
THE NEW JUDICIAL DEFERENCE

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INTRODUCTION

A decade into the “war on terror,” the United States is starting to recover its balance. Plunged by panic into enacting terrorism laws and rushing into effect terrorism policies that challenged both separation of powers and constitutionally protected individual rights, the Bush Administration began to ease up on these draconian policies mid-way through its second term.¹ The

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I would like to thank Jim Fleming for the invitation to speak, my colleagues at Yale Law School (where I was teaching in 2009-2010) for providing a wonderful re-immersion in the law school world, and Serguei Oushakine for reminding me as I was writing this that one must at some point just stop. As a result, the analysis here is current as of August 2011 and does not take into account developments after that.

I dedicate this Article to the memory of Brian Simpson, whose book on British detentions during World War II, *In the Highest Degree Odious: Detention Without Trial in Wartime Britain* (1992), inspired me to work on this topic. Brian was one of my law school mentors, and someone who fundamentally shaped my view of the field. His death in January 2011 was an unbearably sad event for his family, friends, colleagues, and students. His wisdom, prescience, sense of humor, and sense of justice are much missed.

¹ Jack Goldsmith, head of the Department of Justice’s Office of Legal Counsel in 2003-2004, said that he attempted to “clean up the legal mess” even during President Bush’s first

victory of Barack Obama in the presidential election of 2008 was due in no small measure to the fact that the country had become preoccupied with issues other than terrorism.² While the United States has permanently entrenched in federal law many formerly temporary provisions of the USA Patriot Act,³ and the Obama Administration initially adopted many of the policies of its predecessor,⁴ the Obama Administration has shown itself much less willing to rile up public fears over every sign of a potential terrorist attack than its predecessor had been.⁵

term, before Goldsmith felt he had to resign without having been able to change as much as he had wanted. JACK GOLDSMITH, *THE TERROR PRESIDENCY* 180 (2007). But by the later years of President Bush's second term, Secretary of State Condoleezza Rice started to win bureaucratic battles over Vice President Cheney and his legal advisor David Addington, the primary architect of the most extreme policies in the "war on terror." BARTON GELLMAN, *ANGLER: THE CHENEY VICE PRESIDENCY* 374-75 (2008). As his side in the internal battles started to lose more often, Cheney then "played a game of inertia, slowing down initiatives that would disturb the pieces he already had in place." *Id.* at 378. For evidence of Addington's influence in Cheney's office, see DAVID COLE, *JUSTICE AT WAR: THE MEN AND IDEAS THAT SHAPED AMERICA'S WAR ON TERROR* 37-48 (2008). The general diagnosis of experts who follow these developments closely was summarized by Mark Lynch: "[M]any of the most important changes to America's strategy took place not in 2009, but between 2006 and 2008." MARK LYNCH, *CENTER FOR A NEW AMERICAN SECURITY, RHETORIC AND REALITY: COUNTERING TERROR IN THE AGE OF OBAMA* 12 (2010), available at http://www.cnas.org/files/documents/publications/CNAS_Rhetoric%20and%20Reality_Lynch.pdf.

² Those who voted for Barack Obama were, on balance, less worried about terrorist attacks in general than were those who voted for John McCain in the 2008 presidential election. Fully 86% of those who thought terrorism was the most important issue voted for John McCain. 2008 Presidential Election National Exit Poll, CNN, <http://www.cnn.com/ELECTION/2008/results/polls/#val=USP00p6> (last visited Oct. 29, 2011).

³ For a list of the provisions of the USA PATRIOT Act that were originally slated for sunset, see John E. Finn, *Sunset Clauses and Democratic Deliberation: Assessing the Significance of Sunset Provisions in Antiterrorism Legislation*, 48 COLUM. J. TRANSNAT'L L. 442, 462 n.84 (2010). Many of the USA PATRIOT Act's previously temporary clauses were made permanent in 2005. USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, § 102(a), 120 Stat. 192, 194 (codified at 18 U.S.C. § 2510 note (2006)). The remaining "temporary" provisions continue to be renewed year after year. See *USA Patriot Act*, ELECTRONIC PRIVACY INFORMATION CENTER, <http://epic.org/privacy/terrorism/usapatriot/#news> (last visited Oct. 29, 2011) (tracking the renewal debate). The most recent renewal extends the remaining temporary provisions through 2015. PATRIOT Sunsets Extension Act of 2011, Pub. L. No. 112-14, 125 Stat. 216.

⁴ Glenn Greenwald, *The Vindication of Dick Cheney*, SALON, (Jan. 18, 2011, 6:19 AM), http://www.salon.com/news/opinion/glenn_greenwald/2011/01/18/cheney (quoting a number of Bush Administration officials who said that the Obama Administration was largely following the same policies on counter-terrorism).

⁵ The Obama Administration has been less prone to rhetorical tough talk, even as it has continued many of the policies of the later Bush years. LYNCH, *supra* note 1, at 5. And

What has been the role of courts in this trajectory from reaction to the normalization and entrenchment of anti-terrorism powers?

In this Article, I will show that American courts have often approached the extreme policies of the anti-terrorism campaign by splitting the difference between the two sides – the government and suspected terrorists. One side typically got the ringing rhetoric (the suspected terrorists), and the other side got the facts on the ground (the government). In major decisions both designed to attract public attention and filled with inspiring language about the reach of the Constitution even in times of peril, the Supreme Court, along with some lower courts, has stood up to the government and laid down limits on anti-terror policy in a sequence of decisions about the detention and trial of suspected terrorists. But, at the same time, these decisions have provided few immediate remedies for those who have sought the courts' protection. As a result, suspected terrorists have repeatedly prevailed in their legal arguments, and yet even with these court victories, little changed in the situation that they went to court to challenge. The government continued to treat suspected terrorists almost as badly as it did before the suspected terrorists "won" their cases. And any change in terrorism suspects' conditions that did result from these victorious decisions was slow and often not directly attributable to the judicial victories they won.

Does this gap between suspected terrorists' legal gains and their unchanged fates exist because administration officials were flouting the decisions of the courts? The Bush Administration often responded with sound and fury and attempted to override the Supreme Court's decisions or to comply minimally with them when they had to.⁶ But, as this Article will show, these decisions did not actually require the government to change its practices very quickly. The decisions usually required the government to change only its general practices in the medium term. Judges had a different framework for analyzing the petitioners' situation than the petitioners themselves did; judges generally couched their decisions in favor of the suspected terrorists as critiques of systems instead of as solutions for individuals. In doing so, however, courts allowed a disjuncture between rights and remedies for those who stood before them seeking a vindication of their claims. Suspected terrorists may have won

terrorism panic has not been stoked by the Obama Administration even in the face of "rising threats to the U.S. homeland," like the spate of potentially serious terrorist attacks that were foiled at the last minute, including the plot by Najibullah Zazi to blow up the New York subway system, the failed bombing of a Detroit-bound airliner nearly carried out by Umar Abdulmutallab, and the failed Times Square bombing organized by Faisal Shahzad. *Id.* at 10-11.

⁶ For an account of the reactions to the Bush Administration's attempt to work around the major court decisions, see JENNIFER ELSEA & MICHAEL JOHN GARCIA, CONG. RESEARCH SERV., RL 33180, ENEMY COMBATANT DETAINEES: *HABEAS CORPUS* CHALLENGES IN FEDERAL COURT (2010), available at <http://www.fas.org/sgp/crs/natsec/RL33180.pdf>. I will explain the Bush Administration's reactions to court decisions in the analysis that follows, as the specifics vary with each case.

in these cases – and they prevailed overwhelmingly in their claims, especially at the Supreme Court – but courts looked metaphorically over the suspects’ heads to address the policies that got these suspects into the situation where the Court found them. Whether those who brought the cases actually got to benefit from the judgments, either immediately or eventually, was another question.

Bad though the legal plight of suspected terrorists has been, one might well have expected it to be worse. Before 9/11, the dominant response of courts around the world during wars and other public emergencies was to engage in judicial deference.⁷ Deference counseled courts to stay out of matters when governments argued that national security concerns were central. As a result, judges would generally indicate that they had no role to play once the bullets started flying or an emergency was declared. If individuals became collateral damage in wartime, there was generally no judicial recourse to address their harms while the war was going on. As the saying goes, *inter arma silent leges*: in war, the law is mute. After 9/11, however, and while the conflict occasioned by those attacks was still “hot,” courts jumped right in, dealing governments one loss after another.⁸ After 9/11, it appears that deference is dead.

⁷ As Brian Simpson noted about the detention cases that came before the English courts during WWII,

Lawyers and legal institutions do not seem to come out of the story at all well. . . . [T]he courts did virtually nothing for the detainees, either to secure their liberty, to preserve what rights they did possess under the regulation, to scrutinize the legality of Home Office action, or to provide compensation when matters went wrong. . . .

....

. . . Yet it is not clear that the courts had to wash their hands of responsibility as enthusiastically as they did. They could have carved out for themselves a larger role.

A. W. BRIAN SIMPSON, *IN THE HIGHEST DEGREE ODIOS: DETENTION WITHOUT TRIAL IN WARTIME BRITAIN* 418-21 (1992).

Most courts around the world did not have the jurisdiction to review laws for constitutional compliance before the end of World War II, and so the primary cases in which courts could reach governments’ wartime policies involved detentions and habeas claims. See Brian Farrell, *From Westminster to the World: The Right to Habeas Corpus in International Constitutional Law*, 17 MICH. ST. J. INT’L L. 551, 551 (2009).

⁸ Cases around the world have invalidated or found incompatible with human rights law many post-9/11 anti-terrorism policies:

- *Charkaoui v. Canada*, 2007 SCC 9, [2007] 1 S.C.R. 350, (Can.), available at <http://scc.lexum.org/en/2007/2007scc9/2007scc9.html> (finding the indefinite detention of aliens awaiting deportation under an administrative security certificate to be unconstitutional absent regular reviews of the detainee’s situation and assessment of alternatives but permitting detention until the system could be revised);
- Corte Constitucional [C.C.] [Constitutional Court], noviembre 16, 2010, Sentencia C-913/10, Gaceta de la Corte Constitucional [G.C.C.] (Colom.), available at

But, I will argue, deference is still alive and well. We are simply seeing a new sort of deference born out of the ashes of the familiar variety. While governments used to win national security cases by convincing the courts to decline any serious review of official conduct in wartime, now governments win first by losing these cases on principle and then by getting implicit permission to carry on the losing policy in concrete cases for a while longer, giving governments a victory in practice.⁹ Suspected terrorists have received

<http://www.corteconstitucional.gov.co/relatoria/2010/c-913-10.htm> (finding that the legislative procedure followed in enacting the Law on Intelligence Activities failed to meet the higher standard that applies to laws that would infringe upon rights);

- Joined Cases C-402 & C-415/05 P, *Kadi v. Council*, 2008 E.C.R. I-6411, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62005J0402:EN:HTML> (invalidating the European Union's asset freeze regulations as violating basic European constitutional principles of the right to property and due process but permitting the concrete asset freezes raised in the case to continue until the system could be revised);
- Aviation Security Act Case, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Feb. 15, 2006, 115 ENTSCHIEDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVerfGE] 118 (Ger.), summarized in English at <http://www.bundesverfassungsgericht.de/en/press/bvg06-011en.html> (invalidating a statute that would have permitted the armed forces to shoot down hijacked passenger planes that posed a danger to people on the ground);
- Simon Butt & David Hansell, Case Note, *The Masykur Abdul Kadir Case: Indonesian Constitutional Court Decision No 013/PUU-I/2003*, 6 AUSTRALIAN JOURNAL OF ASIAN LAW 176 (2004), available at [www.federationpress.com.au/pdf/AJAL6\(2\)%20Butt.pdf](http://www.federationpress.com.au/pdf/AJAL6(2)%20Butt.pdf) (striking down the retroactivity provision of the post-9/11 anti-terrorism law prospectively; therefore, the retroactive provision was still valid with respect to the "Bali bomber" who brought the case);
- *A and others v. Sec'y of State for the Home Dep't*, [2004] UKHL 56, [2005] 2 A.C. 68 (H.L.), available at <http://www.publications.parliament.uk/pa/ld200405/ldjudgmt/jd041216/a&oth-1.htm> (declaring the post-9/11 preventive detention measures incompatible with the Human Rights Act because they failed to be either proportionate to the threat or narrowly tailored to avert it but permitting the detainees to remain in detention until the system could be revised).

⁹ In comparative perspective, the major exception to this generalization comes from countries with constitutional courts, before which laws can be challenged in the abstract. The German and Colombian cases, for example, resulted in laws being expunged immediately from the books, which created an immediate effect. See *supra* note 8. But those cases were not brought by suspected terrorists; they were general challenges to the laws before they were used in any specific case. By contrast, the cases that were brought by suspected terrorists who had actually been caught in the grip of these policies show a pattern similar to the one outlined for the United States in this Article. See *id.* Suspected terrorists won, and the laws under which they were treated badly had to be modified, but courts generally did not pull a law out from under an offending practice without first giving the government time to do something else with the suspected terrorists in question. As a result, most of the suspected terrorists remained in the same situation after they won their cases as

from courts a vindication of the abstract principle that they have rights without also getting an order that the abusive practices that have directly affected them must be stopped immediately. Instead, governments are given time to change their policies while still holding suspected terrorists in legal limbo. As a result, despite winning their legal arguments, suspected terrorists lose the practical battle to change their daily lives.

Courts may appear to be bold in these cases because they tell governments to craft new policies to deal with terrorism. But because the new policies then have to be tested to see whether they meet the new criteria courts have laid down, the final approval may take years, during which time suspected terrorists may still be generally subjected to the treatment that courts have said was impermissible. Because judicial review of anti-terrorism policies itself drags out the time during which suspected terrorists may be detained, suspected terrorists win legal victories that take a very long time to result in change that they can discern. As a result, governments win the policy on the ground until court challenges have run their course and the courts make decisions that contribute to the time that the litigation takes. This is the new face of judicial deference.

This Article will explore why and how American courts have produced so many decisions in which suspected terrorists appear to win victories in national security cases. As we will see, many judges have handled the challenges that terrorism poses for law after 9/11 by giving firm support, at least in theory, to both separation of powers and constitutional rights. Judges have been very active in limiting what the government can do, requiring substantial adjustments of anti-terrorism policy and vindicating the claims of those who have been the targets. But the solutions that judges have crafted – often bold, ambitious, and brave solutions – nonetheless fail to address the plights of the specific individuals who brought the cases.

This new form of judicial deference has created a slow-motion brake on the race into a constitutional abyss. But these decisions give the government leeway to tackle urgent threats without having to change course right away with respect to the treatment of particular individuals. New deference, then, is a mixed bag. It creates the appearance of doing something – an appearance not entirely false in the long run – while doing far less in the present to bring counter-terrorism policy back under the constraint of constitutionalism.

To see how the face of judicial deference has radically changed over time, I will compare American cases generated by wars and emergencies before 9/11 with the post-9/11 cases. Part I shows how “old deference” worked in the United States, where national security and civil liberties clashed head-on up to and into World War II. By contrast, Part II shows how “new deference” has developed after 9/11 in American courts as a counter to the old hands-off approach.

