible, then, that the nature of the war on terror affected the outcomes of these cases. Under these new conditions, the Court may have internalized Justice Barak's belief that long-lasting conflicts deprive courts of the "luxuries" of the Brennan/Rehnquist cycle. Perhaps America's experience with a war on terror has compelled its law to look a bit more like Israel's.

3. So far, I have assumed that in June 2004 we were still in an active phase of the war on terror. But a third potential explanation why the combatant detention decisions do not look like classic mid-crisis decisions is that the justices may have perceived that we have moved beyond that point in the cycle. I think it is likely that the three decisions handed down on June 28, *2004*, would have looked quite different had they been announced on September 20, *2001*. The passage of time has unquestionably altered public perceptions of both the threat and the necessary government response. In the intervening years, Americans, including the members of the Court, may have become more accustomed to the persistent threats posed by Islamic terrorism. The inevitably prolonged and inchoate nature of the war

44. *Hamdi*, 124 S. Ct. at 2641.

on terror—coupled with the fact that there have been no follow-up attacks on the U.S. homeland since September 11—differentiates it from past crises like the Civil War or World War II. Though the war on terror is still active and dangerous, it is also not continuously apparent to most Americans. There is no draft, no nationwide food rationing, and we no longer see many yellow ribbons hanging on trees across suburban America. Life has simply gone on despite the al Qaeda threat. As such, the ever-present risk of attack and the constant stream of alerts—or what the *New York Times* once called "the ill-explained upswing[s] of the government's yellow-orange yo-yo of terror warnings"[45]—might have changed the common perception of where we are in this crisis. This adjustment might well have influenced the justices' approach to these cases. Although the crisis is ongoing—and indeed *Hamdi* is predicated on the continuation of military operations in Afghanistan—the Court may have offered these more balanced opinions because it perceived itself to be in a different part of the cycle: somewhere in between war and peace or security and insecurity. In this respect, the cycle may have worked just as Justice Brennan or Chief Justice Rehnquist would have predicted. The Court's adoption of the *Mathews* balancing paradigm may permit future courts to institutionalize this sensitivity to the varying national security exigencies as the nature of the crisis evolves.

4. On the other hand, a final explanation of why the combatant detention decisions defy the expectations of the cycle is that the cycle was never really an accurate description of history in the first place. The historical examples I discussed earlier—drawing on the descriptions offered by Justice Brennan and Chief Justice Rehnquist—are highly stylized. In discussing the Civil War, for example, I neglected to address *Ex Parte Merryman*, in which Chief Justice Roger Taney, sitting on circuit, ruled that President Lincoln had no authority to

45. Todd S. Purdum, *What, Us Worry? The New State of Disbelief*, N.Y. TIMES, Aug. 8, 2004, § 4, at 1.

unilaterally suspend the writ of habeas corpus. *Merryman* was decided in 1861, when the crisis of disunion was urgent. The case is largely remembered today for Lincoln's refusal to abide by Taney's holding, but it can also serve as an example of judicial respect for civil liberties in times of war.

Similarly, the standard account of World War II legal history strangely overlooks a decision, handed down the same day as *Korematsu*, that cut an important leg from under the government's internment policy. In *Ex parte Endo*, the petitioner, a U.S. citizen, had been removed to a relocation center in Utah under the terms of the Japanese exclusion order. She filed a habeas corpus petition, claiming that she was a loyal and law-abiding citizen, that no charge had been made against her, and that she was being detained against her will. The government conceded all of these facts, and the Court found that the government had no right to hold citizens who were concededly loyal.[46] It was a narrow holding, but it was also one that clearly defies the historical pattern. As one scholar, Patrick O. Gudridge, wrote, "*Endo* closed the camps. Why don't we remember *Endo*?"[47]

There are many possible answers to Gudridge's question, but I offer two final thoughts in connection with the cycle. First, Justice Brennan's important insight about the episodic nature of crises in American history may be as damning as it is causal. Famous or infamous decisions like *Milligan* and *Korematsu* tend to overshadow ones like *Endo* and *Merryman*. Likewise, problematic wartime decisions like *Quirin* and *Abrams* can eclipse the quiet protections that take place in more continuing crises like the Cold War. In this regard, both the salience and the small sample size of crisis jurisprudence might allow the worst mistakes to stand out too noticeably and to overdetermine the historical model. The danger of describing history

46. *Ex parte Endo*, 323 U.S. 283 (1944).

47. Patrick O. Gudridge, *Remember Endo?* 116 HARV. L. REV. 1933, 1934 (2003).

with simple models is that a few examples will simply be used to prove too much.

Second, modern proponents of the cycle thesis generally rely on *Korematsu* as *the* emblematic decision.[48] I suggest that we might forget *Endo* for the same reasons that the cycle theory may have been developed in the first place—perhaps the cycle theory operates as an apology for *Korematsu*—a case that, like *Dred Scott*, *Plessy*, and *Lochner* "has come to live in infamy."[49] But unlike those other three blunders, *Korematsu* may be more easily categorized into a fancy theoretical model, like the crisis cycle; this model, then, can serve as a convenient, guilty explanation for one of the Court's most egregious errors. If this is true, it would be wrong to view the past—*and the present*—through a cycle built around *Korematsu*.

Certainly, centuries of American history cannot easily be reconciled by a single overarching theory. There are too many nuances and counterexamples for a paradigm like the cycle to perfectly describe the broad strokes of history and law. *Hamdi*, *Padilla*, and *Rasul* may just be the most recent evidence of this—and of how the cycle may not neatly capture the broad strokes of American history. Yet of the four explanations I have offered, I am inclined to credit some combination of the first three and largely to reject the fourth. The cycle described by Justice Brennan and Chief Justice Rehnquist is far too robust a phenomenon—both theoretical and historical—to jettison simply because the combatant detention cases (and some others) do not readily fit. Far more likely, courts have learned from the nation's cyclical precedents and understand, as do Israeli courts, that

48. *See* Rehnquist; Martin S. Sheffer, The Judicial Development of Presidential War Powers (1999); Joel B. Grossman, *The Japanese American Cases and the Vagaries of Constitutional Adjudication in Wartime: An Institutional Perspective*, 19 U. Haw. L. Rev. 649 (1997); Brennan, at 16–17; Lee Epstein et al., *The Effect of War on the U.S. Supreme Court*, at http://gkind.Harvard.edu/files/crisis.pdf.

49. Kathleen M. Sullivan & Gerald Gunther, Constitutional Law 631 n. 4 (14th ed. 2001).

a war without end requires a more refined response to urgent claims of national security.

II.

I began with Justice O'Connor's statement in *Hamdi*—that the courts are capable of properly balancing civil liberties and national security—in order to place the combatant detention decisions in the debate over how well the Court has carried out that balancing in the past.[50] But Justice O'Connor's statement also points to another context in which to view the combatant detention decisions: the growth of the Court's confidence in its capacity as a social policy maker in many realms since World War II. Indeed, in his dissent, Justice Scalia commented derisively on this aspect of the *Hamdi* plurality opinion:

> There is a certain harmony of approach in the plurality's making up for Congress's failure to invoke the Suspension Clause and its making up for the Executive's failure to apply what it says are needed procedures—an approach that reflects what might be called a Mr. Fix-it Mentality. The plurality seems to view it as its mission to Make Everything Come Out Right, rather than merely to decree the consequences, as far as individual rights are concerned, of the other two branches' actions and omissions. . . . The problem with this approach is not only that it steps out of the courts' modest and limited role in a democratic society; but that by repeatedly doing what it thinks the political branches ought to do it encourages their lassitude and saps the vitality of government by the people.[51]

While Justice Scalia probably overstated the extent to which the Court usurped the role of the political branches, there is no denying that the current Court is more muscular in its relations with the political branches than it has been for a long time.

50. *Hamdi*, 124 S. Ct. at 2652.
51. *Id.* at 2673 (Scalia, J., dissenting).

Perhaps it is this confidence, this "Mr. Fix-it Mentality," and not any exogenous cycle, that best explains the Court's approach to the detainee cases. As the Court's view of itself as an institution has evolved over time, perhaps these changes have influenced its treatment of civil liberties in general, including its wartime civil liberties perspective. Accordingly, it might be helpful to look at the detainee decisions through the broader lens of interbranch relations rather than the limited perspective of crisis jurisprudence. I do so below (although in somewhat less detail than the previous section, since several of the other contributors to this volume also touch on this point).

Of course, the powerful, confident Court we see today was not created in a day. For much of its early history, this "least dangerous branch"[52] faced the real threat that the executive branch would fail to enforce the Court's decisions. For example, while the Court's decision in *Ex parte Milligan* was honored by the executive, earlier in the war, the chief justice, sitting on circuit, had issued a similar challenge to the executive's authority in *Ex parte Merryman* and was ignored. Likewise, just a few decades earlier, the Court took a strong stand in *Worcester v. Georgia* (the Cherokee Indians case), and the president refused to enforce its decision.

Even into the late nineteenth century, the Court often avoided direct confrontations with the executive, likely expecting that the Court would emerge the weaker from any such clash. Indeed, the Court has historically been far more deferential than the current Court to presidential claims of broad powers inherent in that office. In *In re Neagle*, for example, decided in 1890, the Court upheld the actions of the attorney general in appointing a bodyguard to protect a Supreme Court justice, despite the absence of explicit congressional delegation of this power. The Court held that the president's authority

52. The Federalist, no. 78 (noting that the judiciary wielded neither the sword nor the purse).

to take care that the laws are faithfully executed must apply not only to acts of Congress but also to the "rights, duties and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the government under the Constitution."[53]

Likewise, in *In re Debs*, a case arising out of the Pullman Strike of 1894, the attorney general sought to enjoin labor leaders from interfering with the functioning of the railroads, which in turn disrupted delivery of the mail. A federal court held that the labor leaders had violated the Sherman Act and issued an injunction on that basis. Although the Court ignored the Sherman Act claims, the majority upheld the legality of the injunction, even in the absence of explicit statutory authorization, apparently acknowledging that seeking the injunction was within the executive's implied powers.

Similarly, in the early years of Franklin Roosevelt's first administration, the Supreme Court under Charles Evans Hughes clashed with the president over a number of New Deal enactments, declaring them unconstitutional at an unprecedented rate. But Roosevelt ultimately prevailed: In a "switch in time that saved nine," Justice Owen Roberts changed his vote in *West Coast Hotel Co. v. Parrish*, effectively shifting the ideological balance of the Court in favor of Roosevelt's programs.

Early traces of the current Court's institutional self-confidence can be traced in several domains. In the area of national security cases, consensus places *Youngstown Sheet & Tube v. Sawyer* at the apex of the judiciary's power vis-à-vis the executive branch. In the days leading up to that case, negotiations between labor and management in the steel industry broke down, and work stoppages loomed. President Harry Truman, concerned that a halt in steel production would impair his ability to successfully wage war in Korea, seized the steel mills by executive order. The owners of the steel mills

53. *In re Neagle*, 135 U.S. 1, 64 (1890).

responded rapidly, seeking injunctive relief in the federal courts. The Supreme Court ultimately sided with the steel mills, holding that Truman lacked both the statutory and the constitutional authority to seize the mills.

Given the Court's cabining of executive power in *Youngstown* more than fifty years ago, the combatant detention decisions may seem less surprising. But although *Youngstown* may look like a risky confrontation for the Court, evidence suggests that the petitioners had public opinion overwhelmingly on their side. The *Chicago Daily News* described the seizure as an example of socialism in action.[54] Likewise, the *New York Daily News* declared that "Hitler and Mussolini would have loved this."[55] The *Washington Post* opined that "President Truman's seizure of the steel industry will probably go down in history as one of the most high-handed acts committed by an American President."[56] Even President Truman's own Justice Department recommended against the seizure. Thus, the Court could confidently confront the executive, secure in the knowledge that the public would support them. The same was not true in *Korematsu* or in the combatant detention cases.

In their defiance of a considerable segment of public opinion, the civil rights decisions that followed shortly after *Youngstown* are probably better examples of the emergence of a more confident Supreme Court. As we mark the fiftieth anniversary of *Brown v. Board of Education*, a number of commentators have emphasized the limits of *Brown*'s impact. But it is important to remember the formidable task the Court saw itself taking on in *Brown*, overseeing a process that would fundamentally restructure Southern society and precipitating nothing less than a social and political revolution. That the Court believed itself capable of achieving the desegregation of public edu-

54. *See President Truman and the Steel Seizure Case: A 50-Year Retrospective*, 41 DUQ. L. REV. 685, 690 (2003).

55. *Id.*

56. *Id.*

cation reflects no little confidence in its own capabilities. And although the Supreme Court under Chief Justices Burger and Rehnquist has retreated from some of the Warren Court's civil rights decisions, it has most often done so not out of judicial reticence but as a result of a different view of substantive law.

Indeed, despite their disagreement with some of the Warren Court's results, the Burger and Rehnquist Courts have been institutional beneficiaries of the former's civil rights and individual rights trailblazing. Those rights-expanding decisions helped elevate the modern Court's stature in the eyes of the legal community and of the broader public. This, in turn, has provided the Court with greater reservoirs of authority as it confronts new issues. For those who applaud the Court's exercise of authority, a virtuous cycle has been at work. Americans cherish their right to speak freely, for example, and their right to be free from discrimination based on race, ethnicity, religion, and gender. Americans expect to be accorded due process, to be protected from governmental intrusion on their privacy, and to have a say in how their government is run. As these rights have become articles of secular faith, the institution charged with protecting them has gained in stature. The Court has reason to be self-confident.

Evidence of this confidence can be found in the Court's accelerating willingness to strike down acts of Congress. Between 1995 and 2002, the Court struck down thirty-three federal laws, an average of more than four a year. By contrast, only 134 acts of Congress were overturned in the 206 years between 1789 and 1995.[57] Even more remarkable than the sheer number of laws the current Court has struck down is the fact that almost half (fifteen) of these decisions were products of five-vote majorities. Of the 134 decisions invalidating statutes prior to 1995, only twenty-two were rendered by a bare

57. Jed Handelsman Shugerman, *A Six-Three Rule: Reviving Consensus and Deference on the Supreme Court*, 37 GA. L. REV. 893 (2003).

majority of justices. And while "few of the five–four decisions before 1995 are considered major precedents,"[58] several of the more recent 5–4 decisions clearly are. These include *Board of Trustees of the University of Alabama v. Garrett*, *Alden v. Maine*, *Seminole Tribe v. Florida*, *United States v. Lopez*, *United States v. Morrison*, and *Printz v. United States*.[59]

A similar attitude among the justices is evident in the Court's recent political-question jurisprudence. Questions that previous Supreme Courts treated as political—as within the discretion of the political branches—appear to be increasingly viewed by the current Court as justiciable, providing only (and only occasionally) deference to the interpretations of the political branches in these matters.[60]

Many of the Court's more recent separation of powers cases also reflect heightened institutional confidence. The Court has reigned in the executive branch in cases such as *Clinton v. New York* and *Clinton v. Jones*, and it has held that Congress improperly aggrandized its power in cases such as *Bowsher v. Synar*, *INS v. Chadha*, *Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc.*, and perhaps most notably *City of Boerne v. Flores*. Justice O'Connor emphasized the importance of the Court's role in maintaining the separation of powers in her *Hamdi* plurality opinion: "Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organi-

58. *Id.*

59. Not all of these 5–4 decisions striking down statutes can be ascribed solely, or even principally, to a particular ideological tilt to the current Court. While eleven of the fifteen 5–4 decisions mentioned here included the five more conservative justices in the majority, the so-called "liberals" on the Court also managed to put together five-vote majorities to strike down statutes. As much as anything, the Court's recent inclination to strike down acts of Congress reflects a new confidence on the Court that straddles lines of both ideology and judicial philosophy.

60. See, e.g., *Bush v. Gore*, 531 U.S. 98 (2000); *United States v. Munoz-Flores*, 495 U.S. 385 (1990); *Japan Whaling Ass'n v. American Cetacean Society*, 478 U.S. 221 (1986).

zations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake."[61]

Yet although this is a powerful Court, it is also one that customarily favors restraint in the scope of its decisions. At the same time that the Court boldly strikes down acts of Congress, it often seems intensely aware of the need to keep each decision limited to the particular, often narrowly crafted, question presented and to postpone consideration of related questions until future cases. A minimalist strategy recognizing rights in resolving the case immediately before it, but leaving the content of the remedy vague, may also have the virtue of encouraging the political branches to help craft a solution, taking advantage of the political branches' superior institutional competencies.

Both the Court's institutional confidence and its minimalist tendencies are evident in the detainee decisions. Certainly, *Padilla* was about as minimalist a decision as one is ever likely to find.[62] By deciding the case on procedural grounds, the majority put off resolving the status of American citizens captured within the United States and designated as enemy combatants—permitting, and perhaps encouraging, a national conversation on this bedrock question.

