

CREATING LEGAL RIGHTS FOR
SUSPECTED TERRORISTS:
IS THE COURT BEING COURAGEOUS
OR POLITICALLY PRAGMATIC?

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*Boumediene v. Bush*¹ continued the Supreme Court's quixotic quest to establish legal guidelines for the War on Terrorism, which George Bush waged—with the support of Congress—after al Qaeda's attacks of September 11, 2001.² A majority of Justices began their battle against the political branches five years ago in a pair of cases.

First, *Hamdi v. Rumsfeld*³ invalidated the government's indefinite detention of "enemy combatants" (i.e., those who had engaged in armed conflict against the United States) who were American citizens.⁴ The Court ruled that they had due process rights to notice and a hearing before an impartial decisionmaker, which might include a military tribunal.⁵

Second, *Rasul v. Bush*⁶ concerned the President's decision to imprison alien enemy combatants in Guantanamo Bay, Cuba, which he had made in reliance upon entrenched precedent construing the federal habeas corpus statute as not extending jurisdiction to foreign-

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1 128 S. Ct. 2229 (2008).

2 See Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 note (Supp. V 2005)) (empowering the President to employ "all necessary and appropriate force" against those responsible for these assaults); Authorization for Use of Military Force Against Iraq Resolution, Pub.L. No. 107-243, 116 Stat. 1498 (Oct. 16, 2002).

3 542 U.S. 507 (2004).

4 *Id.* at 509–39.

5 See *id.* at 509, 524–39.

6 542 U.S. 466 (2004).

ers captured and confined abroad.⁷ The Court creatively reinterpreted this statute to allow the Guantanamo detainees to file habeas petitions and purported to distinguish its previous contrary cases.⁸

In consultation with the executive branch, Congress swiftly responded by clarifying that its habeas law did not give *any* federal court jurisdiction over aliens incarcerated at Guantanamo (thereby overturning *Rasul*) and by establishing instead for these prisoners a multilayered process of military justice followed by federal judicial review.⁹ Seeming to defy Congress, five Justices in *Hamdan v. Rumsfeld*¹⁰ held that it had not repealed the Court's appellate jurisdiction over cases involving foreign enemy combatants or authorized their trial by military commissions.¹¹ Once again, Congress quickly made crystal clear that it had indeed intended to (1) deprive all federal courts (including the Supreme Court) of jurisdiction over habeas petitions from such detainees, and (2) empower the President to try them by military tribunals.¹²

Undaunted, the same five Justices who had formed the *Hamdan* majority recently reached the unprecedented conclusion in *Boumediene v. Bush* that the Constitution's writ of habeas corpus may be invoked by noncitizen enemy combatants who have been apprehended and detained outside of the United States' sovereign territory.¹³ Accordingly, the Court struck down Congress's procedures for such detainees as a suspension of the constitutional habeas writ and as inadequate to protect due process rights.¹⁴

Legal scholars and pundits, who almost uniformly loathe George Bush and thus applauded the *Hamdi*, *Rasul*, and *Hamdan* decisions, praised the *Boumediene* Court for its "courage" in upholding individual liberties and the "rule of law"¹⁵ against the assertedly unparalleled

7 See *id.* at 488–506 (Scalia, J., dissenting) (setting forth this traditional understanding of the habeas statute).

8 See *id.* at 473–85 (majority opinion).

9 See Detainee Treatment Act of 2005, Pub. L. No. 109-148, div. A, tit. X, 119 Stat. 2739 (codified in scattered sections of 10, 28, 42 U.S.C.).

10 548 U.S. 557 (2006).

11 See *id.* at 566–95.

12 See Military Commissions Act of 2006, Pub. L. No. 109-366, § 7(a), 120 Stat. 2600, 2635 (codified as amended at 28 U.S.C. § 2241(e) (2006)).

13 See *Boumediene v. Bush*, 128 S. Ct. 2229, 2262 (2008).

14 *Id.* at 2274.

15 See, e.g., David D. Cole, *Rights Over Borders: Transnational Constitutionalism and Guantanamo Bay*, 2007–2008 CATO SUP. CT. REV. 47, 47, 50–52; Jack M. Balkin, *Two Takes: With Boumediene, the Court Reaffirmed a Basic Principle*, U.S. NEWS & WORLD REP., June 19, 2008, <http://www.usnews.com/articles/opinion/2008/06/19/two-takes-with-boumediene-the-court-reaffirmed-a-basic-principle.html>; Erwin Chemerinin-

misconduct of the Bush administration, which had suffered another stunning “rebuke” that would force it to make significant policy changes.¹⁶ Such claims seem implausible, for several reasons.

For one thing, the current Justices in general are not particularly bold or hell-bent on expansively protecting individual rights, especially as compared to their predecessors on the Warren and early Burger Courts. The Rehnquist and Roberts Courts have shown far greater restraint by: (1) cutting their annual docket in half; (2) frequently deciding cases on the narrowest possible grounds, thereby leaving many legal questions open and amenable to further democratic deliberation; and (3) refraining from creating far-reaching constitutional rights.¹⁷ The “enemy combatant” cases depart from this cautious approach.

Moreover, the Court hardly promotes the rule of law by disingenuously “interpreting” statutes to mean the opposite of what they plainly say (as in *Rasul* and *Hamdan*), inventing new constitutional doctrines (as in *Boumediene*), and ignoring or distorting its precedent (as in all three cases). On the contrary, the rule of law presupposes that judges will impartially apply the written legal rules contained in the Constitution, statutes, and cases.¹⁸

Finally, the Court’s repeated stern reprimands of President Bush and Congress had little real-world impact on their antiterrorism policies, which were not nearly as offensive as measures taken during previous wars.¹⁹ Although the President and Congress always expressed

sky, *Kennedy Key to Supreme Court*, SAN DIEGO SOURCE, Aug. 22, 2008, <http://www.sddt.com/Reports/article.cfm?RID=642&SourceCode=20080822tbb>; Ronald Dworkin, *Why It Was a Great Victory*, N.Y. REV. BOOKS, Aug. 14, 2006, at 18, 20.

16 Jonathan Mahler, *Why This Court Keeps Rebuking This President*, N.Y. TIMES, June 15, 2008, at WK 3 (citing statements by Neal Katyal and Geoffrey Stone).

17 See generally CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* (2001). This trend has continued after Chief Justice Rehnquist’s death in 2005. See Cass R. Sunstein, *The Minimalist: Chief Justice Roberts Favors Narrow Court Rulings that Create Consensus and Tolerate Diversity*, L.A. TIMES, May 25, 2006, at B11.

18 See Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 403–07, 413, 417–18, 422–27 (1996) (examining the evolution and purpose of the rule of law).

19 For example, Lincoln unilaterally suspended the writ of habeas corpus, defied the Chief Justice’s order declaring this suspension unconstitutional, appointed military commissions to try (and sometimes execute) accused war criminals, seized private property, and banned “disloyal” speech and publications. See *infra* notes 56–73 and accompanying text. Similarly, Franklin Roosevelt created military tribunals that imposed death sentences on our enemies (including an American citizen) who had swiftly been convicted of war crimes, forcibly relocated hundreds of thousands of Japanese American civilians, and took over several private factories—all with the Court’s

respect for the Court, they did not implement the radical changes it likely hoped to spur.

In short, I am skeptical of the conventional wisdom that a uniquely brave Supreme Court, motivated by its steadfast commitment to the rule of law, successfully foiled the military policies of a singularly evil President and his legislative henchmen. Rather, I believe that five pragmatic Justices, animated by their personal and political disagreements with the Bush administration, capitalized on the relatively rare opportunity to give a legal lecture to a politically unpopular (but not especially bellicose) President and Congress at a time when a national security crisis had safely passed. I predict that when the next emergency arises (such as another terrorist attack), the Court will accede to whatever military retaliation the President deems appropriate—and will cite as support the precedent that it was careful to distinguish rather than overrule.

bleasing. See *infra* notes 75–85 and accompanying text. Compared to Lincoln and Roosevelt, Bush was more restrained in fighting the War on Terrorism.

To be sure, President Bush adopted innovative strategies and tactics to wage a unique kind of war, in which America's adversaries are not nation-states engaged in conventional armed conflict that will come to an end, but rather amorphous private terrorist groups like al Qaeda which attack civilian targets indiscriminately anywhere in the world in a struggle that may well be permanent. Most notably, Bush asserted expansive inherent Article II powers to prevent future terrorist acts by engaging in surveillance (even domestically) to detect and monitor threats to the United States, indefinitely detaining and coercively interrogating suspected terrorists, trying them by military commissions, facilitating extraordinary rendition, and preemptively stopping terrorists (and the nations who harbor them) before an attack is imminent.

Many scholars have decried the exercise of such broad authority, particularly in the teeth of statutes that limit executive discretion. See, e.g., DAVID COLE & JULES LOBEL, *LESS SAFE, LESS FREE: WHY AMERICA IS LOSING THE WAR ON TERROR* (2007) (arguing that President Bush's claim of power to take any actions he deemed necessary, and to disregard the ordinary legal rules that restrict the application of coercive preventive measures, has undermined the rule of law, liberty, and national security); David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689 (2008) [hereinafter Barron & Lederman, *Commander in Chief, Part I*] (analyzing the Constitution's text in light of its drafting and ratification history to conclude that the President must obey congressional restrictions on his war powers, except laws that interfere with his supervision of the military chain of command); David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, 121 HARV. L. REV. 941 (2008) [hereinafter Barron & Lederman, *Commander in Chief, Part II*] (amplifying this thesis based on post-Founding evidence).

In aggressively responding to the attacks of September 11, the Bush administration made many mistakes. Nonetheless, it achieved its overarching goal of preventing another terrorist assault, while avoiding many of the more egregious actions taken by other Presidents.

I base the foregoing conclusions on recurrent historical patterns, which reveal a flexible and politically sensitive approach to reviewing cases involving military affairs.²⁰ The Court has never entertained *general* claims that the formulation or implementation of military policy exceeded the powers of Congress under Article I or the President under Article II. More *specific* complaints that the exercise of war powers violated someone's individual legal rights have been judicially reviewed, but with far more deference to the government than in the domestic sphere.

The degree of deference, however, has depended upon the factual, legal, and political context of each case. The Court's discretion has been guided primarily by four interrelated factors: (1) the seriousness of the military crisis and the necessity for the President's responsive action; (2) whether or not Congress approved the President's conduct; (3) the egregiousness of the alleged violation of individual rights; and (4) the President's political strength, which if high enough might lead him to ignore a court order to desist from an action he has determined is essential to win a war whose outcome hangs in the balance. This last consideration is never publicly articulated but nonetheless can be crucial.

Application of these factors has always led the Court to decline to challenge politically powerful Presidents like Abraham Lincoln and Franklin Roosevelt who, with Congress's backing, addressed perilous national security threats—regardless of the individual rights at stake.²¹ Even in less dire circumstances, however, the Justices usually have deferred to the President's judgment.²² The Court has struck down war measures only in a few cases when a very unpopular President, such as Andrew Johnson or Harry Truman, unilaterally took a step that the Court found to be disproportionately drastic, invasive of fundamental legal rights, and unnecessary because the military crisis had ended.²³

20 The ideas in this paragraph will be fleshed out in Part I.B. For a summary and analysis of the Court's jurisprudence, see Robert J. Pushaw, Jr., *The "Enemy Combatant" Cases in Historical Context: The Inevitability of Pragmatic Judicial Review*, 82 NOTRE DAME L. REV. 1005, 1005–16, 1024–47 (2007).

21 See *infra* notes 56–85 and accompanying text (discussing numerous cases arising out of the Civil War and World War II).

22 Most pertinently here, after the cataclysmic Second World War had ended, the Court continued to acquiesce to the President's decision to use military commissions. See *infra* notes 86–95 and accompanying text.

23 See *infra* notes 96–113 and accompanying text (describing decisions rendered during Reconstruction and the Korean War).

I predict that *Boumediene* and the other “enemy combatant” decisions will eventually be grouped in this latter category. The Court decided these cases when President Bush’s approval ratings had hit historic lows, long after the September 11 emergency had passed and therefore Bush’s continuation of his initial hard-line approach struck the majority as unnecessary—and inimical to basic liberty interests.²⁴ The only traditional factor for judicial intervention that has not been consistently present is the lack of congressional approval. On the one hand, the majority justified the *Rasul* and *Hamdan* holdings largely on their conclusion that Congress had not authorized President Bush’s action.²⁵ On the other hand, in *Hamdi* and *Boumediene* the Court acknowledged such legislative authorization, yet struck down the President’s actions as unconstitutional—a result that had never occurred before.²⁶

One possible explanation for the novelty of *Hamdi* and *Boumediene* is that the Court found itself in a historically unique situation which allowed it to defy both political branches with relative impunity, for two reasons.²⁷ First, by 2008 the approval rating of Congress had dropped to twelve percent, even lower than George Bush’s twenty-six percent.²⁸ Second, the Justices who decided *Boumediene* knew that there would be a new President elected five months later, and both candidates had pledged to make major changes in detainee policy (including possibly shutting down Guantanamo). Thus, the lame-duck President Bush could not effectively retaliate against the Court, especially given voters’ overriding concern with the sinking economy.²⁹ Under these unusual circumstances, it would be a mistake to characterize the recent “enemy combatant” cases as heralding a permanent shift to fearless, aggressive judicial oversight of military decisions.

24 See *infra* notes 137–47, 163–65, 224–31, 348–56 and accompanying text.

25 See *infra* notes 148–53, 195–99 and accompanying text.

26 See *infra* notes 122–29, 136, 239–40, 357–58 and accompanying text.

27 Part III will develop the themes in this paragraph.

28 See David Paul Kuhn, *Confidence in Congress at Record Low*, POLITICO, June 20, 2008, <http://www.politico.com/news/stories/0608/11232.html>. The political branches’ poll ratings were a tad higher in 2006, but still quite anemic. See *infra* note 231 and accompanying text; see also Neal Devins, *Congress, the Supreme Court, and Enemy Combatants: How Lawmakers Buoyed Judicial Supremacy by Placing Limits on Federal Court Jurisdiction*, 91 MINN. L. REV. 1562 (2007) (contending that the Court realized it would not face a backlash from Congress or the President because of their many political problems).

29 See Vikas Bajaj, *After Big Rally, Grim Outlook Still Looms on Profits and Jobs*, N.Y. TIMES, Oct. 15, 2008, at A1.

The foregoing ideas will be developed in three parts. Part I will summarize the Court's pragmatic, case-by-case approach to judicial review of war powers. Part II will analyze the Court's recent War on Terrorism decisions, with a special emphasis on *Boumediene*. Part III will suggest that these cases eventually will be seen as aberrational, not a harbinger of a Brave New World of increased judicial micromanagement of military policy.³⁰

I. JUDICIAL REVIEW OF THE EXERCISE OF WAR POWERS

A. *The Constitutional Scheme*

The Constitution does not explicitly mention judicial review, much less say how it should be exercised in evaluating claims that Congress or the President acted unconstitutionally in taking war measures. Nonetheless, many clauses in the Constitution, read in light of its underlying structure and political theory, suggest that the judiciary would play an extremely circumscribed role in examining military actions.

The Constitution's Framers and ratifiers understood that it established a heavy presumption favoring judicial review, because only independent Article III courts could impartially ascertain whether political officials had observed the written constitutional limits on their powers and had not transgressed individual legal rights.³¹ This presumption could be rebutted, however, on a showing that particular constitutional provisions entrust Congress or the President with exclusive and conclusive power to interpret and enforce them.³²

30 At the outset, I should make clear that my thesis does not depend on the political party or ideology of any particular President or group of Justices, but rather on the Court's implicit assessment of the President's political strength and popularity in taking decisive war measures. Thus, my purpose here is not to defend George Bush's approach, which had numerous flaws. See *infra* notes 137–38, 141–45, 230–31, 355–56 and accompanying text.

31 The most famous articulation of this argument is found in THE FEDERALIST NO. 78, at 524–27 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). For similar statements by the two leading figures at the framing and ratification conventions, see 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 73–74, 78 (Max Farrand ed., rev. ed. 1966) [hereinafter FARRAND'S RECORDS] (James Madison); 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 445–46, 480–81, 489 (Jonathan Elliot ed., Phila., J.B. Lippincott & Co. 2d ed. 1891) [hereinafter ELLIOT'S DEBATES] (James Wilson). For a detailed analysis of the historical understanding of how judicial review flows from the Constitution's structure and political theory, see Pushaw, *supra* note 18, at 407–35.

32 See THE FEDERALIST NO. 78, *supra* note 31, at 524–25; see also *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 164–66, 170 (1803). For an extensive development of this theme, see generally Robert J. Pushaw, Jr., *Judicial Review and the Political Ques-*

The latter “political questions” included the making, execution, and evaluation of military and foreign policy. The Constitution commits these powers solely to Congress and the President, who have the democratic authority, political incentives, and institutional competence to protect national security.³³ Under Article I, Congress can provide for the common defense;³⁴ authorize military action (by a declaration of war or other means);³⁵ establish, fund, and regulate the armed forces;³⁶ suspend the writ of habeas corpus “when in Cases of Rebellion or Invasion the public Safety may require it”;³⁷ and oversee the executive branch’s conduct of war.³⁸ Article II vests in the Presi-

tion Doctrine: Reviving the Federalist “Rebuttable Presumption” Analysis, 80 N.C. L. REV. 1165 (2002).

33 In defending the Constitution’s grant of plenary authority to the political branches, Alexander Hamilton argued:

[War] powers ought to exist without limitation: *Because it is impossible to foresee or define the extent and variety of national exigencies, or the correspondent extent and variety of the means which may be necessary to satisfy them.* The circumstances that endanger the safety of nations are infinite; and for this reason *no constitutional shackles can wisely be imposed on the power to which the care of it is committed.* This power ought to be co-extensive with all the possible combinations of such circumstances; and ought to be under the direction of the same councils, which are appointed to preside over the common defence.

See THE FEDERALIST NO. 23 (Alexander Hamilton), *supra* note 31, at 147 (second emphasis added); see also THE FEDERALIST NO. 41 (James Madison), *supra* note 31, at 270 (stressing that peaceful republics must have all means necessary to defend themselves against aggressor nations).

The debates over war powers assumed that they would be exercised exclusively by elected federal officials, with no judicial interference. See, e.g., THE FEDERALIST NO. 69 (Alexander Hamilton), *supra* note 31, at 464–65, 470; THE FEDERALIST NO. 74 (Alexander Hamilton), *supra* note 31, at 500. For further discussion of these historical materials, see Pushaw, *supra* note 18, at 401, 430–31, 507–09; Pushaw, *supra* note 20, at 1017–23.

34 See U.S. CONST. art. I, § 8, cl. 1.

35 See *id.* art. I, § 8, cl. 11.

36 See *id.* art. I, § 8, cls. 12–14 (empowering Congress to “raise and support” the Army, “provide and maintain a Navy,” and regulate these forces); *id.* art. I, § 8, cls. 15–16 (authorizing Congress to organize the militia and to arrange for the President to call it forth to suppress insurrections and repel invasions).

37 See *id.* art. I, § 9, cl. 2. Although this provision does not expressly say that only “Congress” can suspend the writ, this conclusion seems clear due to the clause’s placement in Article I (which deals with Congress alone) and traditional Anglo-American practice entrusting this power to legislatures. See *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 91–92, 101 (1807).

38 Article I’s general grant of “legislative power” has always been understood as incorporating the traditional function of overseeing all executive branch action. See Pushaw, *supra* note 18, at 404–05.

dent all “executive Power”³⁹ (to administer federal statutes, including those related to the military) and designates him “Commander in Chief” (to direct the army and navy).⁴⁰ Moreover, Article II implicitly

39 See U.S. CONST. art. II, § 1, cl. 1.

40 See *id.* art. II, § 2, cl. 1. The Commander-in-Chief power was “nominally the same with that of the King of Great-Britain, but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and Admiral . . . , while that of the British King extends to the declaring of war and to the raising and regulating of fleets and armies; all of which by the Constitution . . . would appertain to the Legislature.” See THE FEDERALIST NO. 69, *supra* note 31, at 465 (Alexander Hamilton).

Several scholars have recently argued that the President’s only core and exclusive constitutional power, which cannot be limited by Congress, is superintending the military chain of command (and perhaps defending the nation in an emergency when Congress is not in session)—not controlling war strategy, tactics, and campaigns. See Barron & Lederman, *Commander in Chief, Part I*, *supra* note 19, at 692–98, 720–804 (supporting this theme with a detailed textual and historical analysis); see also Jules Lobel, *Conflicts Between the Commander in Chief and Congress: Concurrent Power over the Conduct of War*, 69 OHIO ST. L.J. 391 (2008) (reaching a similar conclusion by focusing on whether the Constitution commits a particular military subject to one branch or rather to both Congress and the President, to be shared in an overlapping manner).

The Barron/Lederman methodology of distinguishing “core” executive war powers from “peripheral” ones (with the latter susceptible to congressional restraints) resembles my analytical model developed in the context of Article III. See Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735, 738–44, 843–67 (2001) (contending that Congress cannot restrict federal judges’ exercise of pure “judicial power”—rendering a final judgment after applying the law to the facts—and implied authority that is indispensable to performing that function, but that Congress can regulate “beneficial” powers that are merely helpful, useful, or convenient); see also Barron & Lederman, *Commander in Chief, Part I*, *supra* note 19, at 727–28 (citing others who have compared executive and judicial authority).

This analogy to the courts’ powers is imperfect, however, because the stakes involved in the President’s exercise of war powers are considerably higher, often literally a matter of life and death. Thus, I do not believe that the Commander in Chief must strictly comply with a federal statute governing military operations if he concludes that doing so would imperil national security, because he has an independent duty to preserve, protect, and defend the Constitution and the American people. In appropriate critical situations, the President can take the military action he deems essential. Of course, he must later submit to the judgment of the voters and to the oversight of Congress, which in extreme circumstances can impeach him. *Cf.* Barron & Lederman, *Commander in Chief, Part I*, *supra* note 19, at 745–48 (treating skeptically modern Presidents’ claims of Lincoln-like urgent necessity to act unilaterally to preserve the Union because today Congress can reconvene quickly and, in any event, it has enacted many general statutes pre-authorizing Presidents to address emergencies).

Furthermore, assuming that Barron and Lederman are correct about history, it is unclear whether the original constitutional meaning can be implemented today in light of transformative changes such as: (1) the exponential growth of executive

allows the President to respond independently to military emergencies⁴¹ because, unlike the multimember and slow-moving legislature and judiciary, he can take quick and decisive action based on the advice of his expert subordinates who have access to confidential military and foreign intelligence.⁴²

power over the past century (augmented by technological innovations) and the corresponding reduction in the influence of Congress and its incentives to challenge the President in military affairs; (2) the presence of a huge standing army that is continuously funded; (3) the invention and proliferation of nuclear weapons; (4) the post-World War II emergence of a secretive national security bureaucracy under the President's direction; and (5) the courts' general deference to the executive. See Christopher H. Schroeder, *Loaded Dice and Other Problems: A Further Reflection on the Statutory Commander in Chief*, 81 IND. L.J. 1325 (2006). But see Barron & Lederman, *Commander in Chief, Part II*, *supra* note 19, at 1098–110 (rejecting the contention that modern circumstances require jettisoning the traditional constitutional scheme of congressional control over war powers).

41 The Framers authorized Congress to “declare” rather than “make” war to allow the President to engage in warmaking for the limited purpose of repelling sudden attacks. See 2 FARRAND'S RECORDS, *supra* note 31, at 318–19. Except for this emergency defensive power, the Framers and ratifiers authorized Congress alone to initiate military hostilities and the President thereafter to command the armed forces, as the founder of the “originalism” movement demonstrated long ago. See Raoul Berger, *War-Making by the President*, 121 U. PA. L. REV. 29, 36–54, 82–86 (1972); see also William Van Alstyne, *Congress, the President, and the Power to Declare War: A Requiem for Vietnam*, 121 U. PA. L. REV. 1, 7–13 (1972) (to similar effect). America's finest separation-of-powers scholar recently reaffirmed this conclusion and cited many other distinguished academics who shared it, including David Adler, John Hart Ely, Michael Glennon, Harold Koh, Charles Lofgren, Taylor Reveley, and William Treanor. See Louis Fisher, *Lost Constitutional Moorings: Recovering the War Power*, 81 IND. L.J. 1199, 1200–07 (2006).