Part III explains why new deference is very different from other patterns with which it might be confused. New deference identifies something other than the usual gap between law in the books and law in action, a gap that the law and society movement has so famously pointed out. Instead, the gap identified here is built into the opinions themselves. As a result, the contradiction is not located in the inevitable slip between law and its enforcement but in the connection between right and remedy. In addition, new deference is not just another face of judicial minimalism, in which constitutional theorists – Cass Sunstein, in particular – have counseled judges to go slowly in paddling through rough legal waters. In the terrorism cases, there is nothing minimalist about decisions that break so sharply with the past practice of old deference and generate headlines about how “everything has changed.” If anything, the courts that have taken an aggressive role in the anti-terror campaign seem to have been designed to *appear* maximalist with their high-flying rhetoric. The decisions therefore are hardly minimalist in ambition or style, even if their results have been incremental. Finally, new deference is not *Marbury*-ism, to give a name to what the Supreme Court did in *Marbury v. Madison*.¹⁰ Both Mr. Marbury and the suspected terrorists after 9/11 failed to get much from their victories. But the reasons are different. In *Marbury*, the Court announced a major new principle in a case that was otherwise minor and court-limiting, making its revolutionary assertion of powers seem less radical in the specific context.¹¹ In *Marbury*, the Court hid its new light under a barrel, so to speak. In the anti-terrorism cases, by contrast, courts set up a searchlight for all the world to see by announcing a new principle in cases that could not have been more visible or had more at stake. And yet, those who brought the cases felt that the darkness persisted even after they “won.” It appears that the post-9/11 judges who wrote these opinions wanted to be seen to be doing something more than they actually did, while the *Marbury* judges wanted to appear to be doing less. New deference, as a result, is not just another name for *Marbury*-ism.¹²

¹⁰ 5 U.S. (1 Cranch.) 137 (1803).

¹¹ *Id.* at 177.

¹² That said, I do not believe that the phenomenon itself – giving one side a judicial victory and the other side the practical advantage in facts on the ground – is completely new. I wrote about something similar in analyzing comparative abortion cases, where courts handled a high-stakes conflict by giving one of the parties before them a victory on the legal standard and the other side a victory in the practical consequences of the decision. Kim Lane Scheppelle, *Constitutionalizing Abortion*, in *ABORTION POLITICS: PUBLIC POLICY IN CROSS-CULTURAL PERSPECTIVE* 29-54 (Marianne Githens & Dorothy McBride Stetson eds., 1996). Different countries’ courts split the difference differently. In the United States, pregnant women got the right to choose, but their opponents got the facts on the ground by being permitted to block easy access to the procedure. *See id.* at 30-33. In Germany, the state won the capacity to protect the fetus, but women got easier access to abortions. *See id.* at 38-41.

Part IV goes normative and argues that new deference is both a better and worse alternative than old deference. New deference is worse because it gives an appearance that the courts are addressing an issue while in practice not actually curbing the immediate abuses. It therefore gives an overly optimistic sense of victory to those who worry about anti-terrorism's overreach. But those who bring their cases before the courts feel that courts do nothing for them. Such victories may lead to new despair among those who thought that winning in law would allow them to win something in practice, making those who brought their cases feel that they have come to the wrong place for answers.¹³ That said, new deference also creates a horizon beyond which abuse of constitutionalism cannot go – off in some distant future – and eventually that may have some real effect.

But before exploring new deference, we need to see how old deference worked – and why, therefore, we all might have suspected that the courts after 9/11 would not have done as much as they did.

I. OLD JUDICIAL DEFERENCE

The concept is so familiar that the Latin phrase endures: *inter arma silent leges* (in war, law is mute). For a long time, it has been a commonplace that governments not only *may* but *must* behave differently in the presence of existential threats,¹⁴ because as John Locke argued, “the *end of Government* [is] the *preservation of all*.”¹⁵ Locke believed that this prerogative was a

¹³ For example, the lawyers who brought the military commissions challenge to the Supreme Court posted a victory sign on their website when the Supreme Court ruled in their favor. For the sign and the photographs, see <http://www.hamdanvrumsfeld.com> (last visited Oct. 31, 2011). But when Salim Hamdan, the detainee in whose name the case was brought, was told by his military commission judge that he should be pleased that he won his case at the Supreme Court, Hamdan replied, “I didn’t win the case.” *Another Boycott at Guantanamo, Another Test for the Military Commission System*, HUMAN RIGHTS FIRST MILITARY COMMISSION TRIAL OBSERVATION (Apr. 30, 2008), <http://web.archive.org/web/20100827144110/http://www.humanrightsfirst.org/blog/gitmo/2008/04/another-boycott-at-guantamo-another.html>.

As Jenny Martinez recounted it, José Padilla asked her, as his lawyer before the Supreme Court: “Why is it that litigation concerning the alleged enemy combatants detained at Guantanamo and elsewhere has been going on for more than six years and almost nothing seems to have actually been decided?” Jenny S. Martinez, *Process and Substance in the “War on Terror,”* 108 COLUM. L. REV. 1013, 1014-15 (2008). Because she was moved by this question, she wrestled with when procedural issues help just causes and when they just cause painful delay. But one can imagine, as Padilla kept winning his case up and down the court system, that he might have had a more skeptical view about whether the courts were in fact doing anything for him when he won.

¹⁴ For the history of this idea in political thought, see generally CARL FRIEDRICH, *CONSTITUTIONAL REASON OF STATE: THE SURVIVAL OF THE CONSTITUTIONAL ORDER* (1957).

¹⁵ JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 393 (Peter Laslett ed., Cambridge University Press 1960) (1689).

necessary feature of any stable political order: “This Power to act according to discretion, for the publick good, without the prescription of the Law, and sometimes even against it, *is* that which is called *Prerogative*. . . . [T]here is a latitude left to the Executive power, to do many things of choice, which the Laws do not prescribe.”¹⁶

Such views had become commonplace in modern constitutional debates. For example, in his book on emergency powers, *All the Laws but One*, former Chief Justice William H. Rehnquist uses this maxim as the title of his last chapter because it summarizes his conclusions.¹⁷ Moreover, it is typical for post-World War II written constitutions to include overtly elaborated emergency powers that permit explicit deviations from normal governance in times of crisis.¹⁸ Even in countries like the United States, where only limited emergency powers can be found in the constitutional text,¹⁹ or in the United Kingdom, where the lack of a single written constitutional text leaves emergency powers to the Parliament,²⁰ courts have well understood that strong uses of executive power at times of crisis should get a constitutional free pass. Times of crisis are politically fragile and laws may be either casually enforced or widely ignored. Emergency laws may trump ordinary ones; legal corners may be cut. As Chief Justice Rehnquist observed,

In wartime, reason and history both suggest that this balance [between freedom and order] shifts to some degree in favor of order – in favor of the government’s ability to deal with conditions that threaten the national well-being. It simply cannot be said, therefore, that in every conflict between individual liberty and governmental authority that the former should prevail.²¹

¹⁶ *Id.*

¹⁷ WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* 218 (1998).

¹⁸ See Kim Lane Scheppele, *Exceptions Prove the Rule: Embedding Emergency Government in Everyday Constitutional Life*, in *THE LIMITS OF CONSTITUTIONAL DEMOCRACY* 124, 130 (Jeffrey K. Tulis & Stephen Macedo eds., 2010).

¹⁹ The U.S. Constitution has no explicit regime for declaration of emergencies; the closest provision is Article I, Section 9, which provides for suspension of the writ of habeas corpus.

²⁰ In fact, the British government declared a state of emergency on November 11, 2001 and derogated from Art. 5(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms in order to launch a preventive detention regime. The Human Rights Act 1998 (Designated Derogation) Order 2001, 2001 (U.K.), *available at* <http://www.opsi.gov.uk/si/si2001/20013644.htm>. As part of this post-9/11 reaction in the UK, the government also brought in a new emergencies law. The Civil Contingencies Act, 2004, c. 36 (U.K.), *available at* http://www.opsi.gov.uk/acts/acts2004/ukpga_20040036_en_1#Legislation-Preamble.

²¹ REHNQUIST, *supra* note 17, at 222-23.

Some post-9/11 commentators argue that there may be more important things to do during a crisis than to enforce the law as it was. At the start of their book on judicial review of terrorism cases, for example, Eric Posner and Adrian Vermuele set up two models for dealing with the role of constitutional law during national emergencies: the deferential view and the civil libertarian view.²² Not only is the deferential view the one that best describes what U.S. courts have done in times of conflict, they argue, but it also best describes their view of how courts *should* act even now: “[J]udicial review is especially likely to prove counterproductive or even futile during emergencies, due to factors that are unique to emergencies. . . . [T]he rules should change during emergencies.”²³

While courts should not *completely* abdicate their role in emergencies, or so the general view goes, old judicial deference counsels courts to at least hold their constitutional fire until the country is out of danger. Given the likelihood that judges will condone civil liberties violations in wartime that they would never condone in peacetime, some have suggested that it would be better for judges to wait until conflicts are over before they rule on what happened in the heat of the crisis. As former Chief Justice Rehnquist argued,

It is neither desirable nor is it remotely likely that civil liberty will occupy as favored a position in wartime as it does in peacetime. But it is both desirable and likely that more careful attention will be paid by the courts to the basis for the government’s claims of necessity as a basis for curtailing civil liberty. The laws will thus not be silent in time of war, but they will speak with a somewhat different voice.²⁴

This is the old judicial deference – the view that courts should be silent or at least not too confrontational in times of war or emergency. Courts, on this view, are supposed to acquiesce in what the executive does in crises, avoid deciding cases that challenge state policy altogether, or act to confront the government only when the government goes to extremes. In fact, old judicial deference is what courts have traditionally practiced in a number of countries, including the United States.

A review of the history of emergency cases before the U.S. Supreme Court provides ample evidence that old judicial deference has in fact dominated the judgments of the Supreme Court in times of crisis.

Dorr’s Rebellion in Rhode Island (1841-1842) had succeeded in setting up an alternative government of the state with an apparent electoral mandate.²⁵ The old government operated under the colonial charter; the new government was elected pursuant to a newly adopted state constitution that the charter-

²² ERIC A. POSNER & ADRIAN VERMUELE, *TERROR IN THE BALANCE: SECURITY, LIBERTY AND THE COURTS* 15-18 (2007).

²³ *Id.* at 21.

²⁴ REHNQUIST, *supra* note 17 at 224-25.

²⁵ *Luther v. Borden*, 48 U.S. 1, 35-36 (1849).

defenders did not recognize.²⁶ The charter governor declared martial law, called in federal troops, and deputized Borden to break into Luther's house to execute an arrest warrant.²⁷ Luther sued Borden; Borden claimed he acted under an order of the governor; Luther replied that the governor who had deputized Borden was no longer the legitimate governor of the state.²⁸ By the time this case reached the Supreme Court, the answer to the legal question at issue turned on which contender was the true governor of the state. In *Luther v. Borden*, the Court held that it could not answer that question as the matter was more political than legal.²⁹ In this case, the Court announced for the first time in clear fashion the political question doctrine that has come down to the present day.

But the Court took the opportunity to opine nonetheless on what emergencies permitted a state to do. And, in the view of the Justices, the proper government of Rhode Island (whichever one that was) could in fact declare martial law and, under its authority, break down the door of one of its citizens to put him under detention.³⁰ As the Court observed, the state must be able to preserve order and its own institutions, and it may "resort[] to the rights and usages of war to maintain itself."³¹ This left a wide scope indeed for aggressive governmental action in the face of a serious threat.

In a later emergency, the economic crisis of the Great Depression, the Supreme Court also used strong language to uphold emergency actions by the Minnesota government when it delayed foreclosures on houses to keep homeowners from being forced out on the street.³² In so doing, the state overrode the obligations in private contracts.³³ The majority opinion in *Blaisdell*, written by Chief Justice Charles Evans Hughes for a five-to-four Court, is best known for its language seeming to bring emergency powers under the rule of law:

Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved. The Constitution was adopted in a period of grave emergency. Its grants of power to the Federal Government and its limitations of the power of the States were determined in the light of emergency and they are not altered by emergency. What power was thus granted and what limitations were thus imposed are questions which have

²⁶ *Id.*

²⁷ *Id.* at 37.

²⁸ *Id.* at 38.

²⁹ *Id.* at 46-47.

³⁰ *Id.* at 45-46.

³¹ *Id.* at 45.

³² See *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934).

³³ *Id.* at 447.

always been, and always will be, the subject of close examination under our constitutional system.³⁴

But the rest of the judgment qualified that quotable language, creating in the end an expansive view of the powers of the government in times of crisis. As the Court argued, “emergency does not create power,” but it provides an opportunity “for the exercise of power,” up to and including the war power.³⁵ In the end, the Supreme Court upheld the emergency laws against the obligations of contract. In dissent, Justice Sutherland, joined by three of his brethren, argued with great energy that the law was the same in crisis and in peace, and that, while special measures provided for in the Constitution might be permitted in wartime, no such measures existed in the Constitution to cover economic crises.³⁶ Yet, that view lost. With *Blaisdell* on economic emergencies (narrowly) and *Luther v. Borden* on shooting emergencies (with a greater margin), the Supreme Court showed itself to be highly deferential to government when government acted outside of the usual legal constraints in times of crisis.

American courts have been somewhat more vigilant in curbing excesses when it comes to the use of powers specified in the Constitution directly, particularly with respect to habeas corpus. Thus, when presidents have sought to suspend the writ, something that the Constitution implies that only Congress may do and then only under specific conditions,³⁷ the Supreme Court has on multiple occasions struck down these suspensions and issued the writ requiring the government to account for its detentions. The Court did this when President Thomas Jefferson sought to put down the rebellion fomented by Aaron Burr by sending out General James Wilkinson to quell it.³⁸ Wilkinson refused to honor writs of habeas corpus issued by local courts to show why he had arrested those involved in the rebellion.³⁹ In the end, however, Chief Justice John Marshall ordered the release of Wilkinson’s prisoners by arguing that the power to suspend habeas lay only with the Congress and not with the President.⁴⁰ Later, during the Civil War, when President Abraham Lincoln suspended the writ and ordered the detention of those obstructing the Northern

³⁴ *Id.* at 425-26.

³⁵ *Id.* at 426.

³⁶ *Id.* at 473 (Sutherland, J., dissenting).

³⁷ See U.S. CONST. art. I, § 9, cl. 2 (“The 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.”). While the language of the text does not specifically state that the power is granted to Congress alone, the text appears in Article I, which specifies the powers of Congress. Also, the provision does not provide for a general suspension of the writ whenever Congress deems it necessary, but only in circumstances of invasion or rebellion. *Id.*

³⁸ See JUSTIN WERT, *HABEAS CORPUS IN AMERICA: THE POLITICS OF INDIVIDUAL RIGHTS* 40 (2011).

³⁹ See *id.*

⁴⁰ See *Ex parte Bollman & Swartwout*, 8 U.S. 75, 101, 136 (1807).

war effort, several courts questioned the legitimacy of these suspensions as well.⁴¹ When Chief Justice Taney challenged Lincoln's suspension of habeas at the outset of the Civil War, Lincoln ignored the judgment.⁴²

The track record for issuing the writ when the government wanted to try rebels before military commissions was more mixed. In *Ex parte Vallandigham*, another Civil War era case, a trial court in Ohio refused to issue a writ of habeas corpus because the judge believed that a writ, if issued, was unenforceable.⁴³ Judge Leavitt's opinion was remarkable for its pure expression of old judicial deference:

It is perhaps not easy to define what acts are properly within this designation [military necessity], but they must undoubtedly be limited to such as are necessary to the protection and preservation of the government and the constitution, which the president has sworn to support and defend. And in deciding what he may rightfully do under this power where there is no express legislative declaration, the president is guided solely by his own judgment and discretion, and is only

⁴¹ See *Ex parte Merryman*, 17 F. Cas. 144 (1861) (holding the detentions of civilians by military personnel unconstitutional). Chief Justice Taney, riding circuit and therefore not deciding for the Supreme Court, reacted quickly and angrily to President Lincoln's suspension of the writ. He held that the President did not have the power to refuse to answer why people had been detained, because the power to compel him to do so was given in the Constitution to the Congress. Even though the country was evidently preparing for war, Taney would not permit the President to authorize the military to act without acknowledging the proper role of courts to challenge detentions:

I can only say that if the authority which the constitution has confided to the judiciary department and judicial officers, may thus, upon any pretext or under any circumstances, be usurped by the military power, at its discretion, the people of the United States are no longer living under a government of laws, but every citizen holds life, liberty and property at the will and pleasure of the army officer in whose military district he may happen to be found. In such a case, my duty was too plain to be mistaken.