The resolution of *Hamdi* is also minimalist in important ways. The plurality did explicitly indicate that citizens detained as enemy combatants in the Afghan war are entitled to the rudiments of due process—that "[a] state of war is not a blank check for the President when it comes to the rights of the nation's citizens."[63] But in declining to outline precisely the contours of due process for American citizens held as enemy combatants, the plurality also reserved flexibility for the executive branch. Americans, for example, may yet be tried by military tribunals. The Court may define the required pro-

61. *Hamdi*, 124 S. Ct. at 2650.

62. Cass R. Sunstein, *The Smallest Court in the Land*, NEW YORK TIMES, July 4, 2004, § 4 at 9.

63. *Hamdi*, 124 S. Ct. at 2650, citing *Youngstown*.

cedures with greater specificity when these cases are next appealed, but for now the Court has accorded the political branches some room to maneuver.

Rasul is more difficult to characterize as "minimalist" in any classic sense. The majority opinion is broader than Justice Kennedy's concurrence, which predicated jurisdiction on narrow grounds; also, in recognizing a statutory basis for jurisdiction, the Court may well have extended access to the federal courts well beyond Guantanamo Bay. But was *Rasul*, as Justice Scalia suggested in dissent, "judicial adventurism of the worst sort"?[64] To be sure, that decision reflects the workings of a muscular, self-confident Court. But it also reflects a Court operating within its core competency—defining the basic rights and obligations of parties under the Constitution. In both *Rasul* and *Hamdi*, the Court sought to assert its view of the appropriate separation of powers, as it has in so many other recent decisions.

In a way, the very ambiguity that characterizes this aspect of the *Rasul* decision is likely to achieve the goals minimalists espouse: The decision gives the executive branch another chance to choose a more sensible course of action, and it invites Congress to enter the fray.[65] Among other things, *Rasul* has almost nothing to say about the standards that will govern the merits stage of the litigation; the parties continue, for example, to spar over whether the detainees are entitled to have access to lawyers based on *Rasul* and *Hamdi* taken together.

Some might argue that it reflects institutional timidity for a Court that could plainly have reached further to decline to do so. That seems quite a mistaken view of this Court, especially in these cases. Here, as in *Marbury v. Madison*, judicial restraint betokens institutional strength. In the combatant detention cases, the Court demonstrated that it has an integral role to play in the constitutional

64. *Rasul*, 124 S. Ct. at 2711.

65. As John Hart Ely explained in WAR AND RESPONSIBILITY 47–67 (1993), there is considerable reason to doubt that Congress will eagerly seize the Court's invitation to become involved.

order and that it is the final arbiter of what the Constitution (including the Commander-in-Chief Clause) allows. Yet the Court also recognized its own limitations. It acknowledged that it cannot perform fact-finding functions and make policy decisions as well, or as legitimately, as do the political branches. To my mind, the combatant detention decisions enhanced the Court's stature and ensured that whatever next steps the executive (and perhaps Congress) takes, those steps will be brought before the Court for renewed scrutiny.

III.

Drawing on the work of many fine scholars and jurists, I have tried to gauge the significance of the combatant detention cases by viewing them through two alternative historical lenses: the Court's episodic confrontations with civil liberties questions during periods of national security crisis and the rise in recent decades of the Court's institutional power vis-à-vis the other branches of the federal government that is visible across a range of issues unrelated to national security. But, of course, neither of these lenses offers a complete or crystal-clear view. Indeed, we are still so close to the decisions that much about their ultimate significance remains undetermined. I'd like to close by briefly mentioning two sources of that indeterminacy.

First, we don't yet know conclusively how the executive branch and Congress will respond to the decisions. Those responses will do much to shape the practical consequences of the decisions.

So far, the executive branch seems to be following a policy of minimal compliance. Rather than giving Yaser Hamdi the process mandated by the Court, the military has let him go—perhaps in significant part to prevent the Court from having an opportunity to say more precisely how much process he was due. In the Guantanamo cases, the government has read the Court's decision extremely narrowly, insisting in filings before the district court on remand that (1) the petitioners do not have a right to meet with counsel to discuss

the habeas petitions the Supreme Court has now said the federal courts possess the jurisdiction to hear and (2) the petitions should still be dismissed on the pleadings because aliens captured and held outside the United States, even innocent ones, have absolutely no legal rights (notwithstanding the apparent conclusion in the *Rasul* decision to the contrary[66]).

Congress has yet to react at all, but the decisions leave open an array of possibilities. Congress may, according to the *Hamdi* plurality, either broaden or narrow the president's power to detain citizen enemy combatants. For example, rather than limiting the president's authorization to use force in Afghanistan or Iraq, perhaps Congress could authorize more limited actions but with a broader geographic reach. Presumably, in future authorizations for the use of force, Congress could also specify that it is not delegating the power to detain American citizens to the president. With respect to noncitizen detainees, a number of responses are also available to Congress. If the statutory basis of jurisdiction recognized in *Rasul* ends up being as broad as some suggest, Congress could amend the habeas corpus statute to ensure that it does not reach beyond Guantanamo. If Congress wants to allow the military to continue to detain combatants at Guantanamo without complying with the procedural requirements demanded by *Rasul*, it could formally suspend the writ of habeas corpus for that area.[67] Congress could also attempt to strip federal courts of jurisdiction to review habeas petitions originating outside the territory of the United States, or at least raise the bar for invoking the writ.[68]

66. *Rasul*, 124 S. Ct. at 2698 & n.15.

67. Of course, Article I, § 9, of the Constitution permits suspension of the writ only "when in Cases of Rebellion or Invasion the public Safety may require it." But Congress might determine that the threat from al Qaeda constitutes an invasion—a determination that may be plausible when operatives whose actions threaten the functioning of the government are arrested within the United States.

68. Jurisdiction stripping conflicts with aggressive interpretations of *Marbury v. Madison* might even be argued to constitute a suspension of the writ, in which case Congress's action would be subject to the same conditions that would attend a more

Congress may also cabin executive discretion in this area by designing procedures for the military to employ in determining whether to continue holding detainees. It could even compose a War Powers Resolution for the new era of the war on terror.

If the president and Congress may yet reshape our understanding of the combatant detention decisions, the courts themselves may also. Using the example of *United States v. Nixon*, the presidential tapes case, Professor Vicki Jackson noted that when *Nixon* was decided, most observers viewed the decision as a victory for strong limitations on the powers of the executive. But because the decision formally recognized a constitutional doctrine of executive privilege, *Nixon* over time has come to be seen as the foundational case for assertions of a special presidential entitlement to secrecy.[69] In fact, just last term, in *Cheney v. United States District Court*, the case concerning the records of the President's Energy Policy Task Force, the Supreme Court quoted *Nixon* in stating: "'A President's communications and activities encompass a vastly wider range of sensitive material than would be true of any "ordinary individual."'" The Court explained that while "the president is [not] above the law," the judiciary must "'afford Presidential confidentiality the greatest possible protection,'" recognizing "the paramount necessity of protecting the Executive Branch from vexatious litigation that might distract it from the energetic performance of its constitutional duties."[70] What was originally understood as a holding that restricts executive power has now become one that buttresses it. One could well imagine a similar transformation in our appreciation of the terrorism decisions. Initially, *Hamdi* has been seen as a loss for presidential power. But as in the

straightforward suspension. On the other hand, we know from *Turpin v. Felker* that merely raising the bar for those who hope to qualify for habeas relief does not violate the Exceptions Clause or constitute a suspension of the writ.

69. Vicki C. Jackson, *Being Proportional About Proportionality: A Review of David Beatty's* The Ultimate Rule of Law, Constitutional Commentary, n.168 (forthcoming, 2005).

70. *Cheney v. United States District Court*, 124 S. Ct. 2587–88.

Nixon decision, *Hamdi* and the other combatant detention decisions affixed the Court's imprimatur to a legal category that previously had been of uncertain standing. However limited the category "enemy combatant" may be at the moment, the *Hamdi* Court undoubtedly gave it new legal status, and it could one day be applied far more expansively.

The combatant detention trilogy's ultimate impact, then, is far from clear. However, as we face the prospect of a war against Islamic fundamentalist groups extending many years into the future, the Court's ringing declaration that "[i]t is during our most challenging and uncertain moments that . . . we must preserve our commitment at home to the principles for which we fight abroad,"[71] sends an important signal at the outset of a lengthy period of threat that the judiciary will play an important role in guarding those principles upon which we all depend.

71. *Hamdi*, 124 S. Ct. at 2648.

2. The Supreme Court Goes to War

Patricia M. Wald

1. Did the Court Wade in Too Far?

In his colorful dissent in *Hamdi v. Rumsfeld*, one of the three enemy combatant cases decided at the end of the 2004 term, Justice Antonin Scalia accused the plurality opinion of "what might be called a Mr. Fix-it Mentality."[1] According to Scalia, "The plurality seems to view it as its mission to Make Everything Come Out Right, rather than merely to decree the consequences, as far as individual rights are concerned, of the other two branches' actions and omissions." This conceit, in his view, has consequences for Congress and the president: "[This approach] encourages their lassitude and saps the vitality of government by the people."

For decades, a political and academic debate has been waged over the appropriate role of the judiciary in the complex social, economic, and moral issues of our national life. At year 2004, add war to that mix. All such issues, of course, have serious legal questions, attached like barnacles to their bodies corpora. So is it enough, then,

1. *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2673 (2004).

for the Court to locate the legal issue, decide it, and let the other branches of government and societal groups deal with untoward consequences and devise solutions? In the past, this has been the query commentators have asked after the Court's pronouncements on abortion, affirmative action, separation of church and state, gay rights, and the like. But in 2004, this query was raised in the heretofore sacrosanct sphere of war and foreign relations, long regarded as an executive bastion. Like Justice Scalia, some critics of the enemy combatant decisions view the Court, in at least two of the cases, as acting as a superlegislature, putting its own fix on complicated areas formerly left to diplomacy and military judgment. But is that critique fair? Has the Court crossed a bridge too far in telling the other branches, schooled in the conduct of war, what to do and how to do it? Or, as other critics assert, has the Court, in effect, taken on the role of the Music Man, leading the parade, with the seventy-six trombones of our policy-making apparatus straggling behind? Opinions vary. This chapter will attempt to tease out the implications of the Court's several pronouncements for those policy makers and to suggest the unanswered questions that may require a second look by the Court itself.

There is, of course, a basic difference between the enemy combatant cases and earlier hot-button issues where the Court's intervention proved especially controversial. The enemy combatant cases did not involve issues of federalism where fifty "laboratory" states might be working independently on local solutions and competing for best answers. The federal government's jurisdiction over treatment of captured combatants was exclusive. Nor was this an issue that the other two branches had steadfastly refused to take on, such as racial segregation. In this case, the executive branch had seized the reins with vengeance and warned the others away, including, notably, the judiciary. In fact, apart from its September 19, 2001, resolution authorizing "necessary and appropriate force" against those involved with or harboring 9/11 terrorists, Congress had made no attempt to legislate

or even hold hearings as to what should be done with such persons after their capture. The status and treatment of so-called enemy combatants were solely at the executive's discretion or whim. Apart from a few "most favored nation" bows to our allies who had a handful of citizens among the more than 600 prisoners held at Guantanamo Bay, no known diplomatic initiatives had been undertaken. The executive was doing its thing without outside intervention of any kind from any other authority.

But what the *Washington Post* called "international opprobrium"[2] rained down on the United States for its alleged flaunting of international human rights and the laws of war. Front-page color photographs of hooded, shackled, caged prisoners being held incommunicado on the U.S. Guantanamo Base in Cuba for an indefinite duration, with no access to families, press, or lawyers and interminably subjected to interrogations conducted without the protections of the Geneva Conventions, repelled not only allies and enemies abroad but also many of our own citizens. The mainline press here and abroad sided with the American Bar Association, Amnesty International, Human Rights Watch, and scores of civil liberties and human rights groups to protest the status and conditions of the detainees. Even the Red Cross uncharacteristically went public with criticism of the detainees' treatment. When it was revealed that not only foreigners but also American citizens held inside the United States were being treated similarly, the clamor rose to sufficient heights that something had to give. In the United States, the situation inevitably spawned lawsuits. Despite the logistic obstacles to representing incarcerated clients who did not even know that they had lawyers or that lawsuits had been brought on their behalf and who until after, or just before, the Supreme Court heard their cases never got to see or talk to anyone about their legal rights, a half dozen habeas corpus suits were filed and lurched their way up to the Supreme Court.

2. *Belated Reform* (ed.), WASH. POST, July 9, 2004, at A18.

No one could block the lawsuits from being filed, of course, but the Supreme Court could and, it was widely predicted, *would* make short shrift of them by denials of certiorari, particularly in the case of the foreign combatants housed at Guantanamo. An intact precedent from 1950, *Johnson v. Eisentrager*,[3] denied all recourse to U.S. courts for German citizens convicted of war crimes in a U.S. military tribunal abroad and held in an American prisoner of war camp in Germany. In fact, one of the two lower courts of appeal hearing the Guantanamo cases denied all relief and dismissed the writs on the basis of that earlier precedent.[4]

There were, however, perils in that course for the Supreme Court. One was the weak factual basis for ruling that the Guantanamo Naval Base, which operated on a ninety-nine-year renewable lease from Cuba, with the United States in total and exclusive control of everything on the base, was *not* U.S. territory and thus did not fall within the *Eisentrager* precedent (by the time the D.C. Circuit case reached the Supreme Court, the Ninth Circuit had already ruled that way).[5] Second, there was what was viewed by many as executive overreaching in claiming total secret and exclusive control over the detainees' fate, with no declared processes for review or ultimate release. *If* military review panels, which were already provided for in U.S. Army regulations implementing the Geneva Conventions, had been set up, as they had been in the Gulf and Vietnam Wars to hear prisoners' objections to their status as enemy combatants on the grounds that they were, in fact, innocent bystanders and were not engaged in combat alongside our enemies; and *if* the executive had announced a system of periodic reviews to determine whether prisoners could be safely released to their home countries (both of which procedures have been put in effect since the decision), there is at least a good chance the Court would not have waded in so far or

3. *Johnson v. Eisentrager*, 339 U.S. 763 (1950).
4. *Al Odah v. United States*, 321 F.2d 1134 (D.C. Cir. 2003).
5. *Gharebi v. Bush*, 352 F.2d 1278 (9th Cir. 2003).

chastised the executive so harshly. We can certainly speculate that had even those limited processes been in place, the Court might have said that an initial military hearing and periodic review procedures were enough for foreign-born prisoners captured on or near the battlefield, no matter where they were held, and that a full-press U.S. court habeas proceeding was not necessary, nor was there any precedent for its extension to this group. International humanitarian law, as expressed in the Geneva Conventions, would have supplied a sufficient validation for the executive's actions.

As it was, however, the government hung tough on the fifty-year-old *Eisentrager* precedent, which had been decided before the promulgation of the relevant Geneva Conventions on the treatment of battlefield captures, the European Convention on Human Rights, the International Covenant on Civil and Political Rights, and myriad judicial decisions from national, regional, and international courts condemning indefinite detention, even in wartime, without any judicial review (125 members of the British Parliament filed a brief on the prisoners' behalf in the Guantanamo cases). Although at the precise moment the cases were heard in the Supreme Court there were no published reports of torture or blatantly inhumane abuses of prisoners at Guatanamo, troubling rumors of long and harsh interrogations, denial of sleep, and bombardment by noise and bright lights were widespread. Most significantly, the despicable abuses at Abu Ghraib prison in Iraq exploded into the news on the very day of oral argument, only hours after the government lawyer defending the executive's treatment of Guantanamo prisoners had assured the Court that the United States did not engage in torture.

But perhaps, too, as eminent commentators observed, the Court's more interventionist stance was a "separation of powers thing." The Court would not be told by the executive it had no right to intervene in the treatment of battlefield detainees even though individual rights were at stake and prisoners were being held in total isolation for months and years without reference to any legal regime,

national or international. The Court, when all is said and done, is a wily body (several of its members are avowed internationalists), and it is reasonable to believe that its members recognized our country, after 9/11, was involved in a new kind of war, with new dilemmas that needed new rules—the world was watching, and foreign critics were already pouncing on us as hypocrites for refusing to practice the rule-of-law values we preached so aggressively. Moreover, the Court had to be acutely aware of the infamous *Korematsu* decision, which upheld the executive's internment of 120,000 loyal Japanese Americans on undocumented executive assertions that they presented a security risk in World War II.[6] In 2004, this was a badge the Court would not wear.