Rejecting this orthodoxy, Professor Yoo has argued that the Constitution does not establish a single process for commencing war, but rather grants Congress and the President all military powers and permits them to work out the details. See John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167 (1996). Thus, Presidents can start and manage armed conflicts, which Congress can then control through appropriations and impeachment. See *id.* at 174, 196–97, 218, 241–90, 295–96, 300, 305. In Professor Yoo's opinion, the power of Congress to “declare war” against another nation entails simply a “juridical” determination that triggers the international laws of war and domestic constitutional military authority. See *id.* at 204–06, 242–50, 288, 295.

My independent reading of the historical materials leads me to side with the traditional view. Whatever the original meaning, however, Presidents have long asserted independent power to use military force to do much more than merely defend against sudden attacks. Moreover, the Supreme Court has never decided on the constitutionality of such actions, and likely never will. Therefore, the debate over which branch can initiate war has little bearing on judicial review of military powers.

42 The Constitution incorporated a separation-of-powers scheme that reflected these institutional differences, which had their greatest impact in military and foreign

Article III does not give the judiciary any role in authorizing or conducting war.⁴³ Therefore, challenges to military decisions solely on the ground that they did not comply with Articles I or II are not justiciable.⁴⁴ The only situation in which judicial intervention might be appropriate would be where the exercise of war powers *allegedly violated individual legal rights*. Unfortunately, nothing in either the Constitution or its drafting and ratification history explicitly reveals

affairs. See Pushaw, *supra* note 18, at 400–35 (detailing this framework). Like all legislatures, Congress could enact a law only when a majority reached agreement after protracted discussion, debate, and compromise. See *id.* at 401, 415–16. Furthermore, the judiciary moves far more slowly than either political department: courts must wait until parties commence an action and the litigation process has been completed before they can render a judgment applying the law to the facts. *Id.* at 402, 417–18, 421–27.

Consequently, only the executive branch, united in a single President, could act with the necessary speed and firmness based on access to relevant (and often secret) information. See 2 ELLIOT'S DEBATES, *supra* note 31, at 447 (James Wilson); THE FEDERALIST NO. 70 (Alexander Hamilton), *supra* note 31, at 471–73, 476. As Hamilton put it: “[T]he direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand. . . . [T]he power of directing and employing the common strength [in war] . . . forms [a] usual and essential part in the definition of the executive authority.” THE FEDERALIST NO. 74 (Alexander Hamilton), *supra* note 31, at 500. Finally, Congress and the courts are in session for fixed periods, whereas the President is continuously on duty and hence can immediately respond to sudden attacks. See AKHIL REED AMAR, AMERICA'S CONSTITUTION 131, 142–43, 204, 351–63 (2005).

43 Chief Justice Jay and his colleagues set an enduring precedent by declining to give the President requested legal advice on military and foreign policy matters. See Robert J. Pushaw, Jr., *Why the Supreme Court Never Gets Any “Dear John” Letters: Advisory Opinions in Historical Perspective*, 87 GEO. L.J. 473 (1998) (reviewing STEWART JAY, MOST HUMBLE SERVANTS (1997)) (discussing the Justices' refusal in 1793 to answer Washington's questions about America's neutral status in the European wars that followed the American Revolution, which became the basis for the judiciary's policy of never rendering legal advice).

44 See *infra* notes 46–47 and accompanying text; see also Henry P. Monaghan, *Presidential War-Making*, 50 B.U. L. REV. 19, 22–33 (1970) (arguing that the Constitution leaves the precise relationship between the legislative and executive branches in exercising war powers to the political rather than judicial process). But see William Michael Treanor, *Fame, the Founding, and the Power to Declare War*, 82 CORNELL L. REV. 695, 768–70 (1997) (contending that courts should not invoke the political question doctrine to avoid resolving challenges to the President's unilateral commencement of armed hostilities because Congress lacks the political incentives to oppose the President, who alone might be tempted to achieve immortality by leading the country into a war against the national interest); cf. Barron & Lederman, *Commander in Chief, Part I*, *supra* note 19, at 721–25 (maintaining that when the President defies an Act of Congress, courts should not relegate this dispute to political resolution because doing so would force Congress to reenact the same statute by a supermajority or resort to extreme measures like impeachment).

whether such claims should be dismissed as political questions, examined through ordinary domestic-style judicial review, or analyzed through a compromise approach of exercising jurisdiction but showing great deference to the political branches. The Supreme Court wisely chose the latter course.⁴⁵

B. *Jurisprudence on War Powers*

The Marshall Court simultaneously asserted the power of judicial review while recognizing its inapplicability to the military decisions of Congress and the President, which generally concerned the nation as a whole and therefore were subject to scrutiny only through the national political process.⁴⁶ Ever since, the Court has reaffirmed this “political question” analysis.⁴⁷ The only exceptions have arisen in a

45 The Court’s deferential approach reflects the Constitution’s political and institutional framework, which gives the judiciary the weakest incentive to address war powers because it lacks the institutional competence to make sound judgments and because an incorrect decision thwarting the President might lead to a disaster that would harm its prestige. Conversely, the President has the strongest interest in military affairs and the greatest capacity to handle them. See John O. McGinnis, *Constitutional Review by the Executive in Foreign Affairs and War Powers: A Consequence of Rational Choice in the Separation of Powers*, LAW & CONTEMP. PROBS., Autumn 1993, at 293, 293–94, 305–08, 316–18.

46 See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 164–66, 176–80 (1803); see also *Martin v. Mott*, 25 U.S. (12 Wheat.) 19, 28–33 (1827) (refusing to second-guess the President’s determination as Commander in Chief that a possible invasion required calling forth the militia, which he had made pursuant to explicit congressional authorization and based upon information that might require confidentiality and that might not meet judicial standards of admissible evidence); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 197 (1824) (identifying the power of Congress to declare war as a political question); *United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 634–35 (1818) (concluding that courts could not examine congressional judgments about the rights of foreigners during wartime).

47 For instance, the Taney Court abstained from deciding a claim that Rhode Island’s original government, founded in 1663 under a royal charter, did not have a “Republican Form of Government” because it had not been established as a result of a popular convention that established a broadly representative legislature, as had a rival government. See *Luther v. Borden*, 48 U.S. (7 How.) 1, 34–45 (1849). This conclusion reflected the following facts: (1) both Congress and the President had determined that the charter government was legitimate; (2) the President, with the authorization of Congress, had mobilized the militia to suppress the insurgent government; and (3) overruling the political branches’ decisions would require invalidating all of the acts of Rhode Island’s government, which would cause chaos. See *id.* at 38–39, 42–45.

Other cases contain similar analysis. See, e.g., *Georgia v. Stanton*, 73 U.S. (6 Wall.) 50, 71–77 (1868) (refusing to review the decision of Congress to abolish Georgia’s government and impose martial law during Reconstruction); *Gilligan v. Morgan*, 413 U.S. 1, 3, 10–12 (1973) (interpreting the Constitution as committing military

few cases in which plaintiffs credibly alleged that a particular exercise of war powers breached a legal duty in a way that violated their individual legal rights.⁴⁸ Even in these instances, however, the Court typically has resolved all doubts in favor of the validity of the government's action.⁴⁹ The precise degree of deference, however, has varied depending upon the facts and political background of each case. Although the Court's idiosyncratic decisionmaking cannot be reduced to any simple formula, four factors have been particularly influential.⁵⁰

training and procedures entirely to the political branches, and thus dismissing as non-justiciable a complaint that negligent training of the National Guard led to the killing of unarmed antiwar protestors). Three other "political question" decisions will be examined in greater detail below. See *The Prize Cases*, 67 U.S. (2 Black) 635 (1863) (discussed *infra* notes 56–59 and accompanying text); *Ex parte Vallandigham*, 68 U.S. (1 Wall.) 243 (1864) (analyzed *infra* notes 60–63 and accompanying text); *Johnson v. Eisentrager*, 339 U.S. 763 (1950) (considered *infra* notes 89–93 and accompanying text).

48 In the seminal case of *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804), the Marshall Court acknowledged the President's vast discretion in directing the military and his inherent power to meet emergencies, but indicated that Congress in authorizing a war (here, against France) could specify certain boundaries on the President's conduct. *Id.* at 177–78. Accordingly, the President did not have independent Article II power to go beyond the explicit legislative directive to seize ships going "to" French ports by ordering the seizure of all ships going "to" and "from" France. *Id.* at 176–79. The Court ruled that an American officer who had captured a Danish ship pursuant to that defective executive order owed the shipowner damages for violating his legal rights. See *id.*; see also *Brown v. United States*, 12 U.S. (8 Cranch) 110, 128–29 (1814) (holding that an Act of Congress generally authorizing the President to prosecute the War of 1812 did not encompass the specific power to seize persons or enemy property); *Mitchell v. Harmony*, 54 U.S. (13 How.) 115, 133–35 (1852) (disallowing a military officer's seizure of private property during a war because of the lack of either prior congressional permission or some emergency justification).

As wars increased in magnitude and complexity, the Court backed away from these precedents and began to interpret general legislative authorizations to the President to wage war as encompassing all powers he deemed necessary to win, including the seizure of people and goods. See *infra* notes 56–95 and accompanying text.

49 See *infra* notes 56–73, 75–85 and accompanying text (describing the Court's deference to the wartime decisions of Lincoln and Roosevelt, despite their significant infringements on constitutional rights and liberties).

50 See Robert J. Pushaw, Jr., *Defending Deference: A Response to Professors Epstein and Wells*, 69 MO. L. REV. 959, 963–68 (2004) (summarizing the Court's application of these considerations). Several other scholars have noted that the Court has embraced a flexible approach that allows for delicate judgments about the character of the military conflict, the threat it poses to the United States, and the nature of the asserted legal rights. See, e.g., Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2056 (2005); Mark E. Brandon, *War and the American Constitutional Order*, 56 VAND. L. REV. 1815, 1833 (2003); see also Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and*

First, the Justices evaluate the severity of the military emergency and the need for the government's particular retaliatory action. For instance, the Court has accorded Presidents virtual *carte blanche* in dealing with nation-threatening crises, but less leeway in addressing comparatively smaller conflicts.⁵¹

Second, regardless of the magnitude of the military operation, the Court until 2004 always sustained the President when he acted with explicit congressional authorization.⁵² When the President has proceeded unilaterally, however, the Court has been more willing to check him.⁵³

the War on Terror, 120 HARV. L. REV. 2029 (2007) (approving the Court's continued application in its "enemy combatant" decisions of a common law model of habeas, whereby the Justices exercise responsible discretion in interpreting constitutional and statutory provisions—jurisdictional, substantive, and procedural—on a case-by-case basis and adapting them in light of pragmatic concerns, evolving notions of law (especially changing constitutional norms), and sensitivity to the relative institutional competence of the three branches).

51 See *infra* notes 56–114 and accompanying text.

52 In his influential opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), Justice Jackson stressed that where Congress authorizes the President's conduct, the strongest presumption of constitutionality arises, rebuttable only on the difficult showing that the federal government as a whole lacked power. *Id.* at 635–37 (Jackson, J., concurring) (citing numerous decisions upholding the President in this situation, and none to the contrary). The first case in which the Court acknowledged that Congress had authorized the President's action, but nonetheless struck it down as unconstitutional, was *Hamdi v. Rumsfeld*, discussed *infra* Part II.A.

53 Most famously, the Court rejected Truman's claim that he had the independent Article II power to seize and operate domestic steel mills to sustain production for the Korean War effort. See *Youngstown*, 343 U.S. at 585–89, discussed *infra* notes 104–13 and accompanying text.

In certain armed conflicts, particularly during America's early years, Congress often precisely delineated what the President could and could not do. See *supra* notes 48–49 and accompanying text (discussing the Court's enforcement of these specific statutory provisions). As wars became more complicated, however, legislative delegations of power tended to become more generalized. A good illustration is Congress's authorization to the President to use "all necessary and appropriate force" against those responsible for the September 11 attacks. See *infra* note 115 and accompanying text.

The Court's interpretation of such legislation has been highly subjective. For example, the Court construed identical statutory language as authorizing the President to create military commissions in *Ex parte Quirin*, 317 U.S. 1, 38–40 (1942), but not in *Hamdan v. Rumsfeld*, 548 U.S. 557, 593–95 (2006). The most logical inference is that the Court construes generalized statutes as providing authorization when it seeks to avoid a clash with the President (as with Roosevelt), but as not supplying authorization when it wants to challenge him (as with Bush).

In short, although the Court has repeatedly identified congressional authorization or approval as a critical (often dispositive) factor, its determinations on this score tend to mask nonlegal considerations. Thus, it is important to look beneath the sur-

Third, the Justices assess the egregiousness of the alleged invasion of individual legal rights. Unfortunately, this criterion is so protean that its application amounts to a gut call, as illustrated by the Court's contradictory conclusions about the procedures owed to enemy combatants.⁵⁴

Fourth, the Court considers the President's political strength—in particular, whether he enjoys such widespread popular and congressional support in waging a major war that he might ignore a judicial order that, in his opinion, endangers national security.⁵⁵ This calculation is nakedly political and hence is made *sub rosa*, but nonetheless has loomed large in several cases.

The foregoing combination of factors usually leads the Court to uphold the government's action, but there have been important exceptions. These cases reveal the heavily discretionary nature of judicial review of military decisions.

1. Cases Sustaining the Government's Exercise of War Powers

The Civil War era set enduring precedent for deferring to Presidential actions during wartime. Most notably, in *The Prize Cases*,⁵⁶ the Court sustained Lincoln's April 1861 order, which he had issued on his own in response to the attack on Fort Sumter, to blockade Confederate ports and seize all offending merchant vessels and their cargoes—even from shipowners who were unaware of the blockade—despite their claims of unconstitutional deprivation of their property without due process.⁵⁷ A majority of Justices held that Article II gives

face of seemingly technical statutory interpretations to ascertain what is actually driving the Court's decision. See Pushaw, *supra* note 20, at 1012–13.

54 See *infra* notes 60–63, 75–78, 240, 294–318 and accompanying text. On the one hand, the President can *execute* armed enemies (even American citizens) caught in the United States and swiftly convicted there by his appointed military commission according to procedures that he hastily devised. See *Quirin*, 317 U.S. at 21–23, 48. On the other hand, the President cannot use military commissions operating under detailed procedural protections carefully drafted by Congress in noncapital trials of alien enemy combatants who have been captured and imprisoned outside the United States. See *Boumediene v. Bush*, 128 S. Ct. 2229, 2244–77 (2008). The Court has not explained why killing a citizen by virtual executive fiat is less offensive to due process than merely trying a foreign accused war criminal in conformance with a multilayered process approved by Congress.

55 For example, after Abraham Lincoln defied Chief Justice Taney's April 1861 order to release a prisoner who had been detained pursuant to the President's unconstitutional suspension of the writ of habeas corpus, the Court deferred to Lincoln for the remainder of the Civil War. See *infra* notes 64–73 and accompanying text.

56 67 U.S. (2 Black) 635 (1863).

57 See *id.* at 665–75.

the President, as Commander in Chief, unreviewable political discretion to determine the appropriate degree of force required by the crisis, such as the blockade and accompanying deployment of warships.⁵⁸ Moreover, the absence of congressional preauthorization for this specific action did not trouble the Court because (1) existing federal statutes broadly empowered the President to use the military to suppress domestic insurrections, and (2) Congress remedied any possible constitutional problems with Lincoln's order by ratifying it retroactively.⁵⁹ Similarly, in *Ex parte Vallandigham*,⁶⁰ the Court rejected a due process challenge to a sentence imposed by an army tribunal constituted pursuant to instructions approved by Lincoln.⁶¹ The Court declared that it could not "review or pronounce any opinion upon the proceedings of a military commission"⁶² or any other executive branch wartime judgments.⁶³

One reason for the Court's surrender was that Lincoln, at the war's outset, had made it clear he would defy judicial orders that he determined might endanger the military effort—and hence the United States' entire constitutional form of government. Lincoln independently asserted astonishingly broad powers in addition to the blockade, such as suspending the writ of habeas corpus.⁶⁴ Especially concerned that Maryland would secede (thereby cutting off Washington from the Northern states), Lincoln directed U.S. Army officials to throw Confederate sympathizers in military prisons.⁶⁵ One of them, John Merryman, filed a habeas writ to the appropriate Circuit Court, where Chief Justice Taney sat.⁶⁶ Taney ruled that Lincoln had vio-

58 See *id.* at 670.

59 See *id.* at 668–71 (citing federal statutes). But see *id.* at 697–98 (Nelson, J., dissenting) (asserting that Lincoln did not possess the constitutional power to order the blockade and seizures without prior legislative authorization).

60 68 U.S. (1 Wall.) 243 (1864).

61 See *id.* at 250–54.

62 *Id.* at 252.

63 See *id.* at 254 (citing *Martin v. Mott*, 25 U.S. (12 Wheat.) 19, 28–35 (1827)). Lincoln created military commissions with extensive jurisdiction. See DANIEL FARBER, *LINCOLN'S CONSTITUTION* 8, 20, 144–45, 163–75 (2003). Such tribunals had been used without legislative authorization or judicial review since the American Revolution. See John Yoo, *An Imperial Judiciary at War: Hamdan v. Rumsfeld*, 2005–2006 CATO SUP. CT. REV. 83, 89.

64 See FARBER, *supra* note 63, at 17–21, 117, 157–63, 192–95. Lincoln detained thousands of civilians without trial. *Id.* at 19–20, 144, 157. He also unilaterally expanded the army, appropriated money to pay soldiers, and banned disloyal speech and publications. *Id.* at 17–18, 117–20, 132–33, 135–38, 144, 164, 170–75, 192, 196–97.

65 See *id.* at 16–17, 19–20, 117, 157–63.

66 See *Ex parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9487).

lated his oath to faithfully execute the law by usurping the Article I power of Congress to suspend habeas corpus and the judiciary's Article III power to determine whether a private citizen had been detained in violation of the Due Process Clause.⁶⁷

Lincoln ignored Taney's order. Instead, in an address to Congress, he argued that the Constitution implicitly conferred on the President all powers necessary to preserve the Union.⁶⁸ In 1863, Congress retroactively endorsed Lincoln's suspension of habeas.⁶⁹

Furthermore, Lincoln carried out his pre-election pledge to refuse to follow the Court's constitutional interpretation in *Dred Scott v. Sandford*⁷⁰ that the federal government could not interfere with state power over slavery.⁷¹ Indeed, he audaciously claimed that the President as Commander in Chief could unilaterally emancipate millions of slaves in rebellious areas, even though such a sweeping policy determination appeared to be legislative in nature.⁷²

67 See *id.* at 147–53.

68 See Abraham Lincoln, *Message to Congress in Special Session* (July 4, 1861), in 6 COMPLETE WORKS OF ABRAHAM LINCOLN 297, 309 (John G. Nicolay & John Hay eds., Francis D. Tandy Co., 1905) (1894). Initially, Lincoln made the disingenuous argument that he could act because Article I did not expressly say that “Congress,” rather than “the President,” could suspend the writ of habeas corpus. See *id.* at 310. But see *Merryman*, 17 F. Cas. at 148–52 (persuasively demonstrating that Article I conferred this power on Congress alone).

Far more compelling is Lincoln's claim that “measures, otherwise unconstitutional, might become lawful, by becoming indispensable to the preservation of the constitution, through the preservation of the nation.” Letter from Abraham Lincoln to Albert G. Hodges (Apr. 4, 1864), in ABRAHAM LINCOLN: SPEECHES AND WRITINGS 1859–1865, at 585, 585 (Don E. Fehrenbacher ed., 1989). The President's oath to “preserve, protect and defend the Constitution” as a whole justified any actions necessary to save the United States, even those that temporarily sacrificed individual constitutional provisions. See Michael Stokes Paulsen, *The Civil War as Constitutional Interpretation*, 71 U. CHI. L. REV. 691, 722 (2004) (reviewing DANIEL FARBER, LINCOLN'S CONSTITUTION (2003)) (quoting U.S. CONST. art. II, § 1, cl. 8); see also Barron & Lederman, *Commander in Chief, Part II*, *supra* note 19, at 997–1004 (stressing that Lincoln, in articulating this rationale, recognized that he needed the later approval of Congress (which he received) and that his exercise of war powers was subject to legislative regulation).

69 See Act of Mar. 3, 1863, ch. 81, 12 Stat. 755.

70 60 U.S. (19 How.) 393 (1857).

71 *Id.* at 446–52; see also Mark Tushnet, *The Supreme Court, the Supreme Law of the Land, and Attorney General Meese: A Comment*, 61 TUL. L. REV. 1017, 1022 (1987) (setting forth Lincoln's position that federal political officials, in the course of discharging their Article I and II duties, did not have to accept the Court's interpretation of the Constitution in *Dred Scott* or any other case).

72 See FARBER, *supra* note 63, at 19, 21, 144–45, 152–57.

Overall, Lincoln established that a strong President can disregard explicit and critical constitutional provisions—and their interpretation by federal courts—if he concludes that doing so is necessary to meet a serious military crisis and Congress approves his action (even after it was taken).⁷³ Woodrow Wilson learned this lesson well, as he successfully suppressed freedom of expression and other constitutional rights during World War I.⁷⁴

The pattern continued during World War II. The Court repeatedly caved in to Franklin Roosevelt's assertions (often supported by weak or nonexistent evidence) that military necessity justified his seemingly plain violations of constitutional rights and liberties. Three cases illustrate this abdication.

First, in *Ex parte Quirin*,⁷⁵ a unanimous Court initially construed an ambiguous federal statute as empowering the President to use his own military commissions to try enemy combatants accused of violating the laws of war.⁷⁶ The Court then upheld a commission's sentence of capital punishment against Nazi spies (including an American citizen) who had snuck into the United States, and rejected their argument that the Constitution guaranteed their right to a trial in civilian court with ordinary procedural protections.⁷⁷ The *Quirin* opinion does not mention that Roosevelt had garnered overwhelming public support in this matter and that he had used back channels to let the Justices know he intended to execute the saboteurs even if the Court reached a contrary decision.⁷⁸

Second, in *Korematsu v. United States*,⁷⁹ the Court sustained an executive order (approved by Congress) excluding Americans of Japa-

73 See CLINTON ROSSITER, *THE SUPREME COURT AND THE COMMANDER IN CHIEF* 24 (rev. ed. 1976).

74 See Pushaw, *supra* note 20, at 1034–35 (citing sources).

75 317 U.S. 1 (1942).

76 See *id.* at 21–30, 38–39, 45–48. This statutory construction obviated the need for the Court to decide Roosevelt's claim that he possessed independent Article II power to create military tribunals. See *id.* at 28–29; see also Pushaw, *supra* note 20, at 1036 & n.136 (discussing the relevant statutory language).

77 *Quirin*, 317 U.S. at 21–23, 25–28.

78 See A. Christopher Bryant & Carl Tobias, *Quirin Revisited*, 2003 WIS. L. REV. 309, 319–32 (detailing the background of this case, including Roosevelt's inappropriate pressure); Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259, 1291 (2002). The vast majority of Americans endorsed the trial of the spies by military tribunals, were aghast at the Court's decision to interfere, and approved of its swift judgment (rendered the day after oral argument) permitting the commission to proceed. See Jack Goldsmith & Cass R. Sunstein, *Military Tribunals and Legal Culture: What a Difference Sixty Years Makes*, 19 CONST. COMMENT. 261, 266–69 (2002).

79 323 U.S. 214 (1944).

nese descent from the West Coast to prevent sabotage and espionage, despite the serious infringement of their Fourteenth Amendment rights to liberty and equality.⁸⁰ Even though it turned out that the political branches had no credible evidence that Japanese Americans were treacherously disloyal, the Court stressed that it could not in hindsight say that the actions taken during the emergency after Pearl Harbor were unjustified.⁸¹

Third, Roosevelt seized over sixty plants where labor disputes and other problems had impeded the war effort.⁸² The Court waited until the end of hostilities to consider legal challenges to these seizures, then dismissed the cases as moot.⁸³

In all these decisions, the Court recognized that it could not realistically prevent Roosevelt—a remarkably popular President who acted with enthusiastic congressional approval—from taking any steps he deemed essential to win World War II, which imperiled not only the United States but all democracies.⁸⁴ Under these extreme circumstances, it is likely that Roosevelt would have successfully ignored any Court order to desist.⁸⁵

Even after World War II ended, however, the Court almost always continued to defer to the political branches' military decisions. For instance, it sustained the President's power to convene military com-

80 See *id.* at 215–18.

81 See *id.* at 223–24. Justice Jackson argued that the Court should have dismissed the case because it lacked the confidential and relevant information to meaningfully examine the President's claim of military necessity but that, having exercised judicial review, the majority should have invalidated this executive order because it unconstitutionally discriminated against Americans of Japanese descent. See *id.* at 242–48 (Jackson, J., dissenting); see also *id.* at 245–46 (contending that the Court's approval of the government's conduct established a constitutional principle that could be used to sustain similar discrimination in the future, and was therefore more dangerous than the military order itself, which was temporary).