Id. at 152-53 (footnote omitted). For a discussion of the Northern opinion that was distinctly hostile to Taney's view, see REHNQUIST, *supra* note 17, at 34-35.

As the war went on, the suspension of habeas produced more and more arrests for violation of military orders. Other courts also had their doubts that the writ had been validly suspended. The Wisconsin Supreme Court, for example, expressed its concern but then refused to issue the "attachment" that would have required the state to put forward its proof. *Id.* at 61-63.

⁴² Lincoln argued in his July 4, 1861 message to the special session of Congress that the Constitution did not say explicitly whether the power to suspend the writ lay with Congress or the President and that therefore the President could suspend the writ in cases of insurrection or rebellion if Congress were not in session. REHNQUIST, *supra* note 17, at 38. Lincoln, as a result, simply ignored the order to explain why Merryman was detained. *Id.* at 38-39. Nor did the government appeal the case. *Id.* at 44-45.

⁴³ *Ex parte Vallandigham*, 28 F. Cas. 874, 920 (1863).

amenable for an abuse of his authority by impeachment, prosecuted according to the requirements of the constitution.⁴⁴

But this statement, made *during* the war, was clearly limited later by the judgment of the U.S. Supreme Court *after* the war in the case of *Ex parte Milligan*.⁴⁵ The case is generally known for its holding that Lambkin Milligan, having been tried before a military court for supporting the cause of the South in the war, suffered a violation of his constitutional right to a civilian trial, complete with jury and other constitutional guarantees.⁴⁶ The military commission was, as a result, unconstitutional when used for a civilian residing in the place where the ordinary courts were open and functioning.⁴⁷ But, even in this case, the Supreme Court gave lip service to the need for firm executive action in times of crisis and expressed its respect for a zone of presidential action that the courts could not contest:

It is essential to the safety of every government that, in a great crisis, like the one we have just passed through, there should be a power somewhere of suspending the writ of *habeas corpus*. . . . In the emergency of the times, an immediate public investigation according to law may not be possible; and yet, the peril to the country may be too imminent to suffer such persons to go at large. Unquestionably, there is then an exigency which demands that the government, if it should see fit in the exercise of a proper discretion to make arrests, should not be required to produce the persons arrested in answer to a writ of *habeas corpus*. The Constitution goes no further.⁴⁸

The Court, therefore, acquiesced in the ability of the President to suspend the writ of habeas corpus but did not include in those special wartime powers the power to suspend the jurisdiction of the ordinary courts.

The World War II cases, however, brought the expression of old judicial deference to its modern codification in American law. In the German saboteurs case, *Ex parte Quirin*,⁴⁹ eight Germans were deposited by two submarines at different landing sites in the United States – one on Long Island and the second near Jacksonville, Florida.⁵⁰ One of the saboteurs turned himself in to the FBI and gave information that caused the others to be arrested

⁴⁴ *Id.* at 922.

⁴⁵ 71 U.S. (4 Wall) 2 (1866).

⁴⁶ *See id.* at 139-41.

⁴⁷ *See id.*

⁴⁸ *Id.* at 125-26.

⁴⁹ 317 U.S. 1 (1942).

⁵⁰ *See* LOUIS FISHER, CONG. RESEARCH SERV., RL 31340, MILITARY TRIBUNALS: THE QUIRIN PRECEDENT 1 (2002) [hereinafter FISHER, QUIRIN PRECEDENT]. The full version of the tale is compellingly told in LOUIS FISHER, NAZI SABOTEURS ON TRIAL: A MILITARY TRIBUNAL AND AMERICAN LAW (2003). My account of the facts of the case is drawn from Fisher's research.

before they had much of a chance to begin the sabotage they had planned.⁵¹ As a result, charging them in ordinary criminal proceedings was risky for the government both because the men probably could not have been convicted on such meager evidence of criminal activity before they had a chance to do anything and because the minor crimes with which they could be charged did not carry long sentences.⁵² To ensure convictions and the possibility of the death penalty, however, the government instead put the saboteurs before a hastily constructed military commission that had been set up by an Executive Order of the President.⁵³

The Supreme Court agreed to hear the saboteurs' case, which came to the Court as a habeas petition first seeking to compel the government to explain why the saboteurs were detained and second challenging the constitutionality of the military commission before which they were already on trial.⁵⁴ The Court heard nine hours of oral argument in a special session in mid-July 1942 because the parties did not have time to fully brief the issue.⁵⁵ A *per curiam* opinion permitting the trial to go forward was issued almost immediately, but the Court delayed its reasoned judgment until October of that year, after all eight of the saboteurs had been convicted by these military commissions and six had already been executed.⁵⁶ The opinion, as a result, arrived too late to provide a full explanation to the petitioners while they might have still been able to appreciate the basis for the rejection of their case. Moreover, as the Justices got into writing the opinion, the arguments, upon sustained reflection, did not so easily lead to the same outcome that the Court had hastily reached in the summer.⁵⁷ As a result, the case is awkward in multiple senses.

Quirin is the quintessential old deference case. In it, the Court found that there was no requirement for a court to grant a writ of habeas corpus if it were clear that the petitioner would lose once the government was compelled to explain the detention.⁵⁸ The Court then upheld the military tribunals on the constitutional grounds that (a) the President and Congress were together permitted to set up such special courts to try crimes against the law of war, (b) the military tribunals actually set up were within the Articles of War that the Congress has passed to govern the conduct of the U.S. government during the war, and (c) the crimes with which petitioners were charged were in fact war crimes.⁵⁹ But the decision remained awkward because the Court was divided in reasoning why it believed that the military commissions were allowed to try

⁵¹ See FISHER, QUIRIN PRECEDENT, *supra* note 50, at 1.

⁵² See *id.* at 3-4.

⁵³ See *id.* at 4-5.

⁵⁴ See *id.* at 11-12.

⁵⁵ *Id.* at 12.

⁵⁶ *Id.* at 15-16, 28.

⁵⁷ See *id.* at 27-32.

⁵⁸ See *Ex parte Quirin*, 317 U.S. 1, 24 (1942).

⁵⁹ See *id.* at 26-37.

the petitioners on war crimes charges. Some of the Justices thought that Congress had intended that the President retain executive power to enforce the law of war.⁶⁰ Others thought that Congress had intended to encompass within its issuance of Articles of War the charges on which the petitions were tried, which – as war crimes – would have underwritten the jurisdiction of the military tribunal.⁶¹ As a result, an independent appeal to the law of war was unnecessary.⁶² Regardless of the logic underwriting the military commissions, however, the Supreme Court permitted the trials to go forward to their logical conclusion. Deference reigned, both in the Court’s understanding of the law and in what the Court allowed the executive branch to do in the law’s name.

*Johnson v. Eisentrager*⁶³ also produced a result that was deferential in both law and fact. The case involved a habeas petition from German prisoners who had been seized in China by the U.S. Army, tried in China in a military tribunal run by the United States, and then held in post-war occupied Germany in a prison run by the United States.⁶⁴ The Supreme Court denied that the petitioners had any rights in American courts.⁶⁵

Writing for the Court, Justice Jackson displayed an expansive conception of the President’s general detention powers in wartime: “Executive power over enemy aliens, undelayed and unhampered by litigation, has been deemed, throughout our history, essential to war-time security.”⁶⁶ In a case like this one, where enemy aliens were never present in the United States, were captured outside the United States, were tried by an American military commission sitting outside the United States, were convicted of crimes carried out outside the United States, and were imprisoned outside the United States, there was not a close enough connection between the petitioning enemy aliens and the United States to warrant habeas jurisdiction in American courts.⁶⁷ In habeas actions, the Court added, the petitioners should be able to appear in person before the court hearing the case.⁶⁸ But in this case, such a personal appearance would require that the petitioners be transported into the United States from far away. As the Court stated,

It would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home. Nor is it unlikely that the result of such enemy

⁶⁰ *See id.* at 47-48.

⁶¹ *See id.*

⁶² *See id.*

⁶³ 339 U.S. 763 (1950).

⁶⁴ *See id.* at 765-67.

⁶⁵ *See id.* at 790-91.

⁶⁶ *Id.* at 774.

⁶⁷ *See id.* at 777-78.

⁶⁸ *Id.* at 778.

litigiousness would be a conflict between judicial and military opinion highly comforting to enemies of the United States.⁶⁹

In short, the Court believed that a united governmental front was necessary to defeat the enemy, and that could only occur if the courts let military actions run their course without judicial check.

Even the dissenters in this case, Justices Douglas, Black, and Burton, believed that the role of the judiciary should be extremely modest during the conduct of a war: "It would be fantastic to suggest that alien enemies could hail our military leaders into judicial tribunals to account for their day-to-day activities on the battlefield. Active fighting forces must be free to fight while hostilities are in progress."⁷⁰ But the dissenters believed that this case, arising out of facts that took place after German surrender, did not fall into that particular frame.⁷¹ Though the dissenters and the majority disagreed about how to understand the particulars of this case, they were in agreement that courts had no place second-guessing battlefield judgments. Deference was surely due these judgments, all sides agreed.⁷²

Perhaps the most sweeping deference the Supreme Court has ever shown to presidential judgment in wartime, however, can be found in *Hirabayashi v. United States*⁷³ and its successor case in reasoning, *Korematsu v. United States*.⁷⁴ Ruling in the middle of World War II, the *Hirabayashi* Court unanimously upheld the curfew that the U.S. government had placed upon people of Japanese descent living on the West Coast of the United States, deferring explicitly to the political branches in wartime:

The war power of the national government is the power to wage war successfully. It extends to every matter and activity so related to war as substantially to affect its conduct and progress. The power is not restricted to the winning of victories in the field and the repulse of enemy forces. It embraces every phase of the national defense, including the

⁶⁹ *Id.* at 779.

⁷⁰ *Id.* at 796 (Black, J., dissenting).

⁷¹ *See id.*

⁷² In a related case, the Court found that the military tribunal that had tried and convicted a Japanese general for war crimes committed during hostilities was also within the power of the U.S. government to create. His petition for a habeas writ was also denied. The Court here also proclaimed its noninvolvement in matters of war: "The extent to which the power to prosecute violations of the law of war shall be exercised before peace is declared rests, not with the courts, but with the political branch of the Government, and may itself be governed by the terms of an armistice or the treaty of peace." *In re Yamashita*, 327 U.S. 1, 13 (1946).

⁷³ 320 U.S. 81 (1943).

⁷⁴ 323 U.S. 214 (1944). For a particularly good analysis of the role of the courts in wartime as evinced in this case, including a detailed factual background, see Joel Grossman, *The Japanese American Cases and the Vagaries of Constitutional Adjudication in Wartime: An Institutional Perspective*, 19 U. HAW. L. REV. 649 (1997).

protection of war materials and the members of the armed forces from injury and from the dangers which attend the rise, prosecution and progress of war. Since the Constitution commits to the Executive and to Congress the exercise of the war power in all the vicissitudes and conditions of warfare, it has necessarily given them wide scope for the exercise of judgment and discretion in determining the nature and extent of the threatened injury or danger and in the selection of the means for resisting it. Where, as they did here, the conditions call for the exercise of judgment and discretion and for the choice of means by those branches of the Government on which the Constitution has placed the responsibility of war-making, it is not for any court to sit in review of the wisdom of their action or substitute its judgment for theirs.⁷⁵

Having framed *Hirabayashi* in such a completely deferential fashion, the Court felt it could decide no differently in *Korematsu*, the Japanese internment case.⁷⁶ In *Korematsu*, the Supreme Court found constitutional the exclusion orders that President Roosevelt had issued authorizing the internment of some 120,000 Japanese-Americans, most of whom were citizens of the United States.⁷⁷ Because the exclusion orders mandated the removal of a large number of citizens from their homes, the violation of basic rights was even more extreme than it had been in the curfew case. In addition, the internment case was decided after the tide had turned in the war, so that an attack on the West Coast was no longer conceivable.⁷⁸ These differences between *Hirabayashi* and *Korematsu* might have provided an opportunity for the Court to back down from the extreme deference accorded the political branches in *Hirabayashi*. But these two factors only served to split the Court, not to change its mind. In contrast with the unanimous *Hirabayashi* case, the *Korematsu* Court divided six to three.

The majority in *Korematsu* felt the need to maintain the same standards of judgment that the Court had used the previous year. As a result, the Court leaned heavily on its reasoning from *Hirabayashi*:

In the light of the principles we announced in the *Hirabayashi* case, we are unable to conclude that it was beyond the war power of Congress and the Executive to exclude those of Japanese ancestry from the West Coast war area at the time they did. True, exclusion from the area in which one's home is located is a far greater deprivation than constant confinement to the home from 8 p.m. to 6 a.m. Nothing short of apprehension by the proper military authorities of the gravest imminent danger to the public safety can constitutionally justify either. But

⁷⁵ *Hirabayashi*, 320 U.S. at 93 (citations omitted) (internal quotation marks omitted).

⁷⁶ See *Korematsu*, 323 U.S. at 217-18.

⁷⁷ See Grossman, *supra* note 74, at 650.

⁷⁸ *Id.* at 661.

exclusion from a threatened area, no less than curfew, has a definite and close relationship to the prevention of espionage and sabotage.⁷⁹

Readopting its *Hirabayashi* reasoning, the Court upheld the exclusion orders just as it had upheld the curfews.⁸⁰ The Court found that the military had been faced with a large ethnic Japanese population divided between those who were loyal to the United States (and therefore not a threat) and those who were not loyal (and who therefore threatened the United States, which was at war with their country of ancestry).⁸¹ Given the urgency of the situation, the military did not have the capacity or the time to tell who was who, and this justified the internment of all, according to the Court.⁸² But it was loyalty and not ethnicity alone that determined the degree of threat and therefore the legitimacy of government action. Decided the same day as *Korematsu, Ex parte Endo*⁸³ demonstrated the importance of this distinction. Once any particular citizen of Japanese descent had definitively proved her loyalty, she could no longer be interned.⁸⁴

The more extreme violations of civil liberties (internment rather than curfew) and the timing of the case (after the threat of invasion had subsided rather than at the start of the campaign to contain the Japanese on the West Coast) produced three dissents in the case. Justice Roberts, seeking to escape the contradiction of having ruled differently in *Korematsu* than in *Hirabayashi*, emphasized the specific facts of the case and the contradictory position in which Fred Korematsu himself had been placed by law.⁸⁵ Justice Murphy found that internment had no reasonable relationship to the degree of risk averted and tried to walk back the extreme deference that he and his fellow Justices had accorded the military in *Hirabayashi*.⁸⁶ Finally, a dissenting Justice Jackson attempted to distinguish *Hirabayashi* by pointing out that, while military decisions may not be particularly amenable to judicial review during the height of wartime, judicial approval after the threat had largely

⁷⁹ *Korematsu*, 323 U.S. at 217-18.

⁸⁰ *Id.* at 218.

⁸¹ *Id.*

⁸² *Id.* at 219-20.

⁸³ 323 U.S. 283 (1944).

⁸⁴ *See id.* at 302.

⁸⁵ *Korematsu*, 323 U.S. at 232 (Roberts, J., dissenting) (“[T]he petitioner, prior to his arrest, was faced with two diametrically contradictory orders given sanction by the Act of Congress of March 21, 1942. The earlier of those orders made him a criminal if he left the zone in which he resided; the later made him a criminal if he did not leave. I had supposed that if a citizen was constrained by two laws, or two orders having the force of law, and obedience to one would violate the other, to punish him for violation of either would deny him due process of law. And I had supposed that under these circumstances a conviction for violating one of the orders could not stand.”).