II. How Far Did the Court Actually Go in the Guantanamo Case?

The Guantanamo inmates' challenge in *Rasul v. Bush*[7] came in the form of petitions for habeas corpus brought by relatives of natives of friendly countries—England, Australia, and Kuwait. The petitions claimed the detainees were innocent civilians captured abroad during the Afghanistan war by mistake who had never engaged in combat. This choice of plaintiffs had the advantage of giving a sympathetic international "feel" to the case. Indeed, the friendly status of their countries of origin was cited by the 6–3 majority as one of several factors that distinguished it from the *Eisentrager* precedent, which involved enemy alien members of the German army already convicted of war crimes by a military tribunal. Ironically, however, the non–enemy country's identity of the Guantanamo detainees could raise a question whether the vast bulk of Guantanamo detainees who are natives of Afghanistan, our avowed enemy at the time, are entitled to the relief provided in its ruling. Because the Court never suggests

6. *Korematsu v. United States*, 319 U.S. 432 (1943).
7. *Rasul v. Bush*, 124 S. Ct. 2686 (2004).

at any point in its reasoning that these detainees are not so entitled—nor has the Pentagon acted on any such distinction since the decision—it is safe to presume that all Guantanamo inmates have equal access to the writ, though obviously a native of our wartime enemy may have greater difficulty proving his innocent status if captured on or near the battlefield.

In granting access to the habeas corpus writ for the petitioner detainees, the 6–3 fragmented Court in *Rasul* wrote a quite technical opinion, heavily laden with arcane history of the writ and legal peculiarities of its varied applications. The Court saved its rousing rhetoric for the *Hamdi* case and some members for their dissent in *Padilla*—both cases dealing with American citizens.[8] At several junctures, the *Rasul* plurality opinion, authored by Justice Stevens (joined by Justices O'Connor, Souter, Ginsburg, and Breyer; Justice Kennedy

8. *Rumsfeld v. Padilla*, 124 S. Ct. 2711 (2004). *Padilla* was the last of the trilogy of enemy combatant cases and involved an American citizen apprehended at O'Hare Airport and detained first as a material witness and later turned over to the military as an enemy combatant designated by presidential decree. A ruling on the merits was detoured temporarily by a 5–4 decision dismissing his petition for habeas corpus because his counsel did not file it in the district to which he had been transferred as a prisoner but rather the one in which he was originally held. The substantive holding in *Hamdi*, however, seems eminently applicable to his case, and his counsel won a writ for his release in the district mandated by the Court, now on appeal. Even so, Justice Stevens, writing for himself and Justices Souter, Ginsburg, and Breyer, thought this an "exceptional case" where "slavish application" to a "bright line rule" was uncalled for, since Padilla's counsel had not been given fair notice of his impending transfer to South Carolina from New York, where she filed the writ. In addition, Justice Stevens found the case "singular" because "th[e]se decisions have created a unique and unprecedented threat to the freedom of every American citizen." The government had conceded in the lower court that the principal purpose for Padilla's detention was "to find out everything he knows," provoking this excoriating reaction from Justice Stevens:

> At stake in this case is nothing less than the essence of a free society. Even more important than the method of selecting the people's rulers and their successors is the character of the constraints imposed on the Executive by the rule of law. Unconstrained Executive detention for the purpose of investigating or preventing subversive activities is the hallmark of the Star Chamber.

concurred in the judgment only), stressed how "narrow but important" was the question before the Court, that question being strictly limited to whether the writ was available for "judicial review of the legality of Executive detention of aliens in a territory over which the United States exercises plenary and exclusive jurisdiction, but not 'ultimate sovereignty.'" In answering that question affirmatively, the Court first distinguished *Eisentrager* on several grounds, including the enemy alien status of the World War II prisoners and their prior convictions by a U.S. military tribunal for war crimes contrasted with the friendly nation origins of these prisoners and their as yet untried claims of total innocence. However, these differences, the Court emphasized, went only to the detainees' constitutional right to habeas, and their ultimate rights to habeas were based on the habeas statute, 28 U.S.C. § 2241, which had been reinterpreted since *Eisentrager* to allow the writ for U.S. captives held abroad, whether foreigners or U.S. citizens. It then said that the naval base was "within the territorial jurisdiction" of the United States due to the country's "complete jurisdiction and control" over anyone and everything that went on inside it. The Cuban government's retention of some ephemeral "ultimate sovereignty" should the United States choose not to exercise its perennial option to renew the ninety-nine-year lease had no practical or legal effect in this context. Thus, the normal presumption against extraterritorial application of domestic law did not apply. Most critically, the basic habeas corpus statute required only that the Court have jurisdiction over the custodian, not the prisoner—a proposition to which there was no disagreement among the parties here, because the writ was filed in the District of Columbia where the defendants (the president and the secretary of defense) resided. It could not be asserted, the Court concluded, that an American citizen residing or working on the Guantanamo base could not obtain the writ, and the habeas statute itself made no distinction between citizens and aliens in its geographical scope. The final word: These detainees had access to the writ.

But what precisely did the Court decide in *Rasul*, and what exactly does the executive branch have to do to meet it? How much leeway does it leave the executive in setting an altered detention regime for foreign prisoners captured on or near or even far away from the battlefield and not accorded prisoner of war (POW) status? If habeas lies, in which federal court does it lie? As to the last question, for now, it appears to lie in the D.C. Circuit, where the original cases were filed and the secretary of defense resides (the Court has already remanded the Ninth Circuit case for a ruling on whether the writ filed there should be dismissed for lack of jurisdiction). But what happens if the prisoners are moved, as the media report is under consideration, to mainland U.S. bases? Will the *Padilla* case, which dismissed the writ because it was not brought in the district where the prisoner was held and where his immediate warden (not Secretary Rumsfeld) resided, then govern? Probably. And does habeas really lie for every Guantanamo prisoner or, as the majority's closing line might suggest, only for those claiming innocence "of any wrongdoing"—that is, would someone who admitted or confessed under interrogation to participating in combat or in terrorist activity against the United States or even of being affiliated in some manner with al Qaeda be automatically denied the right to habeas? The scope of the Court's ruling on this all-important question was laconic:

> Whether and what further proceedings may become necessary after respondents make their response to the merits of petitioners' claims are matters that we need not address now. Only at stake was the federal court's jurisdiction to determine the legality of the Executive's potentially indefinite detention of individuals who claim to be wholly innocent of wrongdoing.

Over but hardly out. The Court had gotten its feet wet, but only a little.

This limited interpretation of the Court's own ruling inevitably elicits a broader question of what the scope of the habeas hearing

can include. Will the detainee be limited to arguing only that he was not an enemy fighter or terrorist? Or can he also argue that he had rights under customary international law or the Geneva Conventions to fight for the Taliban and thus merited at least POW status? If not captured on or near the battlefield, can he maintain that the government had no grounds under international law on which to justify his summary detention without charges or trial on mere allegations that he had "affiliations," "connections with," gave "support to," or "harbored" terrorists plotting against the United States (many detainees were in fact apprehended far from the battlefield, in Bosnia, Yemen, Saudi Arabia, etc.)? Are the criteria laid down in the Court's companion *Hamdi* decision (discussed subsequently) for determining whether a foreign-born detainee is an enemy combatant different from those applicable to an American-born one, like Hamdi himself? Can the foreign-born prisoner's detention outlast the end of a war in which he fought until it is determined he is no longer a risk to the United States if returned to his home? (Reportedly, several Guantanamo inmates released voluntarily by the United States to their home countries have joined the terrorist ranks.) Finally, can an inmate argue in his habeas hearing that abusive treatment he received at Guantanamo violates the tenets of international humanitarian law (the law of war) even if he is validly determined to be an enemy combatant? Already, a new wave of cases (68 in the D.C. Circuit alone) have been filed involving virtually all of these questions and have begun their slow trek to the Supreme Court.[9] This second round will, if anything, require more difficult balancing and more nuanced constitutional interpretation than the first. All things considered, it

9. One district judge has ruled that there is "no viable legal theory" to support the release of seven of the detainees captured in Bosnia and Pakistan. The ruling said that the current military reviews provide process roughly equivalent to Article 5 of the Geneva Convention. Charles Lane and John Mintz, *Detainees Lose Bid for Release*, WASH. POST, Jan 20, 2005, at A3. Another judge, however, has ruled in the detainees' favor. Both cases are currently under appeal.

seems prudent of the Court to have left these decisions to be sorted out in the lower judicial echelons. There appears to be no danger they will not be pursued.

Within days of the *Rasul* decision, the Pentagon announced it would inform all detainees of their right to file habeas and would begin its own hearings to decide who is or is not an enemy combatant and who is no longer a risk and can be sent home. These military hearings permit the prisoner to appear before a three-person military panel and have a military-appointed personal advocate, but not his own lawyer.[10] However, the prisoner is not allowed to see secret evidence upon which his detention may be based. Although the government originally did not plan to let lawyers into the facility to aid prisoners, even those who don't speak English, in filing their writs, a federal judge has now required that the original *Rasul* petitioners be allowed speedy access to their lawyers and that their conversations be unmonitored.[11] The Pentagon has also sent a number of prisoners back to their home countries on its own. Still, it is not unlikely that the newly erected multimillion-dollar holding facility at Guantanamo will continue to be used for its intended purpose indefinitely.[12]

In addition, other extraordinarily important questions not yet the subject of litigation are in the wings. Justice Scalia, dissenting in

10. As of mid-December, more than 500 of the 550 hearings had been completed and only two released, although final rulings were pending in others. Associated Press, *Guantanamo Review to Free Second Man*, WASH. POST, Dec. 21, 2004, at A22.

11. Carol D. Leonnig, *U.S. Loses Ruling on Monitoring of Detainees*, WASH. POST, Oct. 21, 2004, at A4.

12. See White, supra note 9 (annual review instituted to see if detainees can be released; 150 were released before review begun); Don Van Natta Jr. and Tim Golden, *Officials Detail a Detainee Deal by 3 Countries*, N.Y. TIMES, July 31, 2004, at A1 and A8 (swap of British prisoners in Saudi Arabia for Saudis released from Guantanamo); Mintz, *Most at Guantanamo to Be Tried*, supra note 9 (deputy commander's view that most inmates "may pose little threat and are not providing much valuable intelligence" disputed by other officials; 146 released and 56 returned to home governments so far); Dana Priest, *Long-Term Plan Sought for Terror Suspects*, WASH. POST, Jan. 2, 2005, at A1 (administration preparing long-range plans for indefinite imprisoning of suspected terrorists it does not plan to bring to trial).

Rasul, highlighted one; Justice Thomas, dissenting in *Hamdi*, alluded to another. Justice Scalia said the majority opinion "boldly extends the scope of the habeas statute to the four corners of the earth," anywhere a U.S. custodian of foreign prisoners can be reached, and in so doing "springs a trap on the Executive," which had relied on settled law to the effect that habeas must be brought within a federal judicial district where the prisoner is being held. No such district in Guantanamo exists; according to Scalia, "that should be the end of the case." The consequences of the extension, Scalia warned, will be "breathtaking"; multitudes of aliens previously held abroad after capture in combat can now file habeas petitions in the United States, with the attendant problems of transporting them, as well as witnesses for both prosecution and defense, to the United States and taking military officers away from their field duties to testify. All this will, he said, aid and comfort the enemy. Our courts will be deluged.[13] And whether his parade of horribles is hyperbolic, Justice Scalia does make a point that is not immediately refutable: If the U.S. naval base at Guantanamo is U.S. territory because of the total U.S. control over what happens on it, other bases set up in occupied or even liberated Afghanistan and Iraq or other parts of the world may also be considered U.S. territory. It is a fact that we currently have hundreds of prisoners incarcerated in foreign-based facilities, with no access to judicial review as to the grounds for their apprehension or the duration or conditions of their confinement.[14] Likewise, Justice Thomas

13. Justice Scalia suggested a special district court could be established by Congress on Guantanamo to hear the cases.

14. See Douglas Jehl and Kate Zernike, *Scant Evidence Cited in Long Detention of Iraqis*, N.Y. TIMES, May 29, 2003, at A1 and A10 (hundreds of Iraqi prisoners held in Abu Ghraib for prolonged period despite lack of evidence of security threat, Army report says; 6,500 Iraqi detainees held in Iraq); *CIA's Prisoners* (ed.), WASH. POST, July 15, 2004, at A20 (al Qaeda senior leaders held incommunicado in undisclosed locations, not accessible to Red Cross); Bradley Graham and Josh White, *General Cites Hidden Detainees*, WASH. POST, Sept. 10, 2004, at A24 (up to 100 detainees concealed in military facilities abroad).

asks in the *Hamdi* ruling, if notice and some kind of hearing is necessary to detain a battlefield captive for any prolonged length of time, is it not also required when U.S. paramilitary operations "take out" suspected terrorists all around the world?

Circumstances often compel courts to be pragmatic, in the eyes of doctrinal purists, even arbitrary. The logic of a court's rationale may not have to be taken to its limit because that limit is totally impractical or potentially undesirable for nonlegal reasons. Constitutionally, there may also be separation-of-powers concerns that call for drawing lines in the sand. Thus, the Court limited its certiorari to the question of Guantanamo inmates and several times in the opinion stressed that was all it was deciding. Having made its decision in their favor, however, the Court certainly must have recognized that a second wave of cases would inevitably follow, claiming other U.S. bases or facilities in which prisoners are held abroad also meet the "complete jurisdiction and control" test that qualified Guantanamo as a U.S. territory. And although it is at least arguable that citizens of some of the countries in which U.S. authorities detain combatants and civilians may have more potential access to local courts or that the terms of the U.S. leases may be more temporary or conditional, human rights advocates (nor probably the Supreme Court as well) will hardly be content with a jurisprudence of individual rights based on property law.

It may also be argued that the Guantanamo situation is sui generis as a legitimate application or modest extension of international law concepts that the United States has already embraced. If, for instance, the United States had recognized as applicable, at least to Taliban fighters, the Third Geneva Convention on Treatment of Prisoners and the POW protocol set out therein and if the convention's Article 5 hearings had been held to sort out the totally innocent from the illegal combatants (something the Pentagon says it is now doing but too late to avoid the Court's habeas ruling), then these measures might have inclined the Court to stop at a few sentences

in a per curiam opinion or even a denial of certiorari, leaving things as they were. That, of course, did not happen, and it was necessary for the Court to venture in deeper because the executive had refused to take any steps to provide process for the detainees akin to that laid down by international law for wars between state belligerents. Thus, the outcome might be different (or at least the argument can be made) in situations where no such close relationship to the Geneva-type conflict exists, as in the case of terrorists picked up abroad who are operating outside a traditional war setting. *Eisentrager* was not explicitly overruled by *Rasul* and could maintain legitimacy in these other factual settings. The geographic and situational scope of *Rasul* was left to a case-by-case determination in the future; it is plain that the principles by which these determinations will be made are still murky, but it is difficult to see how it could be otherwise.

The question also remains after *Rasul* whether an alien can be detained by U.S. authorities solely for interrogation or intelligence gathering, even though a citizen, under the *Hamdi* opinion (discussed subsequently), may not. Early on, Pentagon spokespersons said Guantanamo was chosen because they "wanted to put captives out of commission and find out what they knew."[15] The government's affidavits throughout the court proceedings in both *Hamdi* and *Padilla* posited the need to keep prisoners away from counsel, friends, and family in order to create a dependence on their interrogators that would lead to intelligence revelations. The plurality in *Hamdi*, however, ruled out interrogation as a reason to detain a U.S. citizen, and Justice Stevens, dissenting in *Padilla*, expounded:

> Executive detention of subversive citizens, like detention of enemy soldiers to keep them off the battlefield, may sometimes be justified to prevent persons from launching or becoming missiles of destruction. It may not, however, be justified by the naked

15. Scott Higham, Joe Stephens, and Margot Williams, *Guantanamo—A Holding Cell in War on Terrorism*, WASH. POST, May 2, 2004, at A1 and A15.

> interest in using unlawful procedures to extract information. Incommunicado detention for months on end is such a procedure.

Yet, the value of detainees as a source of information remains high in the view of a substantial part of the intelligence community, and its dilution by legal restraints is likely to be vigorously opposed or circumscribed. The justices are worldly men and women and not oblivious to such concerns. The *Rasul* case does not touch the problem of whether detainees from foreign countries can be kept for intelligence purposes even if U.S. citizens can't. It seems plain after *Rasul* and *Hamdi* that Congress should tackle the problem directly and openly rather than asking the Court to determine it on the basis of old rules established for old problems in old kinds of war.

At this point, though, it seems safe to predict that the laws of war, though not specifically alluded to in the *Rasul* opinion, will ensure that battlefield detainees can be kept in temporary holding places in nearby safe places for reasonable periods of time until their status can be sorted out. During that time, they can also be questioned. But longer-term non-POWs removed far from the theater of combat, especially those kept only for intelligence reasons, are more susceptible to falling into the *Rasul* rationale.