The Court previously had upheld a curfew imposed on Japanese Americans before their evacuation from the West Coast. See *Hirabayashi v. United States*, 320 U.S. 81, 91, 105 (1943).

82 See ROSSITER, *supra* note 73, at 59–63 (describing these seizures and the Court's timid response).

83 *Montgomery Ward & Co. v. United States*, 326 U.S. 690, 690 (1945) (per curiam).

84 See *Pushaw*, *supra* note 20, at 1039.

85 Indeed, FDR had indirectly informed the Court that he would defy any order prohibiting him from executing the Nazi saboteurs. See *supra* note 78 and accompanying text. Moreover, during the 1930s Roosevelt had demonstrated his willingness to challenge the Court. See *Pushaw*, *supra* note 20, at 1039 n.149 (citing examples).

missions to try alien enemies in *In re Yamashita*⁸⁶ and *Brandt v. United States*⁸⁷—and even noncombatant American citizens in certain cases, like *Madsen v. Kinsella*.⁸⁸ Most pertinently, *Johnson v. Eisentrager*⁸⁹ held that Article III courts did not have jurisdiction, under either the federal habeas statute or the constitutional provision that “[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it,” to hear a petition from a nonresident enemy alien who had been captured in China, convicted there of war crimes by an American military commission, and transferred to a United States military prison in Germany.⁹⁰ Citing a long and unbroken line of precedent, the Court declared: “Executive power over enemy aliens, undelayed and unhampered by litigation, has been deemed, throughout our history, essential to war-time security.”⁹¹ The Court warned that permitting federal judges to extend habeas corpus beyond their territorial jurisdiction would hamper the war effort and help our enemies by imposing major risks and costs (particularly in transporting and caring for detainees and their witnesses), undercutting the authority of commanding officers and distracting them, and causing friction between the judiciary and the military.⁹² Therefore, the Court declined to review the proceedings of the military tribunal—an institution with longstanding authority to adjudicate violations of the law of war.⁹³

86 327 U.S. 1, 5–6, 25–26 (1946) (refusing to question the President’s decision after World War II to use a military commission, featuring rules of procedure and evidence that diverged from those applied in ordinary courts martial, to convict and sentence to death a Japanese general for war crimes).

87 333 U.S. 836, 836 (1948) (per curiam) (dismissing a habeas petition filed by Nazis who had been convicted by a U.S. military tribunal at Nuremberg); *see also* *Ludecke v. Watkins*, 335 U.S. 160 (1948) (ruling that alien enemies had no constitutional right to be free from wartime detention in the United States pursuant to a federal statute).

88 343 U.S. 341, 342–43, 362 (1952) (upholding the jurisdiction of a military tribunal to try an American civilian accused of murdering her husband when he was serving after World War II in the United States–occupied sector of Germany); *see also id.* at 346–48 (emphasizing that the Court had acknowledged the President’s Article II power “[s]ince our nation’s earliest days” to create military commissions, and fashion their procedures, to meet military exigencies).

89 339 U.S. 763 (1950).

90 *Id.* at 765–76, 781.

91 *Id.* at 774; *see also id.* at 776–77, 777 n.8 (citing cases and other historical sources).

92 *See id.* at 778–79. The Court distinguished its assertion of habeas jurisdiction in *Quirin* on the ground that the Nazi spies had been arrested and tried *within the United States* for crimes committed there. *See id.* at 779–80.

93 *Id.* at 786–87.

Interestingly, even the Warren Court did not second-guess the President's military decisions, but rather confined its liberal constitutional revolution to the domestic sphere.⁹⁴ Indeed, in the half-century following Chief Justice Warren's ascension to the bench in 1954, the Court never invalidated an exercise of war powers.⁹⁵

In sum, in every historical era, the Court typically has acceded to the President's exercise of war powers. Such deference always has been shown when a politically strong President, backed by Congress, responded to a military emergency—regardless of how seriously he infringed individual legal rights. Even in less dire circumstances, however, the Court has been inclined to yield to the political branches' military decisions.

2. Cases Invalidating the President's Exercise of War Powers

Occasionally, however, the Court has departed from its deferential posture. Such cases invariably have involved a politically vulnerable and unpopular President who unilaterally took a disproportionately drastic action, after a military crisis had passed, that egregiously invaded constitutional rights.

The landmark decision is *Ex parte Milligan*,⁹⁶ issued the year after the Civil War had ended. The Court granted a writ of habeas corpus to an Indiana citizen who had been sentenced to death by a military commission for conspiracy against the federal government, reasoning that he deserved an ordinary jury trial because he had never been a soldier and the civilian courts had always remained open.⁹⁷ The Court asserted: "The Constitution . . . is a law for rulers and people,

94 Some of those domestic cases involved policies that related to military affairs but did not involve the actual authorization or prosecution of a war. See, e.g., *United States v. Robel*, 389 U.S. 258, 259–60, 262 (1967) (concluding that a federal statute which barred Communists from employment in defense plants violated the First Amendment); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 146, 165–67 (1963) (striking down an Act of Congress that rescinded the American citizenship of anyone who had evaded military service during World War II or the Korean War).

95 See, e.g., *Dames & Moore v. Regan*, 453 U.S. 654, 662–66, 686 (1981) (upholding the President's unilateral order suspending private claims in American courts against Iran, which had been issued as part of the effort to resolve the Iran hostage crisis); *Gilligan v. Morgan*, 413 U.S. 1, 3–4, 6–9 (1973) (dismissing as nonjusticiable a claim that negligent training of the National Guard had led to the shooting of anti-Vietnam War protestors at Kent State University). See generally Pushaw, *supra* note 20, at 1044–45 (citing numerous other examples and noting that lower federal courts also rejected constitutional challenges to America's undeclared wars in Southeast Asia, Nicaragua, the Persian Gulf, and the former Yugoslavia).

96 71 U.S. (4 Wall.) 2 (1866).

97 *Id.* at 107–08, 118–27.

equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances.”⁹⁸ Because this soaring rhetoric so obviously conflicted with the Court’s recent abdication in constitutional cases (including those involving military tribunals), it frankly admitted:

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.⁹⁹

The Court did not mention that Andrew Johnson had no political capital to spend on a fight with the judiciary. A Southern Democrat who had remained loyal to the Union and was selected Vice President by the Republican Lincoln as a conciliatory gesture, Johnson assumed office upon Lincoln’s assassination and quickly became embroiled in a bitter struggle over Reconstruction with the dominant Radical Republicans in Congress, which culminated in his impeachment.¹⁰⁰

Alas, the Court’s newfound commitment to defend the Constitution “at all times, and under all circumstances” lasted less than a year, when it began to capitulate to constitutionally dubious Reconstruction legislation.¹⁰¹ The conclusion seems inescapable that the Justices realized that they could defy the politically vulnerable Johnson, but not the powerful Congress. Moreover, in World Wars I and II the Court proved itself wholly unable to fulfill its promise in *Milligan* to render purely “legal judgment[s]” protecting constitutional rights after

98 *Id.* at 120–21.

99 *Id.* at 109.

100 See MICHAEL LES BENEDICT, *THE IMPEACHMENT AND TRIAL OF ANDREW JOHNSON* 1–25, 89–95 (1973). Although Lincoln made the initial decision to try Milligan, Johnson had become President by the time the case got to the Court, and he was in no position to challenge its authority.

101 See *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 475–76, 497–501 (1867) (refusing to review the constitutional validity of Acts of Congress establishing military governments in each former Confederate state); *Georgia v. Stanton*, 73 U.S. (6 Wall.) 50, 76–77 (1868) (declining to entertain a claim that Congress had unconstitutionally abolished a state’s existing government); *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 508–09, 512–15 (1869) (sustaining the power of Congress to repeal the Court’s appellate jurisdiction over a pending case brought by a newspaper editor who had been jailed for criticizing Mississippi’s military government and who had attacked the constitutionality of the Reconstruction Acts).

“calmness in deliberation” when military emergencies threatened “public safety” and excited passionate “feelings and interests.”¹⁰²

Again, however, after World War II the Court carefully chose a few cases to reassert some role for the judiciary.¹⁰³ Most notably, in *Youngstown Sheet & Tube Co. v. Sawyer*,¹⁰⁴ six Justices denied Harry Truman’s claim of Article II power to unilaterally seize and operate American steel mills, threatened with closure by a labor strike, to ensure production of arms and materials for the Korean War.¹⁰⁵ The Court emphasized that Truman had not demonstrated that the military situation was so urgent as to warrant his draconian response (taking private property domestically without providing due process or just compensation), especially since he had not received specific congressional permission.¹⁰⁶

Justice Jackson focused on this latter consideration in his famous concurring opinion, which set forth a flexible, contextual approach to war powers featuring three major categories.¹⁰⁷ First, he posited that if the President acts pursuant to legislative authorization, the strongest possible presumption of constitutionality arises, rebuttable only upon the exceedingly difficult showing that the federal government as a whole lacks power.¹⁰⁸ Second, when Congress is silent, the President’s disputed assertion of power would be resolved politically.¹⁰⁹ Third, “[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress”¹¹⁰ Justice Jackson placed the steel seizure in the third category and concluded that Truman had

102 See *supra* notes 74–85 and accompanying text.

103 See, e.g., *Duncan v. Kahanamoku*, 327 U.S. 304, 315–23 (1946) (interpreting an Act of Congress imposing martial law on Hawaii, which did not specifically mention military tribunals, as prohibiting the President (now Truman) from employing them to try loyal citizens (not alien soldiers) for ordinary crimes when the civil courts remained open).

104 343 U.S. 579 (1952).

105 *Id.* at 582–89.

106 See *id.* at 585–88 (concluding that Truman was not exercising his Article II “executive power” because Congress had not enacted a law for him to enforce, and that he could not rely upon his power as Commander in Chief because he was not directing the troops overseas but rather intervening in a domestic labor dispute).

107 See *id.* at 634–55 (Jackson, J., concurring).

108 *Id.* at 635–37.

109 *Id.* at 637.

110 *Id.*

not demonstrated the requisite exclusive constitutional power.¹¹¹ As Chief Justice Vinson and two other dissenters pointed out, however, several generally worded federal statutes and Article II empowered the President to do anything he deemed necessary to wage war successfully (including the seizure of property), and the Court had repeatedly upheld similar executive actions during wartime.¹¹²

The dissenters' legally persuasive argument suggests that unspoken pragmatic considerations influenced the majority's judgment. The political reality was that by 1952 Americans were tired of war, Truman had become one of the most unpopular Presidents in history, and he did not have the political resources or incentives to stand up to the Court.¹¹³ The majority also must have thought that Truman's wholesale takeover of a major American industry—a serious invasion of Fifth Amendment rights—could not be justified because the relatively minor conflict in Korea lacked the same urgency and magnitude of World War II or the Civil War.

111 See *id.* at 640–55. The Court later adopted Justice Jackson's analytical framework. See, e.g., *Dames & Moore v. Regan*, 453 U.S. 654, 668–69 (1981).

112 See *Youngstown*, 343 U.S. at 663–710 (Vinson, C.J., dissenting). Thus, although Justice Jackson assigned Truman's action to Category 3, the dissenters viewed it as a Category 1 situation, and others might plausibly have put it into Category 2 because federal statutes neither authorized nor prohibited the President's specific conduct. In short, Justice Jackson's analytical framework did not provide clear guidance to decide *Youngstown* itself, much less future cases. Cf. Mark Tushnet, *The Political Constitution of Emergency Powers: Some Lessons from Hamdan*, 91 MINN. L. REV. 1451, 1458–62 (2007) (criticizing Jackson's opinion on the ground that *all* constitutional decisions about war powers, not merely Category 2 disputes, depend on politics).

Nonetheless, most scholars have praised Jackson's "reciprocity" model of shared constitutional powers. See, e.g., Neil Kinkopf, *The Statutory Commander in Chief*, 81 IND. L.J. 1169, 1169–75 (2006). Professor Kinkopf rejects the consensus that (1) the President deserves deference in interpreting Acts of Congress concerning war powers, and (2) courts should require a "clear statement" of statutory authority for the President's actions that implicate individual constitutional rights. *Id.* at 1169, 1176–86. Rather, he argues that such canons of construction "load the dice" toward a particular outcome and that courts instead should fairly interpret particular statutes in light of their factual settings. *Id.* at 1176, 1179, 1180–81, 1187–97.

113 See Neal Devins & Louis Fisher, *The Steel Seizure Case: One of a Kind?*, 19 CONST. COMMENT. 63, 64–75 (2002); see also J. Gregory Sidak, *The Price of Experience: The Constitution After September 11, 2001*, 19 CONST. COMMENT. 37, 42 (2002) (characterizing *Youngstown* as "the backlash to the legally clumsy attempt, by a famously unpopular President, to invoke national security as the justification for seizing steel mills during a labor dispute in 1952, an election year in which control of the White House subsequently shifted from one party to the other"). Indeed, Truman himself had publicly declared that he would abide by the Court's judgment and the wishes of Congress. See Barron & Lederman, *Commander in Chief, Part II*, *supra* note 19, at 1058–59.

In sum, the Court can cite cases like *Milligan* and *Youngstown* when it wishes to strike down the President's exercise of military powers. Such opinions provide legal cover for kicking weak Presidents when they're down.

3. Summary

The Court has adopted a practical approach to judicial review in the military context, which consists of a complicated weighing of various legal and political factors in light of the facts and circumstances of each case. Unlike in the domestic sphere, the Court does not simply substitute its interpretation of the Constitution for that of the political branches, but rather accords their views far more respect.¹¹⁴ The result is that, in the vast majority of decisions, the Court either has deemed the exercise of war powers to be a political question (as in *The Prize Cases*, *Vallandigham*, and *Eisentrager*) or has asserted jurisdiction but deferred to the President, despite his infringements on individual constitutional rights (for example, *Quirin* and *Korematsu*).

Sometimes, however, the Court has seized unique opportunities (invariably when the President is politically weak) to announce legal limits on military authority. Such decisions, however, have never signaled a lasting shift to aggressive judicial checking of the political branches. Rather, they recede into the mists when the next emergency hits. This historical background should be kept in mind when examining the recent cases involving alleged terrorists.

II. FIGHTING AND LITIGATING THE WAR ON TERRORISM

Al Qaeda's September 11 attacks triggered a forceful response by President Bush and Congress, which in turn precipitated a host of legal challenges. The Court has tried to set limits on the political

114 Admittedly, even in internal matters, the Court since 1937 has shown great deference to Congress when it exercises its Article I powers. For instance, no statute enacted under the taxing and spending power has been invalidated, and only two trivial laws passed pursuant to the Commerce Clause have been struck down. See Grant S. Nelson & Robert J. Pushaw, Jr., *Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control over Social Issues*, 85 IOWA L. REV. 1, 79–93, 161–62 (1999).

Such cases, however, involved arguments that Congress had exceeded its Article I authority. By contrast, when a plaintiff claims that a federal statute regulating domestic affairs *violates individual constitutional rights*, either on its face or as applied, the Court shows little deference. See, e.g., *United States v. Eichman*, 496 U.S. 310, 312 (1990) (holding that an Act of Congress protecting the American flag from burning or other disfigurement violated the First Amendment).

branches while leaving them enough discretion to wage the War on Terrorism.

On September 18, 2001, Congress in its Authorization for Use of Military Force (AUMF) empowered the President to use “all necessary and appropriate force” against those who planned, committed, or aided the terrorist attacks.¹¹⁵ Relying upon both that statute and Article II, George Bush swiftly sent armed forces to Afghanistan (which had actively supported al Qaeda) and stepped up antiterrorism efforts.¹¹⁶ Most significantly, he asserted power to indefinitely detain anyone he determined was an “enemy combatant” and, at his option, to try such persons by military commissions appointed by the Secretary of Defense.¹¹⁷

In four habeas corpus cases brought by such enemy combatants, the Court held that the President had exceeded his authority under either statutes or the Constitution in a way that violated individual legal rights.¹¹⁸ A critical examination of these decisions reveals legal reasoning that is so strained as to invite the conclusion that practical and political considerations generated the results. The proposed four-factor analysis helps to make sense out of the Court’s cases.

A. Hamdi: *The Due Process Rights of Citizen Detainees*

Hamdi v. Rumsfeld considered a habeas corpus petition brought by an American citizen who had been captured in Afghanistan by American troops.¹¹⁹ The government accused Hamdi of fighting with the Taliban, designated him an “enemy combatant,” and detained him indefinitely at several military prisons (most recently, one in South Carolina).¹²⁰ Hamdi’s father claimed that his son had gone to Afghanistan to do “relief work.”¹²¹

In an opinion by Justice O’Connor, the Court initially noted that Hamdi was covered by a 1971 statute prohibiting the United States from detaining any citizen “except pursuant to an Act of Congress.”¹²² The majority found such authorization in the AUMF’s “all necessary and appropriate force” language, which implicitly included

115 Authorization for Use of Military Force (AUMF), Pub. L. No. 107–40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 note (Supp. V 2005)).

116 See Pushaw, *supra* note 20, at 1005, 1058.

117 See Military Order of November 13, 2001, 3 C.F.R. 918 (2002), *reprinted in* 10 U.S.C. § 801 (2006).

118 See *infra* Part II.A–D.

119 See *Hamdi v. Rumsfeld*, 542 U.S. 507, 510–11 (2004) (plurality opinion).

120 See *id.* at 510.

121 *Id.* at 511.

122 *Id.* at 517 (quoting 18 U.S.C. § 4001(a) (2000)).

the President's long-recognized power to imprison enemy combatants—even citizens—for the duration of an armed conflict.¹²³

Nonetheless, the Court ruled that the Due Process Clause gave citizen-detainees the right to receive notice of the factual basis for their classification and a fair opportunity to rebut the government's assertions before a neutral decisionmaker¹²⁴—which might take the form of an impartial, “appropriately authorized” military tribunal.¹²⁵ The majority rejected the originalist argument of Justices Scalia and Stevens that Hamdi, as an American citizen, had a constitutional right to a criminal trial in an Article III court with full procedural and evidentiary protections.¹²⁶ Justice O'Connor concluded that such elaborate proceedings would undermine the government's legitimate interests in avoiding disclosure of military secrets, preventing the diversion of military officers from their duties, and precluding enemy soldiers from returning to take up arms against America.¹²⁷ The Court declared that its compromise approach balanced the judiciary's “time-honored and constitutionally mandated roles of reviewing and resolving [individual rights] claims”¹²⁸ with sensitivity to the executive's superior competence over military affairs.¹²⁹

In dissent, Justice Thomas maintained that the Court should have limited its inquiry to determining whether Article II and the AUMF had authorized the President to detain enemy combatants.¹³⁰ Having decided that question in the affirmative, the Court should have declined to second-guess the President's judgment—committed to

123 See *id.* at 517–23; see also *id.* at 587 (Thomas, J., dissenting) (agreeing with this point). Justices Souter and Ginsburg concluded that the AUMF lacked the specific congressional authorization for imprisonment of citizens required by the 1971 statute. See *id.* at 541–51 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment).

124 See *id.* at 524–39 (plurality opinion). Not surprisingly, the Court relied upon *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 125 (1866). See *Hamdi*, 542 U.S. at 530–31 (plurality opinion).

125 *Hamdi*, 542 U.S. at 538 (plurality opinion); see also *id.* at 533–35 (stressing that proceedings could be tailored to meet the unique needs of the military setting, such as by relaxing the regular rules of evidence). But see *id.* at 553–54 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment) (contending that a military tribunal would not satisfy due process standards).

126 See *id.* at 554–72 (Scalia, J., dissenting).

127 See *id.* at 531–34 (plurality opinion). Justice Thomas maintained that these interests, and others such as gathering intelligence from detainees, should have led the Court not to craft a balancing test but to refuse to question the President's judgment altogether. See *id.* at 594–98 (Thomas, J., dissenting).

128 *Id.* at 535 (plurality opinion).

129 *Id.* at 531, 535–36.

130 *Id.* at 579–94 (Thomas, J., dissenting).

him alone by the Constitution—that Hamdi was in fact an enemy combatant who deserved detention to protect the public.¹³¹

This dissent had ample support in presidential practice and judicial precedent.¹³² Conversely, Justices Scalia and Stevens made a cogent argument, based on the original meaning of the Constitution's text, that Hamdi deserved a full-blown trial.¹³³ Justice O'Connor tried to steer a middle course that fulfilled the Court's duty to exercise judicial review, yet acknowledged that its case law (reflecting the realities of modern warfare) had made it impractical to insist upon ordinary criminal trials.¹³⁴ The result was a legal mishmash that (1) swept under the rug much inconvenient precedent in which the Court had either refused to question or meekly reviewed the President's determinations concerning the confinement and trial of enemy combatants, and (2) transplanted due process standards that had been developed in the context of hearings for government benefits to the entirely different situation of military detention.¹³⁵ Lost in the rhetoric was a critical legal point: *Hamdi* represented the first time the Court had ever recognized that Congress authorized a presidential war power, yet had struck it down as unconstitutional.¹³⁶

In short, law alone cannot explain the result in *Hamdi*. Rather, the decision continued the pattern of making a discretionary and

131 See *id.*

132 See *supra* Part I.B.1 (summarizing the Court's usual deferential approach).

133 See Carlton F.W. Larson, *The Forgotten Constitutional Law of Treason and the Enemy Combatant Problem*, 154 U. PA. L. REV. 863 (2006) (providing detailed historical support for the position that the Constitution guarantees a regular criminal trial in federal court to those accused of treason, including American citizens and aliens living in the United States who are not accompanying an invading armed force). Although I do not dispute Professor Larson's historical analysis, this approach strikes me as unrealistic in light of technological developments that enable small groups of terrorists to inflict destruction on a scale the Framers could not have contemplated. The prime examples are the September 11 attacks, which succeeded in part because of information revealed during the ordinary criminal trials of the first World Trade Center bombers. See *Boumediene v. Bush*, 128 S. Ct. 2229, 2295 (2008) (Scalia, J. dissenting).

134 See *Hamdi*, 542 U.S. at 531–36 (plurality opinion).

135 See *id.* at 529–35 (citing *Mathews v. Eldridge*, 424 U.S. 319 (1976)). *But see id.* at 579, 594–98 (Thomas, J., dissenting) (decrying the application of *Mathews*). Two distinguished scholars have endorsed the plurality's use of a common law balancing test to determine due process requirements for a citizen who had otherwise been lawfully detained under the AUMF as a battlefield captive, but have lamented Justice O'Connor's failure to provide more clarity on several crucial issues. See Fallon & Meltzer, *supra* note 50, at 2036, 2052, 2071–73, 2090–93.

136 See *supra* notes 26, 52, 104–12 and accompanying text.

pragmatic judgment based on a variety of factual, political, and legal considerations.

Perhaps most importantly, the urgent crisis of September 11, 2001 had long since passed, and a majority of Justices apparently concluded that the federal government had overreached by seeking to detain alleged enemy combatants indefinitely—which might mean permanently, as the War on Terrorism might never end.¹³⁷ Furthermore, the government’s assertion that judicial review was unnecessary because the executive branch could be trusted to respect human rights seemed doubtful when, shortly after oral argument, pictures of American soldiers abusing inmates at Abu Ghraib appeared that lent credence to earlier reports of mistreatment of detainees at other facilities, such as Guantanamo.¹³⁸

Another key factor was the seriousness of the claimed violation of individual legal rights. No constitutional liberty is more fundamental than freedom from unlawful restraint, which had long been secured in Anglo-American law through the “Great Writ” of habeas corpus.¹³⁹

Finally, the Court was confident that President Bush would obey its judgment. Most obviously, he had always expressed respect for the Court as an institution and had never suggested that he would defy its orders. Nor was the President in any position politically to do so. He had taken office after losing the popular vote in 2000 but winning the Electoral College thanks to a wafer-thin margin in Florida—a result secured by a controversial Supreme Court opinion.¹⁴⁰ Nonetheless, Bush always governed as if he had a mandate. Most notably, after September 11 he asserted broad unilateral war powers under Article II, which seemed unnecessary because Congress had already granted him vast general authority to fight terrorists—and would almost certainly have given him any specific powers he requested.¹⁴¹ For the next year

137 See Jules Lobel, *The War on Terrorism and Civil Liberties*, 63 U. PITT. L. REV. 767, 776–90 (2002).

138 See David Cole, *The Idea of Humanity: Human Rights and Immigrants’ Rights*, 37 COLUM. HUM. RTS. L. REV. 627, 653 (2006); Jenny S. Martinez, *Process and Substance in the “War on Terror,”* 108 COLUM. L. REV. 1013, 1050–51 (2008).