⁸⁶ *See id.* at 234 (Murphy, J., dissenting).

subsided was a wholly different matter.⁸⁷ The dissenters, therefore, tried to limit *Hirabayashi* by distinguishing the facts, applying the same principle to reach a different conclusion on different facts, and asserting that later review required no deference, even though review in the heat of the moment of threat might.

Old deference in times of crisis, then, has an old pedigree in American constitutional law. Courts have generally refused to second-guess the actions of either the President or the military when an emergency is ongoing. Lone dissenters may preserve the proud position of courts as guardians of civil liberties. But, in crises, they do not prevail.

The old deference cases drip from an overflowing sense that courts have a limited place in the constitutional order. Over and over, judges report that they cannot possibly know what the executive knows, that they cannot decide without seeing the security-barred information that would enable them to sort out what actions were essential and which were reckless mistakes, and that they have no right to know these things in any event. As a result, judges feel compelled to side with the executive, all of the while saying that they believe that the government in wartime will act in an honorable manner. In times of war, and even in the peace that follows, judges repeatedly find that the government had to do what the government had to do. And after the wars were over, researchers have repeatedly found that the government should not have been trusted.⁸⁸

When 9/11 occurred and it became clear that governments were again going to round up and detain many people in the name of a security threat, it might have been logical to think that courts would again withdraw from an active role in managing the emergency. In fact, as we will see, the opposite occurred. Or, at least, the opposite appears to have occurred. Courts waded into emergency practices and appeared to call governments to account. But they did so without demanding that the specific offending practices change immediately.

II. NEW JUDICIAL DEFERENCE

As the country attacked on 9/11, the United States sprang into action immediately with a twinned strategy of aggressive military action and new

⁸⁷ See *id.* at 245-46 (Jackson, J., dissenting).

⁸⁸ Louis Fisher discovered in his examination of the background of the *Quirin* case that the tribunal had been set up in order to guarantee convictions in cases that had weak evidence. See FISHER, *QUIRIN PRECEDENT*, *supra* note 50, at 3-4. Peter Irons discovered in his examination of the *Korematsu* case that the government had lied in its representations to the Court. Peter Irons, *Politics and Principle: An Assessment of the Roosevelt Record on Civil Rights and Liberties*, 59 WASH. L. REV. 693, 719 (1984). He wrote, "At the time, Justice Department lawyers were aware that military intelligence reports contradicted the Army's 'disloyalty' claim. The Court, however, was not aware of this when it decided these first cases, because Solicitor General Charles Fahy rebuffed Justice Department lawyers' efforts to bring these reports to the Court's attention . . ." *Id.*

understandings of law. From launching wars abroad⁸⁹ to developing novel strategies for rendition, detention, and interrogation of suspected terrorists outside the United States⁹⁰ and curtailing civil liberties through widespread surveillance programs at home,⁹¹ the Bush Administration, with the active participation of the Office of Legal Counsel (OLC) at the Department of Justice, took a generous view of its own powers in wartime. The OLC developed new legal understandings to underwrite the anti-terrorism campaign.⁹²

Some of the new legal understandings resulted from new law. Congress quickly passed the Authorization of the Use of Military Force (AUMF), giving the President a green light to use “all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001.”⁹³ Shortly thereafter, Congress passed the USA PATRIOT Act with nearly unprecedented speed, broadening the definitions of terrorism offenses, clamping down on financial support for terrorism, increasing domestic surveillance capacities of the U.S. government, and adding a toxic mix of small changes in U.S. law that allowed the government to operate secretly and to commandeer private resources in the anti-terrorism campaign.⁹⁴

But much of the new understanding of law consisted of reinterpreting or repudiating old legal understandings without any new formal lawmaking. From 9/11 onwards, legal officials in the OLC churned out opinion after

⁸⁹ The United States launched a war in Afghanistan in fall 2001 and in Iraq in spring 2003. For a timeline of the Afghan war, see COUNCIL ON FOREIGN RELATIONS, *U.S. War in Afghanistan*, <http://www.cfr.org/afghanistan/us-war-afghanistan/p20018>. For a timeline of the Iraq war, see COUNCIL ON FOREIGN RELATIONS, *The Iraq War*, <http://www.cfr.org/iraq/timeline-iraq-war/p18876> (last visited Dec. 2, 2011).

⁹⁰ For a description of the rendition, detention and interrogation program, see Kim Lane Scheppele, *Hypothetical Torture in the “War on Terrorism,”* 1 J. NAT. SEC. L. & POL. 285, 295-303 (2005), available at http://www.mcgeorge.edu/documents/publications/jnslp/04_Scheppele_Master_c.pdf.

⁹¹ See Dan Eggen, *Bush Authorized Domestic Spying*, WASH. POST, Dec. 16, 2005, at A01.

⁹² See Memorandum from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Re: Status of Certain OLC Opinions Issued in the Aftermath of the Terrorist Attacks of September 11, 2001, Memorandum for the Files (Jan. 15, 2009), available at <http://www.gwu.edu/~nsarchiv/torturingdemocracy/documents/20090115.pdf>. In this memo, written at the very end of the Bush Administration, the OLC officially disowned a series of memos written in the aftermath of 9/11. *Id.* The memo describes the specific elements of the legal analysis in the wake on 9/11 that on sober reflection turned out to have radically overreached. *Id.*

⁹³ S.J. Res. 23, 107th Cong. § 2(a) (2001), Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224.

⁹⁴ USA PATRIOT Act, Pub. L. No. 107-55, 115 Stat. 272 (2001). For more detail about this and other actions taken at the time, see Kim Lane Scheppele, *Law in a Time of Emergency*, 6 U. PA. J. CONST. L. 1001, 1034-47 (2004).

opinion, radically changing the interpretation of existing law to permit an aggressive response to terrorism.⁹⁵ New Attorney General Guidelines were promulgated in 2002, changing the ground rules for domestic terrorism investigations.⁹⁶ Presidential “signing statements” signaled that the President would refuse to enforce many laws that Congress had passed and that he himself had signed.⁹⁷ The Bush Administration pushed its own lawmaking capacity to the limits. As a result, for much of the Bush Administration’s tenure, it was unclear just which laws were actually being honored as before, which had been radically reinterpreted, and which were functionally suspended.

Of all of the changes that marked the new US anti-terror policy, the detention practices for suspected terrorists generated the most litigation in American courts. Shortly after 9/11, the Bush Administration began making plans for the detention of terrorism suspects, newly labeled “enemy combatants,” at Guantánamo Bay, Cuba, where the U.S. had a long-standing military base. Guantánamo Bay was selected as a site because government lawyers believed that it was highly unlikely that American courts would exercise jurisdiction there, though they did indicate that there was some “litigation risk.”⁹⁸ The term “enemy combatant” seems to have been helpful to the Administration precisely because it was not an existing term of art with clear legal boundaries. The idea of the enemy combatant served to conflate the idea of an “unlawful combatant” who may be tried under the Geneva Conventions for violations of the laws of war with an “enemy” who has important protections under the Geneva Conventions.⁹⁹ Under international humanitarian law, an enemy may be detained for the duration of the war and an unlawful combatant loses the protections that lawful combatants are granted under the law of war. Such an enemy may be tried for killings and other violent conduct that transgress ordinary civilian law that could not be charged

⁹⁵ The most important memos about rendition, detention, interrogation, and surveillance, along with a short description of their contents, have been tracked by the ACLU, which led the Freedom of Information Act campaigns to force the release the memos. See their list at AMERICAN CIVIL LIBERTIES UNION, *Index of Bush-Era OLC Memoranda Relating to Interrogation, Detention, Rendition and/or Surveillance* (Mar. 5, 2009), http://www.aclu.org/pdfs/safefree/olcmemos_2009_0305.pdf.

⁹⁶ See OFFICE OF THE ATT’Y GEN., DEPT. OF JUSTICE, THE ATTORNEY GENERAL’S GUIDELINES ON GENERAL CRIMES, RACKETEERING ENTERPRISE AND TERRORISM ENTERPRISE INVESTIGATIONS, 15-18, 21-23 (2002).

⁹⁷ T.J. HALSTED, CONG. RESEARCH SERV., RL 33667, PRESIDENTIAL SIGNING STATEMENTS: CONSTITUTIONAL AND INSTITUTIONAL IMPLICATIONS 9-12 (2007).

⁹⁸ See Memorandum from Patrick Philbin and John Yoo, Deputy Assistant Attorneys General, to William Haynes II, General Counsel, Department of Defense, Re: Possible Habeas Jurisdiction over Detainees Held at Guantánamo Bay (Dec. 28, 2001), available at http://dspace.wrlc.org/doc/bitstream/2041/70946/00125_011228_001display.pdf.

⁹⁹ See Muneer Ahmad, *Resisting Guantanamo: Rights at the Brink of Dehumanization*, 103 NW. U. L. REV. 1683, 1705-06 (2009).

as crimes under the law of war. The mix of the two categories was accompanied by an assertion that those affiliated with al Qaeda were not in fact covered by the Geneva Conventions at all.¹⁰⁰ Instead, the Bush Administration asserted that its detention authority was based on the sheer danger that the detainees posed, and it eschewed any legal procedures that could have tested their claims.¹⁰¹ Because “enemy combatant” did not have a clear legal definition, its meaning shifted over the years of the Bush Administration’s anti-terror campaign, before the Obama Administration completely disavowed the category.¹⁰²

In addition to detaining alien enemy combatants at Guantánamo, President George W. Bush also claimed the power to detain domestic enemy combatants, which extended the category to U.S. citizens. The precise legal authority under which President Bush made these designations is not clear; he seems to have simply issued an executive order claiming the power.¹⁰³ Once labeled an enemy combatant in either system, however, a person could be held indefinitely in military custody, without charge or trial.¹⁰⁴ In neither the Guantánamo nor the domestic enemy combatant detentions were any of those detained to be given either counsel or an evidentiary hearing to test the government’s evidence sustaining the detention.¹⁰⁵ The say-so of the American President was enough to detain suspects under this rubric, and there was initially no way for any of them to put the government to its proof.

Litigation on behalf of those detained as enemy combatants started almost immediately, with petitions for writs of habeas corpus being the most common legal vehicle for the challenges. Two U.S. citizens held as domestic enemy combatants, Yaser Hamdi and José Padilla, filed habeas petitions, as did a number of the detainees at Guantánamo. Eventually these cases worked their way up to the U.S. Supreme Court, which ruled on the crisis measures taken in response to 9/11 in a string of decisions that appeared to mount a serious challenge to the enemy combatant framework. For the petitioners, themselves, however, the legal victories directly resulted in very little change in their lives.

¹⁰⁰ See Peter Jan Honigsberg, *Chasing “Enemy Combatants” and Circumventing International Law: A License for Sanctioned Abuse*, 12 UCLA J. INT’L L. & FOR. AFF. 1, 22-26 (2007).

¹⁰¹ See Ahmad, *supra* note 99, at 1726 n.181.

¹⁰² The Obama Administration’s disavowal of the enemy combatant designation came in Respondents’ Memorandum Regarding the Government’s Detention Authority Relative to Detainees Held at Guantanamo Bay at 8-10, *In re: Guantanamo Bay Litigation*, 581 F. Supp. 2d 33 (D.D.C. 2008), available at <http://www.justice.gov/opa/documents/memo-re-det-auth.pdf>.

¹⁰³ See Joanna Woolman, *Enemy Combatants: The Legal Origins of the Term “Enemy Combatant” Do Not Support Its Present Day Use*, 7 J.L. & SOC. CHALLENGES 145, 154-60 (2005).

¹⁰⁴ See *id.* at 157-60.

¹⁰⁵ Allison Danner, *Defining Unlawful Enemy Combatants: A Centripetal Story*, 43 TEX. INT’L L.J. 1, 8-12 (2007); see Woolman, *supra* note 103, at 158-59.

A. *Domestic Enemy Combatants: Hamdi and Padilla*

Saudi and American dual national Yaser Hamdi had been captured in Afghanistan by the U.S.-allied Northern Alliance during the American campaign against Afghanistan in fall 2001.¹⁰⁶ Hamdi was then transferred to the Guantánamo Bay detention facility in January 2002, where it was discovered in April 2002 that he had been born in Louisiana and was therefore a U.S. citizen.¹⁰⁷ He was then moved to a military prison inside the United States where the government claimed it could hold him indefinitely without charge and without permitting him any contact with the outside world, including access to a lawyer.¹⁰⁸

Hamdi's father filed a habeas petition on his son's behalf as next friend, claiming that as a U.S. citizen, Hamdi had rights under the U.S. Constitution to due process as well as assistance of counsel.¹⁰⁹ The district court ordered the government to provide Hamdi with counsel to enable him to contest his detention.¹¹⁰ On appeal from this order, the Fourth Circuit reversed the district court and remanded the case, instructing the lower court to be more deferential to government claims that access to counsel would harm national security.¹¹¹

Back at the district court and faced with court-ordered production of more information about the case, the government filed a vague and general declaration by a government official who claimed some (though not first-hand) knowledge of the case and who asserted (without more) that Hamdi had been fighting with the Taliban in Afghanistan.¹¹² This provided the only public evidentiary support for the government's detention of Hamdi.¹¹³ The declaration consisted of assertions of allegations without explaining what evidence led state officials to believe that those allegations were true.¹¹⁴ Presumably the U.S. government thought that the mere declaration of conclusions would be enough.

For the district court, however, this "Mobbs Declaration" did not suffice. Though acknowledging the long-standing practice of deference to the executive in times of crisis (and citing *Quirin* to that effect), Judge Doumar

¹⁰⁶ Hamdi v. Rumsfeld, 542 U.S. 507, 510 (2004).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 510-11.

¹⁰⁹ *Id.* at 511.

¹¹⁰ These earlier proceedings are summarized in Hamdi v. Rumsfeld, 243 F. Supp. 2d 527, 528-29 (E.D. Va. 2002).

¹¹¹ Hamdi v. Rumsfeld, 296 F.3d 278, 279, 283 (4th Cir. 2002).

¹¹² The "Mobbs Declaration," as it came to be called after its affiant, Michael Mobbs, can be seen in its entirety at Declaration of Michael H. Mobbs, Special Advisor to the Under Secretary of Defense for Policy, Hamdi v. Rumsfeld, 243 F. Supp. 2d 527 (E.D. Va. 2002) (No. 2:02-CV-439) [hereinafter Mobbs Declaration I], available at <http://www.pbs.org/wgbh/pages/frontline/shows/sleeper/tools/mobbshamdi.html>.

¹¹³ See Hamdi, 243 F. Supp. 2d at 528.

¹¹⁴ See Mobbs Declaration I, *supra* note 112, at 148-50.

nonetheless thought that courts had a substantial role to play in cases of this sort:

While it is clear that the Executive is entitled to deference regarding military designations of individuals, it is equally clear that the judiciary is entitled to a meaningful judicial review of those designations when they substantially infringe on the individual liberties, guaranteed by the United States Constitution, of American citizens.¹¹⁵

With this, Judge Doumar held that the Mobbs Declaration did not constitute sufficient evidence to underwrite Hamdi's detention because "it leads to more questions than it answers."¹¹⁶ In demanding more information from the federal government, Judge Doumar asserted the classic civil libertarian defense against government overreaching: "We must protect the freedoms of even those who hate us, and that we may find objectionable."¹¹⁷

The Fourth Circuit again reversed, finding that Hamdi had been captured in a zone of active combat and there had been no dispute about this. As a result, the Mobbs Declaration was sufficient evidence on which to base a detention. In the court's words, "No further factual inquiry [was] necessary or proper."¹¹⁸ The Fourth Circuit then added a classic "old deference" statement:

The constitutional allocation of war powers affords the President extraordinarily broad authority as Commander in Chief and compels courts to assume a deferential posture in reviewing exercises of this authority. And, while the Constitution assigns courts the duty generally to review executive detentions that are alleged to be illegal, the Constitution does not specifically contemplate any role for courts in the conduct of war, or in foreign policy generally.