The almost universal repulsion to the graphically displayed episodes of Iraqi prisoners at the U.S.-controlled Abu Ghraib prison being abused, and even dying, during interrogations cannot be discounted in any prediction of what the Court will do. The Court may well be inclined not to keep a hands-off policy on a problem of that size or gravity. The United States is, after all, a signer of the Convention Against Torture, which provides a cause of action for torture victims, including aliens, wherever detained. Thus, the *Rasul* Court's express finding that Guantanamo inmates may bring suit under the Alien Tort Claims Act is already being used in new lawsuits alleging that torture was in fact employed during interrogations there. Prisoners in other U.S. facilities around the world, perhaps even subjects

of CIA or other counter-terrorism operations, can be expected to follow suit.[16]

An even trickier question is the one suggested by Justice Thomas. The *Rasul* ruling assumes prisoners, like the plaintiffs, were apprehended at or near the battlefield, though many in Guantanamo actually were captured as suspected terrorists elsewhere. The CIA, pursuant to explicit presidential findings disclosed to congressional leaders, engages in worldwide covert operations that result in apprehension of noncombatants and their extended detention for interrogation (or worse). Are these situations likely candidates for a *Rasul*-like ruling? The Geneva Conventions have no apparent application to such cases, unless perhaps the subjects are residents of occupied countries like Iraq.[17] The treatment of these subjects is accordingly a matter of domestic law, either of our own country or of the country where they are being held. But the Court's habeas-based reasoning could very well be analogized to their situation, in which case the repercussions on our antiterrorism efforts might be extreme indeed. Conversely, a court might plausibly hold that habeas in that setting would interfere with the executive's preeminent duty to protect the nation. Justice Thomas, in his *Hamdi* dissent, explicitly recognized the validity of intelligence gathering as a valid interest of the government that must be given due consideration in striking the due process balance between individual liberty and national security.

Finally, the *Rasul* opinion by itself gives no clue as to what

16. See Neil A. Lewis, *Fresh Details Emerge on Harsh Methods at Guantanamo*, N.Y. TIMES, Jan 1, 2005, at A11 (government-released memoranda in American Civil Liberties lawsuit revealing harsh interrogation practices in Guantanamo); Barton Gellman and R. Jeffrey Smith, *Report to Defense Alleged Abuse by Prison Interrogation Teams*, WASH. POST, Dec. 8, 2004, at A1 (internal Defense report cited reports of beatings of detainees by special military task force in Iraq); Neil A. Lewis, *U.S. Court Asserts Authority Over American in Saudi Jail*, N.Y. TIMES, Dec. 17, 2004, at A13 (District judge finds jurisdiction over suit by American jailed in Saudi Arabia as a terrorism suspect who alleges he is detained at behest of American officials).

17. See Dana Priest, *Memo Lets CIA Take Detainees Out of Iraq*, WASH. POST, Oct. 24, 2004, at A1.

procedures are due in any habeas process. By contrast, the *Hamdi* opinion sets out in reasonable detail those processes due an American citizen imprisoned as an enemy combatant. But Hamdi's rights derive largely from his constitutional rights as a citizen, which may well be greater than those accorded an alien; even the president's authority to define who is an enemy combatant may be wider in the case of a foreign-born person than of a citizen. Following the Court's *Rasul* decision, a Bush administration supporter remarked dourly, "If I were a detainee, I wouldn't be breaking out the champagne"; a prominent practitioner before the Court agreed, comparing the Court with someone "test driving a number of different principles without actually forking over a down payment."[18]

District court judges are independent, often stubborn, and even ornery when it comes to standing passively and watching their regular processes shortcut. Until the Supreme Court rules that foreign detainees are not entitled to the same procedural rights as citizens, the trial courts are likely to require appointed counsel, when appropriate, and the necessary degree of discovery required to sort out factual questions. In the words of the *Washington Post*, "Having blundered its way into federal court oversight of detentions at the camp, the government will now have to figure out how to meaningfully facilitate judicial review."[19] But it is not just the government that has been figuring out what to do; the federal judiciary and eventually the Supreme Court, which, in my view, correctly entered the fray, will inevitably become the final arbiter on this series of knotty questions—that is, unless Congress acts decisively and constitutionally in the near future.

18. Charles Lane, *Finality Seems to Elude High Court's Grasp*, WASH. POST, July 4, 2004, at A12.

19. See "Belated Reform," *supra* note 2. But see Carol D. Leonnig, *U.S. Defends Detentions*, WASH. POST, Oct. 5, 2004, at A10 (U.S. defending suits by 60 Guantanamo prisoners says it need not explain reasons for detention or apprehension far from battlefield under Commander-in-Chief power "to prevent captured individuals from serving the enemy").

III. What Did *Hamdi* Decide and How Does It Interact with *Rasul*?

The second enemy combatant case, *Hamdi v. Rumsfeld*, involved an American citizen, captured by the Northern Alliance somewhere in Afghanistan and handed over to the American forces. The president designated Hamdi an enemy combatant, and Hamdi was subsequently incarcerated in a South Carolina military brig, held incommunicado with no access to family or counsel for more than two years. His father, as best friend, brought habeas; the government proffered to the court a nine-paragraph affidavit from a midlevel Pentagon officer and based on hearsay asserting Hamdi was fighting for the Taliban in an Afghanistan combat zone. The Fourth Circuit found the affidavit sufficient to support the president's designation and refused Hamdi access to counsel or to the court to refute the assertions.

The Supreme Court, seemingly much more comfortable in expressing varying emotions of outrage, commitment to old-line values, and skepticism about the executive's "Trust Us" contentions in a case involving an American citizen than in one involving an alien, came down on the side of Hamdi in four separate opinions with three different rationales, none commanding a majority but together involving eight of the nine justices (Justice Thomas was the holdout). The issue was framed by Justice O'Connor in her four-person plurality opinion. The Court was called upon, she said, to decide "the legality of the Government's detention of a United States citizen on United States soil as an enemy combatant and . . . the process that is constitutionally owed to one who seeks to challenge his classification as such." So far as we know, only three U.S. citizens have been so designated, compared with the hundreds of aliens imprisoned in Guantanamo. But the Court was on firmer ground doctrinally when it addressed the constitutional rights of U.S. citizens, and its discussion of remedies was far more detailed than the simple acknowledg-

ment of habeas jurisdiction in *Rasul*. Indeed, it was detailed enough to invoke the "Mr. Fix-it Mentality" jibe of Justice Scalia, who (together with Justice Stevens) nonetheless surprisingly would have given Hamdi even greater relief than did the majority.

Justice O'Connor (writing for herself, Chief Justice Rehnquist, and Justices Kennedy and Breyer) made several key rulings. The most controversial, for some civil libertarians, was that the president had authority under the Authorization of the Use of Military Force (AUMF) resolution, passed by Congress in the wake of 9/11, to detain anyone alleged, as Hamdi was, to be "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." She made abundantly clear, however, that this was the exclusive definition of an "enemy combatant" that the opinion would deal with (despite recognition that the government had attached the label to a much broader array of prisoners, including an American seized on American soil suspected of plotting terrorism with al Qaeda and suspected confederates of al Qaeda seized far from any battlefield and held at Guantanamo and elsewhere around the world). However, this limited definition of an enemy combatant, O'Connor continued, allowed the detention of such persons to conform to the laws of war. Adherence to the laws of war, in turn, meant that their detention was included within the "necessary and appropriate force" that the AUMF resolution authorized to be used on al Qaeda–affiliated persons and those who harbored them—in this case, the Taliban. The resolution, so interpreted, trumped an earlier U.S. statute passed in 1971, 18 U.S.C. § 4001, proscribing the detention of any U.S. citizen except pursuant to an act of Congress. (Interestingly, Justices Stevens, Scalia, Souter, and Ginsburg, in separate opinions, specifically disagreed with this ruling on the nonapplicability of 18 U.S.C. § 4001's bar to Hamdi, and Justice Breyer joined a dissent written by Justice Stevens in *Padilla* to the same effect.) Thus, by relying on international customary law—here, the laws of war—as the basis for detention of non-

POW captives, the O'Connor opinion bypassed the government's argument that Article II of the Constitution gave the president, as commander-in-chief, virtually absolute power to designate someone as an enemy combatant without individual judicial review of any sort.

A power to detain, without charges or trial, battlefield combatants not qualifying for POW treatment under the laws of war is supported by many, but certainly not all, international law experts. There are a significant number who argue that any power to detain battlefield captives other than as POWs or for specific war crimes must come from domestic law and is not found in either the Geneva Conventions or customary international law. If they are right, the 1971 statute adopted to outlaw noncongressionally authorized citizen internment would apply, and Hamdi could not be held. Justice Souter's separate concurrence in the judgment (joined by Justice Ginsburg) found that the drafters of the 1971 statute did indeed mean it to apply robustly in wartime as well as in peacetime. It was especially needed in a separation-of-powers regime, he said, where "deciding . . . what is a reasonable degree of . . . liberty whether in peace or war is not well-entrusted to the Executive Branch . . . whose particular responsibility is to maintain security."

The authorization for "necessary and appropriate force" in the AUMF resolution was not a clear enough statement of congressional intent to repeal the prior 1971 ban on citizen detention. Justice Souter hedged a bit at the end, however, acknowledging that if the laws of war did allow detentions of battlefield combatants lasting for the duration of the war, then that might justify Hamdi's detention as consistent with the earlier statute. But because the United States itself was guilty of violating these same laws of war by not providing Hamdi any process for demonstrating his innocence, as was required by Article 5 of the Third Geneva Convention, which Justice Souter said the United States admitted applied to Taliban fighters, the United States could not seek haven in the laws of war to authorize the detention and overcome the 1971 law.

Justice O'Connor did not deal with this contention of Justice Souter and of many international law experts, that the Taliban was the official armed force of a state party to the Geneva Conventions and that Taliban fighters (apart from al Qaeda partisans) should have been recognized as POWs. That omission may be explained in part because the nature of Hamdi's activities in Afghanistan were in dispute (he claimed to be a total innocent); in any case, there was the government's counter that determining whether fighters for an enemy's regime are recognized as POWs under the Geneva Conventions is a quintessential political judgment of the executive, which the Court should not second-guess. On the other hand, there are many internationalists who would say POW recognition is a treaty obligation that a country must obey and that should be enforceable by its own domestic courts, as well as by international courts. The skirting of the issue by Justice O'Connor, however, weakens, to some degree, the logic of her complex rationale supporting the president's power to detain even the limited group of enemy combatants that came within her opinion's definition. Should the United States go to war again and pursue a like policy of refusing POW status to Geneva Convention Party soldiers, the question is sure to resurface. In Iraq, the United States formally recognized Iraqi army captives as POWs.

On the other hand, a positive byproduct of Justice O'Connor's reliance on the laws of war for support of Hamdi's detention is her statement that detention of enemy combatants is limited under the laws of war to the duration of the particular conflict in which the detainees participated. The specter of indefinite detention past the end of the immediate armed conflict, be it Afghanistan or Iraq or wherever, in the name of an endless worldwide war against terrorism or even against al Qaeda obviously disturbed the Court, which was relying on laws of war principles applicable to traditional wars—that reliance, it warned, could "unravel" in the case of a conflict entirely unlike past wars. In Hamdi's case, however, armed conflict still raged in Afghanistan. He could be detained while U.S. troops were still

involved. But, O'Connor steadfastly maintained, detention under the laws of war is for the purposes of holding the detainees off the battlefield. "[C]ertainly," the opinion stated, "indefinite detention for the purposes of interrogation is not authorized" either by the laws of war or by the AUMF resolution. This limitation poses significant obstacles to the executive's earlier announced intentions to keep battlefield detainees incarcerated as long as the United States thinks they serve an intelligence purpose or pose a risk to our security.

In the end, although much is left open by the plurality opinion dealing with the definition of an enemy combatant, it should be recognized that much is decided as well. It does not decide whether the president, as commander-in-chief, has any such detention power on his own without congressional consent. It does not go beyond a definition of a detainable enemy combatant as one who took up arms against U.S. or allied forces on a specific battlefield (the plurality opinion leaves any expansion of this definition to district courts in future cases), and it appears to assume the duration of detention is restricted to the length of the defined conflict, rejecting any extended incarceration for the purpose of interrogation. It does not decide whether any of these limitations of definition, purpose, or duration apply to foreign-born enemy combatants, though logic and international human rights law suggest most of them should, and human rights activists will surely continue to push for their inclusion. It avoids all questions of whether and to what degree the Geneva Conventions apply to enemy combatants in the Afghanistan war (except as to the duration of detention). Importantly, it uses international law—the laws of war—as the linchpin of its rationale rejecting the applicability of a domestic statute that on its face appears to outlaw the detention.

The final step in Justice O'Connor's regimen for detention of citizen enemy combatants was to list the rudiments of due process that the citizen detainee must receive; this included, under the habeas statute, notice of the charges against him and the right to deny

such charges and produce any material evidence in his defense (evidence under the habeas statute may be taken by deposition, interrogatories, or affidavit, as well as through live witnesses). More basically, she used a balancing of individual liberty and governmental interests, as set out in *Mathews v. Eldridge*,[20] a welfare benefits case, to define the core rights of a detainee to include notice of the factual basis for his classification as an enemy combatant and an opportunity to rebut those presumptions before a neutral decision maker. Significantly, in weighing the competing interests, she narrowly defined the government's "weighty and sensitive interests" as "assuring that those who have in fact fought with the enemy during a war do not return to battle against the United States" and eloquently described the individual's interest as "the most elemental of liberty interests—the interest in being free from physical detention by one's own government," an interest as strong in war as in peace, an interest not diminished even by an accusation of treason. "It is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested." She did, however, entertain the possibility that the detainee's hearing might be "tailored" to offset the alleged burdens on field personnel performing essential military duties. The tailoring might include greater use of hearsay and a rebuttable presumption in favor of the government's evidence; even an "appropriately authorized and properly constituted military tribunal" might suffice. This last suggestion was an invitation the Pentagon seized promptly, instituting a military review process within days of the opinion's issuance, which the Pentagon said would supplement, not supplant, the habeas proceeding. According to the opinion, the hearing need not be held immediately on the battlefield; it could be held within a reasonable time when the decision is made to continue the detention.[21]

20. *Mathews v. Eldridge*, 434 U.S. 319 (1976).

21. Although Justices Souter and Ginsburg voted with the plurality to make a majority for the remand hearing, they disassociated themselves from the portion of

Hamdi, however, had been given no process at all. The government claimed in its affidavit that "undisputed" evidence showed he had been captured in a combat zone and that was sufficient. The Court rejected that argument: The circumstances of his capture were not undisputed at all—his father's affidavit said only that Hamdi resided in Afghanistan at the time of his seizure, and he was never allowed to answer the charges that he was fighting for the Taliban. And, even if undisputed, his seizure in a combat zone would not be proof that he was engaged in an armed conflict against the United States or its partners, which was the only definition of an enemy combatant acceptable in this case.

Addressing the broader separation of powers contention of the government (and Justice Thomas), Justice O'Connor further rejected the argument that the courts could review only the executive's broad detention scheme, not its application in individual cases. "Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake."

There is no doubt that what journalist Anthony Lewis called the president's "presumptuous omnipotence"[22] had been checked. The judiciary would be watching and, theoretically, ready to move on the wartime detention process at critical stages. It had established its outpost. Hearings would not, as the doomsayers predicted, be required on the battlefield. A hybrid procedure short of the usual full court habeas hearing in every case might be crafted that would satisfy due

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the plurality that dealt with any "tailoring" of the detention hearing involving greater use of hearsay or a rebuttable presumption in favor of government evidence. And they did not agree that a military-type hearing could obviate the need for a regular habeas corpus proceeding. They could, however, envision government power to detain "in a moment of genuine emergency, when the Government must act with no time for deliberation . . . if there is reason to fear that [the citizen] is an imminent threat to the safety of the Nation and its people."

22. Anthony Lewis, *The Court v. Bush*," N.Y. TIMES, June 29, 2004, at A27.

process and not unduly burden military personnel or distract them from battlefield duties, though the acceptance of a procedure that put the burden of disproving the government's evidence on the petitioners gave civil libertarians great pause.[23] (This may have been one place where less detail on possible accommodations to the basic habeas right might have been more prudent.) And the lower courts would have to take the initiative in deciding how much further the concept of an enemy combatant could be extended for summary detention purposes.