139 See *Hamdi*, 542 U.S. at 536 (plurality opinion).

140 See *Bush v. Gore*, 531 U.S. 98 (2000) (per curiam). For detailed critiques of this decision, see Robert J. Pushaw, Jr., *Bush v. Gore: Looking at Baker v. Carr in a Conservative Mirror*, 18 CONST. COMMENT. 359 (2001); Robert J. Pushaw, Jr., *The Presidential Election Dispute, the Political Question Doctrine, and the Fourteenth Amendment: A Reply to Professors Krent and Shane*, 29 FLA. ST. U. L. REV. 603 (2001).

141 See *supra* notes 115–17 and accompanying text.

and a half, Bush's approval ratings ranged from sixty to ninety percent.¹⁴²

His downfall began with the March 2003 invasion of Iraq, which he justified on several grounds: that Saddam Hussein had supported al Qaeda, that he possessed weapons of mass destruction, that the Iraqis would welcome America as liberators, that we would achieve a swift victory, and that a thriving democracy would blossom.¹⁴³ When these assumptions proved false, Bush's popularity declined.

By the time of the *Hamdi* decision, his approval level had fallen below fifty percent,¹⁴⁴ and pollsters predicted he would lose the November 2004 election.¹⁴⁵ Nor could Bush make *Hamdi* much of a campaign issue, because the decision had been supported by conservative Republicans like Rehnquist, Scalia, and O'Connor.

All of the aforementioned considerations apparently overcame one that previously had been dispositive: Congress had authorized the President's actions. The Court did not mention the novelty of this result, much less explain why it felt free to flex its muscles against Congress. Perhaps the most plausible reason is that the approval rating of Congress had dropped even lower than that of George Bush, and many members were engaged in close reelection campaigns.¹⁴⁶

Given these practical and political realities, I disagree with the many legal commentators who portrayed *Hamdi* as a courageous decision in which the Court heroically vindicated constitutional rights and liberties against the unprecedented military aggressiveness of the mighty Bush administration.¹⁴⁷ I doubt that the Court would have

142 See George W. Bush Presidential Job Approval, <http://www.gallup.com/poll/116500/Presidential-Approval-Ratings-George-Bush.aspx> (last visited March 18, 2009).

143 See Fisher, *supra* note 41, at 1200, 1212–16, 1223, 1228–54 (detailing the Bush administration's legal, political, and factual errors and misjudgments that led to the Iraq War, and bemoaning the failure of Congress and the media to challenge the executive branch).

144 See USA Today, What Americans Are Saying, <http://www.usatoday.com/news/politicselections/nation/polls/otherpolls.htm> (last visited Mar. 18, 2009).

145 See USA Today, Campaign 2004: USA Today/CNN/Gallup Poll Results, <http://www.usatoday.com/news/politicselections/nation/polls/usatodaypolls.htm> (last visited Mar. 18, 2009). Bush managed to rebound to over fifty percent in October and won a close election in November. See *id.*

146 See Jeffrey M. Jones, *Congress Approval Rating Matches Historical Low*, GALLUP, Aug. 21, 2007, <http://www.gallup.com/poll/28456/Congress-Approval-Rating-Matches-Historical-Low.aspx> (setting forth poll results from 1974–2007).

147 See, e.g., Erwin Chemerinsky, *Enemy Combatants and Separation of Powers*, 1 J. NAT'L SECURITY L. & POL'Y 73, 73–74, 87 (2005); Harold Hongju Koh, *The Ninth Annual John W. Hager Lecture, the 2004 Term: The Supreme Court Meets International Law*, 12 TULSA J. COMP. & INT'L L. 1, 13–17 (2004).

been quite so brave if the United States had suffered another major terrorist attack after September 11, Americans had demanded forceful military retaliation, and a popular President had followed the voters' will.

B. Rasul: Statutory Habeas Corpus for Alien Enemy Combatants

1. The Justices' Opinions

The companion case to *Hamdi* was *Rasul v. Bush*, which involved an Act of Congress empowering federal district courts, "within their respective jurisdictions," to entertain habeas corpus petitions filed by those who claimed they had been detained in violation of federal law.¹⁴⁸ The Court interpreted this statute as extending habeas jurisdiction to anyone with custody over foreigners captured overseas and confined in Guantanamo, which by treaty is subject to Cuba's "ultimate sovereignty" but is under U.S. control and jurisdiction.¹⁴⁹

Writing for the majority, Justice Stevens acknowledged that this holding conflicted with *Johnson v. Eisentrager*, which had rejected the claim that federal courts possessed either constitutional or statutory habeas jurisdiction over foreigners who had been found guilty of war crimes by a military tribunal abroad and imprisoned in Germany.¹⁵⁰ The Court concluded that *Eisentrager* did not apply, for two reasons. First, unlike the petitioners in that case, the detainees here were not citizens of nations at war with America, had denied committing any hostile acts against the United States, had never been heard before any tribunal, and were being held in territory that America controlled.¹⁵¹ Second, *Eisentrager's* statutory ruling had been cursory and had implicitly been overruled in the 1973 *Braden* case,¹⁵² which allowed a federal district court in Kentucky to entertain a habeas petition filed by a prisoner located outside of its territorial jurisdiction (he was being detained by a federal court in Alabama) as long as its process could reach his custodian.¹⁵³

Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, dissented from the majority's "novel" and "irresponsible"

148 542 U.S. 466, 473 (2004) (quoting 28 U.S.C. § 2241(a), (c)(3) (2000)).

149 *Id.* at 473–85.

150 *See id.* at 475–76.

151 *See id.* at 475.

152 *Braden v. 30th Judicial Circuit Court*, 410 U.S. 484 (1973).

153 *See Rasul*, 542 U.S. at 478–79 (citing *Braden*, 410 U.S. at 494–95). *But see id.* at 485–88 (Kennedy, J., concurring) (rejecting the assertion that *Braden* overruled *Eisentrager*, but finding that the latter case did not preclude jurisdiction because of the differences between the petitioners in *Eisentrager* and *Rasul*).

holding that the habeas statute “extend[ed] to aliens detained by the United States military overseas, outside [its] sovereign borders . . . and beyond the territorial jurisdiction of all its courts,” which “contradict[ed] a half-century-old precedent on which the military undoubtedly relied, *Johnson v. Eisentrager*.”¹⁵⁴ He scoffed at the notion that this case had been overturned by *Braden*, which dealt with the entirely different issue of an American criminal subject to the jurisdiction of two courts within the United States and therefore did not even mention *Eisentrager*.¹⁵⁵ Justice Scalia emphasized that “[i]n abandoning the venerable statutory line drawn in *Eisentrager*, the Court boldly extends the scope of the habeas statute to the four corners of the earth.”¹⁵⁶ This result ignored *Eisentrager*’s warning that such judicial overreaching could harm America’s war effort and help its enemies by diverting our commanders’ attention, exposing our soldiers to needless risk, imposing significant costs, and embroiling the judiciary in controversies with the military.¹⁵⁷

2. A Critique of *Rasul*

From a purely legal standpoint, Justice Scalia’s argument is unassailable. The habeas corpus statute plainly limits jurisdiction to the court located in the territory where the prisoner is held.¹⁵⁸ Indeed, this restriction is so clear that the Court in *Eisentrager* found it unnecessary to elaborate upon its six-word conclusion that the statute does not cover aliens detained beyond the territorial jurisdiction of the United States (and hence its courts),¹⁵⁹ and instead devoted its opin-

154 *Id.* at 488–89 (Scalia, J., dissenting).

155 *Id.* at 488–89, 494–98.

156 *Id.* at 498.

157 *Id.* at 499.

158 See 28 U.S.C. § 2241 (a) (2006) (“Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.”).

159 The Court reversed the judgment of a circuit court that had interpreted the habeas statute as conferring jurisdiction to avoid the possibility of invalidating the law as unconstitutionally suspending the writ. See *Johnson v. Eisentrager*, 339 U.S. 763, 767, 791 (1950) (reviewing *Eisentrager v. Forrester*, 174 F.2d 961, 966–67 (D.C. Cir. 1949)). The Court rejected the alien prisoners’ claim that they enjoyed the privilege of habeas corpus: “Nothing in the text of the Constitution extends such a right, nor does anything in our statutes.” See *id.* at 768. Except for that sentence, the opinion focuses on the constitutional issue. *Id.* at 768–78; see also *Rasul*, 542 U.S. at 488–94 (Scalia, J., dissenting) (maintaining that *Eisentrager* correctly interpreted the habeas statute).

ion to demonstrating that the Constitution confers no such right either.¹⁶⁰ Moreover, it is hard to give any credence to the assertion of Justice Stevens that the Court in a domestic criminal case (*Braden*) somehow forgot to mention that it was overruling a well-established precedent (*Eisentrager*) in the unrelated context of foreign enemies captured and held abroad.¹⁶¹ Perhaps most tellingly, even the two leading academic critics of the Bush administration's enemy combatant polices, Neal Katyal and David Cole, conceded that *Eisentrager* precluded statutory habeas relief in *Rasul*.¹⁶²

In short, *Rasul* did not result from an objective application of legal principles, but rather from the same pragmatic calculus that took place in *Hamdi*.¹⁶³ Indeed, I submit that the majority's opinion is so patently wrong that they must have issued it not as a serious legal analysis but rather to send a message to the politically vulnerable President and Congress: the writ of habeas corpus would be available to challenge Guantanamo policies.¹⁶⁴ The Court believed that the government's actions were unnecessarily draconian to meet the actual threat posed. The majority apparently thought that their obviously bizarre statutory construction would deter Congress from revising its legislation to clarify that habeas jurisdiction did not reach aliens cap-

160 See *Eisentrager*, 339 U.S. at 768–78.

161 See *supra* note 152–53 and accompanying text.

162 See Neal Katyal, *The Changing Laws of War: Do We Need a New Legal Regime After September 11? Sunsetting Judicial Opinions*, 79 NOTRE DAME L. REV. 1237 (2004) (making this admission, but contending that *Eisentrager* should not be treated as binding today because of intervening changes in both law—such as America's adoption of the Geneva Conventions in 1955 and the Warren Court's transformation of the Due Process Clause—and war, particularly the stateless and permanent nature of the fight against terrorism); Cole, *supra* note 138, at 651, 653 (asserting that the detainees won in *Rasul* not because of their “strained” legal arguments but rather “because Guantanamo had become an international embarrassment to the United States”).

Similarly, Professors Fallon and Meltzer have applauded the outcome in *Rasul*, but have acknowledged that the opinion of Justice Stevens did not coherently explain (1) why habeas cases like *Braden* concerning citizens suddenly applied to aliens, and (2) whether the federal habeas statute reached all foreign enemies detained abroad (which would contradict *Eisentrager*) or merely those in Guantanamo (which would be defensible as a common law extension of precedent because of the unique status of that American-controlled naval base). See Fallon & Meltzer, *supra* note 50, at 2056–59, 2064.

163 See *supra* notes 137–46 and accompanying text.

164 See Martinez, *supra* note 138, at 1049–53 (arguing that *Rasul*'s ostensibly narrow procedural ruling based on statutory construction was actually intended to send a signal to the President and the Congress about the Court's views on the detainees' substantive legal rights, especially its willingness to apply to them the constitutional guarantee of habeas corpus).

tured and held outside of the United States, because such a denial of habeas might well be struck down as unconstitutional.¹⁶⁵

Despite this thinly veiled threat, Congress overturned *Rasul*'s statutory interpretation.¹⁶⁶ Nonetheless, doing so did not defy the Court's judgment, either technically (because Congress ultimately can determine the meaning of its own laws) or substantively (because Congress established an alternative process that allowed Guantanamo detainees to challenge their confinement as unlawful in an Article III court—the same purpose served by habeas).¹⁶⁷

3. The Political Branches' Response to the Court's Decisions

Shortly after *Hamdi* and *Rasul* came down, the Bush administration guaranteed elaborate procedural protections to everyone held at Guantanamo. At the initial stage, no detainee would be deemed an "enemy combatant" without first receiving "multiple levels of review by military officers and officials of the Department of Defense."¹⁶⁸ Next, a detainee could challenge his designation as an enemy combatant before a Combat Status Review Tribunals (CSRT).¹⁶⁹ There he would be appointed a Personal Representative, who would review and summarize classified documents and help the accused present exculpatory evidence by testifying, calling witnesses who were reasonably available, questioning witnesses summoned by the tribunal, and introducing relevant documents.¹⁷⁰ The CSRT had power to decide whether the government had unlawfully imprisoned the detainee and, if so, to order his release.¹⁷¹

Conversely, if the CSRT affirmed the Defense Department's determination, the detainee could be tried by a military commission. Such commissions would follow the usual procedural rules of military

165 See *id.* at 1051–53 (suggesting that the Court hoped its threat of judicial review to invalidate the political branches' curbing of habeas procedures would induce them not to make such cutbacks, but that the President and Congress "apparently did not receive the intended signal").

166 See Detainee Treatment Act (DTA) of 2005, Pub. L. No. 109-148, div. A, tit. X, § 1005(e)(1), 119 Stat. 2739, 2741–42. Section 1005(e)(1) amended the Habeas Corpus Act, 28 U.S.C. § 2241(e) (2006). This statutory provision will be discussed *infra* notes 173–78 and accompanying text.

167 See *infra* notes 175–79 and accompanying text.

168 Memorandum from Gordon R. England, Sec'y of the Navy, U.S. Dep't of Defense, Implementation of Combat Status Review Tribunal Procedures for Enemy Combatants Detained at Guantanamo Bay Naval Base, Cuba, at Enclosure(1) 1 (July 29, 2004) (on file with the Notre Dame Law Review).

169 See *id.*

170 See *id.* at Enclosure(1) 2.

171 See *id.* at Enclosure(1) 9.

courts, except that they could: (1) exclude the defendant from any part of the proceeding to protect “national security interests” (such as safeguarding intelligence sources or activities); (2) admit any evidence they determined had probative value to a reasonable person (including hearsay); and (3) block the accused’s access to classified information if doing so would not deny him a fair trial.¹⁷²

In contrast to the executive’s quick response, Congress spent a lot of time drafting the Detainee Treatment Act (DTA).¹⁷³ This statute incorporated the executive regulations concerning military administrative determination of “enemy combatant” status followed by CSRT review, while adding a requirement that the Secretary of Defense promulgate procedures for periodic consideration of “any new evidence” relating to that status and for an annual review to determine the need to continue to hold alien detainees.¹⁷⁴ Furthermore, section 1005(e)(2) of the DTA gave the U.S. Court of Appeals for the D.C. Circuit “exclusive jurisdiction” to decide whether the Defense Department’s standards and procedures were properly applied by the CSRT and were consistent with the federal Constitution and laws.¹⁷⁵ Finally, section 1005(e)(3) granted the D.C. Circuit the same jurisdiction over military commission decisions¹⁷⁶—a provision that presupposed congressional approval of such commissions.

Because the DTA authorized a federal court to hear claims by Guantanamo detainees that they were being held illegally (the basic function of habeas), Congress did not consider ordinary habeas jurisdiction to be necessary for them. Accordingly, section 1005(e)(1) of the DTA provided that “no court, justice, or judge shall have jurisdiction to hear or consider . . . an application for a writ of habeas corpus filed by or on behalf of an alien detained . . . at Guantanamo Bay.”¹⁷⁷ This provision would “take effect on the date of [its] enactment [Dec. 30, 2005].”¹⁷⁸

In short, Congress and the President addressed the Court’s concerns. The political branches took seriously *Hamdi*’s invitation to

172 See *Hamdan v. Rumsfeld*, 548 U.S. 557, 613–15, 621–25 (2006) (summarizing these procedures).

173 See Pub. L. No. 109-148, div. A, tit. X, 119 Stat. 2739, 2739–44.

174 See *id.* § 1005(a), 119 Stat. at 2740–41. Moreover, the DTA directed the President to appoint (with the Senate’s approval) a Designated Civilian Official as the final review authority within the Defense Department of the decisions of the CSRT and any other administrative review board. *Id.* § 1005(a)(2), 119 Stat. at 2741.

175 See *id.* § 1005(e)(2), 119 Stat. at 2742–43.

176 See *id.* § 1005(e)(3), 119 Stat. at 2743.

177 See *id.* § 1005(e)(1), 119 Stat. at 2742.

178 See *id.* § 1005(h)(1), 119 Stat. at 2743.

determine what kind of impartial decisionmaker (including military tribunals) and procedures for citizen-detainees would satisfy due process standards while meeting military needs.¹⁷⁹ Indeed, the DTA went well beyond *Hamdi's* minimum requirements by (1) extending procedural protections to noncitizens, and (2) providing not merely for military tribunals (CSRTs and military commissions), but also for review in an Article III court. Similarly, although Congress corrected *Rasul's* misinterpretation of the general habeas corpus statute, it acted within the spirit of that decision by providing Guantanamo detainees with habeas-like procedural protections. The political branches' efforts, however, did not prevent further litigation.

C. Hamdan: More Creative Statutory Interpretation to Deny the President Authority to Establish Military Commissions

In July 2004, the Bush administration brought terrorism charges against Salim Hamdan, a Yemeni who had been captured in Afghanistan, taken to Guantanamo, and designated an "enemy combatant" by the military.¹⁸⁰ A CSRT affirmed that determination, and proceedings before a military commission commenced.¹⁸¹ However, a federal district court swiftly granted Hamdan's request for a habeas writ based on its conclusion that his military commission had violated the Uniform Code of Military Justice (UCMJ) and the Geneva Conventions.¹⁸² The Court of Appeals for the D.C. Circuit reversed in an opinion joined by then-Judge Roberts, which ruled that the Geneva Conventions were not judicially enforceable, that Hamdan's military commission did not run afoul of the UCMJ, and that such tribunals were constitutional under *Quirin*.¹⁸³

The Supreme Court granted certiorari on November 7, 2005.¹⁸⁴ Congress then enacted DTA section 1005(e)(1), which provided that as of December 30, 2005, "no court, justice, or judge" had jurisdiction to consider habeas actions by alien detainees at Guantanamo.¹⁸⁵ Because Congress had removed the Court's jurisdiction, the govern-

179 See *Hamdi v. Rumsfeld*, 542 U.S. 507, 538 (2004) (plurality opinion).

180 See *Hamdan v. Rumsfeld*, 548 U.S. 557, 566–70 (2006). The government accused Hamdan of assisting Osama bin Laden as a bodyguard/driver, transporting weapons to al Qaeda, and receiving weapons training. See *id.* at 570.

181 *Id.* at 570–71.

182 *Id.* at 571 (citing *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152, 158–72 (D.D.C. 2004)).

183 *Id.* at 571–72 (describing the circuit court decision).

184 *Id.* at 572.

185 See DTA, div. A, tit. X, Pub. L. No. 109–148, § 1005(e)(1), (h), 119 Stat. 2739, 2741–43.

ment moved to dismiss.¹⁸⁶ Remarkably, the Court concluded that Congress had not intended to eliminate its jurisdiction (despite section 1005(e)(1)'s language seeming to do precisely that) or to authorize military commissions (despite section 1005(e)(3)'s apparent acceptance of their validity). These holdings will be examined in turn.

1. Snatching Jurisdiction from the Jaws of a Congressional Repeal

Justices Scalia, Thomas, and Alito voted to dismiss the case, for two reasons.¹⁸⁷ First, the DTA unequivocally stripped any "court" (including the Supreme Court) of jurisdiction to hear habeas petitions by aliens detained at Guantanamo.¹⁸⁸ Second, venerable precedent established that Article III gives Congress absolute power to make "Exceptions" to the Court's appellate jurisdiction and that a statute eliminating jurisdiction applies to pending cases, absent an express reservation of jurisdiction.¹⁸⁹ Justice Scalia then argued that (1) the DTA's elimination of jurisdiction did not unconstitutionally suspend the privilege of habeas corpus because this writ does not extend to an enemy alien confined outside of the United States' sovereign territory,¹⁹⁰ and (2) in any event, Congress had provided a constitutionally adequate substitute for habeas by authorizing both the D.C. Circuit and Supreme Court to review the military commissions' decisions.¹⁹¹

In the face of this apparently impregnable legal analysis, Justices Stevens, Souter, Ginsburg, and Breyer (joined in part by Justice Kennedy) ingeniously recharacterized the controlling precedent. They asserted that the Court's repeated holdings that statutes stripping jurisdiction applied to pending cases had not stated a black-letter rule (as had always been thought), but rather established a mere "presumption against jurisdiction."¹⁹² The majority found that this presumption had been rebutted after applying "[o]rdinary principles of statutory construction" to the DTA to conclude that it had not

186 See *Hamdan*, 548 U.S. at 572.

187 See *id.* at 656–61 (Scalia, J., dissenting).

188 See *id.* at 655–57.

189 See *id.* at 656–61, 672 (listing numerous cases dating back to the mid-1800s); see also U.S. CONST. art. III, § 2 (setting forth the Exceptions and Regulations Clause).

190 See *Hamdan*, 548 U.S. at 669–70 (Scalia, J., dissenting) (citing *Johnson v. Eisen-trager*, 339 U.S. 763, 768 (1950)).

191 See *id.* at 670–71 (identifying several cases recognizing that Congress could provide such alternative procedures).

192 See *id.* at 576–77 (majority opinion).

repealed the Court's jurisdiction.¹⁹³ The opposite interpretation, Justice Stevens warned, would "raise[] grave questions about Congress' authority to impinge upon this Court's appellate jurisdiction, particularly in habeas cases. . . . [Hamdan] suggests that, if the Government's reading is correct, Congress has unconstitutionally suspended the writ of habeas corpus."¹⁹⁴ The Court's clever statutory construction enabled it to seize jurisdiction and reach the merits.

2. Did Congress Authorize Military Commissions?

The majority held that neither the DTA nor the AUMF had specifically empowered the President to create military commissions, and they refused to imply such authorization.¹⁹⁵ Indeed, the commissions violated the directive of Congress—which the Court discovered for the first time lurking in UCMJ section 36(b)—that executive branch procedural rules for such commissions must "be uniform insofar as practicable" with those of courts martial.¹⁹⁶ Justice Stevens chided President Bush for not making an "impracticability" determination sufficient to justify departing from court-martial practice when he authorized the commission to exclude the defendant as necessary to protect national security interests, admit hearsay, and deny the accused access to classified information that might be exculpatory.¹⁹⁷

193 *Id.* at 575–80. Justice Stevens invoked the arcane interpretive rule that "a negative inference may be drawn from the exclusion of language from one statutory provision that is included in other provisions of the same statute." *Id.* at 578. As applied here, section 1005(h)(2) of the DTA explicitly made sections 1005(e)(2) and (e)(3)—which confer "exclusive jurisdiction" on the D.C. Circuit to review "final decision[s]" of CSRTs and military commissions—applicable to pending cases, but section 1005(h)(1) did not contain such a similar express termination of pending cases as to section 1005(e)(1). *See id.* at 578–84.

Put simply, Justice Stevens determined the meaning of the DTA based upon an obscure canon of construction instead of the fundamental rule of interpretation: reasonably discerning the intent of the legislature. Congress clearly meant to repeal the Court's jurisdiction by providing that "no court" had jurisdiction to consider Guantanamo detainees' habeas petitions, and the Court previously had always held that such statutes applied to pending cases. *See id.* at 655–57, 660–65 (Scalia, J., dissenting). The most dramatic indication that the majority had contravened the intent of Congress was its swift amendment of the DTA to overturn *Hamdan*. *See infra* Part II.D.

194 *See Hamdan*, 548 U.S. at 575 (majority opinion).

195 *See id.* at 593–95; *id.* at 650–51 (Kennedy, J., concurring).

196 *See id.* at 620–25 (majority opinion) (quoting 10 U.S.C. § 836(b) (2000)); *id.* at 639–641 (Kennedy, J., concurring).

197 *See id.* at 613–15 (majority opinion) (quoting U.S. Dep't of Defense, Military Commission Order No. 1, at 9 (Mar. 21, 2002)); *id.* at 623–24; *id.* at 644–53 (Kennedy, J., concurring).