Indeed, Article III courts are ill-positioned to police the military's distinction between those in the arena of combat who should be detained and those who should not.¹¹⁹

Old deference, indeed.

This case was accepted for review by the Supreme Court, where the decision was handed down on the same day as another domestic enemy combatant case involving José Padilla.¹²⁰ José Padilla is a U.S. citizen who had never lived for a substantial period outside the United States.¹²¹ He was arrested at O'Hare

¹¹⁵ *Hamdi*, 243 F. Supp. 2d at 531.

¹¹⁶ *Id.* at 533.

¹¹⁷ *Id.* at 536.

¹¹⁸ *Hamdi v. Rumsfeld*, 316 F.3d 450, 459 (4th Cir. 2003).

¹¹⁹ *Id.* at 474.

¹²⁰ *Hamdi v. Rumsfeld*, 542 U.S. 507, 507 (2004); *Rumsfeld v. Padilla*, 542 U.S. 426, 426 (2004). Both opinions were decided on June 28, 2004.

¹²¹ *Padilla ex rel. Newman v. Bush*, 233 F. Supp. 2d 564, 573 (S.D.N.Y. 2002); Declaration of Michael H. Mobbs, Special Adviser to the Under Secretary of Defense for Policy at 2-4, *Padilla v. Bush*, 233 F. Supp. 2d 564 (S.D.N.Y. 2002) (No.

Airport in May 2002 and held in detention for years before eventually being charged with and convicted of a crime in the ordinary courts.¹²² He was held first as a “material witness” in connection with the New York grand jury investigation into the 9/11 attacks; then he was designated by President Bush as an “enemy combatant” in June 2002 and transferred to military custody.¹²³ A writ of habeas corpus was sought by his court-appointed lawyer immediately upon his transfer.¹²⁴ As the evidentiary basis for Padilla’s detention, the government provided another bare-bones declaration from the same governmental official who had offered a statement in the *Hamdi* case. The declaration alleged that Padilla had travelled to Afghanistan and Pakistan, had met with high-level al Qaeda operative Abu Zubaydah, had undergone explosives training, and was part of a plot to explode a radioactive “dirty bomb” within the United States.¹²⁵ Padilla, through his lawyer – with whom he had not been allowed to meet after being designated an enemy combatant – challenged his detention without trial.

The United States District Court for the Southern District of New York, in an opinion by Judge (and later Attorney General) Michael Mukasey, permitted Padilla’s lawyer to represent him in the habeas action and ordered that the government permit her to consult with him.¹²⁶ Judge Mukasey also determined that Defense Secretary Donald Rumsfeld was the proper respondent because the military commandant of the prison in which Padilla was held would only be able to release Padilla upon an order from Rumsfeld.¹²⁷ As to the question of whether Padilla was properly detained, Judge Mukasey noted that the AUMF provided sufficient authorization for the detention, and so Padilla could be held by the President under that authority.¹²⁸ That said, Padilla still had to be given the possibility of challenging his detention through a habeas action at which he could present evidence on his own behalf.¹²⁹ At the habeas hearing,

02CIV445(MBM)) [hereinafter Mobbs Declaration II], available at http://web.archive.org/web/20100217092812/http://www.humanrightsfirst.org/us_law/inthecourts/padilla_briefs/JOint_Submissions/Joint_Appendix/Declaration_of_Mobbs,_Bush.pdf.

¹²² *Padilla*, 542 U.S. at 430. For the legal timeline of José Padilla’s case, see the summary and compilation of documents at HUMAN RIGHTS FIRST, http://web.archive.org/web/20100217085312/http://www.humanrightsfirst.org/us_law/inthecourts/supreme_court_padilla.aspx (last visited October 13, 2011).

¹²³ *Padilla*, 542 U.S. at 430-31.

¹²⁴ Petition for Writ of Habeas Corpus, *Padilla v. United States*, 233 F. Supp. 2d 564 (S.D.N.Y. 2002) (No. 02CIV445(MBM)), available at http://news.findlaw.com/hdocs/docs/padilla/padillaus61102_pet.pdf. Donna Newman, the lawyer who filed the habeas petition, had been assigned to Padilla while he was held as a material witness and had exercised unquestioned right to counsel.

¹²⁵ See Mobbs Declaration II, *supra* note 121, at 2-4.

¹²⁶ *Padilla v. Bush*, 233 F. Supp. 2d 564, 575-78, 600-05 (S.D.N.Y. 2002).

¹²⁷ *Id.* at 581-82.

¹²⁸ *Id.* at 598-99.

¹²⁹ *Id.* at 599.

however, the government only had to provide “some evidence” that Padilla was indeed an enemy combatant for his detention to continue.¹³⁰ The opinion set a low standard for the government to meet in order to be permitted to continue the detention, but it at least said that there had to be some independent review of whether the government had met the standard. The government appealed.

At the Second Circuit, the three-judge panel gave Padilla an even more sweeping victory.¹³¹ The judges concluded that the President did not have the power to detain Padilla because the AUMF was insufficiently explicit, and they ordered Padilla to be released from military custody.¹³² But the court gave lip-service to deference, even as it refused to extend it:

We agree that great deference is afforded the President’s exercise of his authority as Commander-in-Chief. . . . We also agree that whether a state of armed conflict exists against an enemy to which the laws of war apply is a political question for the President, not the courts. . . . But when the Executive acts, even in the conduct of war, in the face of apparent congressional disapproval, challenges to his authority must be examined and resolved by the Article III courts.¹³³

Judge Wesley, dissenting, voted to support the reasoning of Judge Mukasey, below.¹³⁴ Nonetheless, the Second Circuit actually ordered Padilla to be released from military custody.

Both the *Hamdi* and *Padilla* cases went up in parallel fashion to the Supreme Court. The cases could have been distinguished: Hamdi was captured on a traditional battlefield while Padilla was captured at an airport in the United States. But they also could have been treated similarly, inviting a general decision on the President’s power to detain U.S. citizens without charge or trial. Instead of doing either of these things, however, the Supreme Court decided one on the merits and used a procedural dodge to avoid deciding the other.

Both cases were handed down on the same day.¹³⁵ While the Padilla case may have seemed the easier one because it was not a battlefield capture and all of the judges below had found fault with the detention, the Court decided to avoid the question. Finding that Padilla had brought his case to the wrong court in the first place because the commandant of the brig in which he was held was not in New York, the Court ruled that Padilla had to go back and start over again in the proper district court.¹³⁶

¹³⁰ *Id.* at 608.

¹³¹ *Padilla v. Rumsfeld*, 352 F.3d 695, 724 (2d Cir. 2003).

¹³² *Id.* at 698.

¹³³ *Id.* at 712-13 (citations omitted).

¹³⁴ *Id.* at 726 (Wesley, J., dissenting).

¹³⁵ *See supra* note 120.

¹³⁶ *Rumsfeld v. Padilla*, 542 U.S. 426, 451 (2004).

Jenny Martinez's brilliant analysis of this case, which she had argued before the Court, focuses on the way that the Court sidestepped the substantive question of the legitimacy of the detention by concentrating instead on aspects of the process that surely would not have made a difference to the decision in the long run.¹³⁷ The case surely would have, and indeed almost did, come back to the Supreme Court again for a final ruling on the legality of the detention; the Court only denied certiorari on the second time around because Padilla would have been incarcerated anyway on other criminal charges.¹³⁸

Even as the Court refused to hear the merits of Padilla's claim, no language in the Supreme Court's *Padilla* judgment pledged deference to the executive in a time of war. In fact, it is hard to tell from the majority opinion in *Padilla* that this case presented a national security issue at all. Instead the case was decided as if it were a garden-variety habeas action in which jurisdictional precision at the trial level was the core of the matter and forum-shopping was the primary evil to be prevented.¹³⁹ By treating the case as not at all unusual, the Court refused to frame the case in a way that demanded that something be said about deference.

But the odd decision in the case can hardly be understood as anything other than an evasion. It not only evaded the question of what to do about Padilla's detention, but it also evaded the need to defer because it bought time for a political resolution in the case without actually giving the President a judicial stamp of approval on his power to detain. The Court treated *Padilla* as a normal non-emergency case, and the President got to maintain his detention without judicial challenge for a while longer.

The dissenters in the case – Justice Stevens, joined by Justices Ginsburg, Breyer and Souter – made much of the fact that this case was about limitations on executive power, and in this regard, they were overtly *unwilling* to defer:

At stake in this case is nothing less than the essence of a free society. Even more important than the method of selecting the people's rulers and their successors is the character of the constraints imposed on the Executive by the rule of law. Unconstrained executive detention for the purpose of investigating and preventing subversive activity is the hallmark of the Star Chamber. For if this Nation is to remain true to the ideals symbolized by its flag, it must not wield the tools of tyrants even to resist an assault by the forces of tyranny.¹⁴⁰

Strong language – but in dissent. The majority took note of this extraordinary analysis by laconically arguing, “[I]t is surely just as necessary in important

¹³⁷ Martinez, *supra* note 13, at 1032-41.

¹³⁸ See Padilla Hanft, 547 U.S. 1062, 1062-63 (2006).

¹³⁹ *Padilla*, 542 U.S. at 447 (“This rule, derived from the terms of the habeas statute, serves the important purpose of preventing forum shopping by habeas petitioners.”).

¹⁴⁰ *Id.* at 465 (Stevens, J., joined by Breyer, Ginsburg, Souter, JJ., dissenting).

cases as in unimportant ones that courts take care not to exceed their ‘respective jurisdictions’ established by Congress.”¹⁴¹

The decision in *Hamdi*, which issued the same day, fractured the Court in multiple directions but provided no more deference on the face of the judgment. Five Justices – Chief Justice Rehnquist, along with Justices O’Connor, Breyer, Kennedy, and Thomas – voted to uphold the detention, but only because they argued that the AUMF provided a sufficient congressional *imprimatur* for battlefield detention by the executive.¹⁴² They differed, however, on the evidentiary standard needed to maintain the detention.¹⁴³ Six Justices – Chief Justice Rehnquist, along with Justices O’Connor, Breyer, Kennedy, Ginsburg, and Souter – found that Hamdi could assert his Fifth Amendment due process rights and demand a habeas hearing at which the government could be put to its proof.¹⁴⁴ Two of the Justices – Justices Scalia and Stevens – thought that the detention could only be authorized if Congress suspended habeas, otherwise the writ should be granted and Hamdi should be released.¹⁴⁵ Only one – Justice Thomas – fully supported the government’s position.¹⁴⁶ The Court vacated the Fourth Circuit decision and remanded for further proceedings.¹⁴⁷

In the multiple opinions that *Hamdi* produced, all of the Justices save Justice Thomas ruled against the government’s case for indefinite detention with unusually undeferential language. As the plurality opinion written by Justice O’Connor with Chief Justice Rehnquist, Justices Kennedy, and Breyer joining, famously stated,

[W]e necessarily reject the Government’s assertion that separation of powers principles mandate a heavily circumscribed role for the courts in such circumstances. Indeed, the position that the courts must forgo any examination of the individual case and focus exclusively on the legality of the broader detention scheme cannot be mandated by any reasonable view of separation of powers, as this approach serves only to *condense* power into a single branch of government. We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation’s citizens. Whatever power the United

¹⁴¹ *Id.* at 450-51 (Rehnquist, C.J.) (majority opinion).

¹⁴² *See Hamdi v. Rumsfeld*, 542 U.S. 507, 517 (2004) (O’Connor, J.) (plurality opinion); *see id.* at 579 (Thomas, J., dissenting).

¹⁴³ *Compare id.* at 534 (O’Connor, J.) (plurality opinion) (requiring “credible evidence” to overcome the President’s factual determination), *with id.* at 584 (Thomas, J., dissenting) (requiring the “clearest conviction” to the contrary).

¹⁴⁴ *See id.* at 509 (O’Connor, J., joined by Rehnquist, C.J., and Breyer and Kennedy, JJ.) (plurality opinion); *id.* at 553 (Souter, J., joined by Ginsburg, J., concurring in part and dissenting in part).

¹⁴⁵ *Id.* at 573 (Scalia, J., joined by Stevens, J., dissenting).

¹⁴⁶ *Id.* at 579 (Thomas, J., dissenting).

¹⁴⁷ *Id.* at 507 (O’Connor, J.) (plurality opinion).

States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake.¹⁴⁸

Despite the undeferential judgment, the plurality opinion nonetheless found that Hamdi's detention was in fact authorized by the AUMF.

The opinion of Justice Souter, joined by Justice Ginsburg, also refused deference to the executive, and it reached a different result. In ruling that the President could not detain a citizen without an explicit act of Congress authorizing the detention, Justice Souter stated,

The defining character of American constitutional government is its constant tension between security and liberty, serving both by partial helpings of each. In a government of separated powers, deciding finally on what is a reasonable degree of guaranteed liberty whether in peace or war (or some condition in between) is not well entrusted to the Executive Branch of Government, whose particular responsibility is to maintain security. For reasons of inescapable human nature, the branch of the Government asked to counter a serious threat is not the branch on which to rest the Nation's entire reliance in striking the balance between the will to win and the cost in liberty on the way to victory¹⁴⁹

The dissenting opinion of Justice Scalia, joined by Justice Stevens, was even less deferential to presidential authority. It argued that, in the absence of the formal suspension of the writ of habeas corpus, the President had no power to detain a citizen in wartime without charges, hearing, or trial:

The proposition that the Executive lacks indefinite wartime detention authority over citizens is consistent with the Founders' general mistrust of military power permanently at the Executive's disposal. In the Founders' view, the "blessings of liberty" were threatened by "those military establishments which must gradually poison its very fountain." . . . A view of the Constitution that gives the Executive authority to use military force rather than the force of law against citizens on American soil flies in the face of the mistrust that engendered these provisions.¹⁵⁰

The proper response, Justices Scalia and Stevens argued, would be for Congress to suspend the writ and for the Court to then defer to Congress's judgment. The plurality's solution – to say that Congress indirectly authorized the detention through the AUMF – bypassed the Constitution's explicit provisions for what to do in such a case. As Justices Scalia and Stevens concluded,

¹⁴⁸ *Id.* at 535-36 (citation omitted).

¹⁴⁹ *Id.* at 545 (Souter, J., joined by Ginsburg, J., concurring in part and dissenting in part).

¹⁵⁰ *Id.* at 568-69 (Scalia, J., joined by Stevens, J., dissenting) (citation omitted) (quoting Federalist No. 45, at 238 (J. Madison)).

Many think it not only inevitable but entirely proper that liberty give way to security in times of national crisis – that, at the extremes of military exigency, *inter arma silent leges*. Whatever the general merits of the view that war silences law or modulates its voice, that view has no place in the interpretation and application of a Constitution designed precisely to confront war and, in a manner that accords with democratic principles, to accommodate it.¹⁵¹

Justice Thomas was the only one who supported the government’s position wholeheartedly. Not surprisingly, his opinion drips with old deference:

This detention falls squarely within the Federal Government’s war powers, and we lack the expertise and capacity to second-guess that decision. . . . I do not think that the Federal Government’s war powers can be balanced away by this Court. Arguably, Congress could provide for additional procedural protections, but until it does, we have no right to insist upon them.¹⁵²

By contrast with the Court’s judgments in the World War II cases of *Quirin*, *Eisentrager*, *Hirabayashi*, and *Korematsu*, the Court in the post-9/11 domestic enemy combatant cases seemed to stand up strongly against the President, asserting that it had the right to judge when detentions were legitimate.