Perplexing, however, is the extent to which the rationale and rights set out in the *Hamdi* plurality apply to noncitizens, who do not necessarily enjoy all the constitutional rights of U.S. citizens. Does their liberty interest, for instance, rank lower in the *Mathews v. Eldridge* balance? Ironically, many come from countries where no liberty interest at all in these circumstances would be recognized. If the *Hamdi* safeguards do not apply to citizen and noncitizen detainees alike, but foreigners (at least the Guantanamo inmates) do have access to habeas, exactly which rights will *Hamdi* give noncitizens? Aliens in habeas actions have not traditionally received a lesser degree of procedural protections, but the courts have never before been faced with hundreds, or even thousands, of such detainees, many allegedly intent upon injuring our own citizens as soon as they are released, and some having no place to which they can be safely returned. The government could presumably try the most dangerous for war crimes or even under our domestic criminal laws (it already has a half dozen slated for military tribunals), but even with controversially restricted

23. It's not clear whether the military tribunal to which Justice O'Connor referred would require counsel. The Army Regulations and Article 5 of the Third Geneva Convention do not. Neither do the newly initiated Pentagon status hearings for Guantanamo inmates. Hamdi, however, was specifically accorded counsel on remand to assist him in his habeas hearing. Hamdi has since been released and sent back to Saudi Arabia under certain restrictions on his freedom to travel or concert with terrorist groups. See Jerry Markham, *Hamdi Returned to Saudi Arabia*, WASH. POST, Oct. 12, 2004, at A2.

defense rights, the military trials are proving extremely slow to mount.[24] A district court ruling, currently on appeal, has stayed all military tribunal proceedings on the ground that the detainees were denied their Geneva Convention rights to a hearing on whether they merited POW status or were innocent of any engagement in combat. If they were POWs, they could be tried only by court-martial under the convention.[25]

As to civilian courts, alleged obstructionist tactics and the due process problem of nondisclosable evidence and unavailable witnesses present real problems to their extensive use, as the ongoing *Moussaoui* trial indicates too well.[26] And the open question, discussed earlier, of what the foreign detainee can claim in a habeas hearing—for example, international law violations or torture contentions—further conflates the issue. Both the *Rasul* decision and the *Hamdi* plurality opinion seem to focus exclusively on the situation of a detainee protesting his complete innocence of any involvement in an armed conflict. More nuanced challenges to the legality of detention on other grounds may well require more guidance from the Court. But the variety of scenarios in which these challenges will rise would have made detailed protocols not only impossible but probably counterproductive. The Court signaled the path and a few markers—that is all it could or likely should have done.

24. Neil A. Lewis, *U.S. Terrorism Tribunal Set to Begin Work*, N.Y. TIMES, Aug. 22, 2004, at A17 (four detainees appear in court after three years, defense lawyers complain of inadequate translation help, anonymous witnesses, loose evidence rules, and no appeal to civilian authorities); Scott Higham, *Trials Set to Begin for Four at Guantanamo*, WASH. POST, Aug. 23, 2004, at A1 and A7 (conversations between defendants and lawyers can be monitored; exculpatory evidence can be kept secret; defense lawyers and human rights activists label proceedings "fundamentally unfair"); Neil A. Lewis, *Guantanamo Tribunal Process in Turmoil*, N.Y. TIMES, Sept. 26, 2004, at A20 (officials acknowledge the process is in turmoil).

25. Carol D. Leonnig and John Mintz, *Judge Says Detainees' Trials Are Unlawful*, WASH. POST, Nov. 9, 2004, at A1.

26. *The Tribunals Begin*, WASH. POST, Aug. 29, 2004, at B6.

IV. The *Hamdi* Dissent

Who would have suspected that the most civil liberties–oriented opinion in *Hamdi* would be authored by Justice Scalia in an odd-couple dissent with Justice Stevens? Justice Scalia's construct is clean and straightforward—the U.S. Constitution prescribes the procedural and definitional requirements for treason, and U.S. laws do the same for other crimes against national security. Also, the Constitution's Suspension Clause allows Congress to suspend the writ of habeas corpus temporarily in dire national emergencies. Any detention of a citizen can and must be handled within that framework. The congressional resolution on which the plurality relies to authorize these detentions does not and could not constitutionally legislate a third option. The history of the Great Writ, described in extraordinary detail in Justice Scalia's opinion, demonstrates that its principle raison d'être was to ensure due process before the executive can deprive a citizen of liberty under any circumstances. Thus, there could not be "a different special procedure for imprisonment of a citizen accused of wrongdoing by aiding the enemy in wartime." The laws of war might permit detention of enemy aliens for the duration but the tradition for American citizens is altogether different. American terrorists and traitors can be subjected to established criminal processes, and when those processes prove totally impracticable, the writ can be, and has on occasion, been suspended.

Precedents from the War of 1812 confirmed the absence of military authority to indefinitely imprison citizens in wartime outside of normal criminal procedures. *Ex parte Milligan*, in the Civil War, rejected the "usages of war" as a justification for putting a citizen of a nonseceding state before a military tribunal for sabotage while the civilian courts in his own locale were open and operating.[27] *Ex parte Quirin*, which allowed an American citizen to be tried by a military

27. *Ex parte Milligan*, 71 U.S. 2 (1866).

tribunal, is dismissed as "not this Court's finest hour."[28] However, it involved admitted German army saboteurs stealing into the United States during wartime, not citizens captured abroad who disputed any military involvement against the United States.

Justice Scalia, like Justice Souter, did not think the AUMF resolution specific enough to repeal the earlier ban against detention of citizens except pursuant to an act of Congress, and while the laws of war might authorize detention of foreigners as enemy combatants, it could never supersede constitutional requirements for detaining citizens. Justice Scalia, however, is careful to admit the "relatively narrow compass" of his profound ruling—it applies only to citizens detained within the territorial jurisdiction of a federal court. In sum, the writ is available—until suspended—only for citizens detained where a federal court operates (it is not clear whether Scalia thinks the military could transfer or keep U.S. citizens outside U.S. territory to avoid that requirement). Within these geographical limits, however, habeas would inevitably attain for them the full panoply of criminal trial rights, notice, discovery, counsel, civilian judge, even jury, and, in treason cases, the two witnesses to an overt act rule. Justice Scalia's decision sounds generous, and it is—to a degree—but it applies only to two cases so far and might even be avoidable by military canniness in locating prisoners outside federal judicial districts. We know that Justice Scalia would not recognize any jurisdiction over the Guantanamo inmates, and he suggests Congress might legislate a separate procedure for intelligence gathering, presumably from either foreigners or Americans. Within its narrow boundaries, Justice Scalia's rationale is liberal but it leaves the vast bulk of U.S.-held detainees outside its charmed circle.[29]

28. *Ex parte Quirin*, 63 S. Ct. 2 (1942).

29. Justice Thomas is odd man out. Not "Mr. Fix-it" surely, rather Mr. "Nothing is wrong—Just trust the executive." According to Justice Thomas, the detention of Americans as enemy combatants falls squarely within the president's war powers, courts have no competence or expertise to second-guess him. Although the Court

v. Conclusion—What to Make of It All?

Like its same-term *Blakeley* decision on sentencing, the Supreme Court's entry into the arena of the war on terrorism is destined to create immediate demands for more elucidation, more explanation, and more intervention.[30] In the end, it is hard to give credence to Justice Scalia's criticism that the Court had gone too far in laying down protocols for executive treatment of wartime detainees. In some ways, however, it may not have gone far enough, considering the splintered rationales of the *Rasul* and *Hamdi* cases; to go much further might well have brought fragile coalitions down altogether. The Court has ruled definitively on one aspect of the war—U.S. and foreign detainees housed in Guantanamo who are accused of being enemy combatants fighting American forces in armed combat must be allowed access to the ancient writ of habeas corpus if they claim to be innocent bystanders, not combatants. In such a proceeding, U.S. citizens must be accorded certain basic rights to notice and to defend on the facts. Much more than that, we do not know. But for launching the quest, the Court deserves praise.

Some big questions remain unanswered. Does habeas lie for foreign detainees housed elsewhere than at Guantanamo? Does it lie

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has the right to look at Hamdi's case, it should do so only with "the strongest presumptions for the Government." It should look at whether the president had general authority to detain enemy combatants, not how he exercised it in individual cases. Nor should detention be limited to the duration of a particular conflict. In certain contexts, "due process requires nothing more than a good-faith Executive determination"—the president has the power to make "virtually conclusive factual findings" on who is an enemy combatant. Detention might be justified by the need for intelligence as well as preventing return to the battlefield. In Hamdi's case, he would not grant counsel on remand or even notice of charges if it could destroy the intelligence-gathering function of his detention.

30. *Blakeley v. Washington*, 124 S. Ct. 2531 (2004) (late in the 2003 term, Court invalidated portions of state-sentencing guidelines regime, thereby throwing validity of federal sentencing guidelines into grave doubt; within weeks, Court granted certiorari on the issue of their constitutionality with argument at beginning of October 2004 term and decision rendered in January 2005).

for claims of abuse or violations of international law apart from total innocence of being a combatant at all?[31] Do foreigners have the same rights at a habeas hearing as do American-born defendants?[32] How far can the designation of "enemy combatant" carry beyond the battlefield? Do targets of intelligence covert actions abroad have any rights comparable with enemy combatants?

The laws of war, as interpreted by the *Hamdi* plurality, were a key element of the decision, but they have no applicability beyond the battlefield or occupied territory and are not readily adaptable to the war on terrorism. The Geneva Conventions and progeny are badly in need of revision if they are to meet the realities of terrorist wars. But equally deficient is our own domestic law concerning who, under what conditions, with what procedures, and for how long battlefield captives can be held. The Supreme Court entered the arena because it had to; individual liberties guaranteed by our Constitution and laws to citizens (and, to some degree, to aliens) were in jeopardy.

31. President Bush's investigative commission cites 300 cases of alleged abuse at U.S.-controlled prisons abroad and urges that all prisoners be treated "in a way consistent with U.S. jurisprudence and military doctrine and with U.S. interpretation of the Geneva Conventions." Eric Schmidt, *Abuse Panel Says Rules on Inmates Need Overhaul*, N.Y. TIMES, Aug. 25, 2004, at A1. Army investigators similarly found that the CIA hid prisoners from international human rights groups. Josh White, *Abuse Report Widens Scope of Culpability*, WASH. POST, Aug. 26, 2004, at A1 and A16. See also R. Jeffrey Smith, *Agency Is Faulted on Practices in Iraq, Secrecy Amid Probe*, WASH. POST, Aug. 26, 2004, at A18 (Army report says that CIA's detentions and interrogation practices "led to a loss of accountability, abuse, reduced interagency cooperation and unhealthy mystique that . . . poisoned the atmosphere" in Abu Ghraib).

32. See United Nations Committee on Elimination of Racial Discrimination Resolution, 64th Session, Feb.–Mar. 2004 (state parties should "ensure that noncitizens detained or arrested in the fight against terrorism are properly protected by domestic law that complies with international human rights, refugee and humanitarian law"); American Bar Association House of Delegates Resolution, August 25, 2004 (condemning any use of torture or other cruel, inhumane, or degrading treatment or punishment upon persons within the custody or under the physical control of the U.S. government [including its contractors] and calling for an independent commission to prepare a full account of detentions and interrogations carried out by the United States).

The Court has momentarily finished the opening round, but the legal battles are still being waged. Before there are repetitions of the Afghanistan and Iraq wars, there needs to be a thoughtful debate on and legislative resolution of interrogation procedures and rights, detention limits on who and how long non-POWs can be held, and what, if any, rights adhere to targets of covert actions. It is long past time for Congress to become engaged—even though there are skeptics in the civil liberties community about what Congress may do. Congress is the branch of government directly responsible, along with the executive, to the citizenry for the reconciliation of wartime security and civil liberties, and Congress must fully accept this moment of responsibility.[33] Otherwise, there are bound to be much deeper interventions by the Court in this troubled area of the law. Once in the water, the Court may not be able to hug the shoreline much longer; instead, it will be carried irretrievably by the current out to the "boundless sea."

33. At the urging of the White House, the congressional conference committee on the Intelligence Reform Bill "scrapped a legislative measure that would have imposed new restrictions on the use of extreme interrogation measures by American intelligence officers." Douglas Jehl and David Johnston, *White House Fought New Curbs on Interrogations, Officials Say*, N.Y. TIMES, Jan. 13, 2005, at A1.

3. Enemy Combatants and the Problem of Judicial Competence

John Yoo

FROM THE INITIAL RETURNS, one might believe that the 2003–2004 October term of the Supreme Court dealt the Bush administration a defeat in the war on terrorism. *Rasul v. Bush* held that the federal courts—for the first time—will review the grounds for detaining alien enemy combatants held outside the United States.[1] In *Hamdi v. Rumsfeld*, the justices required that American citizens detained in the war have access to a lawyer and a fair hearing before a neutral judge.[2]

While the Court has unwisely injected itself into military matters, closer examination reveals that it has affirmed the administration's fundamental legal approach to the war on terrorism and left it with sufficient flexibility to effectively prevail in the future. Despite the pleas of legal and media elites, the Justices did not turn the clock back to September 10, 2001. Rather, the Court agreed that the United States is at war against the al Qaeda terrorist network and the Taliban militia that supports it. It agreed that Congress has authorized that war. The justices implicitly recognized that the United States may

1. *Rasul v. Bush*, 124 S. Ct. 2686 (2004).
2. *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004).

use all the tools of war to fight a new kind of enemy that has no territory, no population, and no desire to spare innocent civilian life. The days when terrorism was merely considered a law enforcement problem and our only forces were limited to the FBI, federal prosecutors, and the criminal justice system will not be returning.

Nonetheless, the Court also emphasized the importance of judicial review in assessing the cases of individual detainees captured in the war on terrorism. The Supreme Court made clear that it would no longer consider military decisions in wartime to be outside the competence of the federal courts. Instead, the judiciary would review the grounds for the detention of enemy combatants. Expansion of judicial review into military decisions represents an intrusion of the federal courts that is unprecedented on both formal and functional grounds. At the simplest, formal level, this expansion required the Court to effectively overrule a precedent decided at the end of World War II that was exactly on point.[3] At a broader, functional level, it will call on the judiciary to make factual and legal judgments in the midst of war, pressing the courts far beyond their normal areas of expertise and risking conflict with the other branches in the management of wartime measures.

This chapter discusses four issues. Part I explains why the events of September 11, 2001, demonstrate that terrorism has become a matter for war, rather than simply a crime. Part II argues that the Supreme Court's cases in *Hamdi* and *Rasul* accepted the judgment of the political branches on this important point; the government's authority to detain enemy combatants without charge followed. Part III discusses the Court's decision to require a certain level of due process for enemy combatants, both citizens and aliens, detained both within and outside the United States. Part IV questions whether the comparative institutional competencies of the judiciary make it a good choice to advance and to carry out national security and foreign policy.

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

I.

After the September 11 terrorist attacks, the United States went to war against the al Qaeda terrorist organization. On that day, al Qaeda operatives hijacked four commercial airliners and used them as guided missiles against the World Trade Towers in New York City and the Pentagon in the nation's capital. Resisting passengers brought down in Pennsylvania a fourth plane that appears to have been headed toward either the Capitol or the White House. The attacks caused about 3,000 deaths, disrupted air traffic and communications within the United States, and caused the economy billions of dollars in losses. Both the president and Congress agreed that the attacks marked the beginning of an armed conflict between the United States and the al Qaeda terrorist network.[4] Indeed, al Qaeda's September 11 attacks amounted to a classic decapitation strike designed to eliminate the political, military, and financial leadership of the country.

It may be useful at the outset to discuss the difference between al Qaeda and September 11, on the one hand, and the traditional wars that had characterized the nineteenth and twentieth centuries, on the other. While al Qaeda had conducted a series of attacks against the United States since the 1993 bombing of the World Trade Center, September 11 made salient the unconventional nature of both the war and the enemy. Al Qaeda is not a nation-state, nor is it an alter-ego supported by a nation state, which may distinguish it from the groups in the Vietnam War. As a nonstate actor, al Qaeda does not have a territory or population, nor does it seek to defend or acquire any specific territory. In this respect, it is unlike an indigenous rebel group that is fighting to replace an existing regime through an intrastate civil war.

Al Qaeda's operations are also unconventional and, as strategic

4. See President's Military Order "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," 66 *Fed. Reg.* § 1(a), 57,833 (Nov. 13, 2001); *Authorization for Use of Military Force*, Pub. L. 107-40, 115 Stat. 224 (2001).

analysts like to say, asymmetric. Al Qaeda soldiers do not wear uniforms, and they do not operate in conventional units and force structures. Rather, their personnel, material, and leadership move through the open channels of the international economy and are organized in covert cells. Al Qaeda does not seek to close with and defeat the enemy's regular armed forces on the battlefield. Instead, it seeks to achieve its political aims by launching surprise attacks, primarily on civilian targets, through the use of unconventional weapons and tactics, such as concealed bombs placed on trains or using airplanes as guided missiles. Victory does not come from defeat of the enemy's forces and eventually a negotiated political settlement, rather it comes from demoralizing an enemy's society and coercing it to take desired action.