The majority admitted that *Yamashita* was “a glaring historical exception to the general [uniformity] rule,” but asserted that Congress had amended its laws to extend UCMJ protections to persons like Hamdan.¹⁹⁸ For good measure, the Court held for the first time that the Geneva Conventions were judicially enforceable and prohibited the military commissions as constituted.¹⁹⁹

In dissent, Justice Thomas picked apart the majority’s interpretation of the AUMF and UCMJ.²⁰⁰ Initially, he argued that the AUMF’s conferral of authority on the President to use “‘all necessary and appropriate force’” against the terrorists surely was meant to include the long-acknowledged power to try enemy combatants by military tribunals.²⁰¹ In fact, Justice Thomas demonstrated that all similarly broad legislative delegations in the past had been interpreted this way, and that the Court had repeatedly recognized the validity of military commissions.²⁰² Moreover, he stressed that Congress had anticipated AUMF-type grants when it enacted Article 21 of the UCMJ, which provides that the conferral of jurisdiction on courts-martial “‘do[es] not deprive military commissions . . . of concurrent jurisdiction with respect to offenders or offenses that by statute or by law of war may be tried by military commissions’”²⁰³

Justice Thomas also showed that UCMJ Article 36(b) had reaffirmed the President’s longstanding power—recognized in cases such as *Vallandigham*, *Quirin*, *Yamashita*, *Brandt*, and *Madsen*—to create military tribunals and to prescribe procedures that deviated from those of

198 *Id.* at 617–20 (majority opinion); *id.* at 651–53 (Kennedy, J., concurring). Because Justice Kennedy agreed with Justice Stevens and his three colleagues that Congress had not authorized Hamdan’s military commission and that its structure and procedures were invalid, he found it unnecessary to reach the questions of whether the law of war included conspiracy and whether Common Article 3 of the Geneva Conventions required that the defendant be continuously present at trial. *See id.* at 653–55. In dicta, the plurality answered “no” to the first question and “yes” to the second. *See id.* at 595–613, 633–35 (plurality opinion). The dissenters reached the opposite conclusions. *See id.* at 697–704, 715–18 (Thomas, J., dissenting). I will not consider such international law issues here.

199 *See id.* at 626–31 (majority opinion); *id.* at 637, 641–43, 651–53 (Kennedy, J., concurring).

200 *See id.* at 679–724 (Thomas, J., dissenting).

201 *Id.* at 678–83 (quoting AUMF, § 2(a), 50 U.S.C. § 1541 note (Supp. III 2003)).

202 *See id.* at 680–81 (citing supporting statutes and cases); *see also* Michael Stokes Paulsen, *Youngstown Goes to War*, 19 CONST. COMMENT. 215, 252, 256–57 (2002) (maintaining that the AUMF arguably contained the most sweeping delegation of war powers to a President in history and unquestionably authorized George Bush to create military commissions).

203 *Hamdan*, 548 U.S. at 681–83 (Thomas, J., dissenting) (quoting 10 U.S.C. § 821 (2000)).

ordinary court-martial procedures when he deemed uniformity to be impracticable.²⁰⁴ Hence, contrary to the claims of Justice Stevens, *Yamashita* was hardly a “glaring exception” to a “rule” that the President had to maintain procedural uniformity.²⁰⁵ Justice Thomas added that the Court had always previously found the Geneva Conventions to be enforceable politically rather than judicially.²⁰⁶

In conclusion, Justice Thomas maintained that several federal statutes—enacted in conformance with the Constitution’s language, underlying separation-of-powers design, history, and precedent—commanded the Court to defer to President Bush’s decision to convene military commissions to try enemy combatants.²⁰⁷ The majority’s defiance of established legal principles, he warned, might have disastrous consequences by hindering the ability of the President and Congress to fight terrorists.²⁰⁸

3. A Legal and Pragmatic Appraisal of *Hamdan*

Evaluated in strictly legal terms, *Hamdan* makes little sense. The arguments of Justice Thomas should easily have prevailed because they were supported by entrenched constitutional practice and precedent in all three branches.²⁰⁹

First, Presidents have always asserted power to try enemy soldiers for war crimes by creating military tribunals and determining their structure and procedures.²¹⁰ The startling implication of *Hamdan* is that, for two centuries, our Commanders in Chief have been acting lawlessly—even giants like Washington, Lincoln, and Roosevelt.²¹¹

204 See *id.* at 706–12. Furthermore, even assuming *arguendo* that the majority had properly interpreted Article 36(b) as requiring the President in a judicial proceeding to justify his departures from court-martial procedures, President Bush had determined that it was impracticable to use such rules because of the singular problems raised in trials against accused terrorists. See *id.* at 712–14.

205 See *id.* at 708–11.

206 See *id.* at 716–18 (citing governing precedent).

207 See *id.* at 678–724.

208 See *id.* at 678–79, 691, 705–06.

209 Two distinguished national security scholars had anticipated all of these arguments and set forth detailed legal support for them. See Bradley & Goldsmith, *supra* note 50, at 2127–31.

210 See *supra* Part I.B.1.

211 See, e.g., Samuel Estreicher & Diarmuid O’Scannlain, *Hamdan’s Limits and the Military Commissions Act*, 23 CONST. COMMENT. 403, 404 (2006) (deeming this decision “remarkable” because the Court had never previously curbed the President’s ability to try unlawful combatants by military tribunals, a practice that dated back to the Revolutionary War); *id.* at 404–21 (emphasizing that the MCA repudiated the *Hamdan*

Second, Congress had often recognized the President's authority to convene military commissions of his own design to try enemy combatants. Most importantly, Article 21 of the UCMJ codified this power generally.²¹² Furthermore, if the AUMF's grant of power to the President to use "all necessary and appropriate force" against the terrorists implicitly included his long-acknowledged authority to detain enemy combatants (as *Hamdi* had held), then it also should have included the equally venerable power to try them by military tribunals.²¹³ Finally, the DTA confirms the understanding of Congress that it had already granted President Bush such authority, because section 1005(e)(3) assumes the validity of his military commissions and provides for appeals from their judgments.²¹⁴

Third, the Court had invariably sustained the President's power to convene military tribunals to try enemy combatants for war crimes—and had never second-guessed his judgment that national security necessitated such commissions.²¹⁵ This deference was shown even in cases involving American citizens, such as *Vallandigham* and *Quirin*.²¹⁶ The *Hamdan* majority's conclusion that alien enemies have greater legal rights than citizens is self-evidently incorrect.

majority's holding, which rested on dubious legal reasoning, that Congress had not authorized military commissions).

212 See Uniform Code of Military Justice, art. 21, 64 Stat. 108, 115 (1950) (current version at 10 U.S.C. § 821 (2006)). An eminent academic reached this conclusion based on the UCMJ's text and legislative history shortly after its enactment in 1950, and his interpretation is especially reliable because he could not possibly have been influenced by subsequent events such as September 11. See ROSSITER, *supra* note 73, at 102–03, 109–11. Several modern law professors have similarly demonstrated that Congress intended to codify *Quirin*'s holding that Article of War 15 empowered the President to create military commissions by incorporating Article 15's text word-for-word in Article 21 of the UCMJ. See Bradley & Goldsmith, *supra* note 50, at 2130; Goldsmith & Sunstein, *supra* note 78, at 274–75.

213 See *supra* Part II.A. But see Fallon & Meltzer, *supra* note 50, at 2088–89 (contending that, because *Hamdan* could be imprisoned indefinitely, no security exigency prevented the majority from insisting on clearer congressional authorization than that found in the generally worded AUMF before the Court would override other specific statutory provisions governing military commissions).

214 See Yoo, *supra* note 63, at 97. But see Cass R. Sunstein, *Clear Statement Principles and National Security: Hamdan and Beyond*, 2006 SUP. CT. REV. 1 (arguing that *Hamdan* reasonably ruled that the President, except perhaps in true emergencies, must act pursuant to unambiguous legislative authorization if he departs from standard adjudicatory procedures and that such a "clear statement" was absent here, but conceding that the Court also could have plausibly concluded that Congress had approved the military commissions and that they did not violate any law).

215 See *supra* Part I.B.1.

216 See *supra* notes 60–63, 75–78 and accompanying text (describing these cases).

Equally implausible is the Court's use of diametrically opposed interpretive approaches depending on whether the statute concerned its own jurisdiction or the President's powers. On the one hand, the majority leniently construed sections 1005(e)(1) and (h) of the DTA, which appeared to strip the Court of jurisdiction to hear Hamdan's appeal, as doing no such thing. On the other hand, the Court interpreted the UCMJ, AUMF, and DTA, which almost surely authorized the President to convene military commissions, to mean the opposite. The only common thread linking these two rulings is that they both maximized the Court's power vis-à-vis the political branches.²¹⁷

As with *Rasul*, the most damning indictment of the Court's legal analysis in *Hamdan* came not from its critics²¹⁸ but rather from its supporters. For instance, David Cole, who led the legal academy's condemnation of the Bush administration's antiterrorism policies and who applauded the result in *Hamdan*, candidly conceded that the Court had ignored its settled law:

To say that Hamdan faced an uphill battle is a gross understatement. The Supreme Court has said in the past that foreign nationals who are outside U.S. borders, like Hamdan, lack any constitutional protections. Hamdan was a member of the enemy forces when he was captured, and courts are especially reluctant to interfere with the military's treatment of "enemy aliens" in wartime. He filed his suit before trial, and courts generally prefer to wait until a trial is completed before assessing its legality. And as recently as World War II, the Supreme Court upheld the use of military tribunals, and ruled that the Geneva Conventions are not enforceable by individuals in U.S. courts but may be enforced only through diplomatic means.

. . . And as if Hamdan did not face enough hurdles, after the Supreme Court agreed to hear his case, Congress passed a law that appeared to be designed to strip the Supreme Court of its jurisdiction to hear the case. . . .

. . . .

The fact that the Court decided the case at all in the face of Congress's efforts to strip the Court of jurisdiction is remarkable in itself. That the Court then broke away from its history of judicial deference to security claims in wartime to rule against the President, not even pausing at the argument that the decisions of the commander in chief are "binding on the courts," suggests how

217 See Devins, *supra* note 28, at 1581.

218 For example, President Bush's main post-September 11 constitutional law advisor on the War on Terrorism argued that the Court had ignored both the directive of Congress to refrain from exercising jurisdiction and its own precedent validating military tribunals. See Yoo, *supra* note 63, at 99–103.

troubled the Court's majority was by the President's assertion of unilateral executive power.²¹⁹

Professor Cole did not explain how merely feeling "troubled" permits five Justices to disregard their long-established legal duties to honor the decision of Congress to remove the Court's jurisdiction and to defer to the President's discretionary determination that a foreign enemy combatant should be tried by a military commission.²²⁰ Similarly, Martin Flaherty, a distinguished scholar of constitutional law and human rights, admitted that Congress probably had enacted the DTA to repeal the Court's jurisdiction in *Hamdan*, but praised the Court for asserting power anyway and courageously thwarting President Bush.²²¹ Perhaps most significantly, Hamdan's own attorney, Georgetown Law Professor Neal Katyal, had acknowledged in an earlier article that *Quirin* was directly on point in supporting the President's power to establish military commissions.²²²

In short, *Hamdan*'s legal analysis was so unpersuasive, even to those who favored the result, that it cried out for an alternative explanation.²²³ Again, three practical factors appear to have influenced the Court most heavily.

219 David Cole, *Why the Court Said No*, N.Y. REV. BOOKS, Aug. 10, 2006, at 41, 41–42.

220 Although Professor Cole wisely did not even attempt to rationalize the Court's usurpation of jurisdiction in the teeth of a contrary Act of Congress, he did suggest that the majority had properly concluded that Bush asserted "unilateral" power. *Id.* at 42–43. I do not find that statutory interpretation plausible—and neither did Congress, which immediately overturned it. *See infra* Part II.D. But even if I agreed with the majority that President Bush lacked statutory authorization, precedent dictated judicial respect for his independent military judgments under Article II—as Cole essentially concedes by noting that "the Court then broke away from its history of judicial deference to security claims in wartime." Cole, *supra* note 219, at 42.

221 *See* Martin S. Flaherty, *More Real than Apparent: Separation of Powers, the Rule of Law, and Comparative Executive "Creativity" in Hamdan v. Rumsfeld*, 2005–2006 CATO SUP. CT. REV. 51, 57–58, 82. Many other liberal academics have questioned the Court's statutory interpretation. *See* Barron & Lederman, *Commander in Chief, Part I*, *supra* note 19, at 703–04 (citing Burt Neuborne and Cass Sunstein, among others).

222 *See* Katyal & Tribe, *supra* note 78, at 1283–90 (making this concession, but arguing that *Quirin* should not be treated as a controlling precedent because it had been decided in a factual and legal context quite different from that presented by the War on Terrorism).

223 *See* Tushnet, *supra* note 112, at 1451–72 (contending that *Hamdan*, which held merely that Congress had not authorized Bush's military commissions, illustrates the recurrent theme that constitutional "law" concerning emergency powers depends upon interactions between the political branches, not substantive rules applied by courts). A few *Hamdan* supporters, however, have tried to defend the Court's decision on its own legal terms. *See, e.g.*, Harold Hongju Koh, *Setting the World Right*, 115 YALE L.J. 2350 (2006) (praising the Court for properly rejecting the Bush administration's exorbitant claims of unilateral war powers and instead restoring *Youngstown's*

First, the September 11 emergency had long since passed, the terrorists had not attacked America again, and domestic life had returned to normal—unlike past military struggles that required the continuous mobilization of all Americans to ensure our very survival as a nation, such as the Civil War and World War II.²²⁴ Under these relatively calm circumstances, Justice Stevens and his four colleagues apparently felt that President Bush did not need to convene military commissions because existing tribunals (such as courts martial) would suffice. The dissenters, on the other hand, would have deferred to the President because they deemed the War on Terrorism to be an urgent and ongoing struggle.²²⁵

Second, the majority viewed the government's actions as threatening fundamental due process values and the sacred writ that secured them, habeas corpus.²²⁶ For example, Justice Stevens explicitly said that he interpreted the DTA as not stripping the Court of jurisdiction in order to avoid the “grave” question of whether such a repeal would amount to an unconstitutional suspension of habeas.²²⁷ Likewise, the Court's tortured constructions of the AUMF and UCMJ suggested a desire to sidestep the issue of whether the military commissions' manner of appointment, structure, and procedures were so heavily weighted against the detainees as to violate the Due Process Clause.²²⁸ The dissenters eschewed such strained statutory interpreta-

balanced constitutional approach, in which Congress and the courts play meaningful roles in military decisionmaking).

224 See Goldsmith & Sunstein, *supra* note 78, at 280–82 (emphasizing that the legal intelligentsia supported military commissions in World War II but not in the War on Terrorism, which they view as a minor skirmish that has caused few changes or sacrifices in daily life); see also Stephen Ellmann, *The “Rule of Law” and the Military Commission*, 51 N.Y.L. SCH. L. REV. 761, 762–65 (2006–2007) (stressing that the passage of time after the initial shock of September 11th invited growing public and judicial skepticism about the executive's bold assertions of inherent power).

225 See *Hamdan v. Rumsfeld*, 548 U.S. 557, 705 (2006) (Thomas, J., dissenting) (“We are not engaged in a traditional battle with a nation-state, but with a worldwide, hydra-headed enemy, who lurks in the shadows conspiring to reproduce the atrocities of September 11, 2001 [The majority's decision] sorely hamper[s] the President's ability to confront and defeat a new and deadly enemy.”).

226 See Devins, *supra* note 28, at 1484–85 (observing that the Court sees its special role as protecting individual rights and is therefore particularly sensitive to restrictions on habeas corpus).

227 *Hamdan*, 548 U.S. at 575–76 (majority opinion).

228 Significantly, *Hamdan*'s lead attorney offered this explanation for the outcome. See Neal Kumar Katyal, Comment, *Hamdan v. Rumsfeld: The Legal Academy Goes to Practice*, 120 HARV. L. REV. 65, 74–75, 87–91 (2006); see also *id.* at 97–105 (maintaining that the Court's statutory construction was influenced by constitutional considerations implicated by the President's assertion of unlimited Article II power to

tions because they saw no constitutional problems: practice and precedent had established that alien enemy combatants outside of the United States had no right to habeas and could be tried by military commissions.²²⁹

Third, the Court knew President Bush would not defy its judgment. He had not done so after *Hamdi* and *Rasul*, and he was now in an even weaker political position. The main reason was the Bush administration's inept execution of the Iraq War, which dragged on at a huge cost and thereby exacerbated the economic problems wrought by the September 11 attacks and other factors. Bush's approval rating had sunk to an all-time low of thirty-one percent,²³⁰ and his party would soon lose control of Congress.²³¹ Furthermore, the Court technically held only that no statute had repealed its jurisdiction or authorized military tribunals, which meant that Bush could seek congressional action on both issues without running afoul of the Court's order.²³² As Justice Breyer summarized the majority opinion:

The Court's conclusion ultimately rests upon a single ground: Congress has not issued the Executive a "blank check." Indeed, Congress has denied the President the legislative authority to create military commissions of the kind at issue here. Nothing prevents the President from returning to Congress to seek the authority he believes necessary.²³³

Nonetheless, these official pronouncements were like an iron fist inside a velvet glove. As with *Rasul*, the majority distorted the relevant legislation and precedent so blatantly as to invite the conclusion that they simply wished to send a message to President Bush and Congress: Do not again attempt to take away federal court jurisdiction over the

create military tribunals, formulate their procedural rules, and change those rules at any time).

229 See *supra* Part I.B.1.

230 See Adam Nagourney & Megan Thee, *Poll Gives Bush His Worst Marks Yet on Major Issues*, N.Y. TIMES, May 10, 2006, at A1.

231 For a detailed account of the 2006 congressional elections, which shifted control from the Republicans to the Democrats, see Jason Manning & Alyson Hurt, Wash. Post, 2006 Election Results, <http://projects.washingtonpost.com/elections/keyraces/map> (last visited Mar. 3, 2009); see also Devins, *supra* note 28, at 1589–94 (pointing out that the Court in *Hamdan*, as in *Youngstown*, checked an unpopular President who had claimed sweeping powers to wage war despite heavy public criticism).

232 See Devins, *supra* note 28, at 1586–94 (arguing that the *Hamdan* Court cleverly asserted judicial supremacy yet depicted itself as modestly attempting to preserve the prerogatives of Congress, thereby avoiding a clash with the legislative branch while at the same time keeping open its option to reach the constitutional question in a later case).

233 *Hamdan*, 548 U.S. at 636 (Breyer, J., concurring) (citation omitted).

Guantanamo detainees or to try them by military commissions. If you have the audacity to do so—to amend the statutes to make clear that you meant what you said originally—we will find a way to strike them down as unconstitutional.

But the political branches did not get (or did not heed) the message. Instead, they accepted at face value, perhaps gullibly, the notion that *Hamdan* was simply about lack of statutory authorization.²³⁴ The struggle between the Court and the political branches, however, was not about law but about power—who would ultimately control antiterrorism policy?²³⁵ It is quite possible that Congress and the President understood this point, and decided once and for all to let the Court know they were in charge. Whether out of naiveté or stubbornness, the political branches set up another clash with the Court.

D. Boumediene: A New Constitutional Right to Habeas for Foreign Enemies

Congress quickly overturned *Hamdan*'s two key statutory interpretations by passing the Military Commissions Act (MCA) on October 17, 2006.²³⁶ First, section 7(a) amended the DTA to make clear that “[n]o court, justice, or judge shall have jurisdiction to hear” either (1) “an application for a writ of habeas corpus filed by . . . an alien . . . who has been determined by the United States to have been properly detained as an enemy combatant,” or (2) “any other action . . . relating to any aspect of [his] detention, transfer, treatment, trial, or con-

234 For example, President Bush said he took the Court's opinion “very seriously” and would cooperate with Congress to enact legislation that addressed the majority's concerns. See Charlie Savage, *Justices Deal Bush Setback on Tribunals*, BOSTON GLOBE, June 30, 2006, at A1; see also Stephen I. Vladeck, *Congress, the Commander-in-Chief, and the Separation of Powers After Hamdan*, 16 TRANSNATIONAL L. & CONTEMP. PROBS. 933, 934–41, 956–94 (2007) (maintaining that the Court genuinely sought to protect the constitutional role of Congress in limiting the President's exercise of war powers).

235 See Jana Singer, *Hamdan as an Assertion of Judicial Power*, 66 MD. L. REV. 759 (2007) (contending that *Hamdan* primarily concerned not the appropriate relationship between the President and Congress but rather the Court's injection of itself as a key player in national security disputes that implicated individual rights, and therefore predicting (correctly) that the Court would aggressively resist the MCA); see also Jesse Choper & John Yoo, *Wartime Process: A Dialogue on Congressional Power to Remove Issues from the Federal Courts*, 95 CAL. L. REV. 1243, 1248–52 (2007) (debating Professor Yoo's proposition that the Court's plainly mistaken statutory interpretations in *Hamdi* and *Hamdan* reflected the political miscalculation that Congress would back down).

236 Pub. L. No. 109-366, 120 Stat. 2600 (codified as amended at scattered sections of 10, 18, 28, 42 U.S.C.).

ditions of confinement.”²³⁷ Second, section 7(b) provided that these amendments “shall take effect on the date of the enactment of this Act, and shall apply to all cases, without exception, pending on or after th[at] date.”²³⁸

These words spelled out the intent of Congress with such emphatic clarity that they left no room for any interpretive sleight of hand. Thus, in *Boumediene v. Bush*, the Court unanimously held that section 7 of the MCA had denied all federal courts jurisdiction to consider the habeas petitions of alien enemy combatants at Guantanamo, including cases pending at the time of the statute’s enactment.²³⁹

Nonetheless, the same five Justices in the *Hamdan* majority joined an opinion authored by Justice Kennedy holding that: (1) the Constitution extended the privilege of habeas corpus to these petitioners; (2) Congress had effectively suspended the writ, and its DTA procedures were an inadequate substitute for habeas; and (3) the detainees did not have to exhaust the DTA remedy of review in the D.C. Circuit before proceeding with their habeas actions in the district courts.²⁴⁰ Chief Justice Roberts and Justice Scalia wrote separate dissents, joined by Justices Thomas and Alito, disputing each of these points.²⁴¹ *Boumediene* can best be understood by examining the majority and dissenting opinions on the three main issues: exhaustion, the reach of the Suspension Clause, and the adequacy of the DTA procedures.

1. Requiring Exhaustion to Avoid the Constitutional Question

Chief Justice Roberts argued that the Court should have made petitioners exhaust their remedies under the DTA, thereby honoring the congressional choice to commit to the D.C. Circuit initial review of whether the CSRT procedures were consistent with the Constitution.²⁴² If the D.C. Circuit determined that those procedures protected whatever due process rights alien detainees might possess under *Hamdi* (an issue the majority refused to address), then no additional process would be needed, whether labeled “habeas” or otherwise.²⁴³ Therefore, the Chief Justice contended, declining jurisdiction would implement the fundamental principle that the Court should

237 See *id.* § 7(a), 120 Stat. at 2635–36 (codified at 28 U.S.C. § 2241 (e)(1)–(2) (2006)), declared unconstitutional by *Boumediene v. Bush*, 128 S. Ct. 2229 (2008).

238 *Id.* § 7(b), 120 Stat. at 2636 (codified at 28 U.S.C. § 2241 note (2006)).

239 *Boumediene v. Bush*, 128 S. Ct. 2229, 2242–44 (2008).

240 See *id.* at 2244–77.

241 See *id.* at 2279–93 (Roberts, C.J., dissenting); *id.* at 2293–307 (Scalia, J., dissenting).

242 *Id.* at 2279–81 (Roberts, C.J., dissenting).

243 *Id.* at 2281.

avoid deciding constitutional questions (here, about the Suspension Clause) until absolutely necessary.²⁴⁴

Justice Kennedy, however, concluded that the Court had to depart from this rule of self-restraint because of the “grave” constitutional issues and the need to avoid further delay, since some of the petitioners had been held for as long as six years.²⁴⁵ Hence, the Court took jurisdiction, decided that the Suspension Clause protected the alien detainees, and remanded to the District Court with instructions to adapt normal habeas proceedings in light of “[p]ractical considerations and exigent circumstances.”²⁴⁶

Chief Justice Roberts had two responses. First, the rule against deciding constitutional questions prematurely applied with special force when they were “grave.”²⁴⁷ Second, the majority had launched a system that would take *longer* than the DTA proceedings, because before getting to the D.C. Circuit—where petitioners could go immediately under the DTA, despite their failure to do so for over two years—they would have to endure litigation in federal trial courts, which had been given the onerous task of designing new habeas procedures.²⁴⁸ These arguments, however, did not dissuade the majority from reaching the merits.

2. The Applicability of the Suspension Clause to Alien Enemies Located Outside of the United States

All of the Justices agreed on three points. First, judicial deference to the constitutional judgments of the political branches was at its zenith in national security cases.²⁴⁹ Second, the Court had never interpreted the Suspension Clause as protecting alien enemy combatants captured and detained outside of the United States’ sovereign

244 *Id.* at 2283.