The headlines the day after these decisions showed that the press got the message loud and clear. The Court was not going to defer to the President in the post-9/11 crisis:

- John Riley, *Setback for Bush Administration; Win for Detainees*, Newsday, June 29, 2004;
- Tony Bartelme, *Supreme Court Torpedoes ‘Enemy Combatant’ Policy*, Post and Courier (Charleston, S.C.), June 29, 2004;
- Mark Helm, *Detainees Can File Challenges, High Court Says Ruling on ‘Enemy Combatants’ Deals a Blow to Bush Anti-Terror Policies*, Seattle Post-Intelligencer, June 29, 2004;
- Stephen Henderson, *Detainees Win Access to Courts; Supreme Court Rulings Deliver a Legal Blow to the Administration’s Antiterrorism Policy*, Philadelphia Inquirer, June 29, 2004;
- Linda Greenhouse, *Court Overrules Bush on Enemy Combatants*, International Herald Tribune (Fr.), June 30, 2004.

¹⁵¹ *Id.* at 579.

¹⁵² *Id.* at 579 (Thomas, J., dissenting).

The language of the *Hamdi* opinion dominated the media's attention. *Padilla* was a procedural case, written in technical language for lawyers and therefore it got relatively little attention. But *Hamdi* was red meat for journalists. The most common quote of the day came from Justice O'Connor's plurality opinion in *Hamdi*: "[A] state of war is not a blank check for the President when it comes to the rights of the Nation's citizens."¹⁵³ The general view seemed to be that the President had lost his battle in the courts. The headlines bragged that the Supreme Court refused to allow him the deference that previous courts had granted previous wartime presidents.

But what would you have thought if you were José Padilla or Yaser Hamdi? After the Bush Administration policy was struck down in forceful terms, with only one of the Court's Justices supporting it in full, didn't you win?

Padilla was transformed by the Supreme Court's opinion into Sisyphus.¹⁵⁴ After pushing the rock of his case up the hill, he was condemned to watch it roll back down again to the bottom, so that he would have to start over again. His case was re-filed in a different district court, the one within which the military brig was located, and the process started all over.¹⁵⁵ The new district court agreed that Padilla should be granted the writ and released.¹⁵⁶ On appeal to the Fourth Circuit, however, Padilla encountered a loss. Echoing its earlier opinion in the *Hamdi* case and citing approvingly Supreme Court's judgment in that case, the court found that, under the AUMF, the President did in fact have the authority to detain Padilla.¹⁵⁷

While his case was pending (again) on a writ of certiorari before the U.S. Supreme Court, the government indicted Padilla on criminal charges unrelated to the allegations that had publicly grounded his detention in the first place. Padilla was charged with participating in a terrorist plot centered in Florida, a danger that had never emerged before when the initial allegations against him claimed that he had planned to explode a dirty bomb in the Northeast.¹⁵⁸ Could Padilla be transferred to civilian custody to stand trial on these new charges? That question came back to the Fourth Circuit.

¹⁵³ *Id.* at 536.

¹⁵⁴ The myth has its most famous modern expression in Albert Camus's story, *The Myth of Sisyphus*. See Albert Camus, *The Myth of Sisyphus*, reprinted in *THE MYTH OF SISYPHUS* 1 (Justin O'Brien trans., 1991).

¹⁵⁵ Petition for Writ of Habeas Corpus, *Padilla v. Hanft*, 389 F. Supp. 2d 678 (D.S.C. 2005) (No. Civ.A. 2:04-2221-26).

¹⁵⁶ *Padilla v. Hanft*, 389 F. Supp. 2d 678, 692 (D.D.C. 2005).

¹⁵⁷ *Padilla v. Hanft*, 423 F.3d 386, 397 (4th Cir. 2005).

¹⁵⁸ For the timeline of the case, see the Human Rights First summary, supplemented with a document trail, at *In the Courts: José Padilla, U.S. Citizen*, HUMAN RIGHTS FIRST, http://web.archive.org/web/20100217085312/http://www.humanrightsfirst.org/us_law/inthe_courts/supreme_court_padilla.aspx (last visited Oct. 21, 2011).

The Fourth Circuit, in a heated decision filled with the anger of betrayal, refused to approve Padilla's transfer to civilian authorities.¹⁵⁹ Judge Luttig had written the original Fourth Circuit opinion stating that the President had the authority to hold Padilla as an enemy combatant. But on this second time around, he penned a judgment highly critical of the Bush Administration's change of heart, implying that the Administration sought instead to evade a serious review of Padilla's situation. For Judge Luttig, the sudden new criminal charges on the eve of the Supreme Court's review of the case created "at least an appearance that the government may be attempting to avoid consideration of our decision by the Supreme Court."¹⁶⁰ In the end, Judge Luttig even stepped down from the bench, amid stories that he believed that the Bush Administration had lied about Padilla's involvement in terrorism and had therefore put him in the untenable position of upholding a controversial detention that had no basis in fact.¹⁶¹ He had accorded the Bush Administration all of the deference it requested but seemed to have concluded in the end that his faith had been misplaced.

The Supreme Court, however, approved Padilla's transfer¹⁶² and later declined the cert petition.¹⁶³ The denial of cert was accompanied by an unusual concurrence from Justices Kennedy and Stevens along with Chief Justice Rehnquist, as well as an unusual dissent from Justice Ginsburg. Both opinions noted Padilla's legitimate concerns that he might be returned to military custody and indicated that the Court should take action if that occurred.¹⁶⁴ Justice Ginsburg thought that the Court should hear the Padilla case right away because the government had not fully renounced its power to return him to military custody at any time.¹⁶⁵

Five years after his initial arrest, in May 2007, Padilla finally stood trial on charges that were never even mentioned before he was indicted on them more than four years into his detention. While he was convicted of those charges, nothing ever came of his contention that he was held illegally for four years in the first place.¹⁶⁶

Both Padilla and his lawyers might be forgiven for not being able to tell the difference between a non-deferential opinion and a deferential one. Even though the Supreme Court had gone to some lengths to avoid approving Padilla's original detention and had also gone out of its way to avoid any statements giving deference to the President, Padilla never had any real

¹⁵⁹ Padilla v. Hanft, 432 F.3d 582, 587 (4th Cir. 2005).

¹⁶⁰ *Id.* at 583.

¹⁶¹ Jerry Markon, *Appeals Court Judge Leaves Life Appointment for Boeing*, WASH. POST, May 11, 2006, at A11.

¹⁶² Hanft v. Padilla, 546 U.S. 1084 (2006).

¹⁶³ Padilla v. Hanft, 547 U.S. 1062 (2006).

¹⁶⁴ *Id.* at 1063 (Kennedy, J., concurring); *id.* at 1064 (Ginsburg, J., dissenting).

¹⁶⁵ *Id.* at 1064 (Ginsburg, J., dissenting).

¹⁶⁶ *In the Courts: José Padilla, U.S. Citizen*, *supra* note 158.

prospect of being released. Instead, the Court colluded in dragging out the process without ever approving it, until another solution came along. While it may be true that Padilla's detention was eventually regularized in the ordinary courts because the Bush Administration seemed to fear what the Supreme Court would do on its second review of the case, it is not so clear that this was good for Padilla. Being convicted of criminal conspiracy charges and being sent to a high-security supermax prison for seventeen years¹⁶⁷ may in fact have resulted in a longer, harsher, and more rigidly enforced detention than would have resulted from being held as an enemy combatant.

By comparison, consider what happened to those held in Guantánamo. Of the 779 men held in Guantánamo as enemy combatants at some point since 9/11, 600 were released as of August 2011.¹⁶⁸ Virtually all of those who had pleaded guilty to terrorism-related conspiracy charges before the military commissions were released with little more than time served.¹⁶⁹ The only person who has received an extensive sentence so far refused to mount any defense.¹⁷⁰ If you were Padilla's counsel, or Padilla himself, you might well think that the Court's lack of deference did not necessarily produce a better result for him, as seventeen years in a supermax prison exceeded any sentence handed down at Guantánamo to that point. More crucially, while Padilla's case was being sorted out up and down the federal courts, Padilla was held for forty-three months in detention without trial, largely in solitary confinement, and interrogated without counsel for twenty-one of those months.¹⁷¹

What gives this case a bad taste, however, is not Padilla's ultimate innocence (which seems doubtful, though just what he might be guilty of is still unclear) but the fact that the government was allowed to keep Padilla in

¹⁶⁷ See Molly McDonough, *Terror Plotter Padilla Sent to Supermax*, A.B.A. J., Apr. 21, 2008, http://www.abajournal.com/news/article/terror_plotter_padilla_sent_to_supermax; Emily Bazelon, *Here We Go Again*, SLATE, Mar. 3, 2009, <http://www.slate.com/id/2212793>.

¹⁶⁸ A record of all those held at Guantánamo can be found in *The Guantánamo Docket*, N.Y. TIMES, <http://projects.nytimes.com/guantanamo> (last visited Dec. 2, 2011).

¹⁶⁹ For a list of all those who have been charged through the military commission process at Guantánamo and the sentences they have received, see *The Guantanamo Trials*, HUMAN RIGHTS WATCH, <http://www.hrw.org/features/guantanamo> (last visited Jan. 5, 2012). In most cases, where there was a conviction, the sentences that detainees were given equaled the number of years that they had already been held at Guantánamo. By contrast, the sentences given in civilian trials in courts in the United States have been much longer. For a summary of terrorism trials in Article III courts and their outcomes, see NEW YORK UNIVERSITY CENTER ON LAW AND SECURITY, TERRORIST TRIAL REPORT CARD: SEPTEMBER 11, 2001-SEPTEMBER 11, 2010, available at http://www.lawandsecurity.org/Portals/0/Documents/01_TTRC2010Final1.pdf (2010).

¹⁷⁰ A review of the fates of those who went through the military commissions up through the summer of 2010 can be found in Charlie Savage, *Guantánamo Detainee Pleads Guilty in Terrorism Case*, N.Y. TIMES, July 8, 2010, <http://www.nytimes.com/2010/07/08/us/08gitmo.html>.

¹⁷¹ Martinez, *supra* note 13, at 1018 n.15.

detention for such a long time without providing him any due process and without publicly presenting the evidence on which he was initially detained. The courts, and in particular the Supreme Court, colluded in this extended detention by dragging out the determination of what process Padilla was due to the point where the military detention became moot. The Supreme Court may not have overtly deferred in its decision in the case, but it deferred in the results it permitted. This is the essence of the new judicial deference: Courts appear to stand up to executive power in the middle of a crisis – or at least they do not endorse broad claims of executive power – but in the end, they do not in fact require the executive to change policy on the ground for years.

For Yaser Hamdi, the concrete results of his “win” at the Supreme Court also were not immediate or particularly good in the end. While the Supreme Court did reach the merits of his case and held that he was due a habeas hearing, the Court – in the very same plurality judgment that found he had such rights – conspicuously refused to say what rights those were. Instead, Justice O’Connor’s plurality opinion left many options open. The opinion held that Hamdi had to be notified of the factual basis of his classification and to receive an opportunity to rebut these charges with evidence before a neutral fact-finder.¹⁷² But beyond those absolutes, things were not so clear:

[T]he exigencies of the circumstances may demand that . . . enemy-combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict. Hearsay, for example, may need to be accepted as the most reliable available evidence from the Government in such a proceeding. Likewise, the Constitution would not be offended by a presumption in favor of the Government’s evidence, so long as that presumption remained a rebuttable one and fair opportunity for rebuttal were provided. Thus, once the Government puts forth credible evidence that the habeas petitioner meets the enemy-combatant criteria, the onus could shift to the petitioner to rebut that evidence with more persuasive evidence that he falls outside the criteria. A burden-shifting scheme of this sort would meet the goal of ensuring that the errant tourist, embedded journalist, or local aid worker has a chance to prove military error while giving due regard to the Executive once it has put forth meaningful support for its conclusion that the detainee is in fact an enemy combatant.¹⁷³

In other words, whatever process was due might come in the form of a proceeding the likes of which had never been seen before in the United States. Without requiring that this habeas hearing look like other habeas hearings, the Supreme Court was inviting in *Hamdi* just what it invited in *Padilla*: a long, drawn-out process of litigating the specifics, during which time, of course, the petitioner would remain in detention.

¹⁷² *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004).

¹⁷³ *Id.* at 533-34.

For Hamdi himself, as it turned out, freedom came quicker than this, but not because the Court forced the government's hand directly. Instead, rather than put forward any evidence to sustain its claims, even under the less-than-onerous standards that the Supreme Court invited, the government released Hamdi, sending him back to Saudi Arabia, a country where he also held citizenship. Under the terms of his release, Hamdi agreed to renounce both violent terrorism and his U.S. citizenship, to abide by severe restrictions on his ability to travel, and to never sue the United States for anything that had happened while he was held in detention.¹⁷⁴ Upon arrival back in Saudi Arabia, Hamdi spent his initial days in seclusion with his family before planning to go on for a degree in marketing at a local university.¹⁷⁵ By the time he was released from detention, however, he had been held for nearly three years while the courts dithered about his rights and while almost all of the judges who heard his case failed to give deference to the executive who detained him.¹⁷⁶

In both the Padilla and Hamdi cases, the courts appeared to give victories to the detainees without providing for their immediate release or even for a speedy adjudication of their claims. In fact, the decisions of the Supreme Court provided the cover for the detentions to drag on indefinitely pending clarification of crucial questions left unanswered by the Court. The President may have, in the end, received no serious deference, but the detainees also had no serious vindication of their rights. This is what new judicial deference looks like.

B. *Alien Enemy Combatants: The Guantánamo Cases*

The cases arising out of the Guantánamo detentions are so numerous and varied and have been going on for so long that a complete review of all the Guantánamo litigation is impossible.¹⁷⁷ But the three Guantánamo cases that have been decided so far by the Supreme Court have been crucial in setting the parameters of the detentions. All three appeared to deal severe setbacks to the Bush Administration policy of maintaining the detentions at Guantánamo while not requiring any oversight from anyone outside the executive branch, the intelligence services, and the military. But all three cases were made from the same recipe as the domestic enemy combatant cases: take a healthy pinch of robust, defiant language and mix thoroughly with muddled remedies, so that it will take endless litigation to result in any change on the ground for the detainees themselves. The result? New judicial deference, in which the Court will appear to be saving the rule of law from a lawless executive. But in the

¹⁷⁴ Settlement Agreement at 3, *Hamdi v. Rumsfeld*, No. 2:02-cv-00439243 (E.D. Va. Sept. 17, 2004), available at <http://news.findlaw.com/wp/docs/hamdi/91704stlagmnt.html>.

¹⁷⁵ Jerry Markon, *Hamdi Returned to Saudi Arabia*, WASH. POST, Oct. 12, 2004, at A02.

¹⁷⁶ *See id.*

¹⁷⁷ For a record of each case and what happened to the detainee involved, see *The Guantánamo Docket*, *supra* note 168.

immediate aftermath of the decisions, the Court produced results closer to what the executive branch wanted, because each decision left many legal loose ends that had to be tied up before any particular detainee's case could be resolved.

The detention camp at the Guantánamo Bay Naval Base was opened in December 2001 and began receiving detainees from the conflict in Afghanistan almost immediately.¹⁷⁸ Before President Obama signed an executive order in January 2009 to close the detention camp,¹⁷⁹ detainees had been captured all over the world and imprisoned there with virtually no due process, and they were forced to live in often appalling conditions under an interrogation regime that the International Committee of the Red Cross (ICRC) said was "tantamount to torture."¹⁸⁰ Later, the ICRC issued a report on fourteen "high-value detainees" who had been held in secret CIA interrogation sites before being transferred to Guantánamo. That report dropped the "tantamount" and just said that they had been tortured.¹⁸¹

Guantánamo was chosen as the detention site for post-9/11 overseas captures apparently because it was assumed that the U.S. courts would never assume jurisdiction there.¹⁸² But because no other country, and certainly not Cuba, could reach any detainee on the base to assess the grounds for the detention, the detainees fell into a space where no legal jurisdiction applied. The detention camp was therefore famously called a "legal black hole" by the British high court judge, Lord Johan Steyn, who went on to explain what the role of judges should be in such matters:

The theory that courts must always defer to elected representatives on matters of security is seductive. But there is a different view, namely that while courts must take into account the relative constitutional competence of branches of government to decide particular issues, they must never, on constitutional grounds, surrender the constitutional duties placed on

¹⁷⁸ For the story of Guantánamo's beginnings, see KAREN GREENBERG, *THE LEAST WORST PLACE: GUANTANAMO'S FIRST 100 DAYS* 23, 74 (2009).