Another factor distinguishes the war against al Qaeda from previous wars. In previous modern American conflicts, hostilities were limited to a foreign battlefield, while the U.S. home front remained safe behind the distances of two oceans. In this conflict, however, the battlefield can occur anywhere, and there can be no strict division between the front and home. The September 11 attacks themselves, for example, were launched by foreign forces from within the United States, using American airliners, against targets wholly within the United States. While American territory has witnessed foreign attack in the past, most notably the attack on Pearl Harbor to launch World War II, September 11 constituted the first major attack on the continental United States, and on major American cities since the War of 1812.

Thus, like previous wars, an important dimension of the conflict with al Qaeda has occurred abroad, in which the U.S. armed forces and the intelligence agencies have played an offensive role aimed at destroying the terrorist network. In October 2001, the United States launched a military campaign in Afghanistan that within a few short weeks rooted out al Qaeda from its bases and removed from power

the Taliban militia that had harbored it.[5] The United States has conducted operations against al Qaeda terrorists in other parts of the world, such as the Philippines, Yemen, and parts of Africa. It has detained hundreds of al Qaeda and Taliban fighters as prisoners at the naval base at Guantanamo Bay, Cuba. In March 2003, motivated in part by Iraq's suspected links to terrorist groups in general and al Qaeda specifically, the United States and its allies invaded Iraq and removed Saddam Hussein from power.[6]

Unlike previous conflicts, however, the war against al Qaeda also has a significant domestic dimension. The initial salvo was launched by al Qaeda operatives against the United States from within the United States. Al Qaeda shows no lessening in its efforts to pull off another attack within the United States on the scale of September 11. The Justice Department has discovered al Qaeda cells in cities such as Buffalo, New York, and Portland, Oregon; detained a resident alien who had intended to destroy the Brooklyn Bridge; and intercepted at least one American citizen in Chicago who had planned to explode a radiological dispersal device, known as a "dirty bomb," in a major American city. After the attacks, the federal government investigated and detained hundreds of illegal aliens within the United States with possible links to the terrorists. Many were deported. Al Qaeda agents taken into custody within the United States have been designated as enemy combatants and are being detained without criminal charge until the end of the conflict. Congress enacted legislation—the USA Patriot Act—to enhance the powers of the FBI

5. For my earlier discussions of the legal issues surrounding the Afghanistan war, see Robert J. Delahunty and John Yoo, *The President's Constitutional Authority to Conduct Military Operations Against Terrorist Organizations and the Nations That Harbor or Support Them*, 25 HARV. J. L. & PUB. POLICY 487 (2002); John C. Yoo and James C. Ho, *The Status of Terrorists*, 44 VA. J. INT'L L. 207 (2003).

6. Of course, the primary justifications for the war in Iraq were Hussein's continuing possession of a weapons of mass destruction (WMD) program and his flouting of United Nations Security Council resolutions. See John Yoo, *International Law and the War in Iraq*, 97 AM. J. INT'L L. 563 (2003).

and the intelligence community to defeat international terrorists within the United States,[7] and created a new Department of Homeland Security to consolidate twenty-two separate domestic agencies with responsibilities for domestic security.[8] After these legislative changes, the government engaged in an expanded surveillance effort to monitor the communications of terrorist targets under the Foreign Intelligence Surveillance Act.

It is this virtually unprecedented domestic dimension to the conflict that has led some to misunderstand the fundamental nature of the conflict with al Qaeda. They argue that terrorism is a tactic, not an enemy, and that this implies that the war on terrorism is a problem for the criminal law, as it was before September 11, 2001. The war on terrorism is no different conceptually from the war on drugs, the war on poverty, or the war on crime. These "wars" also have their own nonstate actors, such as drug cartels or organized crime groups. However, I believe September 11 is different in kind rather than degree. Perhaps the confusion arises from the political rhetoric of the "war on terrorism" and the actual conflict, which is between the United States and the al Qaeda terrorist organization and its affiliates. The United States is not at war with every group in the world that uses terrorist tactics. Furthermore, al Qaeda is different from a drug cartel or organized crime groups, and hence its defeat is more a matter for war than for crime.

Several reasons distinguish the war against the al Qaeda terrorist network from a large-scale criminal investigation or a broad and persistent social problem. First, al Qaeda represents a wholly foreign threat that emanates from outside the United States. This makes it different from homegrown terrorism, such as the bombing of the

7. *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism* (USA PATRIOT) *Act*, Pub. L. No. 107-56, 115 Stat. 272 (2001).

8. Exec. Order No. 13,228, *Establishing the Office of Homeland Security and the Homeland Security Council*, 66 *Fed. Reg.* 51,812 (2001).

Oklahoma City federal building by Timothy McVeigh, which would be an appropriate subject for the criminal justice system. Second, al Qaeda is unlike a crime organization in that it seeks purely political ends, rather than acting out of a desire for gain or financial profit. Al Qaeda attacked the United States because it wants the United States to withdraw its military and political presence from the Middle East. It may seek financial gain to fund its terrorist operations to achieve that goal, but financial advancement is not its purpose. Third, al Qaeda has proven that it is capable of inflicting a level of violence on the United States that pushes its conduct beyond the realm of crime into that of war. While the location of the precise line between the violence of crime and that of war may not be certain, it seems clear that the September 11 attacks crossed that line, with their approximately 3,000 deaths and billions of dollars in damage.

II.

In *Hamdi*, the Supreme Court accepted the political branches' basic decision to characterize the September 11 attacks as war. In so doing, it rejected arguments that terrorism had to be understood solely as criminal activity, and it denied the notion that war could only occur against nations and not against nonstate actors as well.

During the fighting in Afghanistan, Yaser Hamdi was captured by Northern Alliance troops, a coalition of groups allied to the United States and opposed to the Taliban militia, and was handed over to the U.S. armed forces.[9] Hamdi was transferred to the naval station at Guantanamo Bay and then, upon discovery that he had been born in the United States, to a navy brig in South Carolina. He was not charged with a crime. Hamdi's father filed a writ of habeas corpus seeking his son's release, based on the claim that as an American citizen, Hamdi could not be held without criminal charges or access

9. These facts are taken from the Court's majority opinion. *Hamdi*, 124 S. Ct. 2633 (2004).

to a tribunal or counsel. He based his argument on 18 U.S.C. § 4001(a), which declares that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." Although the government did not challenge Hamdi's right to seek habeas, it argued that he was detained lawfully as an enemy combatant under the laws of war. It refused to allow Hamdi access to a lawyer or to appear in person in court. Finally, the government provided to the court as evidence a declaration from a Defense Department official stating that Hamdi had traveled to Afghanistan in the summer of 2001, affiliated himself with a Taliban military unit, and surrendered while armed.

After proceedings in the district court and the Fourth Circuit, the case arrived before the Supreme Court on the question of whether the government could detain Hamdi as an enemy combatant. This raised the basic questions of whether the September 11 attacks constituted a war, which branch of the government had the authority to decide that question, and what powers were available to the president if, indeed, the United States were at war. If September 11, for example, merely constituted a criminal act rather than an act of war, then Hamdi's detention was illegal under the Fifth and Sixth Amendments, which require indictment or presentment, right to counsel, the right to remain silent, and the right to a speedy trial. Hamdi's detention also would have violated Section 4001(a), because no act of Congress has overridden the rights of criminal defendants to be free of detention without criminal charge.

A four-justice plurality opinion of the Court agreed with the government that the September 11 attacks had initiated a state of war, that the Afghanistan conflict was part of that war, and that enemy combatants could be detained without criminal charge as part of that war. As an initial matter, the Court avoided the Solicitor General's argument that the president could detain Hamdi pursuant solely to his authority, under Article II of the Constitution, to conduct war.[10]

10. *Id.* at 2639.

The Court could do so because Congress had enacted a statute on September 19, 2001, authorizing the president to use "all necessary and appropriate force" against "nations, organizations, or persons" he determines are responsible for the September 11 attacks. Agreement of the political branches that the September 11 attacks initiated a war and that the president could pursue that conflict in Afghanistan was enough to trigger deference on the part of the Court. "There can be no doubt that individuals who fought against the United States in Afghanistan as part of the Taliban, an organization known to have supported the al Qaeda terrorist network responsible for those attacks, are individuals Congress sought to target in passing" the authorization to use force.[11] The Court did not itself conduct any inquiry into whether the basic facts satisfied the statute or whether the statute satisfied the Constitution. It did not ask whether the September 11 attacks had indeed constituted an act of war for constitutional purposes; it did not ask whether sufficient evidence existed to show that al Qaeda was responsible for those attacks; nor did it examine whether the Taliban regime was sufficiently associated with al Qaeda to fall within the September 18 authorization.

Once the Court agreed that the September 11 attacks initiated a state of war with al Qaeda, it then accepted the next portion of the administration's legal framework for the war on terrorism. Ever since the earliest days of warfare, the lesser power to detain combatants has been understood to fall within the greater authority to use force against the enemy.[12] As the Court recognized, the purpose of detention in the military context is not to punish, but merely to prevent combatants from returning to the fight. In fact, such detention is the merciful, humanitarian alternative to a practice of granting no quarter to the enemy. That power extends even to U.S. citizens, as it did in the case of *Ex parte Quirin*, in which the Court upheld the World

11. *Id.* at 2640.
12. See, e.g., *Ex parte Quirin*, 317 U.S. 1, 28 (1942).

War II detention and trial by military commission of Nazi saboteurs, one of whom apparently was a U.S. citizen.[13] After noting that the laws of war permitted the detention without criminal charge of Confederate soldiers during the Civil War, the Court observed that "[a] citizen, no less than an alien, can be 'part of or supporting forces hostile to the United States or coalition partners' and 'engaged in an armed conflict against the United States.'"[14] No specific congressional authorization, the Court further concluded, was needed. "Because detention to prevent a combatant's return to the battlefield is a fundamental incident of waging war," the Court concluded, "in permitting the use of 'necessary and appropriate force'" Congress authorized wartime detention of enemy combatants.[15]

The Court finally upheld the third leg of the administration's justification for Hamdi's detention. Hamdi and his supporters argued that his detention was unconstitutional because it was indefinite—a return to the idea that terrorism constitutes a fundamentally criminal enterprise. Hamdi sought a return to September 10, 2001—when terrorists were arrested based on probable cause; were indicted by grand juries; received *Miranda* warnings, attorneys, a speedy trial, and the right to know all of the government's case, to depose and call any relevant witnesses, and to seek *Brady* evidence, among other things. The Court flatly rejected this argument. The justices recognized that the United States may use all of the tools of war to fight a new kind of enemy that has no territory, no population, and no desire to spare innocent civilian life. The days when terrorism was merely considered a law-enforcement problem and our only forces were limited to the FBI, federal prosecutors, and the criminal justice system will not be returning any time soon.

Instead, the Court drew upon the standard rule under the laws of war that prisoners can be detained until the end of a conflict. This

13. *Id.*
14. *Hamdi*, 124 S. Ct. at 2640–41.
15. *Id.* at 2641.

principle follows from the basic purposes of wartime detention of enemy combatants. As we have seen, to borrow the plurality's words, "the purpose of detention is to prevent captured individuals from returning to the field of battle and taking up arms once again."[16] The flip side of this purpose is that once a conflict is over, the relationship between the nations and populations returns to peace.[17] Once peace exists, no reason continues to exist for detaining captured combatants, and it becomes the obligation of each nation to prevent their citizens from restarting hostilities. "The United States may detain, for the duration of these hostilities, individuals legitimately determined to be Taliban combatants who 'engaged in an armed conflict against the United States.'"[18] So long as "the record establishes that United States troops are still involved in active combat in Afghanistan," detention may continue. The Court accepted the government's arguments that it was premature to identify when the conflict *might* end while combat operations in Afghanistan were still ongoing, as they are still ongoing today.

At the same time, the Court acknowledged the unconventional nature of the war on terrorism and suggested that if hostilities continued for "two generations," Hamdi's detention might indeed become indefinite and fall outside the government's war powers. Aside from recalling Justice O'Connor's fondness for measuring time by generations,[19] the Court did not provide any specific details about why thirty-six years ought to constitute any principled line. Suppose American troops remain engaged in combat in Afghanistan in 2040; nothing in the laws of war requires the United States to release Hamdi or other Taliban detainees. Even if Hamdi were no longer a threat

16. *Id*. at 2640.

17. Cf. Geneva Convention (III) Relative to the Treatment of Prisoners of War, art. 118, Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364; Hague Convention (II) on Laws and Customs of War on Land, art. 20, July 29, 1899, 32 Stat. 1817; Hague Convention (IV) of 1907, Oct. 18, 1907, 36 Stat. 2301.

18. *Hamdi*, 124 S. Ct. at 2642.

19. See *Grutter v. University of Michigan*, 539 U.S. 306, 343 (2003).

because of his age, harmlessness itself is not a grounds to seek release—nations at war, for example, are not required to release disabled prisoners of war. While the United States may decide to release older or less dangerous prisoners as a matter of policy, the Court identified no constitutional rule that required their release within a specific period of time not set by the end of hostilities.

Upholding detention as a central aspect of the war power is perhaps the most significant aspect of the Court's terrorism decisions. Afghanistan presents the easiest case: a traditional conflict between two nation-states that occurred primarily on the battlefield. It may be hard to believe, but the United States was lucky—al Qaeda and its Taliban allies chose to deploy fighters in a battlefield setting where superior American air and ground power gave the United States the advantage. Al Qaeda will not make that mistake twice. Rather, al Qaeda seeks to infiltrate operatives into our open society with the goal of launching surprise attacks designed to inflict massive civilian casualties. As the Jose Padilla example shows (whose case was dismissed by the Supreme Court because it was improperly brought in New York), al Qaeda has been recruiting American citizens who can better escape detection. Although fighting there continues, Afghanistan will not be the front line of the future; O'Hare airport, New York harbor, and the Mexican and Canadian borders will be. Preventing the government from detaining citizens who have decided to become terrorists would have seriously handicapped the nation's ability to stop attacks and to gain better intelligence on our enemy's plans.

III.

Up to this point, the Court remained well within the bounds set by previous Courts in reviewing government war powers to detain enemy combatants. At the outset of the Civil War, for example, the Court had deferred to the president's determination of whether a war had broken out with the Confederacy. In *The Prize Cases*, the Court

explained that "[w]hether the President in fulfilling his duties as Commander in Chief" was justified in treating the southern States as belligerents and instituting a blockade, was a question "to be *decided by him*."[20] The Court could not question the merits of his decision, but must leave evaluation to "the political department of the Government to which this power was entrusted."[21] As the Court observed, the president enjoys full discretion in determining what level of force to use.[22] At the end of World War II, the Court had found that the question of whether a state of war continued in existence despite the apparent cessation of active military operations was a political question.[23] In the first years of World War II, the Court upheld the government's authority to detain enemy combatants, even citizens, during war. Despite the arguments of a coalition of law professors, members of the bar, and commentators, in *Hamdi*, it would have been remarkable for the Court to have disregarded this framework developed over the nation's long history and to have challenged the political branches in perhaps their area of greatest competence.[24]

It was at this point, however, that the Court then took a wrong turn and overstepped the traditional boundaries of judicial review. All

20. *The Prize Cases*, 67 U.S. (2 Black) 635, 670 (1862).

21. *Id.*

22. *Id.* ("He must determine what degree of force the crisis demands.") (internal quotations omitted); see *Eisentrager*, 339 U.S. 763, 789 (1950) ("Certainly it is not the function of the Judiciary to entertain private litigation—even by a citizen—which challenges the legality, the wisdom, or the propriety of the Commander-in-Chief in sending our armed forces abroad or to any particular region."); *Chicago & S. Air Lines v. Waterman Steamship Corp.*, 333 U.S. 103, 111 (1948) ("The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret.").

23. *Ludecke v. Watkins*, 335 U.S. 160, 167–70 (1948).

24. It is important to note that although Justice O'Connor's opinion drew only a plurality of the Court—Chief Justice Rehnquist and Justices Kennedy and Breyer—Justice Thomas's dissent agreed with the plurality on these essential points.

parties agreed that an American citizen held as an enemy combatant could challenge his detention through a petition for a writ of habeas corpus. This had been the rule since at least *Ex parte Milligan* (1866), in which the Court ordered the release of an American citizen who had plotted to attack military installations and was detained by Union military authorities while "the courts are open and their process unobstructed."[25] Milligan had been captured well away from the front, had never associated with the enemy, and at best was merely a sympathizer with the Confederate cause.[26] The crucial question, then, was not whether habeas corpus would remain available but how the process ought to be structured to take into account the government's interests in protecting the national security and the noncriminal nature of the detention, while at the same time providing a sufficient test of the government's evidence to guard against pretextual detentions.