245 *See id.* at 2262–63, 2274–75, 2777 (majority opinion); *see also id.* at 2278–79 (Souter, J., concurring) (asserting that these delays cast doubt upon the arguments of Chief Justice Roberts that (1) the military justice system and D.C. Circuit would handle these claims in a reasonable time period, and (2) the Court was usurping power from the political branches, rather than merely trying to make habeas review meaningful despite their foot-dragging). The majority cautioned that, absent such an undue delay, federal courts should refrain from entertaining a detainee’s habeas petition at least until the CSRT had reviewed his status. *Id.* at 2275–76 (majority opinion).

246 *Id.* at 2275–77 (majority opinion) (stressing the practical need to accommodate to the greatest extent possible the government’s legitimate interest in protecting classified information, including sources and intelligence-gathering methods).

247 *Id.* at 2282 (Roberts, C.J., dissenting).

248 *Id.*

249 *See id.* at 2276–77 (majority opinion); *id.* at 2296–97 (Scalia, J., dissenting).

territory, and *Eisentrager* had rejected such a claim.²⁵⁰ Third, the Clause incorporated the practice of England’s common law courts, which similarly had never in a reported case extended the habeas corpus writ extraterritorially to foreigners.²⁵¹

Given this legal background, Justice Scalia and his fellow dissenters reached the logical conclusion that the Court should respect the government’s determination that noncitizen enemy combatants apprehended overseas and confined in Cuba did not enjoy the constitutional privilege of habeas corpus.²⁵² The Court managed to hold the opposite by rewriting history and its own precedents. To understand this point, it is necessary to compare the opinions of Justices Kennedy and Scalia on the original meaning of the Suspension Clause and the cases interpreting it.

a. The Framing-Era Understanding of the Habeas Guarantee

Both the majority and dissent recognized that the Constitution’s prohibition against suspending “[t]he Privilege of the Writ of Habeas Corpus” was intended to preserve the writ as it existed at the time of the Founding.²⁵³ Justice Scalia demonstrated that all the historical evidence established that the English common law writ, as codified in the Habeas Corpus Act, extended only to territories subject to the Crown’s sovereignty (the “King’s dominions”)—including certain areas like Wales and Berwick that were not part of “the realm” (that is, England proper).²⁵⁴ Conversely, the habeas writ could not issue to other nations where the Crown was not sovereign, such as Scotland, which was part of Great Britain but treated as a foreign dominion under the King of Scotland.²⁵⁵ Justice Scalia repeatedly cited Chief Justice Mansfield’s definitive analysis in *Rex v. Cowle*²⁵⁶ (involving Berwick), which is helpful to quote verbatim:

[W]rits of . . . habeas corpus . . . may issue to every dominion of the Crown of England.

250 See *id.* at 2262 (majority opinion); *id.* at 2278 (Souter, J., concurring); *id.* at 2293–94 (Scalia, J., dissenting).

251 See *id.* at 2248–51 (majority opinion); *id.* at 2297–98, 2303–06 (Scalia, J., dissenting).

252 See *id.* at 2293–307 (Scalia, J., dissenting).

253 See *id.* at 2247–48 (majority opinion); *id.* at 2303 (Scalia, J., dissenting).

254 See *id.* at 2303–05 (Scalia, J., dissenting); see also *id.* at 2249–51 (majority opinion) (rejecting petitioners’ argument that Guantanamo Bay was analogous to areas that were not part of England’s “realm” but were formally considered to be part of its sovereign territory).

255 See *id.* at 2304–05 (Scalia, J., dissenting).

256 (1759) 97 Eng. Rep. 587 (K.B.).

There is no doubt as to the power of this Court [the King's Bench]; where the place is under the subjection of the Crown of England; the only question is, as to the propriety.

To foreign dominions, which belong to a prince who succeeds to the throne of England, this Court has no power to send any writ of any kind. We cannot send a habeas corpus to Scotland²⁵⁷

In other words, English courts had undoubted “power” to issue habeas writs “to every dominion” subject to “the Crown of England” (although “the propriety” of doing so might raise a discretionary “question,” especially in areas like Berwick), whereas judges had “no power” to send a writ “[t]o foreign dominions” like Scotland. Justice Scalia accused the majority of “mischaracterizing” Lord Mansfield’s language²⁵⁸ to suggest that, when English courts did not have “power” to issue habeas writs in foreign territories such as Scotland, it was unclear whether they lacked *jurisdiction* to issue such writs or refrained from doing so for *prudential* reasons (for example, to avoid conflict with Scotland, which had its own court system and law).²⁵⁹

Justice Kennedy’s recharacterization of *Cowle* enabled him to maintain that such prudential barriers had no relevance to Guantanamo, where Cuban courts have no jurisdiction, American law applies, and federal court judgments presumably will be obeyed.²⁶⁰ This reinterpretation of *Cowle* also provided the main support for the majority’s determination that English precedents and legal commentaries were “inconclusive” as to whether a common law court would have granted a habeas petition by a foreigner detained outside of a nation’s sovereign territory, but within its military and civil control.²⁶¹ The Court then surmised that the touchstone of English habeas juris-

257 *Id.* at 599–600; *see also Boumediene*, 128 S. Ct. at 2304–05 (Scalia, J., dissenting) (quoting this passage in part).

258 *See Boumediene*, 128 S. Ct. at 2305 (Scalia, J., dissenting).

259 *See id.* at 2249–50 (majority opinion) (citing *Cowle*, 97 Eng. Rep. at 600).

260 *See id.* at 2251–53.

261 *See id.* at 2248–51. Justice Kennedy also noted that the historical record was incomplete, especially because most reports of habeas proceedings had not been printed. *See id.* at 2251 (citing a manuscript later published as Paul D. Halliday & G. Edward White, *The Suspension Clause: English Text, Imperial Contexts, and American Implications*, 94 VA. L. REV. 575 (2008)). *But see infra* notes 334–39 and accompanying text (contending that the original meaning of the Suspension Clause likely reflected the understanding of habeas corpus set forth in publicly available case reports and commentaries by authoritative eighteenth-century English legal figures like Mansfield and Blackstone, not in obscure and unpublished records).

diction may have been *de facto* (i.e., practical) control over a territory rather than *de jure* (i.e., legal and technical) sovereignty.²⁶²

As Justice Scalia argued, however, even if the English law incorporated into the Suspension Clause were inconclusive as to whether the habeas writ extended to aliens in another country, that indefiniteness would mean that the majority had no basis to strike down the interpretation of that Clause by Congress and the President as not covering foreign enemy combatants in Guantanamo.²⁶³ The Court avoided its duty to defer to the political branches' reasonable constitutional judgments about military affairs by construing the Suspension Clause in light of "separation of powers" principles, which assertedly gave the judiciary a unique role in protecting detainees from "manipulation" of habeas by the Legislature and Executive.²⁶⁴ Justice Scalia retorted that such principles

262 See *Boumediene*, 128 S. Ct. at 2251–53. The majority did not cite a single case mentioning such a *de facto* control test for determining habeas jurisdiction for aliens held outside of England's sovereign territory. Furthermore, "this novel *de facto-de jure* approach does not explain why the writ never issued to Scotland, which was assuredly within the *de facto* control of the English Crown." *Id.* at 2299 n.3 (Scalia, J., dissenting).

263 *Id.* at 2296–97 (Scalia, J., dissenting).

264 Justice Kennedy emphasized that the Suspension Clause must be interpreted in light of the centrality of the habeas writ to the Framers as a safeguard of individual liberty, as evidenced by their careful specification of the limited grounds for its suspension: only in times of rebellion or invasion, and only when public safety so requires. *Id.* at 2244–47 (majority opinion). Thus, except during rare periods of formal suspension of the writ, the judiciary had a duty to protect detainees from abuses by the executive and legislative branches, which had occurred cyclically in English history. See *id.* at 2244–45 (citing a manuscript by Professors Halliday and White, *supra* note 261, describing how the King's courts initially fashioned the common law habeas writ to protect his interest in securing compliance with his laws by examining a government jailer's authority to hold a prisoner); see also *id.* at 2245–47 (tracing the gradual development of habeas as a mechanism to check the Crown's power by protecting citizens' liberty, but noting its frequent denial by courts or suspension by Parliament in times of political unrest—problems which continued even after passage of the Habeas Corpus Act of 1679).

The majority concluded that "[t]he separation-of-powers doctrine, and the history that influenced its design, therefore must inform the reach and purpose of the Suspension Clause." See *id.* at 2247; see also *id.* at 2253 (asserting that accepting the government's sovereignty-based test for constitutional habeas jurisdiction would be "contrary to fundamental separation-of-powers principles"); *id.* at 2259 (maintaining that, because the habeas writ is "an indispensable mechanism for monitoring the separation of powers," the standards governing its extraterritorial scope "must not be subject to manipulation by those whose power it is designed to restrain"); *id.* at 2277 ("Within the Constitution's separation-of-powers structure, few exercises of judicial power are as legitimate or as necessary as . . . hear[ing] challenges to the authority of

are to be derived not from some judicially imagined matrix, but from the sum total of the individual separation-of-powers provisions that the Constitution sets forth. Only by considering them one-by-one does the full shape of the *Constitution's* separation-of-powers principles emerge. It is nonsensical to interpret those provisions themselves in light of some general “separation-of-powers principles” dreamed up by the Court. Rather, they must be interpreted to mean what they were understood to mean when the people ratified them. And if the understood scope of the writ of habeas corpus was “designed to restrain” (as the Court says) the actions of the Executive, the understood *limits* upon that scope were (as the Court seems not to grasp) just as much “designed to restrain” the incursions of the Third Branch. “Manipulation” of the territorial reach of the writ by the Judiciary poses just as much a threat to the proper separation of powers as “manipulation” by the Executive. . . . [M]anipulation is what is afoot here. The understood limits upon the writ deny our jurisdiction over the habeas petitions brought by these enemy aliens, and entrust the President with the crucial wartime determinations about their status and continued confinement.²⁶⁵

In short, the majority invoked “separation of powers” notions to conclude that, because courts must thwart political abuses of the habeas writ, English common law cases should be read as recognizing judicial discretion to issue the writ to aliens held outside of England’s sovereign territory but within its practical control. This innovative methodology, which enabled the Court to revise English history, yielded the same result when applied to American precedents.

b. Case Law on the Suspension Clause

The majority and dissent agreed that the most relevant decision was *Johnson v. Eisentrager*,²⁶⁶ which involved Germans who had been apprehended in China, convicted there of war crimes by an American military commission, and transferred to a military prison in the American Zone of occupied post-war Germany.²⁶⁷ Writing for the Court, Justice Jackson rejected the German detainees’ application for a habeas writ on the following basis:

the Executive to imprison a person . . . [through] habeas corpus, a right of first importance . . .”).

265 *Id.* at 2297–98 (Scalia, J., dissenting).

266 *Eisentrager* is discussed in *Boumediene*, 128 S. Ct. at 2257–58 (majority opinion), and *id.* at 2298–302 (Scalia, J., dissenting). See *supra* notes 89–93 and accompanying text (analyzing *Eisentrager*).

267 See *Johnson v. Eisentrager*, 339 U.S. 763, 765–66 (1950).

We are cited to no instance where a court, in this or any other country where the writ is known, has issued it on behalf of an enemy alien who, at no relevant time and in no stage of his captivity, has been within its territorial jurisdiction. Nothing in the text of the Constitution extends such a right, nor does anything in our statutes.²⁶⁸

As Justice Scalia noted, the *Eisentrager* opinion repeatedly reinforced this quoted language to make clear that territorial sovereignty determined habeas jurisdiction over a foreigner²⁶⁹: “*Eisentrager* thus held—held beyond any doubt—that the Constitution does not ensure habeas for aliens held by the United States in areas over which our Government is not sovereign.”²⁷⁰

Justice Kennedy conceded that the Court in *Eisentrager* had denied the writ because the prisoners “‘at no relevant time were within any territory over which the United States is sovereign, and [that] the scenes of their offense, their capture, their trial, and their punishment were all beyond the territorial jurisdiction of any court of the United States.’”²⁷¹ He insisted, however, that this language did not mean that *Eisentrager* had “adopted a formalistic, sovereignty-based test for determining the reach of the Suspension Clause.”²⁷² He offered two reasons for this conclusion, each of which Justice Scalia disputed.

First, Justice Kennedy speculated that, because the United States lacked both *de jure* and *de facto* sovereignty over the German prison, the Court did not necessarily use “sovereignty” in the technical legal sense.²⁷³ Justice Scalia identified the obvious flaw in this reasoning: the United States surely exercised practical *de facto* control over a

268 *Id.* at 768.

269 *See, e.g., Boumediene*, 128 S. Ct. at 2298 (Scalia, J., dissenting) (“‘[I]n extending constitutional protections beyond the citizenry, the Court has been at pains to point out that it was the alien’s presence within its territorial jurisdiction that gave the Judiciary power to act.’” (quoting *Eisentrager*, 339 U.S. at 771)); *id.* at 2298 (noting that *Eisentrager*, 339 U.S. at 779, had distinguished *Ex parte Quirin* and *In re Yamashita*, which both permitted enemy aliens to seek habeas relief (albeit unsuccessfully), on the ground that those detainees had been in custody within “our sovereignty”).

270 *Id.* at 2298–99.

271 *Id.* at 2257 (majority opinion) (quoting *Eisentrager*, 339 U.S. at 778).

272 *Id.* at 2257.

273 *Id.* at 2252–53, 2257. Justice Kennedy further maintained that, even if the Court in *Eisentrager* had deemed America’s lack of formal sovereignty over the prison to be the decisive factor, “its holding is not inconsistent with a functional approach to questions of extraterritoriality. The formal legal status of a given territory affects . . . the political branches’ control over that territory. *De jure* sovereignty is a factor that bears upon which constitutional guarantees apply there.” *Id.* at 2258.

prison in the American Zone of occupation, so *Eisentrager* must have turned on formal sovereignty.²⁷⁴

Second, the majority noted that the *Eisentrager* opinion devoted considerable attention to the characteristics of the German prisoners and to the practical difficulties of ordering the United States to produce them for habeas proceedings (for instance, shipping and guarding them).²⁷⁵ In response, Justice Scalia showed that Justice Jackson had set forth such factors not in application of some “functional” test, but rather to illustrate that the case represented a particularly easy application of the black-letter rule that aliens (whether friendly or hostile) could not invoke habeas jurisdiction unless they were present within America’s sovereign territory.²⁷⁶ He concluded that the majority had engaged in “a sheer rewriting” of the controlling case:

Eisentrager mentioned practical concerns—but not for the purpose of determining *under what circumstances* American courts could issue writs of habeas corpus for aliens abroad. It cited them to support *its holding* that the Constitution does not empower courts to issue writs of habeas corpus to aliens abroad *in any circumstances*. . . .

274 See *id.* at 2299 n.3 (Scalia, J., dissenting).

275 *Id.* at 2257–58 (majority opinion) (citing *Eisentrager*, 339 U.S. at 779, 781).

276 See *id.* at 2299–300 (Scalia, J., dissenting) (citing *Eisentrager*, 339 U.S. at 771, 777–78). Justice Kennedy also claimed that reading *Eisentrager* as formulating a narrow test of de jure sovereignty in determining the extraterritorial reach of the Constitution would be inconsistent with the approach focusing on “practical considerations” taken in earlier decisions. See *Boumediene*, 128 S. Ct. at 2253–58 (majority opinion).

For example, *The Insular Cases* established that the Constitution applied in full to territories Congress had incorporated into the United States that were surely destined for statehood, but only in part to unincorporated territories depending upon their unique circumstances (such as the sophistication of their legal systems). See *Dorr v. United States*, 195 U.S. 138, 139–43 (1904); *Downes v. Bidwell*, 182 U.S. 244, 286–87 (1901). In Justice Kennedy’s view, these decisions recognized that “practical considerations” might lead the Court to apply constitutional provisions to non-citizens in territories over which the United States did not have de jure sovereignty. See *Boumediene*, 128 S. Ct. at 2253–55. The dissenters replied that *The Insular Cases* undercut the majority’s holding because they involved American territories that were unquestionably part of the United States’ sovereign territory. *Id.* at 2300–01 (Scalia, J., dissenting).

The Court also invoked *Reid v. Covert*, 354 U.S. 1 (1957), which had ruled that American civilians, who were married to servicemen and living on American military bases in England and Japan, had been denied their constitutional right to a jury trial when they had been convicted by military courts. *Id.* at 4–5, 38–41. Justice Kennedy acknowledged that the Court in *Reid* had identified petitioners’ American citizenship as a key factor, but claimed that the Court also had weighed practical concerns like the place of their confinement and trial. *Boumediene*, 128 S. Ct. at 2255–56. Justice Scalia responded that *Reid* focused exclusively on the rights of American *citizens* abroad, and had nothing to do with aliens. See *id.* at 2301–02 (Scalia, J., dissenting).

....

. . . *Eisenstrager* nowhere mentions a “functional” test, and the notion that it is based upon such a principle is patently false.²⁷⁷

Unmoved, Justice Kennedy again maintained that reading decisions like *Eisenstrager* as giving the political branches power to determine when and where the Constitution governs would let them displace the Court in constitutional interpretation, which would be especially troubling as to habeas because that writ was designed to monitor those branches.²⁷⁸ Accordingly, the majority gleaned from its cases three factors, which it applied to hold that the United States’ plenary de facto control over Guantanamo Bay—not its formal disclaimer of sovereignty in the 1903 treaty with Cuba—should determine the foreign prisoners’ habeas rights under the Suspension Clause.²⁷⁹

The first consideration was “the citizenship and status of the detainee and the adequacy of the process through which that status determination was made.”²⁸⁰ Justice Kennedy acknowledged that the petitioners’ non-American citizenship cut against them, but deemed it more important that they had contested their “enemy combatant” status (unlike the *Eisenstrager* prisoners) and that the CSRT did not provide a “rigorous adversarial process” to determine their status reliably.²⁸¹ To Justice Scalia, this analysis produced the “crazy result” that alien enemy combatants who had been sentenced to death by military commissions after the end of a war had no judicial remedy (*Eisenstrager*), whereas those who merely were being held during an ongoing conflict had an immediate right to a habeas proceeding—and perhaps to release before their trial by a military commission.²⁸² He contended that the Guantanamo detainees were akin not to those in *Eisenstrager*, but rather to the prisoners of war held by the United

277 See *id.* at 2299–300 (Scalia, J., dissenting).

278 *Id.* at 2259 (majority opinion). But see *id.* at 2302–03 (Scalia, J., dissenting) (arguing that the majority failed to grasp that the Constitution sometimes leaves constitutional decisions to the political branches and that the Court can legitimately expound the law only in cases over which it has constitutional and statutory jurisdiction—which is lacking in habeas actions involving alien enemies).

279 *Id.* at 2252–53, 2259–62 (majority opinion).

280 *Id.* at 2259.

281 See *id.* at 2259–60; see also *id.* at 2260 (emphasizing that the CSRT procedures failed to provide detainees with an attorney, accorded the government’s evidence a presumption of validity, and did not allow the accused to obtain all evidence that might rebut the government’s charges).

282 See *id.* at 2302 (Scalia, J., dissenting).

States during World War II—none of whom received habeas protection, even the 400,000 detained on American soil.²⁸³

Second, the Court evaluated “the nature of the sites where apprehension and then detention took place.”²⁸⁴ Justice Kennedy admitted that the petitioners, like the *Eisentrager* inmates, were technically outside the United States.²⁸⁵ Nonetheless, he contrasted America’s exclusive and longstanding control over Guantanamo Bay with its shared and short-term jurisdiction over occupied Germany, where it had to account to the other Allied forces.²⁸⁶ As Justice Scalia argued, however, the *Eisentrager* Court never mentioned such factors, but it did hold that alien enemies captured and detained beyond U.S. borders had no privilege of habeas corpus.²⁸⁷

Third, the majority focused on “the practical obstacles inherent in resolving the prisoner’s entitlement to the writ,”²⁸⁸ which in *Eisentrager* had included significant costs and diverting the attention of military personnel responsible for a large area and population consisting of a defeated enemy that might engage in guerrilla warfare.²⁸⁹ Justice Kennedy contrasted Germany with Guantanamo—a small, isolated, fortified, American-controlled base where extending habeas corpus jurisdiction would not “apparent[ly]” compromise the military mission.²⁹⁰ Justice Scalia countered that the Court lacked any institutional competence to second-guess the judgment of Congress and the President that these habeas actions would hamper the war effort because of the same diversion of military resources and costs noted in *Eisentrager*.²⁹¹

Justice Kennedy concluded that the unusual circumstances of Guantanamo and the length of the War on Terrorism (and hence of the detainees’ confinement) “lack[ed] any precise historical parallel.”²⁹² Accordingly, it was irrelevant that

283 *See id.*

284 *Id.* at 2259 (majority opinion).

285 *Id.* at 2260.

286 *See id.* at 2260–61.

287 *See id.* at 2301 (Scalia, J., dissenting).

288 *Id.* at 2259 (majority opinion).

289 *See id.* at 2261 (citing *Johnson v. Eisentrager*, 339 U.S. 763, 784 (1950)).

290 *See id.* at 2261–62; *see also id.* at 2277 (“Our opinion does not undermine the Executive’s powers as Commander in Chief.”).

291 *See id.* at 2295–96 (Scalia, J., dissenting). Justice Kennedy insisted that judicial deference to the political branches in military affairs did not mean abdication, especially given that the War on Terrorism might be of unlimited duration. *See id.* at 2277 (majority opinion).

292 *Id.* at 2262.

the Court has never held that noncitizens detained by our Government in territory over which another country maintains *de jure* sovereignty have any rights under our Constitution. . . . [T]he lack of a precedent on point is no barrier to our holding.

We hold that [the Suspension Clause] has full effect at Guantanamo Bay.²⁹³

3. The Insufficiency of the DTA's Procedures

The majority ruled that section 7 of the MCA had unconstitutionally suspended the habeas writ because the DTA's provisions for reviewing detainees' status were not an adequate replacement for ordinary habeas procedures, for two reasons.²⁹⁴ First, section 1005(e)(2)(C) did not authorize the D.C. Circuit to inquire into the legality of detention generally, but rather limited that court to assessing whether the Defense Department's standards and procedures had been followed by the CSRT and whether they complied with the Federal Constitution and laws.²⁹⁵ Second, section 1005(e)(2)(A) gave the D.C. Circuit "exclusive jurisdiction" and no discretion to transfer any case to the district court to take advantage of its superior factfinding competence—an option available in ordinary habeas proceedings.²⁹⁶

293 *Id.* Justice Scalia took a decidedly less optimistic view:

[T]he Court warps our Constitution in a way that goes beyond the narrow issue of the reach of the Suspension Clause, invoking judicially brainstormed separation-of-powers principles to establish a manipulable "functional" test for the extraterritorial reach of habeas corpus It blatantly misdescribes important precedents, most conspicuously . . . *Eisentrager*. It breaks a chain of precedent as old as the common law that prohibits judicial inquiry into detentions of aliens abroad And, most tragically, it sets our military commanders the impossible task of proving to a civilian court, under whatever standards this Court devises in the future, that evidence supports the confinement of each and every enemy prisoner.

The Nation will live to regret what the Court has done today.

Id. at 2307 (Scalia, J., dissenting); see also Eric A. Posner, *Boumediene and the Uncertain March of Judicial Cosmopolitanism*, 2007–2008 CATO SUP. CT. REV. 23, 27–32 (contending that Justice Kennedy misread *Eisentrager* and unwisely traded its predictable rule for vague "functional" standards).

294 See *Boumediene*, 128 S.Ct. at 2262–75 (majority opinion). Justice Kennedy stressed that the two leading cases addressing habeas substitutes upheld them because Congress had streamlined habeas processes yet had retained the courts' broad remedial power to secure the historic purpose of the writ—including discretion to engage in ordinary habeas review as a last resort. See *id.* at 2264–65 (citing *Swain v. Pressley*, 430 U.S. 372 (1977); *United States v. Hayman*, 342 U.S. 205 (1952)). The DTA did not confer such judicial powers. See *id.* at 2265–66.