¹⁷⁹ Exec. Order No. 13,492, *Review and Disposition of Individuals Detained at the Guantánamo Bay Naval Base and Closure of Detention Facilities*, 74 Fed. Reg. 4897 (Jan. 22, 2009). While the Executive Order specified that the detention camp would be closed within a year, that deadline was missed.

¹⁸⁰ Neil A. Lewis, *Red Cross Finds Detainee Abuse in Guantánamo*, N.Y. TIMES, Nov. 30, 2004, http://www.nytimes.com/2004/11/30/politics/30gitmo.htm?_r=1.

¹⁸¹ INT'L COMM. OF THE RED CROSS, ICRC REPORT ON THE TREATMENT OF FOURTEEN "HIGH VALUE DETAINEES" IN CIA CUSTODY 5 (Feb. 2007), available at <http://www.nybooks.com/media/doc/2010/04/22/icrc-report.pdf>.

¹⁸² See Memorandum from Patrick Philbin and John Yoo, Deputy Assistant Attorneys General, to William J. Haynes, General Counsel, Department of Defense, *Possible Habeas Jurisdiction over Aliens Held in Guantánamo Bay, Cuba*, Dec. 28, 2001, available at http://dspace.wrlc.org/doc/bitstream/2041/70946/00125_011228_001display.pdf.

them. . . . And judges do have the duty, even in times of crisis, to guard against an unprincipled and exorbitant executive response.¹⁸³

The first Guantánamo case to reach the Supreme Court asked whether detainees held at Guantánamo had habeas rights that could be recognized by American courts. In the early days, most of those held at Guantánamo had been captured as a result of the war in Afghanistan in fall 2001.¹⁸⁴ Many of the captures had been made not by American forces, but by local collaborators who may well have been motivated by the bounty that the United States would pay to acquire “foreigners” found in the war zone.¹⁸⁵ As Guantánamo became the detention site of choice for the Bush Administration, men were transferred there who had been snatched at various places around the world. No detainee received even the relatively cursory battlefield review to determine his status, as the Geneva Conventions required.¹⁸⁶ None had ever had the evidence against him reviewed by anyone apart from the people who had captured and held him. The habeas petitions sent to American courts were aimed at getting some sort of hearing for the detainees to determine whether there was any evidence that they posed any threat.

The *Rasul*¹⁸⁷ case was decided by the Supreme Court on the same day as *Padilla* and *Hamdi*. Fourteen petitioners, one from Britain, one from Australia, and twelve from Kuwait, challenged the legality of their detention in American courts, but ironically, Safiq Rasul, the lead petitioner in the case, had already been released to his native Britain before the Supreme Court decided the matter.¹⁸⁸ The Court proceeded with the case anyway because the situations of the other detainees in the case had not yet been resolved. The lower courts that heard the detainees’ cases cited *Eisentrager* and refused their

¹⁸³ Lord Johan Steyn, *Guantánamo Bay: The Legal Black Hole*, 53 INT’L & COMP. L.Q. 1, 2 (2004), available at <http://journals.cambridge.org/action/displayFulltext?type=1&fid=1523520&jid=ILQ&volumeId=53&issueId=01&aid=1523512&bodyId=&membershipNumber=&societyETOCSession>.

¹⁸⁴ The story of the first detainees who arrived at the camp is told in GREENBERG, *supra* note 178, at 4, 68.

¹⁸⁵ Michelle Faul, *Gitmo Detainees Say They Were Sold*, COMMON DREAMS, May 31, 2005, <http://www.commondreams.org/headlines05/0531-10.htm>.

¹⁸⁶ Geneva Convention Relative to the Treatment of Prisoners of War, art. 5, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135. For U.S. Army regulations bringing this provision into effect in battlefield review, see U.S. Dep’t of Army, Reg. 190-8, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees § 1-6 (Oct. 1, 1997), available at <http://www.au.af.mil/au/awc/awcgate/law/ar190-8.pdf>. For the denial of rights of U.S. detainees to status determinations by a competent tribunal under the Geneva Conventions, see Erin Chlopak, *Dealing with the Detainees at Guantánamo Bay: Humanitarian and Human Rights Obligations Under the Geneva Conventions*, 9 HUM. RTS. BRIEF 6, Spring 2002, at 6, available at <http://www.wcl.american.edu/hrbrief/09/3guantanamo.cfm>.

¹⁸⁷ *Rasul v. Bush*, 542 U.S. 466, 466 (2004).

¹⁸⁸ *Id.* at 471 n.1.

claims, without more.¹⁸⁹ But the Supreme Court accepted the cases and reversed.

Justice Stevens, writing for a majority that consisted also of Justices Breyer, Ginsburg, O'Connor, and Souter, with Justice Kennedy concurring in the result, held that the detainees did in fact have habeas rights in U.S. courts.¹⁹⁰ Distinguishing both the jurisdictional claim and the nature of the petitioners from the parallel elements of *Eisentrager*, Justice Stevens argued that there was no longer any bar to the detainees held by the United States outside its territorial boundaries challenging their detentions in American courts.¹⁹¹ The specific differences between the Guantánamo petitioners and the *Eisentrager* petitioners seemed especially important to him, particularly the fact that the Guantánamo petitioners before the Court had never had a chance to contest their detentions in any meaningful way while the petitioners in *Eisentrager* had been imprisoned after a full military trial.¹⁹²

The majority decision in *Rasul* is remarkable both for its relative brevity and for its refusal to make any gesture toward deference. The subject of deference simply did not come up. The Court's majority went about its business as if the detentions played no role in the management of a crisis of state.

Justice Kennedy's concurring opinion, however, indicated that deference was still an important, though not a dispositive, issue for him:

The decision in *Eisentrager* indicates that there is a realm of political authority over military affairs where the judicial power may not enter. The existence of this realm acknowledges the power of the President as Commander in Chief, and the joint role of the President and the Congress, in the conduct of military affairs. . . . A necessary corollary of *Eisentrager* is that there are circumstances in which the courts maintain the power and the responsibility to protect persons from unlawful detention even where military affairs are implicated.¹⁹³

Justice Kennedy concurred in the result in *Rasul*, but he made it clear that indefinite detention without trial presented wholly different facts than *Eisentrager*, where the petitioners had been already convicted in a military tribunal.¹⁹⁴

Justice Scalia, writing in dissent and joined by Chief Justice Rehnquist and Justice Thomas, argued that the majority's analysis had massively changed the law, undermining what was, in their view, the still-valid *Eisentrager*

¹⁸⁹ See *Al Odah v. United States*, 321 F.3d 1134, 1145 (D.C. Cir. 2003); *Rasul v. Bush*, 215 F. Supp. 2d 55, 73 (D.D.C. 2002).

¹⁹⁰ *Rasul*, 542 U.S. at 484.

¹⁹¹ *Id.* at 476.

¹⁹² *Id.*

¹⁹³ *Id.* at 487 (Kennedy, J., concurring).

¹⁹⁴ *Id.* at 487-88.

precedent.¹⁹⁵ But the context of a global war made the majority's mistake even worse in Justice Scalia's eyes:

Departure from our rule of *stare decisis* in statutory cases is always extraordinary; it ought to be unthinkable when the departure has a potentially harmful effect upon the Nation's conduct of a war. The Commander in Chief and his subordinates had every reason to expect that the internment of combatants at Guantánamo Bay would not have the consequence of bringing the cumbersome machinery of our domestic courts into military affairs. . . . For this Court to create such a monstrous scheme in time of war, and in frustration of our military commanders' reliance upon clearly stated prior law, is judicial adventurism of the worst sort.¹⁹⁶

For Justice Scalia, deference counseled against novel readings of the law, and it also counseled against any interference with military judgment.

The *Rasul* decision represented an astonishing legal victory for the detainees. And yet, nothing changed quickly. The decision decided no actual habeas claims; it merely decided that habeas claims *could* be made.

Of course, the Court could not decide habeas cases that had not been developed. But the Court in *Rasul* might have done more to help these habeas cases along. The Court said virtually nothing about what rights a detainee could vindicate through a habeas action, let alone what habeas procedure would pass constitutional muster for aliens held outside the territorial United States. Did the alien detainees have Fifth Amendment due process rights, as did citizen Hamdi? What standard of evidence should apply to their continued detention? Did they have any rights to vindicate on a habeas claim at all – and if so, what were they? These questions required further litigation. And, since none of the detainees had been freed by their victory in *Rasul*, their detention continued while all of this was sorted out.

As in *Padilla*, where the Court simply made no mention of deference to the executive in an extraordinary time, the Court's majority in *Rasul* also made a bold ruling while never mentioning deference – but also without requiring any immediate change in the situation on the ground. The petitioners, who were left in detention with all of the other prisoners at Guantánamo, could now begin their long treks through the courts seeking resolution of their individual cases. That was to be expected; *Rasul* only determined that they could bring these cases.

But if the Court was really outraged by the detentions and eager to sort out whether the detainees were in fact held unlawfully, the Court could have done more. As the detainees soon learned, the Court had not bushwhacked through the legal forest to clear the path; much still had to be decided about where that

¹⁹⁵ *Id.* at 493 (Scalia, J., dissenting).

¹⁹⁶ *Id.* at 506.

path would go. That required more litigation and more delay, with the detainees' situations remaining unchanged in the meantime. This was again the new judicial deference: The Court boldly delivered a defeat to the policy of the government without speeding up relief to the detainees.

Hamdan was the next case to come before the Supreme Court from the Guantánamo detentions.¹⁹⁷ Salim Hamdan challenged the military commission system at Guantánamo before which he was to be tried.¹⁹⁸ President Bush had issued a military order in November 2001 to declare that new military tribunals would be set up to try some of the non-American detainees.¹⁹⁹ After a long delay in which the procedures were hammered out within the Defense Department and the military,²⁰⁰ some of the detainees were finally put before these new military commissions. Hamdan alleged that the military commissions had been unlawfully constituted, and he filed a habeas petition in the U.S. federal courts to challenge these commissions.²⁰¹

The district court that first heard Hamdan's challenge to the military commissions ruled in his favor. It held that the crimes with which he was charged were not properly considered crimes in the law of war, which specified the only crimes that could be tried before a military commission, according to the Geneva Conventions framework.²⁰²

The Court of Appeals for the District of Columbia then overturned the district court, arguing that Congress had authorized the military commissions indirectly so that the President did not act alone.²⁰³ In addition, the appeals court explained, the Geneva Conventions that defined war crimes were not self-executing and so the United States was not limited in the military commissions to trying those specific offenses.²⁰⁴ Moreover, Hamdan would have to exhaust his remedies in the military commission system before he would have access to an American civilian court.²⁰⁵

The Supreme Court, again quite surprisingly, appeared to deal another blow to the Bush Administration's anti-terror campaign by reversing the D.C. Circuit,²⁰⁶ even though Congress in the meantime had enacted the Detainee Treatment Act of 2005 (DTA 2005) that denied to all Guantánamo detainees

¹⁹⁷ *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

¹⁹⁸ *Id.* at 557.

¹⁹⁹ Military Order of November 13, 2001, Detention, Treatment and Trial of Certain Non-Citizens in the War against Terrorism, 66 Fed. Reg. 57,833 (Nov. 16, 2001).

²⁰⁰ See David Glazier, *A Self-Inflicted Wound: A Half-Dozen Years of Turmoil over the Guantánamo Military Commissions*, 12 LEWIS & CLARK L. REV. 131, 147-85 (2008).

²⁰¹ See *Hamdan*, 548 U.S. at 557.

²⁰² *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152, 152 (D.D.C. 2004).

²⁰³ *Hamdan v. Rumsfeld*, 415 F.3d 33, 38 (D.C. Cir. 2005).

²⁰⁴ *Id.* at 40.

²⁰⁵ *Id.* at 42.

²⁰⁶ *Hamdan*, 548 U.S. at 635.

the right to make any habeas claims in American courts.²⁰⁷ But the Court was quite fractured on the specifics. A majority agreed that the Court could act despite the language of the DTA 2005, holding that the Act did not apply to cases pending at the time the legislation was passed.²⁰⁸ The Court then proceeded to find the military commissions were unlawful as constituted because they violated provisions of the Uniform Code of Military Justice (UCMJ), which was Congress's last word on how military trials should be conducted.²⁰⁹ Moreover, the majority found, the UCMJ incorporated Common Article 3 of the Geneva Conventions, which created minimum standards that the Bush military commissions failed to meet.²¹⁰ The opinion could be read two ways on the subject of Common Article 3: either Common Article 3 was incorporated into the UCMJ, which was what made Common Article 3 binding on the actions of the government, or Common Article 3 had independent force as part of a set of treaties that the United States had signed and ratified, which had then been incorporated into U.S. law in various ways. Either way, Common Article 3 created a set of minimum standards for the commissions, absent some further act of Congress.

Three four-Justice opinions added to this analysis by stating (a) that the structure of military commissions violated both common law norms for military tribunals and the Geneva Conventions directly,²¹¹ (b) that Congress could authorize new tribunals but that the President could not invent them without such authorization,²¹² and (c) that the President could not unilaterally define crimes for such tribunals to hear.²¹³ But the bottom line was clear: the military commissions could not continue in their present form.

While the opinion showed no judicial deference to the President, it was strangely incoherent with respect to the deference owed to Congress. The Court ruled that Congress through the UCMJ provided a constraint for the President. But on the other hand, the Court ruled that Congress through the DTA 2005 provided no constraint for the Court. As a result, the logic of deference did not apply uniformly throughout the Court's judgment. The Court saw its mission as interpreting the Constitution and the role of the three

²⁰⁷ Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(e), 119 Stat. 2739, 2742-43 (codified at 10 U.S.C. § 801 note (2006)). The DTA 2005 was a response to the Court's ruling in *Rasul*, and it clearly attempted to shut down the Guantánamo litigation as well as to limit their access to counsel. See Jonathan Hafetz, *What the Detainee Treatment Act Really Means for Guantanamo Detainees*, JURIST (Apr. 20, 2006), <http://jurist.law.pitt.edu/forumy/2006/04/what-detainee-treatment-act-really.php>.

²⁰⁸ *Hamdan*, 548 U.S. at 572-84.

²⁰⁹ *Id.* at 635.

²¹⁰ *Id.* at 613.

²¹¹ *Id.* at 595-635 (Stevens, J., joined by Souter, Ginsburg, and Breyer, JJ.) (plurality opinion).

²¹² *Id.* at 636 (Breyer, J., joined by Kennedy, Souter, and Ginsburg, JJ., concurring).

²¹³ *Id.* at 636-55 (Kennedy, J., joined in pertinent part by Souter, Ginsburg, and Breyer, JJ., concurring in part).

branches within it. Deference was only due to either of the others if they were properly fulfilling their constitutional functions.

As a result, the majority in *Hamdan* found legal fault with the President's end-run around the system that Congress had set up in the UCMJ, both with respect to the definition of war crimes that military tribunals could hear and with respect to the procedures such tribunals were to follow. As the majority observed, the UCMJ itself said that any new military tribunal must be made as procedurally similar to courts martial as was "practicable."²¹⁴ The majority offered a slight bit of deference to the President's judgment on which procedures of the ordinary federal courts were practicable under the circumstances, before stating that the President would receive less deference in his determination of which aspects of courts martial could not be practicable.²¹⁵ As the Court explained,

[T]he only reason offered in support of that determination [that the ordinary courts martial rules are not practicable] is the danger posed by international terrorism. Without for one moment underestimating that danger, it is not evident to us why it should require, in the case of Hamdan's trial, any variance from the rules that govern courts-martial.²¹⁶

As a result, the President had to follow the UCMJ in setting up the tribunals, unless Congress said otherwise.