Viewed at a somewhat higher level of generality, *Hamdi* really called upon the Court to determine how much information judges need to perform the habeas function in a wartime detention context. In a regular habeas case, for example, a federal court reviewing a purely executive detention (rather than, as is usually the case, detention and conviction of a criminal defendant by the state courts) might exercise de novo review of the facts. If the executive claimed, for example, that an individual had to be detained because he posed an imminent threat to public safety, a judge might feel it necessary to examine witnesses in court and to directly review the records of the detention.[27] Or, following Judge Wilkinson's approach in the Fourth Circuit, the Court could have accepted the "some evidence" standard

25. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 121 (1866).

26. *Id.* at 131.

27. See, e.g., *United States v. Salerno*, 481 U.S. 739, 748 (1987) ("in times of war or insurrection, when society's interest is at its peak, the Government may detain individuals whom the government believes to be dangerous."); *Moyer v. Peabody*, 212 U.S. 78, 82–83 (1909) (governor's detention of individual because of insurrection).

that required the government to provide the facts that led the military to believe that a detainee satisfies the legal standard for status as an enemy combatant. That standard seeks to provide the government the maximum flexibility to preserve its intelligence sources and methods and to minimize interference with ongoing military operations. Such considerations had led the Court in 1950 to refuse to allow alien enemy combatants resort to habeas at all. In *Eisentrager*, the Court had held that German POWs convicted by military commission for war crimes could not seek review of their sentences in a federal court through a writ of habeas corpus. According to the *Eisentrager* Court:

> The writ, since it is held to be a matter of right, would be equally available to enemies during active hostilities as in the present twilight between war and peace. Such trials would hamper the war effort and bring aid and comfort to the enemy. They would diminish the prestige of our commanders, not only with enemies but with wavering neutrals. It would be difficult to devise a more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home. Nor is it unlikely that the result of such enemy litigiousness would be a conflict between judicial and military opinion highly comforting to enemies of the United States.[28]

Add to these concerns the important military interest, only made more acute by the unconventional nature of the war with al Qaeda, of interrogating enemy combatants for information about coming attacks. Unlike previous wars, the current enemy is a stateless network of religious extremists who do not obey the laws of war, who hide among peaceful populations, and who seek to launch surprise attacks on civilian targets with the aim of causing massive casualties. They have no armed forces to target, no territory to defend, no people to protect, and no fear of killing themselves in their attacks. The front

28. *Eisentrager*, 339 U.S. at 779.

line is not solely a traditional battlefield, and the primary means of conducting the war includes the efforts of military, law enforcement, and intelligence officers to stop attacks *before* they occur. Information is the primary weapon in the conflict against this new kind of enemy, and intelligence gathered from captured operatives is perhaps the most effective means of preventing future terrorist attacks upon U.S. territory.

According to this understanding of war, de novo judicial review threatened to undermine the very effectiveness of the military effort against al Qaeda. A habeas proceeding could become the forum for recalling commanders and intelligence operatives from the field into open court; disrupting overt and covert operations; revealing successful military tactics and methods; and forcing the military to shape its activities to the demands of the judicial process. Indeed, the discovery orders of the trial judge in *Hamdi* threatened to achieve exactly these results. Appropriate concern over these considerations should have led the Court to adopt the "some evidence" standard, which promised to narrow judicial inquiry to the facts known to the government and subject to production in court. Justice Thomas, who observed that courts "lack the expertise and capacity to second-guess" the battlefield decisions made by the military and ultimately the president, agreed with this approach.

Joined by Justices Souter and Ginsburg, however, the plurality imposed vague guidelines for reviewing detentions. Rejecting the positions of both Hamdi and the government, it struck the compromise that an enemy combatant must receive a lawyer and "a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker." It transplanted that most amorphous of standards—the *Mathews v. Eldridge*'s test—to determine whether a process meets the requirement of the due process clause: a balancing of the private interest affected by government action, the government's interests, and the costs of providing greater process, all measured in the context of deciding whether more process would reduce

government error.[29] That the Court had to resort to a case about the procedural due process rights that attend the termination of welfare benefits suggests the extent to which the Court was improvising.

It is difficult to understand how the *Eldridge* test can be applied with any serious coherence. The values that *Eldridge* calls on the courts to balance seem obviously difficult, if not impossible, to measure against any common metric. The Court's own discussion in *Hamdi* bears this out. On the one hand, Justice O'Connor wrote that an individual citizen's interest "to be free from involuntary confinement by his own government" is fundamental.[30] On the other hand, the government has a "weighty and sensitive" interest in preventing enemy combatants from returning to fight against the United States.[31] The Court could have defined the government's interest at an even higher level of importance, because requiring the government to reveal intelligence information, such as the surveillance of al Qaeda leaders, during habeas proceedings could prevent the government from carrying out the shadowy war against al Qaeda with its most effective sources and methods. Once defined as prevailing in the conflict, rather than simply detaining enemy combatants, the government's interest would have reached the most compelling level known to American constitutional law. As the Court has said before, "It is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation."[32]

Nevertheless, how the Court actually measures these factors is unclear, especially so in the Court's opinion. Do we gauge the government's interest in protecting the national security in lives potentially saved times the reduction in the probability of an attack—factoring in the average value of a life as measured by the Department of Health and Human Services or the Environmental Protection

29. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).
30. *Hamdi*, 124 S. Ct. at 2647.
31. *Id.*
32. *Haig v. Agee*, 453 U.S. 280, 307 (1981) (citation omitted).

Agency? And how does the government measure the individual liberty interest against unwilling detention—in the average amount of dollars that an average citizen would pay to avoid detention per hour? If these efforts to monetarize the values seem silly, then perhaps we can admit there is no systematic, rational way to balance these competing values. Then, to make matters even more difficult, the Court requires that judges use these values as guideposts with which to determine which procedural features should attend habeas corpus proceedings for enemy combatants. Even though it made various observations about possible procedures—such as suggesting that the government should receive a presumption in favor of its evidence, one that put the burden of proof on the detainee to disprove—the Court really just punted on the procedures to the lower courts and the executive branch.

One might think of *Hamdi* as a case in which its practical importance outstrips its significance as a matter of theory or policy. After all, the government had detained only three American citizens as enemy combatants, Yaser Hamdi, John Walker Lindh, and Jose Padilla. As of this writing, Lindh was transferred to the criminal justice system and reached a plea bargain with prosecutors, while Hamdi has renounced his citizenship and been released to the custody of Saudi Arabia. *Hamdi*, however, has application far beyond the remaining case of Padilla because of the Court's decision in *Rasul v. Bush*, in which the Court found that Guantanamo Bay (and perhaps military operations worldwide) lay within the jurisdiction of the federal courts. *Rasul* essentially overruled *Eisentrager*, and it unwisely threatens to inject the federal courts into the micromanagement of the military. *Rasul* provided no guidance on how soon those hearings must be held, where they will be held, who can participate, and how classified intelligence will remain protected. Despite an extended discussion of the peculiarities of the Guantanamo lease, *Rasul* even leaves unclear whether judicial review would apply beyond the Guantanamo base

to Iraq (and Saddam Hussein) or Afghanistan (and Osama bin Laden, should he be captured).

Without any discussion of these issues in *Rasul*, we can only assume that the approach outlined in *Hamdi* will prove sufficient to meet habeas corpus standards. If the process is sufficient to meet the due process standards for American citizens detained within the United States, it seems safe to conclude that they will satisfy the requirements for alien enemy combatants detained outside the United States. Although it unwisely extended its reach to wartime detentions outside the United States, the Court left the executive branch with substantial room to maneuver on the nature and scope of review. *Hamdi*, for example, approves of a detainee's access to counsel, but it does not explain when they can meet, whether their communications can be monitored for clandestine messages, or whether the lawyers can be military officers. *Rasul* studiously avoided any discussion of the substantive rights, if any, that al Qaeda and Taliban detainees have, and neither decision overturned the administration's policy that the Geneva Conventions do not apply. The Pentagon could easily adapt its existing review process for Guantanamo prisoners to meet the standards of *Hamdi* (as Justice O'Connor seemed to invite). Military commissions already established by President Bush to try alien terrorists would almost certainly meet the procedural requirements set out by the Court. Thus, the Court's intervention into detainee policy, and its imposition of ambiguous standards for review, threaten to extend not just to the navy brig in Charleston, South Carolina, but also to Guantanamo Bay, Afghanistan, and even Iraq.

IV.

Despite protests to the contrary, *Hamdi* and *Rasul* will thrust the federal courts into the center of policy making in the war on terrorism. The courts will face decisions about whether the government

must produce certain kinds of evidence or witnesses, particularly those involving intelligence information and assets; how long the government can question detained enemy combatants before they have access to a lawyer; and how much the government must disclose in open court about its operations. These decisions will have an effect on the tactics and operations that the government will be able to use to combat terrorism in the future. Because the Court did not set any clear lines, but instead called on lower courts to balance multiple factors, it is hard to escape the conclusion that the federal judiciary will have a significant policy-making role on terrorism issues. This part of the chapter questions whether the courts have a comparative advantage in the area of foreign policy and national security, or whether such decisions should be left to the political branches. Do the federal courts, now charged with interpreting and applying *Hamdi* and *Rasul*, have a superior ability to gather information to make national security decisions or even to conduct the balancing called for by the Supreme Court?

The design and operation of the judiciary give it a comparatively weak institutional vantage point from which to achieve foreign affairs and national security goals. This is not to say that federal courts are institutionally unable to play a role. Rather, the important question for ensuring the most effective pursuit of national policy is, Which institutions within the federal government have a comparative advantage as a matter of their structure? As to this second-order question, I argue that the federal judiciary, in such a role, suffers significant institutional disadvantages that make it a poor choice for carrying out national security policy. It is important to distinguish between both micro and macro level characteristics of the judiciary. Several characteristics of federal courts at the micro level—the operation of individual judges in individual lawsuits—limit the information that flows to courts and the options available to them. At a macro level, certain systemwide features of the Article III judiciary may poorly equip it to carry out national policy on a global scale.

1. Micro factors

The defining function and features of the Article III courts, which may make them superior to other branches in performing certain functions, also may make them comparatively less well suited to playing a leading national security role. Federal courts are designed to be independent from politics, to passively allow parties to drive the litigation, and to receive information in highly formal ways through litigation. These characteristics may make courts more neutral in their decision making and fairer in their attitude toward defendants or detainees. But they also may render the courts less effective tools for achieving national security goals. Comparison of courts with other institutions may make these points more salient.

An initial difference between courts and other institutions is access. Compared with other institutions, courts have high barriers to access from parties.[33] Markets, to take one example, have virtually no barriers—all one need do is purchase a product. Congress has somewhat higher barriers than markets. It is generally thought that interest groups must provide campaign contributions or political support in order to attain access to political leaders, although studies also show that members of Congress are responsive to public pressure as reflected through the media and constituents.[34] The executive branch has lower levels of access than Congress; it is probably easier for individuals and groups to provide information to, and make requests of, agencies, although perhaps with no greater chances of success than with Congress. Certainly, for members of Congress, access to the executive branch is extremely low. In addition to formal hearings and information transmitted to Congress by the executive branch, agency officials and congressional staff conduct numerous discussions

33. Neil Komesar, Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy 125 (1994).

34. See Robert Cooter, The Strategic Constitution 51–74 (1999) (discussing interest group theory of politics).

and meetings in a never-ending dialogue of questions and requests for information and responses.[35]

By contrast, courts have numerous doctrines that limit access to the courtroom. Under standing doctrine, for example, plaintiffs must have suffered an actual injury in fact, which is traceable to conduct on the part of a defendant who can remedy the harm.[36] The timing of the case must be just right, neither too early to be unripe nor too late to be moot.[37] Of particular importance to the subject matter at hand, the case cannot raise political questions whose determination is constitutionally vested in another branch.[38] The plaintiff must actually be able to claim to benefit from a cause of action created under federal law. Litigation itself demands significant resources, at least in comparison with means of accessing the executive or legislative branches. Taking advantage of a judicial forum not only requires time and money to make substantive legal arguments in court and to pursue discovery, but also demands resources for navigating the complexity of litigation rules—hence, the need to hire teams of lawyers to represent parties in interest.

There are also significant differences in the manner by which courts acquire and process information. Information is gathered through a painstaking process of discovery, conducted between the contending parties, which can take a long time and incur great expense. That information must satisfy the federal rules of evidence—it must survive tests for relevance, credibility, and reliability—and it must be presented to the court in accordance with specific, fairly painstaking courtroom procedures. The executive branch, by contrast, can collect information through agency experts, a national and global

35. See, e.g., Peter Strauss, *The Place of Agencies in the Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984).

36. See, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

37. See, e.g., *DeFunis v. Odegaard*, 416 U.S. 312 (1974) (mootness); *United Public Workers v. Mitchell*, 330 U.S. 75 (1947) (ripeness).

38. *Nixon v. United States*, 506 U.S. 224 (1993).

network of officials and agents, and links with outside groups and foreign governments. Congress can collect information itself or acquire it from the executive branch or outside groups via relatively inexpensive hearings. Courts, however, cannot proactively collect information on a question before them. Aside from public record information, such as that contained in open media sources or scholarly journals, courts must rely on the parties to bring information to them. Courts do not operate the broad network of information sources available to the executive branch, nor can they benefit from the informal methods of information collection at the disposal of the legislature. Indeed, courts usually cannot update the information available on a question except through the context of a case. Thus, if a court has made a decision based on information available to it at time 1, it usually will not continue to gather information thereafter—even if that information gathering would lead it to change its decision—until another case raising the same issue is brought. And even then, a court usually will not reexamine its earlier decision unless the information provided by the parties showed that the factual context has changed so dramatically as to dictate a departure from stare decisis.[39]

Article III itself also imposes significant restrictions on the role of courts in performing certain functions. Once the president and Congress have enacted a statute, the judiciary's constitutional responsibility is to execute those goals in the context of Article III cases or controversies, subject to any policy-making discretion that the courts are implicitly given by Congress in areas of statutory ambiguity or of federal common law. Federal judges cannot alter or refuse to execute those policies, even if the original circumstances that gave rise to the statute have changed.[40] If a federal court, for example, finds that a

39. See, e.g., Thomas R. Lee, *Stare Decisis in Economic Perspective: An Economic Analysis of the Supreme Court's Doctrine of Precedent*, 78 N.C. L. Rev. 643 (2000).

40. For a contrary view, see Guido Calabresi, A Common Law for the Age of Statutes (1985).

defendant has violated the Helms-Burton Act by "trafficking" in property confiscated by the Cuban government, it must render judgment for an American plaintiff who once owned that property.[41] Article III requires a federal court to reach that decision, even if the effects of the judgment in that particular case would actually harm the national interest. This is because courts cannot control the timing of their proceedings or coordinate their judgments with the actions of the other branches of government. One might easily see how this might be the case: The president, for example, might be engaged in a diplomatic campaign to pressure a Middle Eastern country into terminating its support for terrorism at the time that a judicial decision frees a suspected al Qaeda operative. A judicial decision along these lines could undermine the appearance of unified resolve on the part of the United States, or it might suggest to the Middle Eastern country that the executive branch could not guarantee that it could follow through on its own counterterrorism policies. A court cannot take account of such naked policy considerations in deciding whether a federal statute has been violated or whether to grant relief, whereas the political branches, of course, can make constant policy modifications in reaction to ongoing events.

A last micro difficulty arises from the substantive challenge presented by international law. Detention decisions will call on the federal courts not only to find facts in applying the enemy combatant standard; they may also have to hear claims brought by detainees that their treatment or conditions of confinement violate international treaties or customary international law or that the manner of their capture violated international law. International law is a very different subject from that usually encountered by federal courts. Many observers admit that the very concept of customary international law—law that "results from a general and consistent practice of states followed

41. John Yoo, *Federal Courts as Weapons of Foreign Policy: The Case of the Helms-Burton Act*, 20 Hastings Int'l & Comp. L. Rev. 747 (1997).

by them from a sense of legal obligation" rather than through positive enactment[42]—is fraught with difficulty.[43]

Even if the very nature of international law were not so uncertain and ambiguous, it is likely that the federal courts would either experience a high error rate in determining its content or expend high decision costs to attempt to reach the right answer. International law involves sources that are not often encountered by federal judges or American lawyers. The very source of customary international law—state practice—is not as readily available to courts as are reported decisions. State practice may not even be reflected in publicly available documents, but may more often lie in the archives of the State Department and foreign ministries, or they may not even be recorded in documents at all, but rest in the preserve of unwritten custom. American-trained judges—almost all of them generalists—would have to survey the actions of governments over the course of dozens, if not hundreds, of years and make fine-grained judgments not just about what states have done but also why they did it.