295 See *id.* at 2265–66.

296 See *id.* at 2266.

The Court concluded that the DTA's procedures failed to give petitioners a meaningful opportunity to show they were being confined unlawfully, the core purpose of habeas.²⁹⁷ Most significantly, Justice Kennedy asserted that a detainee could not effectively contest the CSRT's findings of fact, which might be erroneous because they were made without an ordinary adversarial hearing.²⁹⁸ And, even assuming the DTA could be construed as permitting the D.C. Circuit to review or correct the CSRT's determinations, the statute still had one fatal constitutional defect: the D.C. Circuit could not supplement the record on review with relevant exculpatory evidence discovered after the CSRT proceedings had ended.²⁹⁹

In dissent, Chief Justice Roberts emphasized that the Court had inexplicably ignored *Hamdi*, which recognized that the Due Process Clause allows habeas procedures for citizen-detainees to be restricted to protect national security and hence requires only "basic process"—notice of the charges and an opportunity to rebut them before a neutral decisionmaker (such as an impartial military tribunal).³⁰⁰ He

297 See *id.* at 2266, 2269, 2271–74. The majority expressed concern that the DTA did not explicitly empower the D.C. Circuit to consider a detainee's challenge to the President's authority under the AUMF to imprison him or to order the release of an individual adjudged to have been detained illegally. See *id.* at 2271–72, 2274. Nonetheless, Justice Kennedy concluded that the statute might be read as implicitly providing for such constitutionally required judicial authority. See *id.* at 2271–72; see also *id.* at 2291–92 (Roberts, C.J., dissenting) (agreeing with such an interpretation, and noting that the Court had long construed the general habeas corpus statute as impliedly conferring power to release any wrongfully held prisoner).

298 See *id.* at 2268–70, 2272–74 (majority opinion). For instance, the CSRT procedures did not afford a detainee the assistance of counsel, limited his ability to obtain classified information and present evidence, and allowed hearsay—all of which inhibited him from rebutting the factual basis for the government's conclusion that he was an enemy combatant. *Id.* at 2269.

299 See *id.* at 2272–74; see also *id.* at 2267–68, 2270 (pointing out that habeas courts in the nineteenth century had routinely added and evaluated such exculpatory evidence, and maintaining that such power was now constitutionally required for any habeas substitute). The Court acknowledged that habeas review could be more circumscribed if the underlying detention proceedings were more thorough. See *id.* at 2270. For example, in two cases arising out of World War II, the Court limited its review to determining whether the executive had legal authority to try petitioners by military commissions, which had followed adversarial processes in which the accused enjoyed appointed counsel. See *id.* at 2270–71 (citing *In re Yamashita*, 327 U.S. 1 (1946); *Ex parte Quirin*, 317 U.S. 1 (1942)).

300 See *id.* at 2283–86 (Roberts, C.J., dissenting) (citing *Hamdi v. Rumsfeld*, 542 U.S. 507, 525, 533–34, 538 (2004)). Similarly puzzling was the majority's criticism of the government's procedures as "limited," because habeas had long been recognized as a flexible remedy that could be restricted depending on a detainee's status and rights. See *id.* at 2286–87. Most pertinently, cases like *In re Yamashita* taught that alien

argued that Congress had complied with *Hamdi* by giving detainees notice, multiple levels of military review to determine whether they should be designated enemy combatants, and a hearing before the neutral CSRT to challenge the government's allegations by calling witnesses, taking testimony, and gathering documents.³⁰¹

Indeed, the Chief Justice noted that Congress had gone beyond *Hamdi*'s requirements, in two ways. First, the DTA extended due process rights to *noncitizen* detainees.³⁰² Second, Congress provided them with additional review in an Article III court, which could examine both whether the CSRT had complied with the Defense Department's standards and whether those rules violated the Constitution or other federal laws.³⁰³ Chief Justice Roberts lamented that Congress had implemented *Hamdi*'s suggestions, "only to find itself the victim of a constitutional bait and switch."³⁰⁴

He further argued that the DTA met even the majority's own criteria for an adequate alternative to habeas, because it gave petitioners a meaningful opportunity to challenge their detention as unlawful and granted the CSRT and the D.C. Circuit power to order their release.³⁰⁵ Indeed, the DTA afforded far more elaborate procedural protections than those that had been given enemy combatants or prisoners of war in the past, which had always passed constitutional muster.³⁰⁶ The Chief Justice then responded to the Court's four objections to the sufficiency of the DTA system.

First, he conceded that detainees did not have legal counsel at the CSRT proceedings.³⁰⁷ He pointed out, however, that the petition-

enemy combatants captured and held overseas in sovereign American territory did not enjoy the same habeas privileges as American citizens imprisoned domestically for ordinary crimes. *See id.* at 2286–87. In fact, the Court had held that enemy combatants had extremely narrow habeas protections, whether they were foreigners or citizens. *See id.* at 2286 (citing *Ex parte Quirin*, 317 U.S. 1, 25 (1942) (limiting review of a military commission verdict to determining whether the tribunal had jurisdiction)).

301 *See id.* at 2283–84.

302 *See id.* at 2284; *see also id.* at 2287 (stressing that accused enemy combatants who were aliens surely did not enjoy greater procedural rights than those who were American citizens).

303 *See id.* at 2284, 2289.

304 *Id.* at 2285.

305 *Id.* at 2287. He also expressed bewilderment that the majority would assert that the DTA was a constitutionally inadequate substitute for habeas without identifying what rights DTA or habeas review were supposed to protect. *See id.* at 2286. As the Court had not even bothered to describe those rights, it obviously could not explain how Congress had failed to protect them. *See id.*

306 *See id.* at 2289.

307 *See id.* at 2287–89.

ers did have the assistance of a Personal Representative before the CSRT and an attorney for the D.C. Circuit appeal.³⁰⁸

Second, the majority criticized the detainees' lack of unfettered access to classified information, which might help their defense.³⁰⁹ The Chief Justice replied that Congress had allowed the petitioners' Personal Representative (at the CSRT stage) and attorney (on appeal) to examine such confidential documents and summarize their substance to their clients—the first time enemy combatants had ever been made privy to any classified information.³¹⁰

Third, Justice Kennedy complained that the detainees could not confront all witnesses and that the CSRT could admit hearsay.³¹¹ Chief Justice Roberts countered that the detainees could confront (or call) any witnesses as long as they were “reasonably available”—a traditional requirement of military regulations—and that *Hamdi* had approved such restrictions (and the use of hearsay) in recognition of the government's interest in avoiding undue disruption of its military operations.³¹²

Fourth, the Court asserted that another problem singlehandedly rendered the DTA an inadequate substitute for habeas: the detainees could not introduce exculpatory evidence discovered after the CSRT proceedings.³¹³ The Chief Justice answered that these petitioners had the right to present evidence of their innocence before the CSRT and to have any negative ruling reviewed by the D.C. Circuit, and that the situation of later-unearthed evidence had not actually occurred and thus could not be the basis for striking down the DTA as facially

308 *See id.* at 2288–89.

309 *See id.* at 2269 (majority opinion).

310 *See id.* at 2288 (Roberts, C.J., dissenting). Moreover, he chided the Court for again failing to provide any concrete options:

What alternative does the Court propose? Allow free access to classified information and ignore the risk the prisoner may eventually convey what he learns to parties hostile to this country, with deadly consequences for those who helped apprehend the detainee? If the Court can design a better system for communicating to detainees the substance of any classified information relevant to their cases, without fatally compromising national security interests and sources, the majority should come forward with it.

Id.; *see also id.* at 2295 (Scalia, J., dissenting) (arguing that military intelligence revealed during the first World Trade Center bombing trial, which al Qaeda had used to facilitate the September 11 attacks, showed the foolishness of requiring the armed forces to divulge classified information).

311 *See id.* at 2269 (majority opinion).

312 *See id.* at 2287–88 (Roberts, C.J., dissenting).

313 *See id.* at 2271 (majority opinion).

unconstitutional.³¹⁴ Moreover, if that hypothetical scenario ever arose, the DTA did give the Defense Department, the CSRT, and the D.C. Circuit ample power to consider such exculpatory evidence.³¹⁵

Finally, Chief Justice Roberts deplored the majority's failure to explain how the district courts should design a habeas remedy that balanced the detainees' rights with national security interests—for example, how access to classified information could be tailored to avoid compromising vital military intelligence, how military officers stationed overseas could be called as witnesses without interfering with their duties, and how foreign witnesses in remote locations could be subpoenaed.³¹⁶ The Court's refusal to address these issues, and the fact that Congress and the President had devoted considerable effort to devising a system that did, led the Chief Justice to predict that the new "habeas" remedy would look a lot like the DTA procedures.³¹⁷ He ended with the following observations:

So who has won? Not the detainees. The Court's analysis leaves them with only the prospect of further litigation to determine the content of their new habeas right, followed by further litigation to resolve their particular cases, followed by further litigation before the D.C. Circuit—where they could have started had they invoked the DTA procedures. Not Congress, whose attempt to "determine—through democratic means—how best" to balance the security of the American people with the detainees' liberty interests, has been unceremoniously brushed aside. Not the Great Writ, whose majesty is hardly enhanced by its extension to a jurisdictionally quirky outpost, with no tangible benefit to anyone. Not the rule of law, unless by that is meant the rule of lawyers, who will now arguably have a greater role than military and intelligence officials in

314 See *id.* at 2289–91 (Roberts, C.J., dissenting).

315 First, the DTA permitted the D.C. Circuit to remand to the CSRT in light of newly found exculpatory evidence and then review the tribunal's decision. *Id.* at 2289–90 (citing sources). Second, Congress directed the Secretary of Defense to examine any new evidence relating to each detainee's status and, if material information is discovered, to order a CSRT to convene for reconsideration—again, followed by D.C. Circuit review. *Id.* at 2290 (citing statutory and regulatory provisions). Third, the DTA required the Defense Department to conduct an annual evaluation of each prisoner's status, with its findings reviewed by an appointed civilian. *Id.* at 2290.

316 See *id.* at 2292. Justice Scalia noted that even the military, in applying its legal standards that balanced the detainees' liberty interests against national security concerns, had released at least thirty Guantanamo prisoners who later committed terrorist atrocities. See *id.* at 2294–95 (Scalia, J., dissenting). Consequently, the Court's new requirement that military officials defend their decisions before a civilian court with procedural and evidentiary rules more stringent than those devised by the political branches would result in the release of more such terrorists. See *id.* at 2294–96.

317 See *id.* at 2292 (Roberts, C.J., dissenting).

shaping policy for alien enemy combatants. And certainly not the American people, who today lose a bit more control over the conduct of this Nation's foreign policy to unelected, politically unaccountable judges.³¹⁸

4. A Critique of *Boumediene*

Law professors and commentators typically have praised the *Boumediene* Court's "courage" in upholding "the rule of law,"³¹⁹ but have not rectified its failure to explain how existing legal materials supported its decision. This silence reinforces the sense that law had little to do with the result, whereas pragmatic and political calculations loomed large.

a. The Law Governing Jurisdiction and the Privilege of Habeas Corpus

Justice Kennedy's opinion does not set forth a coherent interpretation of the historical meaning of the Constitution's text, structure, or implementing practice and precedent. The majority's disregard of settled law characterized its analysis of both jurisdictional and substantive issues.

Initially, neither the dissenters nor scholars have fully grasped the magnitude of the Court's subversion of established jurisdictional doctrines, most notably the heretofore plenary constitutional power of Congress over the jurisdiction of Article III courts.³²⁰ *Boumediene* marked the first time the Court has struck down a statute stripping it (or any other federal court) of jurisdiction, and thus appeared to

318 *Id.* at 2293 (citation omitted) (quoting *Hamdan v. Rumsfeld*, 548 U.S. 557, 636 (2006) (Breyer, J., concurring)).

319 *See supra* note 15 and accompanying text.

320 The lengthy dissents contain only one oblique reference to this problem. *See Boumediene*, 128 S. Ct. at 2279 (Roberts, C.J., dissenting) ("Congress entrusted that threshold question [i.e., whether the DTA protected detainees' rights] . . . to the Court of Appeals for the District of Columbia Circuit, as the Constitution surely allows Congress to do."); *see also* Cole, *supra* note 15, at 48–49 (remarking on the novelty of the Court's invalidation of a statute restricting federal jurisdiction). As this article went to press, I became aware of a soon-to-be-published essay that addresses these issues more thoroughly. *See* Martin J. Katz, *Guantanamo, Boumediene, and Jurisdiction-Stripping: The Imperial Presidency Meets the Imperial Court*, 25 CONST. COMMENT. (forthcoming 2009) (approving the Court's unprecedented assertion of judicial power as a proportionate response to President Bush's equally extraordinary claims of war powers (with the acquiescence of Congress), and contending that *Boumediene* is not limited to habeas cases but rather can be applied whenever Congress attempts to eliminate federal jurisdiction over constitutional cases and thereby prevent federal courts from checking the political branches).

overrule *sub silentio* cases tracing back to *Ex parte McCardle*.³²¹ McCardle was a newspaper editor who, after criticizing the Reconstruction Congress for imposing martial law in the South, had been charged with seditious libel and held in Army custody while awaiting trial by a military commission.³²² Pursuant to an 1867 statute, he petitioned for a writ of habeas corpus and appealed its denial to the Supreme Court, which reviewed briefs and heard oral arguments.³²³ While McCardle's case was pending, Congress repealed the Court's jurisdiction.³²⁴ The Justices unanimously dismissed the appeal and declared:

We are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of this court is given by express words [in Article III].

What, then, is the effect of the repealing act upon the case before us? We cannot doubt as to this. Without jurisdiction the court cannot proceed at all Jurisdiction is the power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause. . . .

. . . .
 . . . [J]udicial duty is not less fitly performed by declining ungranted jurisdiction than in exercising firmly that which the Constitution and the laws confer.³²⁵

321 74 U.S. (7 Wall.) 506 (1869).

322 *See id.* at 508.

323 *See id.* at 507–08.

324 *See id.* at 508, 513–14.

325 *Id.* at 514–15; *see also id.* at 515 (mentioning that the legislative repeal of the Court's appellate jurisdiction in 1867 did not affect the petitioner's ability to invoke the Court's habeas jurisdiction under a longstanding statute that had remained intact); *Ex parte Yerger*, 75 U.S. (8 Wall.) 85 (1868) (reaffirming the availability of such alternate avenues of habeas review).

My point is that the Court failed even to cite *McCardle* and its progeny, much less explain why they should not lead to the opposite result. I am not suggesting that those decisions correctly interpreted the Constitution.

On the contrary, I have never accepted the Court's assertion that its appellate jurisdiction over a federal question "Case" may be eliminated by Congress and not given to any lower federal court, thereby leaving the ultimate decision to state judiciaries. *See, e.g.*, Robert J. Pushaw, Jr., *Congressional Power over Federal Court Jurisdiction: A Defense of the Neo-Federalist Interpretation of Article III*, 1997 BYU L. REV. 847, 847–53, 856–97. Rather, I have adopted Akhil Amar's position that Article III provides that federal judicial power "shall" (i.e., must) extend, in either original or appellate form, to "all" cases arising under federal law. For a detailed development of this argument, *see id.* at 849–97; *see also* Robert J. Pushaw, Jr., *A Neo-Federalist Analysis of Federal Question Jurisdiction*, 95 CAL. L. REV. 1515, 1516–17, 1541–49 (2007); Robert J. Pushaw, Jr., *Article III's Case/Controversy Distinction and the Dual Functions of Federal Courts*, 69 NOTRE

If the Court had to honor a congressional repeal of its habeas jurisdiction in a case concerning an American civilian who had been detained within the United States (and hence seemingly fell squarely within the protection of the Suspension Clause), it is impossible to fathom how its “judicial duty” would be less demanding in an appeal involving alien enemy combatants confined outside of the United States.³²⁶

Moreover, even assuming the *Boumediene* majority properly ignored *McCordle*, the political question doctrine dictated dismissal.

DAME L. REV. 447, 464–65, 470–82, 489–502, 523–31 (1994); cf. Steven G. Calabresi & Gary Lawson, *The Unitary Executive, Jurisdiction Stripping, and the Hamdan Opinions: A Textualist Response to Justice Scalia*, 107 COLUM. L. REV. 1002 (2007) (rejecting Scalia’s claim that Congress can remove the Court’s appellate jurisdiction over federal law cases as inconsistent with the objective original meaning of the Constitution’s text and structure).

Under my suggested approach, neither the DTA nor the MCA presented a constitutional problem because Congress authorized review of the detainees’ federal law questions in an Article III court (the D.C. Circuit, followed by an appeal to the Supreme Court). See DTA, Pub. L. No. 109-148, div. A, tit. X, § 1005(a)(2)–(3), 119 Stat. 2739, 2742–43 (2006). I suspect that the majority in *Boumediene* implicitly concluded that Congress, in exercising its power to regulate federal jurisdiction, cannot run afoul of another provision of the Constitution (such as the Suspension Clause). See Janet Cooper Alexander, *Jurisdiction-Stripping in a Time of Terror*, 95 CAL. L. REV. 1193, 1238–40 (2007) (predicting this line of reasoning).

A legislative withdrawal of jurisdiction, however, could almost always be challenged as violating some other constitutional provision. For instance, taking away the federal courts’ power to hear school-prayer cases would invariably lead to violations of the Establishment Clause as interpreted by the Supreme Court, because elected judges in states with deeply religious populations would be unlikely to enforce such precedent vigorously. Therefore, *Boumediene* signals a retreat from the longstanding (but erroneous) principle that Congress has absolute control over federal court jurisdiction.

Although that development is welcome, the Court’s specific holding is not. The Suspension Clause does not extend habeas corpus protections to enemy aliens outside of the United States, and even if it did, Congress in the DTA and MCA provided a constitutionally adequate substitute. See *infra* notes 334–42 and accompanying text.

326 *Boumediene* casts doubt upon both the general principle of congressional control over federal jurisdiction and its specific application to habeas corpus in cases dating back to *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 93–101 (1807), which established that Article III courts lack jurisdiction to issue habeas writs absent legislative authorization. See Pushaw, *supra* note 40, at 739, 745–54, 782–84, 802–03, 827–28, 831–33, 842–43 (analyzing *Bollman* in the broader context of congressional power over the jurisdiction of federal courts, which prevents them from asserting “inherent” nonstatutory authority to issue writs and to perform other tasks). For a thorough and illuminating debate of the foregoing issues, see Choper & Yoo, *supra* note 235, at 1246–88

Beginning with *Marbury v. Madison*,³²⁷ the Court has repeatedly acknowledged that, under our system of separation of powers, the Constitution limits judicial review to *legal* issues, but commits certain *political* questions (such as military and foreign policy decisions, appointments, and impeachment) for final resolution exclusively to Congress or the President (or both).³²⁸ In sharp contrast, Justice Kennedy suggested that “separation of powers” required the Court to read constitutional provisions, and the precedent interpreting them, as not foreclosing a role for the judiciary because otherwise the political branches might manipulate their unreviewable power.³²⁹

The Framers, however, believed that any such abuse should be remedied by the political rather than the judicial process.³³⁰ To take an example that would have seemed obvious to the Founders (and to the Court until quite recently), Article II entrusts to the President the power to determine the appropriate procedures for dealing with enemy combatants, with any misbehavior rectified by Congress, the voters, and international political pressure.³³¹ Furthermore, the Court itself sometimes abuses its power, as it did in *Boumediene* when it interfered with such policy decisions on the pretext that they violated the Suspension Clause.

In short, it is Kafkaesque for the majority to invoke “separation of powers” as a justification for dismantling two bulwarks of that doctrine, congressional control over federal jurisdiction and the political question doctrine.³³² Similar delusions of judicial grandeur impelled the Court to ignore its venerable prudential rule of avoiding constitutional questions until petitioners have exhausted available remedies, which also reflects separation-of-powers concerns for limiting the judiciary to its proper role.³³³

327 5 U.S. (1 Cranch) 137 (1803).

328 See *id.* at 164–71; see also *Nixon v. United States*, 506 U.S. 224, 228–29, 237–38 (1993) (summarizing the political question doctrine, and holding that it precluded judicial review of Article I’s clauses granting Congress power to impeach and try executive and judicial officials). Justice Scalia argued that an “inflated notion of judicial supremacy” led the majority to distort *Marbury* and its progeny by suggesting that respecting jurisdictional limitations would deprive the Court of its power “to say what the law is.” See *Boumediene v. Bush*, 128 S. Ct. 2229, 2302–03 (2008) (Scalia, J., dissenting).

329 See *supra* note 264, 278 and accompanying text.

330 See Pushaw, *supra* note 18, at 444–53, 497–511 (citing numerous historical sources).

331 See *id.* at 449–51.

332 For a description and critique of the Court’s separation-of-powers rationale, see *supra* notes 263–65 and accompanying text.

333 See *supra* Part II.D.1.

Turning to the merits, *Boumediene's* central holding—that the Constitution's guarantee of habeas corpus protected enemy aliens who had been captured and confined outside of the United States' sovereign territory—was not supported by a single citation to any Anglo-American legal source.³³⁴ The Suspension Clause incorporated English practice, and every relevant published British case and commentary stated that the habeas writ did not extend to any foreigners (even civilians) who had been detained beyond England's sovereign dominion.³³⁵ The Supreme Court adopted this rule and specifically applied it, in cases like *Eisentrager*, to alien enemy combatants abroad.³³⁶

Far from citing any authority to the contrary, law professors like Ronald Dworkin and David Cole have commended the *Boumediene* Court for ignoring precedent and instead relying upon general ideals of liberty and human rights.³³⁷ Indeed, the only colorable justification for *Boumediene* has come from two historians, who recently unearthed unpublished English materials suggesting a broad conception of habeas that allowed courts of a sovereign nation to determine whether its officials had power to imprison a subject, regardless of his

334 See *Boumediene*, 128 S. Ct. at 2303–07 (Scalia, J., dissenting).

335 The two towering figures of eighteenth-century English jurisprudence recognized that the habeas writ did not apply extraterritorially. See *R v. Cowle*, (1759) 97 Eng. Rep. 587, 599–600 (K.B.) (Lord Mansfield); 3 WILLIAM BLACKSTONE, COMMENTARIES *78–79, *131. Likewise, the major English secondary sources set forth this principle as black-letter law. See, e.g., RICHARD SHARPE, THE LAW OF HABEAS CORPUS 188–91 (2d ed. 1989).

336 See *supra* notes 89–93 and accompanying text; see also J. Andrew Kent, *A Textual and Historical Case Against a Global Constitution*, 95 GEO. L.J. 463 (2007) (demonstrating that the Constitution's language, structure, and history reveal that it does not confer judicially enforceable rights on aliens outside the United States); *id.* at 521–24 (illustrating this thesis by showing that the Constitution's habeas corpus writ does not apply to noncitizens overseas).

337 See Dworkin, *supra* note 15, at 18 (conceding that “American law has never before recognized that aliens imprisoned by the United States abroad have such [habeas] rights,” but saluting the Court for its “landmark change” of implementing general principles of liberty); Cole, *supra* note 15, at 47–61 (acknowledging that Justice Kennedy's opinion conflicts with longstanding case law, yet praising it as implicitly incorporating the emerging international law notion that courts can hold a nation accountable for human rights violations against any persons within its control, even in territory beyond its sovereign borders). Professor Katyal has maintained that the MCA violates constitutional equality principles because its military commission procedures and habeas-stripping provisions apply only to noncitizens. See Neal Katyal, *Equality in the War on Terror*, 59 STAN. L. REV. 1365 (2007). But see Fallon & Meltzer, *supra* note 50, at 2082–84 (explaining that the Constitution, as a compact among the American people for their benefit and mutual advantage, fairly distinguishes between citizens and aliens).

location or status.³³⁸ These historians have not, however, set forth any *specific* evidence that the drafters, ratifiers, or implementers of the Suspension Clause understood its protections as reaching noncitizen enemy aliens outside of the United States.³³⁹

338 Professors Halliday and White interpret the original meaning of the Suspension Clause based primarily on previously overlooked English court archives of habeas corpus cases and other manuscripts. See Halliday & White, *supra* note 261, at 582, 588–93, 713 (describing these sources, and lamenting that scholars have ignored them in favor of published documents such as case reports and treatises like Blackstone’s *Commentaries*). These authors argue that the common law habeas writ enabled the King (through his judges) to vindicate his prerogative power by ensuring that his officers had legal authority to detain someone, so that courts focused more on the jailer than on the prisoner, whose rights and liberties, citizenship, and territorial location were of far lesser concern. See *id.* at 583–87, 593–670, 700–01, 713. Consequently, the habeas writ could run outside the geographical boundaries of the English realm to anywhere in the King’s dominions where he had a relationship with his subjects, particularly through franchises that endowed companies with part of the royal authority. See *id.* at 633–44. Indeed, in a few cases, courts even investigated the factual and legal basis for detaining “alien enemies” (i.e., subjects of a sovereign nation at war with Britain) when they were present in the King’s dominions, and a judicial determination that they were in “open hostility” to the Crown would preclude habeas relief. See *id.* at 587, 606–07.

Professors Halliday and White contend that Americans were familiar with this English history, particularly because Parliament’s suspension of the writ in America between 1777 and 1783 (seemingly in violation of the colonists’ rights as English subjects) led to a deeper practical appreciation for the former practice of making habeas corpus widely available and difficult to suspend. See *id.* at 628–33, 644–51, 670–99, 713–14. Thus, the authors assert that the Suspension Clause recognized that federal courts had power to grant habeas writs according to substantive common law principles (i.e., concentrating on whether a federal government official had the legal power to jail someone, not on the prisoner’s status or location). See *id.* at 676–99.

339 Professors Halliday and White express caution in applying their historical analysis to different modern conditions, but nonetheless mention two implications of their thesis for habeas corpus in the War on Terrorism. *Id.* at 586–87, 700–14. First, the writ could run outside of the United States’ sovereign territory if its officials were holding a prisoner in custody. *Id.* at 586–87, 700, 705, 707. Second, for the same reason, federal courts might well be able to inquire into the legality of the detention of accused foreign terrorists, even though they are not necessarily analogous to traditional “alien enemies,” at least to determine whether they were, in fact, enemy combatants. See *id.* at 587, 606–07, 705–14; see also Alexander, *supra* note 325, at 1200, 1232–38 (urging that the focus in habeas review should be on the constraints the Constitution imposes on the government (wherever it operates), not on the rights the Constitution confers on detainees who are noncitizens located outside of the United States).

I have no basis to question the historical research of Professors Halliday and White, because I have not gone to England to dig up and examine the relevant unpublished documents. But neither did the drafters and ratifiers of our Constitution. Rather, the lawyers in that group relied most heavily on books that were readily available. Most notably, Blackstone’s *Commentaries* “became the bible of American

Moreover, before the War on Terrorism, constitutional law scholars of all ideological stripes agreed that *Eisentrager* and other cases had precisely the meaning that Justice Scalia ascribed to them.³⁴⁰ That consensus indicates that personal opposition to the Bush administration's detainee policies, not adherence to existing law, explains the position of the *Boumediene* majority and their academic apologists.

Finally, even assuming the Suspension Clause did apply to petitioners, the Court has long recognized that habeas corpus is a flexible remedy that can be tailored to meet different circumstances.³⁴¹ Therefore, the majority in *Boumediene* should have deferred to Congress, which had formulated a comprehensive review scheme that accounted for the unique problems posed by foreign suspected terrorists while allowing them to challenge the legality of their detention before an Article III court—the same purpose served by habeas.³⁴²

Overall, the Court's conclusions on every major issue did not reflect a reasonable interpretation of ambiguous legal sources, but rather a manipulation of clear legal principles. Most importantly, before *Boumediene*, one of the few ironclad rules in war powers jurisprudence was that the Suspension Clause did not apply to alien enemy combatants outside of America's sovereign territory. Therefore, Congress had the power to remove *all* federal court jurisdiction

lawyers," had an unmatched influence on the Framers, and remained the most important legal source in the United States for a century. See DANIEL J. BOORSTIN, *THE MYSTERIOUS SCIENCE OF THE LAW* 1–2, 35 (1941). Blackstone clearly said that the writ of habeas corpus did not apply to *any* foreigners detained outside of the King's sovereign dominions, much less alien enemies. See *supra* note 335. Lord Mansfield, the greatest judge of the eighteenth century, expressed the same opinion in a well-known reported case. See *supra* note 335. Even if Blackstone and Mansfield were wrong, their legal views would likely have been accepted as correct by most Americans.

Admittedly, it is possible that the opposite was true—that Americans generally disagreed with these English luminaries and instead shared the unspoken understanding of habeas uncovered by Professors Halliday and White. These scholars cite no concrete evidence, however, that anyone in America ever stated or implied that the Suspension Clause would protect foreign enemy combatants seized and held beyond the United States' sovereign territory.

340 See, e.g., 1 RONALD D. ROTUNDA & JOHN E. NOWAK, *TREATISE ON CONSTITUTIONAL LAW* § 6.13 (4th ed. 2007); 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 300–01 (3d ed. 2000).

341 See *Boumediene*, 128 S. Ct. at 2267–68.

342 See *supra* notes 173–79 and accompanying text; see also Gregory E. Maggs, *Foreword: Symposium on the New Face of Armed Conflict: Enemy Combatants After Hamdan v. Rumsfeld*, 75 *GEO. WASH. L. REV.* 971, 992–95 (2007) (making this argument in concluding that the MCA was constitutional). But see Alexander, *supra* note 325, at 1199–232 (maintaining that the DTA and MCA do not supply a constitutionally adequate substitute for habeas or allow for other meaningful alternative avenues of judicial review).

over cases involving Guantanamo detainees—and a fortiori could, as a matter of legislative grace, grant them access to the D.C. Circuit followed by review in the Supreme Court.

Indeed, *Boumediene's* lawlessness is so transparent that both dissenting Justices took the unusual course of flatly saying so. Justice Scalia declared that “[w]hat drives today’s decision is neither the meaning of the Suspension Clause, nor the principles of our precedents, but rather an inflated notion of judicial supremacy.”³⁴³ Similarly, Chief Justice Roberts maintained that “this decision is not really about the detainees at all, but about control of federal policy regarding enemy combatants.”³⁴⁴

Once again, it is telling that even *Boumediene's* staunchest academic boosters have not seriously disputed the dissenters’ legal arguments or tried to defend Justice Kennedy’s opinion on its own terms. Most notably, David Cole has admitted that the Court broke with its settled case law by: (1) striking down congressional restrictions on federal court jurisdiction; (2) extending constitutional protections to noncitizens outside United States territory during wartime; (3) holding that the Constitution’s habeas writ applied to foreign enemies captured and detained abroad, contrary to *Eisentrager*; and (4) invalidating a statute concerning the military passed by Congress and signed by the President.³⁴⁵ Professor Cole instead justifies *Boumediene* as reflecting the modern international law precept that courts can vindicate the human rights of any persons against an offending nation that exerts control over them, even in territory beyond its sovereign borders.³⁴⁶ If he is correct, however, then the majority should have honestly set forth that legal reasoning instead of purporting to apply domestic constitutional law.³⁴⁷

343 *Boumediene*, 128 S. Ct. at 2302 (Scalia, J., dissenting).

344 *Id.* at 2279 (Roberts, C.J., dissenting).

345 See Cole, *supra* note 15, at 47–49, 53–54. Despite the Court’s disregard for established constitutional principles, Professor Cole lauds *Boumediene* as “a profound—and in many respects surprising—defeat for the Bush administration in the legal ‘war on terror.’ . . . [T]he courts will play a vital role in ensuring that the rule of law applies to the ongoing struggle with Al Qaeda.” *Id.* at 47.

346 See *id.* at 47, 50–53, 56–61; cf. Posner, *supra* note 293, at 23–25, 32–46 (contending that *Boumediene* rests on an implicit theory of “judicial cosmopolitanism”—that courts must protect the interests of noncitizens overseas—that conflicts with the Constitution, which authorizes the political branches to negotiate with foreign nations to achieve mutual advantages rather than allowing courts unilaterally to bestow unreciprocated benefits on aliens).

347 Indeed, even some scholars who endorsed *Hamdi*, *Rasul*, and *Hamdan* predicted that the Court in *Boumediene* would be unlikely to invalidate the MCA because of the absence of any legal authority to do so. See, e.g., Mark C. Rahdert, *Double*

Although I agree with Professor Cole that the Court's stated legal rationale is unpersuasive, I do not share his intuition that international law drove its decision (although this law may have had some effect). Rather, I submit that the Justices engaged in their usual process of weighing many case-specific pragmatic, political, ideological, and legal considerations.

b. A Realistic Assessment of *Boumediene*

The majority and dissent parted company in their discretionary judgments about three key factors. First, Justices Kennedy, Stevens, Souter, Ginsburg, and Breyer believed that no military emergency warranted the political branches' actions. The majority recognized that some individuals fear that "terrorism continues to pose dangerous threats to us for years to come,"³⁴⁸ but apparently thought those fears were overblown because seven years had passed since September 11 without any terrorist attacks. Moreover, America had not been placed on a continuous war footing, as in past armed conflicts. Under these circumstances, the Court concluded that the United States could afford to extend the privilege of habeas corpus to Guantanamo detainees without compromising "the military mission."³⁴⁹

The dissenters, on the other hand, viewed the government's detention policies as part of its reasonable response to an urgent situation: "America is at war with radical Islamists" who have credibly "threatened further attacks."³⁵⁰ Justice Scalia deplored the majority's conferral of new constitutional rights (and enhanced procedural protections) on suspected foreign terrorists because the government, in applying less stringent procedural rules, had mistakenly released at least thirty enemy combatants who later committed terrorist atrocities.³⁵¹ He warned that application of more demanding procedures would result in the release of more terrorists, which "will almost certainly cause more Americans to be killed."³⁵²

Second, Justice Kennedy and his colleagues felt that denying petitioners their constitutional privilege to seek the writ of habeas corpus was particularly egregious:

Checking Executive Emergency Power: Lessons from Hamdi and Hamdan, 80 TEMP. L. REV. 451, 483–86 (2007).

348 *Boumediene*, 128 S. Ct. at 2277 (majority opinion).

349 *See id.* at 2261.

350 *See id.* at 2294 (Scalia, J., dissenting).

351 *See id.* at 2294–95.

352 *See id.*

Security subsists, too, in fidelity to freedom's first principles. Chief among these are freedom from arbitrary and unlawful restraint and the personal liberty that is secured by adherence to the separation of powers. It is from these principles that the judicial authority to consider petitions for habeas corpus relief derives.

. . . Within the Constitution's separation-of-powers structure, few exercises of judicial power are as legitimate or as necessary as the responsibility to hear challenges to the authority of the Executive to imprison a person. . . .

. . . .

. . . The laws and Constitution are designed to survive, and remain in force, in extraordinary times. Liberty and security can be reconciled; and in our system they are reconciled within the framework of the law. The Framers decided that habeas corpus, a right of first importance, must be a part of that framework³⁵³

The dissent emphasized that, on the contrary, the Founders had chosen not to extend the privilege of habeas corpus to alien enemy combatants abroad.³⁵⁴ Excluding this exceedingly tiny subset of prisoners, as mandated by law, would have no effect on the writ's availability to the millions who were entitled to seek it to protect their cherished right to be free from unlawful restraint.

Third, the Court had no doubt that President Bush would obey its judgment, as he had in *Hamdi*, *Rasul*, and *Hamdan*. By June 2008, when *Boumediene* came down, Bush was a lame-duck President whose popularity rating had hit all-time lows.³⁵⁵ Thus, he did not have the political strength to resist the decision, even if he had been inclined to do so.³⁵⁶

353 *Id.* at 2277 (majority opinion); *see also id.* at 2244–47 (emphasizing the historical centrality of the habeas writ in safeguarding liberty); Gerald L. Neuman, *The Extra-territorial Constitution After Boumediene v. Bush*, 82 S. CAL. L. REV. 259, 273 (2009) (arguing that the Court's "functional" approach took into account "a nontextual, normative valuation of the importance of the particular right under consideration," individual liberty).

354 *See Boumediene*, 128 S. Ct. at 2293–94, 2303–06 (Scalia, J., dissenting).

355 *See supra* notes 24, 27–29 and accompanying text.

356 *See* Linda Greenhouse, *Justices, 5-4, Back Detainee Appeals for Guantanamo*, N.Y. TIMES, June 13, 2008, at A1 (quoting Bush's statement that "we'll abide by the court's decision—that doesn't mean I have to agree with it"). Throughout his second term, Bush persisted in asserting sweeping war powers as if America were in a continuing military crisis similar to the Civil War or World War II, even though the carnage and devastation were plainly not comparable. *See supra* notes 140–45, 224 and accompanying text. Moreover, Bush never mobilized America to make great sacrifices for an all-consuming military mission, as Lincoln and Roosevelt had done.

Another political problem arose from the unusual nature of the War on Terrorism, which defined success primarily in terms of preventing possible attacks (the

The foregoing three factors counterbalanced a fourth that historically had been determinative: express congressional authorization of the President's action.³⁵⁷ *Boumediene* thereby joined *Hamdi* as the only cases in which the Court has invalidated a war policy approved by both political branches. The most logical explanation for the majority's willingness to defy Congress was the latter's historically low approval rating.³⁵⁸

In sum, the Justices in *Boumediene* engaged in a complex calculus that balanced a variety of factual, political, ideological, and practical considerations. Accordingly, it would be a mistake to take the Court's legal pronouncements at face value as though they set forth permanent principles.³⁵⁹

III. A CRITICAL EXAMINATION OF THE "ENEMY COMBATANT" CASES

According to most law professors and commentators, the Court courageously enforced the Constitution and the "rule of law" in *Hamdi*, *Rasul*, *Hamdan*, and *Boumediene* by striking down the unprecedented military policies of the Bush administration and its nefarious allies in Congress, thereby requiring them to alter their antiterrorism strategy.³⁶⁰ More generally, some scholars have argued that these cases will trigger a seismic shift—that the Court henceforth will review

details of which could not be revealed for national security reasons) rather than concrete battlefield victories such as Gettysburg and D-Day. See Barron & Lederman, *Commander in Chief, Part I*, *supra* note 19, at 713–15. Symbolically, it was much easier for Bush to rally Americans in the wake of the September 11 attacks than in the shadowy realm of undisclosed threatened assaults that did not materialize.

In short, by 2008 President Bush did not have the political capital to assert broad military powers and expect the Court to back down.

357 See *supra* note 52 and accompanying text; see also Cole, *supra* note 15, at 47–48 (“[F]or the first time in its history the Supreme Court declared unconstitutional a law enacted by Congress and signed by the president on an issue of military policy in a time of armed conflict.”).

358 See *supra* note 28 and accompanying text. Furthermore, a Congress that had shifted to a Democratic Party majority in the 2006 elections would be unlikely to resist the Court's invalidation of the MCA, which had been crafted primarily by Republicans shortly before they lost control of the House and Senate. See Devins, *supra* note 28, at 1593–94; see also Paul A. Diller, *When Congress Passes an Intentionally Unconstitutional Law: The Military Commissions Act of 2006*, 61 SMU L. REV. 281, 332–33 (2008) (making this point and emphasizing that many members of Congress, during the debate over the MCA, had repeatedly expressed their expectation that the Court would strike down this statute).

359 See Posner, *supra* note 293, at 33 (suggesting that, in a future case, the Court could “confine *Boumediene* to the facts, treating Guantanamo Bay as unique because U.S. control is complete”).

360 See *supra* notes 15–16 and accompanying text.

allegedly unlawful exercises of military power as rigorously as it does domestic matters.³⁶¹ I am skeptical of the foregoing account, for many reasons.

Most obviously, today's Justices do not appear to be uniquely courageous, as compared to their predecessors, in their willingness to stand up to the President and Congress. On the contrary, the current Justices have been far more deferential to the elected branches, and far less likely to boldly create expansive constitutional rights, than many of their forebears (most notably those on the Warren Court).³⁶² For example, over the past twenty years, the Court has halved its docket and tended to decide cases on the narrowest possible legal grounds, which has left many important constitutional questions open for further democratic debate.³⁶³ *Hamdi*, *Rasul*, and *Hamdan* seemed to be consistent with that trend, as the majority issued limited rulings that entrusted Congress and the President with ample discretion to fashion particular procedures for enemy combatants.³⁶⁴ *Boumediene* pulled the rug out from under the political branches by nullifying their handiwork through the fabrication of a right that had no foundation in the Constitution's text, history, structure, and precedent.

Boumediene, then, simply imposed the will of five Justices who disagreed personally and politically with the government's detainee policies. So did *Rasul* and *Hamdan*, which "interpreted" statutes to contradict their clearly intended meanings and thereby necessitated two congressional overrides.³⁶⁵ It is ironic to praise such decisions as vindicating the "rule of law," which requires courts to apply the legal principles located in the Constitution, statutes, and cases even if doing so leads to results that judges find distasteful.³⁶⁶

361 See, e.g., Chemerinsky, *supra* note 15; Dworkin, *supra* note 15, at 20–21.

362 See SUNSTEIN, *supra* note 17, at 6–8. The Warren Court revolutionized constitutional law in areas such as criminal procedure, equal protection, and substantive due process/privacy. See Robert J. Pushaw, Jr., *Partial-Birth Abortion and the Perils of Constitutional Common Law*, 31 HARV. J.L. & PUB. POL'Y 519, 522, 529–31, 577–78, 589 (2008). The Burger and Rehnquist Courts struggled to apply and modify this precedent on a case-by-case basis and occasionally issued novel decisions like *Lawrence v. Texas*, 539 U.S. 558 (2003), which created a due process right of privacy for consenting adults to engage in sodomy. See *id.* at 578–84.

363 See *supra* note 17 and accompanying text.

364 See *supra* Part II.A–C.

365 See *supra* notes 148–66, 185–208, 212–14, 236–39 and accompanying text.

366 See *supra* note 18 and accompanying text; see also Tushnet, *supra* note 112, at 1472 (ridiculing the *Hamdan* Court's "paean to the Rule of Law" and observing that "if *Hamdan* is a triumph of the Rule of Law, so must be the Military Commissions Act").

Furthermore, critics who charged that the Bush administration's military policies were unparalleled in their harshness don't know much about history. Most pertinently, Lincoln suspended habeas corpus generally,³⁶⁷ whereas Bush left the writ intact except for a few hundred alien enemy combatants in Guantanamo (who still enjoyed multilayered military and judicial review of their claims, unlike their historical counterparts).³⁶⁸ Lincoln also asserted independent power to try war crimes by military commissions and execute those found guilty, as did Roosevelt—both with the Court's blessing.³⁶⁹ Bush followed their lead, except he did not impose capital punishment. Nor did he emulate other drastic wartime measures, such as Lincoln's and Roosevelt's seizures of private property, Wilson's criminal prosecutions of antiwar speakers, and Roosevelt's forcible relocation of ethnic minorities.³⁷⁰

In short, President Bush invoked longstanding executive practice to justify detaining foreign enemy combatants, not allowing them to contest their status in habeas proceedings, and ordering their trial by military commission. Although legal scholars and pundits congratulated the Court for dealing the Bush administration a string of supposedly stunning defeats,³⁷¹ the President managed to do what he believed necessary to protect national security for all but the last few months of an eight-year tenure. The Court did not cow the political branches into radically changing their basic antiterrorism policies.³⁷² Thus, a realist would conclude that the Court, in asserting increased authority to review the exercise of war powers, actually highlighted its institutional weakness in this area.

History also suggests the unlikelihood that *Hamdi*, *Rasul*, *Hamdan*, and *Boumediene* are the vanguard of an enduring switch to aggressive judicial review to protect individual rights during wartime. Many scholars have approvingly cited Justice Kennedy's majestic declaration that "[t]he laws and Constitution are designed to survive, and remain in force, in extraordinary times. Liberty and security can be reconciled; and in our system they are reconciled within the frame-

367 See *supra* note 64 and accompanying text.

368 See *supra* notes 168–79, 185, 236–38, 300–06, 313–18 and accompanying text.

369 See *supra* notes 61–63, 75–78 and accompanying text.

370 See *supra* notes 56–57, 74, 79–83 and accompanying text.

371 See *supra* notes 15–16 and accompanying text.

372 See Rahdert, *supra* note 347, at 454–56, 480, 487–88 (concluding that the Bush administration's ability to persuade Congress to enact the DTA and MCA illustrate that the Court's "enemy combatant" decisions did not have much real impact on the conduct of the War on Terrorism).

work of the law.”³⁷³ This rhetoric echoes the words of *Ex parte Milligan*: “The Constitution . . . is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances.”³⁷⁴ But recall that the Court in *Milligan* confessed that it had not followed the Constitution during the Civil War,³⁷⁵ and that its promise to enforce constitutional law “at all times” was broken within a year.³⁷⁶ Cases like *Ex parte Quirin* similarly reveal that, contrary to Justice Kennedy’s wishful thinking, the Court during “extraordinary times” often does not deliberately interpret the Constitution and laws in a way that best reconciles liberty and security.³⁷⁷ It is naïve to suppose that our current Justices are so uniquely brave and noble that they will be immune to similar pressures—especially if a crisis were to arise on a par with the Civil War or World War II.³⁷⁸

Indeed, history teaches that, during wartime, judicial discretion has been the better part of valor. The Court has always showed much greater deference to the government (sometimes bordering on abdication) when it has exercised military powers than when it has regulated domestic affairs. The precise degree of deference has reflected the factual, legal, and political circumstances of each case, although certain considerations have emerged as especially important—the severity of the crisis, the President’s political strength, approval of his actions by Congress, and the nature of the legal rights at stake.³⁷⁹ These factors have invariably persuaded the Court to yield to a powerful President like Lincoln or Roosevelt who, with the support of Congress, responded to a pressing threat to national security.³⁸⁰ Even in

373 *Boumediene v. Bush*, 128 S. Ct. 2229, 2277 (2008); see also Chemerinsky, *supra* note 15 (endorsing Justice Kennedy’s statement).

374 *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 120–21 (1866).

375 See *id.* at 109.

376 See *supra* note 101 and accompanying text (citing cases in which the Court capitulated to the constitutionally dubious actions of the powerful Reconstruction Congress).

377 See *supra* notes 75–78 and accompanying text.

378 Other scholars share my skepticism. See, e.g., Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029, 1041–44 (2004); Eric A. Posner & Adrian Vermeule, *Accommodating Emergencies*, 56 STAN. L. REV. 605, 623–25 (2003); Mark Tushnet, *Defending Korematsu? Reflections on Civil Liberties in Wartime*, 2003 WIS. L. REV. 273, 304–05.

379 See *supra* notes 50–55 and accompanying text.

380 See, e.g., *Korematsu v. United States*, 323 U.S. 214, 218–20, 223–24 (1944); *The Prize Cases*, 67 U.S. (2 Black) 635, 665–82 (1862); see also *supra* notes 79–81 and accompanying text (discussing *Korematsu*); *supra* notes 56–59 and accompanying text (analyzing *The Prize Cases*).

conflicts less serious than the Civil War and World War II, the Justices typically have respected the President's judgment that a particular military measure had to be implemented.³⁸¹ The Court has invalidated such laws only in relatively rare cases like *Milligan*³⁸² and *Youngstown*,³⁸³ when a wildly unpopular President like Johnson or Truman independently took actions that struck a majority of Justices as unnecessary and offensive to fundamental legal rights.³⁸⁴

I suspect that, in time, the "enemy combatant" decisions will be placed into this final category. A group of Justices pragmatically exploited a golden opportunity to announce new legal limits on the President when his approval ratings had hit Truman-like lows, the immediate post-September 11 crisis had long since faded and hence Bush's initial get-tough approach seemed too severe, and individual liberty in its most basic form was at stake. The only sharp break from the past was the Court's willingness to thwart executive action that enjoyed the approval of Congress, either expressly (*Hamdi* and *Boumediene*) or implicitly (*Rasul* and *Hamdan*). The most plausible reason for this newfound aggressiveness was Congress's own historically abysmal approval ratings. Moreover, in *Boumediene* the Court had the added advantages that Bush was a lame duck, that the new President would likely alter detainee policy and perhaps shut down Guantanamo, and that economic woes had displaced terrorism as the voters' chief concern.³⁸⁵

I anticipate, however, that when the next military crisis rears its ugly head, the Court will uphold whatever policies the President deems prudent to meet the danger. Fortunately, the Court could support such a deferential judgment by relying upon the precedent that it took such pains to distinguish rather than overrule, such as *Eisen-trager*, *Quirin*, and *The Prize Cases*.³⁸⁶

CONCLUSION

The War on Terrorism has aroused such powerful emotions on both sides of the debate that it becomes easy to ascribe to Supreme Court decisions a significance that they do not actually possess. On the one hand, the liberal dream that *Hamdi*, *Rasul*, *Hamdan*, and

381 See *supra* notes 86–95 and accompanying text.

382 See *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 134–36 (1866); see also *supra* notes 96–100 and accompanying text (describing *Milligan*).

383 See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587–89 (1952); see also *supra* notes 104–13 and accompanying text (examining *Youngstown*).

384 See *supra* notes 96–100, 104–13 and accompanying text.

385 See *supra* notes 28–29 and accompanying text.

386 See *Boumediene v. Bush*, 128 S. Ct. 2229, 2257–58, 2270–71 (2008).

Boumediene have ushered in a new age of heroic judicial defense of constitutional rights during wartime will probably not come true. On the other hand, the conservative nightmare voiced by Justice Scalia and his followers that the federal judiciary will forever be embroiled in overseeing military policy (for example, through millions of habeas corpus proceedings brought by captured soldiers) also seems overly dramatic.

In the midst of such a heated controversy, history sheds cold but bright light. America has experienced cycles before in which the Court asserted broad authority to review the exercise of war powers. But that approach has never lasted. Rather, the Justices typically have exercised their discretion to yield to the political branches in military matters, often because they had no other realistic choice. This history suggests that the “enemy combatant” cases will not have a profound lasting impact.