An analogy here can be made to the disputes over the use of legislative history in statutory interpretation. Whether courts should consult legislative history has proven to be one of the focal points for broader debates about the nature of the legislation, the process of judicial reasoning, and the purpose of interpretation. To summarize all too briefly, many who believe that courts should seek out Congress's "intent" or broader "purpose" find reliance on legislative history, along with other policy considerations, generally acceptable.[44]

42. Restatement (Third) of the Foreign Relations Law of the United States § 102(2) (1987).

43. Compare Anthony A. D'Amato, The Concept of Custom in International Law 4 (1971) with Ian Brownlie, Principles of Public International Law 5–6 (4th ed., 1990).

44. See, e.g., William N. Eskridge Jr., *Textualism, the Unknown Ideal?* 96 Mich. L. Rev. 1509 (1998) (reviewing Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law (1997)); Daniel A. Farber and Philip P. Frickey, *Legislative Intent and Public Choice*, 74 Va. L. Rev. 423 (1988); William N. Eskridge

A minority argue that legislative history ought not to be used, either because there is no such thing as a collective intent or because consulting legislative history evades the formal separation of powers.[45] Adrian Vermeule made a similar argument in this debate: Even if courts should seek legislative intent, their "limited interpretive competence" suggests that they "might do better, even on intentionalist grounds, by eschewing legislative history than by consulting it."[46] Judges simply may have limited competence in understanding and properly using legislative history, leading both to high decision costs in conducting extensive reviews of legislative history without any corresponding reduction (and perhaps even an increase) in error costs.

If this is true with regard to legislative history, these costs will only be compounded in the context of international law. The sources of legislative history at least rest within the general bounds of American public law, and so will be familiar to most judges. Although expensive to gather and analyze in relation to other forms of American legal research,[47] legislative history may well be cheap to use in comparison with sources of international law, which comes in different languages, involves not just texts but also practices, and is recorded in sources that are often not publicly available. Even the use of more conventional public sources, such as multilateral treaties and the resolutions of the UN General Assembly, have serious interpretive problems. It is highly questionable, for example, that nations that refuse to sign treaties should be held to the same norms because

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Jr. and Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321 (1990).

45. See, e.g., John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673 (1997); Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J. L. & PUB. POL'Y, 61, 68 (1994).

46. See Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of* Holy Trinity Church, 50 STAN. L. REV. 1833 (1998).

47. See, e.g., Kenneth W. Starr, *Observations About the Use of Legislative History*, DUKE L. J. 371, 377 (1987); Eskridge, supra note 44, at 1541; Vermeule, supra note 46, at 1868–69.

they have "ripened" into custom or that customary international law should be read to go beyond the standards set by a widely joined treaty. Decisions by organs of the United Nations, particularly of the General Assembly, have no formal authority in declaring customary international law if, by definition, that law represents the practice of *states*, not the opinions of international organizations.[48] The most pertinent evidence of state practice will be the most expensive to come by, and there is no empirical showing yet that federal courts will perform better in their use than any other institution.

2. *Macro institutional factors*

The organization of the federal judiciary as an institution perhaps has even more significant effects on the comparative ability of the courts to achieve national security goals. First, the federal judiciary is a generalist institution composed of generalist judges. Members of the judiciary are not often chosen because of expertise in any particular subject—unlike, say, the way in which scientists may be hired for work at the Department of Energy, the Environmental Protection Agency, or the Food and Drug Administration. This is even more so the case in foreign affairs; judges are usually not chosen because of any background in specific regions or areas, nor are they selected because they have experience in national security issues. As an institution, the judiciary is unlikely to have great facility with international legal, political, or economic theories or materials, and its members are more likely to be chosen because of their prominence as litigators or as public officials. It is difficult to remember more than a handful

48. The legitimacy of this "new" customary international law is debated in Prosper Weil, *Toward Relative Normativity in International Law?* 77 AM. J. INT'L L. 413, 433 (1983); Alain Pellet, *The Normative Dilemma: Will and Consent in International Lawmaking,* 12 AUSTRALIAN Y.B. INT'L L. 22 (1992), and is summarized in ANTONIO CASSESE AND JOSEPH H. H. WEILER (eds.), CHANGE AND STABILITY IN INTERNATIONAL LAWMAKING (1988). For discussions of the problems with international law raised here, see generally Patrick Kelly, *The Twilight of Customary International Law*, 40 VA. J. INT'L L. 449 (2000).

of judges who had significant foreign affairs experience before their appointment to the federal bench, and certainly a candidate's prominence in the field of public international law or international relations theory would not be a strong selling point for a nominee.

Similarly, the federal judiciary itself is organized along generalist lines. Aside from the Court of Appeals for the Federal Circuit, the federal courts are organized by geographic region, not by subject matter in the way that some European judicial systems are. This not only prevents specialization, but it also retards the accumulation of experience and the easy internal transmission of information between judges handling common issues. Few judges will have any special background, for example, in arms control issues, and even if some gain significant knowledge about it through a particular case, the generalist organization of the judiciary means that this experience will not be retained and put to use in all future cases on the same subjects. In fact, it is highly unlikely those judges will hear cases on the same subject again.

Second, of the three branches of government, the judiciary is the most decentralized. It can lay claim to being the most balkanized, if also the most deliberate. The front line of the judiciary is composed of ninety-four district courts, which are staffed by more than 667 judges.[49] Until appellate courts have ruled on a legal issue, the judges in these district courts can hold ninety-four different interpretations of the law. There are thirteen federal courts of appeals, with 179 judges.[50] The Supreme Court currently hears between seventy and eighty-five cases per year, while about 60,000 cases a year are filed in the Courts of Appeal and about 325,000 cases are filed each year in the district courts.[51] Given the other demands on the Supreme

49. History of Federal Judgeships, U.S. District Courts, http://www.uscourts.gov/history/tableh.pdf.

50. History of Federal Judgeships, U.S. Courts of Appeals, http://www.uscourts.gov/history/tablec.pdf.

51. Judicial Caseload Indicators 2003, http://www.uscourts.gov/caseload2003/front/Mar03Txt.pdf.

Court's caseload, it is doubtful that the Court could devote a significant portion of its docket to correcting erroneous interpretation of international law or mistaken interference with foreign and national security policy set by the political branches. Unless this happens, the geographic organization of the federal courts may well produce disharmony or at least an undesirable diversity of possible interpretations and applications of international law and foreign policy.

In some areas, this level of decentralization might not pose such a problem. Geographically organized courts may better tailor national policies to local conditions, allow for diversity and even experimentation in federal policies, and provide a more effective voice for local communities in federal judicial decision making. These are not positive values, however, in foreign affairs and national security. The Constitution specifically sought to centralize authority over these subjects to provide the nation with a single voice in its international relations, so as to prevent other nations from taking advantage of the disarray that had characterized the Articles of Confederation.[52] Indeed, in cases such as *Crosby* and *Garamendi*, the Court recently has preempted state efforts to influence the conduct of foreign nations precisely because of the need for a uniform foreign policy set by the Congress or the president.[53] This rationale, however, which was offered to justify national preeminence over the fifty states, applies with equal force to a federal judiciary of ninety-four district courts and thirteen appellate courts. The usual factors that have led to judicial specialization do not seem to be present here. Unlike the Second Circuit and securities law, there is no natural geographic center for matters that affect international relations, and unlike the D.C. Circuit and administrative law, the habeas corpus statute does not require that detainee suits be brought in a specific court of appeals. In fact,

52. See generally FREDERICK MARKS, INDEPENDENCE ON TRIAL: FOREIGN AFFAIRS AND THE MAKING OF THE CONSTITUTION (1973).

53. *American Insurance Association v. Garamendi*, 539 U.S. 396 (2003); *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000).

Rasul seems to suggest that enemy combatants held outside the United States could bring suits in any of the federal district courts. Judicial implementation of foreign and national security policy seems to bring a promise of disharmony where uniformity is perhaps supremely important.

Third, institutional structure also suggests that judicial activity in national security may be slow, in terms of both implementation and self-correction. Lawsuits can often take years to complete. Even when cases are expedited, they will certainly require several months to complete from time of filing to final judgment and appeal. Even though they did not reach extensive discovery or trial proceedings, recent Supreme Court cases on Massachusetts' efforts to sanction Burma and on California's efforts to provide remedies for Holocaust victims still took several years to adjudicate.[54] Last term's enemy combatant cases—in which the legal issues were clear, no discovery was needed, and detainees had significant liberty interests in a swift resolution—still required roughly two to three years for decision on the threshold substantive questions.[55] These cases may even have proceeded quickly by judicial standards, but the important question is whether, as a matter of comparative institutional competence, the executive or other branches can implement foreign policy goals even faster.

Delay also may be the story of the day with regard to monitoring and feedback. Judicial errors or deviations from policy may take years to reverse or may even go entirely uncorrected. Stories about the delay between the filing of a suit in federal court and the eventual judgment are well known. Slowness obviously impedes the swift and effective execution of foreign policy. Delay also infects the judiciary's institu-

54. The lawsuit in *Garamendi* began in 1999 and was not finally decided by the Supreme Court until 2003 (124 S. Ct. at 2385). *Crosby* began in 1998 and was not decided by the Supreme Court until 2000 (530 U.S. at 371).

55. See, e.g., *Hamdi*, 124 S.Ct. at 2636 (Hamdi captured in 2001; habeas filed in 2002); *Rasul*, 124 S.Ct. at 2691 (detainees captured in 2001; habeas filed in 2002).

tional systems for communicating between its different units and for correcting errors. Even though the federal courts have an appeals court system for detecting and correcting errors, it can take months, if not years, to run its course. Even if a district or circuit judge acts in defiance of established circuit court or Supreme Court precedent, litigation is needed to correct the error. Standards of review concerning fact finding may even render some decisions immune from appellate review, despite contrary or conflicting results reached by different trial courts in similar cases. Transmission of information identifying and correcting errors may become garbled within the system, which helps explain the repeated cycles of repeal and remand that can occur in the context of a single case.[56]

The judiciary's characteristics as an institution render it superior to other institutions for certain kinds of decisions. It can address issues more fairly and with less interference from the political branches, and it can implement federal policy over a wide number of cases throughout the country. Its high level of insulation from outside control allows it to help solve political commitment problems between interest groups or between branches of government. Its virtues, however, also create its problems as an institutional actor in foreign affairs and national security. Its evenhandedness and passivity create problems in gathering and processing information effectively and in coordinating its policies with other national actors. Its procedural fairness and geographic decentralization prevent it from acting swiftly in a unified fashion, and it lacks effective tools for the rapid assimilation of feedback and the correction of errors.

All of this is not to say that the federal courts should be utterly removed from the review of the detention of American citizens as enemy combatants. *Hamdi* is on the books, and the Supreme Court has decided *Rasul* and essentially overruled *Eisentrager*, which I think

56. Martin Shapiro, *Toward a Theory of Stare Decisis*, 1 J. LEG. STUD. 125, 125–34 (1972).

will prove to be mistaken. The federal courts *will* play a role in making terrorism policy, unless Congress and the president cooperate and enact a new habeas statute to govern enemy combatant cases (which appears unlikely so far). Nevertheless, these decisions provide to the lower courts fairly broad discretion in shaping procedures. Choices still must be made about the timing of detainees' access to lawyers, whether *Miranda* rights will be invoked, what evidence must be produced, whether witnesses must appear, and what standard of review should be applied to the military's decisions. Decisions still must be made about the deference, if any, that courts will provide to the executive's interpretation and application of international law, such as the Geneva Conventions. Even if the Court has rejected the "some evidence" test, it still might adopt the deference afforded to agency decision making under the arbitrary and capricious standard and *Chevron*.[57]

These decisions to come will fall on a spectrum between outright de novo review according to standards similar to those of the criminal justice system and a standard that would be deferential to the political branches. The analysis here seeks to point out the institutional difficulties that the courts will encounter in attempting to play a de novo role in reviewing national security decisions during the war on terrorism. All too often these decisions are characterized in terms of the policy goal sought, without regard to the second-order question of relative institutional capabilities. Rather than ask itself whether it can balance security against liberty interests—obviously it can choose some point on the policy spectrum—the judiciary ought to ask itself whether the other branches could strike a better balance based on more informed judgment. Given the micro and macro institutional problems with courts, the judiciary may undermine, rather than promote, national policy in the war on terrorism by overestimating its abilities and refusing to provide deference to the political branches.

57. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (judicial deference to agency interpretation of ambiguous law).

4. Judicial Baby-Splitting and the Failure of the Political Branches

Benjamin Wittes

I.

The day the Supreme Court handed down what have collectively become known as the enemy combatant cases—June 28, 2004—was both widely anticipated and widely received as a legal moment of truth for the Bush administration's war on terrorism. The stakes could not have been higher. The three cases came down in the midst of election-year politics. They each involved challenges by detainees being held by the military without charge or trial or access to counsel. They each divided the Court. And they appeared to validate or reject core arguments that the administration had advanced—and had been slammed for advancing—since the fight against al Qaeda began in earnest after September 11, 2001.

The dominant view saw the cases as a major defeat for President George W. Bush—and with good reason. After all, his administration had urged the Court to refrain from asserting jurisdiction over the Guantanamo Bay naval base in Cuba, and it did just that in unambiguous terms: "Aliens held at the base, no less than American citi-

zens, are entitled to invoke the federal courts' authority."[1] The administration fought tooth and nail for the proposition that an American citizen held domestically as an enemy combatant has no right to counsel and no right to respond to the factual assertions that justify his detention. The Court, however, held squarely that "a citizen-detainee seeking to challenge his classification as an enemy combatant 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."[2] It held as well that "[h]e unquestionably has the right to access to counsel" in doing so.[3] These holdings led the *New York Times* to call the cases "a stinging rebuke" to the administration's policies, one that "made it clear that even during the war on terror, the government must adhere to the rule of law."[4]

A dissident analysis of the cases, however, quickly emerged as well and saw them as a kind of victory for the administration dressed up in defeat's borrowed robes. As David B. Rivkin Jr. and Lee A. Casey put it: In the context of these cases, the court accepted the following critical propositions: that the United States is engaged in a legally cognizable armed conflict with al Qaeda and the Taliban, to which the laws of war apply; that "enemy combatants" captured in the context of that conflict can be held "indefinitely" without criminal trial while that conflict continues; that American citizens (at least those captured overseas) can be classified and detained as enemy combatants, confirming the authority of the court's 1942 decision in *Ex Parte Quirin* (the "Nazi saboteur" case); and that the role of the courts in reviewing such designations is limited. All these points had been disputed by one or more of the detainees' lawyers, and all are now settled in the government's favor.[5]

1. *Rasul v. Bush*, 124 S. Ct. 2686, 2696 (2004).
2. *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2648 (2004).
3. *Id.* at 2652.
4. Editorial, "Reaffirming the Rule of Law," *New York Times*, June 29, 2003, A26.
5. David B. Rivkin Jr. and Lee A. Casey, "Bush's Good Day in Court," *Wash-*

Even among those who celebrated the administration's defeat, this analysis had some resonance. Ronald Dworkin, for example, began his essay on the cases by triumphantly declaring, "The Supreme Court has finally and decisively rejected the Bush administration's outrageous claim that the President has the power to jail people he accuses of terrorist connections without access to lawyers or the outside world and without any possibility of significant review by courts or other judicial bodies." But he then went on to acknowledge that the Court had "suggested rules of procedure for any such review that omit important traditional protections for people accused of crimes" and that the government "may well be able to satisfy the Court's lenient procedural standards without actually altering its morally dubious detention policies."[6] How big a rebuke could the cases really represent if they collectively entitle the president to stay the course he has chosen?

In my view, both strains of initial thought have considerable merit. The administration clearly suffered a "stinging rebuke" in rhetorical terms. But Dworkin, Rivkin, and Casey (an unlikely meeting of the minds if ever there were one) were quite correct that, in the long run, the president's actual power to detain enemy combatants may not have been materially damaged either with respect to citizens domestically or with respect to enemy fighters captured and held abroad. In a profound sense, the Supreme Court, despite delivering itself of 178 pages of text on the subject of enemy combatant detentions, managed to leave all of the central questions unanswered. In fact, if a new front in the war on terrorism opened tomorrow and the military captured a new crop of captives, under the Court's rulings, the administration would face very nearly the same questions as it did in 2002. Can the military warehouse foreign citizens captured

ington Post, August 4, 2004, A19. The quotation refers to *Ex parte Quirin*, 317 U.S. 1 (1942).

6. Ronald Dworkin, "What the Court Really Said," *The New York Review of Books*, August 12, 2004.