According to the plurality constituted by Justices Stevens, Souter, Ginsburg and Breyer, it would be hard for the President to justify any deviation from rules for courts martial because he had not demonstrated any military necessity for doing so.²¹⁷ That plurality also thought that Common Article 3 of the Geneva Conventions directly covered Hamdan and required that he be tried by a "regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples."²¹⁸

The four-Justice concurrence led by Justice Breyer, including Justices Kennedy, Souter, and Ginsburg, repeated the majority's non-deferential language from *Hamdi* that war was not a "blank check" for the President.²¹⁹ And here, nearly five years after 9/11, the Breyer concurrence denied the very emergency that the President had insisted upon as the source of his power:

Where, as here, no emergency prevents consultation with Congress, judicial insistence upon that consultation does not weaken our Nation's ability to deal with danger. To the contrary, that insistence strengthens the Nation's ability to determine – through democratic means – how best

²¹⁴ *Id.* at 561 (majority opinion).

²¹⁵ *Id.* at 623 n.51.

²¹⁶ *Id.* at 623-24.

²¹⁷ *Id.* at 612 (Stevens, J.) (plurality opinion).

²¹⁸ Geneva Convention Relative to the Treatment of Prisoners of War, art. 3, ¶ 1(d), Aug. 12, 1949, 6 U.S.T. 3316, 3320, 75 U.N.T.S. 135, 138.

²¹⁹ *Hamdan*, 548 U.S. at 636 (Breyer, J., concurring).

to do so. The Constitution places its faith in those democratic means. Our Court today simply does the same.²²⁰

Justice Kennedy, concurring in part, and joined by Justices Souter, Ginsburg, and Breyer, implicitly denied the emergency and emphasized the importance of normal laws in abnormal times: “Respect for laws derived from the customary operation of the Executive and Legislative Branches gives some assurance of stability in time of crisis. The Constitution is best preserved by reliance on standards tested over time and insulated from the pressures of the moment.”²²¹ There was, in short, no continuing emergency and therefore no reason to deviate from normal procedures. To hammer that point home, the Kennedy opinion emphasized that the determination of whether courts martial rules were not “practicable” could not rely only on the President’s judgment, but instead had to be based on an objective consideration of the situation on the ground,²²² a standard that would invite further judicial review.

The dissent by Justice Scalia, joined by Justices Alito and Thomas, reverted to old deference and argued that the Court should have nothing to do with the matter. First, jurisdiction stripping meant jurisdiction stripping; once Congress acted to deny habeas actions in the federal courts to Guantánamo detainees, Justice Scalia and his affiliated dissenters argued it should apply even to pending cases, including this one.²²³ Given that the Court had taken the case, however, Justice Scalia believed that the Court improperly intruded on matters best left to the political branches because the emergency was still ongoing:

The principal opinion on the merits makes clear that it does not believe that the trials by military commission involve any “military necessity” *at all* This is quite at odds with the views on this subject expressed by our political branches. Because of “military necessity,” a joint session of Congress authorized the President to “use all necessary and appropriate force,” including military commissions, “against those nations, organizations, or persons [such as petitioner] he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001.” In keeping with this authority, the President has determined that “[t]o protect the United States and its citizens, and for the effective conduct of military operations and prevention of terrorist attacks, it is necessary for individuals subject to this order . . . to be detained, and, when tried, to be tried for violations of the laws of war and other applicable laws by military tribunals.” It is not clear where the Court derives the authority – or the audacity – to contradict this determination.²²⁴

²²⁰ *Id.*

²²¹ *Id.* at 637 (Kennedy, J., concurring in part).

²²² *Id.* at 640-41.

²²³ *Id.* at 656-59 (Scalia, J., joined by Thomas and Alito, JJ., dissenting).

²²⁴ *Id.* at 674 (citations omitted).

Justice Scalia accused his colleagues of audacity by noting that the order to suspend the military commissions “brings the Judicial Branch into direct conflict with the Executive in an area where the Executive’s competence is maximal and ours is virtually nonexistent. We should exercise our equitable discretion to *avoid* such conflict. Instead, the Court rushes headlong to meet it.”²²⁵

Justice Thomas, writing in dissent and joined by Justices Scalia and (in part) Alito, also attacked his colleagues: “The plurality’s evident belief that *it* is qualified to pass on the ‘military necessity’ of the Commander in Chief’s decision to employ a particular form of force against our enemies is so antithetical to our constitutional structure that it simply cannot go unanswered.”²²⁶

Not only should the Court not interfere with presidential decisions, Justice Thomas argued, but Congress should not be read as having failed to authorize the President to act in ways it did not explicitly legislate.²²⁷ As he had argued in the previous detention cases, Justice Thomas stated, “[T]he President’s decision to try Hamdan before a military commission for his involvement with al Qaeda is entitled to a heavy measure of deference.”²²⁸ His colleagues’ willingness to decide the case on the merits, then, was “both unprecedented and dangerous.”²²⁹

In *Hamdan*, as in *Rasul*, the decision was understood broadly by the press as a defeat for the President and an assertion of power by the Court. The headlines in the immediate aftermath of the decision tell the story:

- Charles Lane, *High Court Rejects Detainee Tribunals; 5 to 3 Ruling Curbs President’s Claim of Wartime Power*, Washington Post, June 30, 2006;
- David G. Savage, *High Court Rejects Bush’s Claim That He Alone Sets Detainee Rules*, Los Angeles Times, June 30, 2006;
- Stephen Henderson, *Supreme Court Rebukes Bush on Tribunals*, McClatchy Newspapers (D.C.), June 29, 2006;
- Linda Greenhouse, *Justices, 5-3, Broadly Reject Bush Plan to Try Detainees*, New York Times, June 29, 2006;
- James Gordon Meek, *W Slapped on Gitmo Trials*, New York Daily News, June 30, 2006.

²²⁵ *Id.* at 677.

²²⁶ *Id.* at 678 (Thomas, J., joined by Scalia and Alito, JJ., dissenting) (citation omitted).

²²⁷ *Id.* at 680.

²²⁸ *Id.*

²²⁹ *Id.* at 706.

As the conventional wisdom went, then, the Court had refused deference for all to see. While the *Hamdan* decision was complicated and fractured, the bottom line was that the majority, as well as the multiple plurality opinions accompanying it, all held that the President's judgments in the "war on terror" were not due deference. If the Congress and the President had acted together, then that was another matter. But the military commissions were constituted by a presidential order that ran contrary to existing statutes. For an Administration determined to keep its military commissions, there was a clear way out of this bind: go to Congress and get authorization for the commissions. This was precisely what the Bush Administration did, and the result was the Military Commissions Act of 2006 (MCA 2006).²³⁰

The MCA 2006 may have been passed by Congress, but the resulting military commissions were little different from those that had already been set up by presidential decree.²³¹ In fact, the MCA 2006, passed in reaction to the *Hamdan* decision, overtly permitted the President to make the military commissions different from ordinary courts martial,²³² taking away the primary objection that the Supreme Court had had to their original structure. The law also expanded the set of crimes that could be prosecuted in military commissions so that now conspiracy was included along with material support for terrorism.²³³ In addition, the MCA 2006 entrenched virtually all of the procedures that the Supreme Court had argued made the commissions different from courts martial.²³⁴ The military commissions that resulted from this Act of Congress may have had a legislative-executive pedigree instead of a purely executive one, but the substance of the commissions was largely the same.

Of course, if you were Salim Hamdan, you might well have thought that your victory in the Supreme Court would have provided a substantial change in your condition. The website put up by the lawyers for Hamdan certainly cheered the Supreme Court's decision by deploying a large banner reading:

²³⁰ Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600. For comparisons between the commissions as set up under the Act and ordinary courts martial, see David J. R. Frakt, *An Indelicate Imbalance: A Critical Comparison of the Rules and Procedures for Military Commissions and Courts-Martial*, 34 AM. J. CRIM. L. 315 (2007), and Richard Meyer, *When a Rose Is Not a Rose: Military Commissions v. Courts-Martial*, 5 J. INT'L CRIM. JUST. 48 (2007).

²³¹ JENNIFER ELSEA, CONG. RESEARCH SERV., RL 33688, THE MILITARY COMMISSIONS ACT OF 2006: ANALYSIS OF PROCEDURAL RULES AND COMPARISON WITH PREVIOUS DOD RULES AND THE UNIFORM CODE OF MILITARY JUSTICE (2007), available at <http://www.fas.org/sgp/crs/natsec/RL33688.pdf>.

²³² *Id.* at 6.

²³³ *Id.* at 10-11.

²³⁴ See *id.* at 15-37 (providing a detailed comparison of procedures pointing out all of the (mostly small) differences between the commissions established under the executive order and the commission procedures authorized under MCA 2006).

“June 29th, 2006: Victory!!!”²³⁵ But an immediate change in Hamdan’s situation was not what the case produced. In fact, the decision of the Supreme Court, requiring that the military commissions be put on hold while Congress took up the matter, only served to delay Hamdan’s trial while not substantially improving the procedures from his point of view.

Hamdan had originally been charged in June 2004 with conspiracy to commit a terrorist act, accused of being Osama bin Laden’s driver and bodyguard.²³⁶ By the time the Supreme Court ruled in his favor, it was June 2006. The MCA 2006 passed later that year, and new charges against Hamdan were brought on May 10, 2007.²³⁷ This time he was charged not only with conspiracy but also with material support for terrorism, a new and vague crime made available for the first time by the MCA 2006.²³⁸ Before his trial could begin, charges against him were dropped again because, according to the military commission’s judges who finally reviewed his case in detail, the commission did not have the jurisdiction to try him until it could be determined authoritatively that he was indeed an “enemy combatant,” the only sort of person over whom the commission exercised jurisdiction.²³⁹ More wrangling. More delays. During this time, Hamdan was held in solitary confinement.²⁴⁰ His lawyers argued that his mental state had deteriorated to the point that he could no longer assist in his own defense.²⁴¹ In April 2008, after seven years of cooperating with the military commission process, Hamdan decided to boycott his own trial.²⁴² As he said to the military commission judge at the time, defending his decision not to cooperate with the military commissions as then constituted,

²³⁵ Hamdan v. Rumsfeld website, <http://www.hamdanvrumsfeld.com/index> (last visited Oct. 12, 2011).

²³⁶ Hamdan v. Rumsfeld, 548 U.S. 557, 569 (2006) (stating that Hamdan was charged on July 13, 2004 with conspiracy to commit terrorism for acting as “Usama bin Laden’s ‘bodyguard and personal driver,’ ‘believ[ing]’ all the while that bin Laden ‘and his associates were involved in’ terrorist acts”).

²³⁷ The charge sheet issued under the MCA 2006, which adds material support to the conspiracy count, can be found at http://www.defense.gov/news/May2007/Hamdan_Charges.pdf.

²³⁸ *Id.*

²³⁹ *Guantanamo Pair’s Charges Dropped*, BBC, June 5, 2007, <http://news.bbc.co.uk/2/hi/americas/6720315.stm>.

²⁴⁰ Declaration of Andrea Prasow, Assistant Detailed Defense Counsel to Salim Hamdan, Military Commission, United States v. Hamdan, (Feb. 1, 2008), *available at* http://humanrights.ucdavis.edu/projects/the-guantanamo-testimonials-project/testimonies/testimomies-of-lawyers/prasow_hamdan_declaration.pdr.pdf.

²⁴¹ *Id.*

²⁴² Deborah Colson, *Another Boycott at Guantanamo, Another Test for the Military Commission System*, HUMAN RIGHTS FIRST BLOG (Apr. 30, 2008), <http://web.archive.org/web/20100827144110/http://www.humanrightsfirst.org/blog/gitmo/2008/04/another-boycott-at-guantnamo-another.html>.

America tells the whole world that it has freedom and justice. I do not see that. . . . There are almost 100 detainees here. We do not see any rights. You do not give us the least bit of humanity. . . . Give me a just court. . . . Try me with a just law.²⁴³

Hamdan was understandably frustrated with the process, including the wins that were not wins and the losses that had the same effect as the wins: prolonging his detention. When one of the commission judges told Hamdan that he should be pleased with the way things were going because he had won his case before the U.S. Supreme Court, Hamdan replied, "I didn't win the case."²⁴⁴

Hamdan's trial before the military commission finally started on July 21, 2008.²⁴⁵ In the end, Hamdan was acquitted of the conspiracy charge that he had fought from the start of his military commission saga. He was convicted, however, of material support, a new crime brought under the jurisdiction of the military commissions only after Hamdan had won his case at the Supreme Court.²⁴⁶ The military jury sentenced him to sixty-six months of detention, with sixty-one months credit for time served. Therefore, his remaining sentence was only five months.²⁴⁷

By the time the trial was over, most who followed the proceedings closely were convinced that Hamdan had been, at most, a bit player in the global terror campaign. The chief judge of the military commission even wished Hamdan well after the trial, telling him, "I hope the day comes that you return to your wife and your daughters and your country, and that you are able to be a provider and a father and a husband in the best sense of all those terms."²⁴⁸ This was hardly the greeting that the military officer who heard all of the evidence against Hamdan would have wished on someone truly dangerous.

Hamdan had been captured in November 2001 in Afghanistan and had been one of the first detainees to arrive when Guantánamo opened in January 2002.²⁴⁹ By the time he was finally released in November 2008,²⁵⁰ he had

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ William Glaberson & Eric Lichtblau, *Military Trial Begins for Guantanamo Detainee*, N.Y. TIMES, July 22, 2008, <http://www.nytimes.com/2008/07/22/washington/22detain.html>. For coverage of the Hamdan trial, see the compilation of news reports of the trial, compiled by Ben Winograd, *Hamdan Military Commission Coverage*, SCOTUSBLOG, <http://www.scotusblog.com/2008/07/hamdan-military-commission-coverage>.

²⁴⁶ William Glaberson, *Bin Laden Driver Sentenced to a Short Term*, N.Y. TIMES, Aug. 7, 2008, <http://www.nytimes.com/2008/08/08/washington/08gitmo.html>.

²⁴⁷ *Id.*

²⁴⁸ Jess Bravin, *Bin Laden Driver's Sentence Signals Doubts About Cases*, WALL ST. J., Aug. 8, 2008, <http://online.wsj.com/article/SB121811582864120531.html>.

²⁴⁹ See Declaration of Andrea Prasow, *supra* note 240.

²⁵⁰ *Bin Laden Driver Arrives in Yemen*, AL JAZEERA, Nov. 26, 2008, <http://english.aljazeera.net/news/middleeast/2008/11/20081126185525992378.html>.

been held in detention for seven years, much of it in solitary confinement, including more than two years after he “won” before the Supreme Court. In the end, however, he was convicted of a minor charge that only existed because the Supreme Court made the President go to Congress for authorization to use military commissions. If the Court’s decision in *Hamdan* was a victory for non-deference, it was not much of a victory for Hamdan himself.

The Supreme Court next took up the Guantánamo challenges in the *Boumediene* case.²⁵¹ Lakhdar Boumediene was an Algerian national who had moved to Bosnia-Herzegovina in the early 1990s. He was picked up, along with five other men, by U.S. forces in Bosnia despite contrary orders from the highest court of that country, which had investigated all charges against Boumediene and the others only to find them baseless. Nonetheless, the Bosnian captives were delivered to Guantánamo in January 2002.²⁵² Held without any meaningful review of the grounds for their detentions for years, the habeas cases of the Bosnian detainees finally came to the Supreme Court in the 2007-2008 Term.²⁵³ The cases arrived after Congress had passed the Detainee Treatment Act of 2005 (DTA 2005), which both set up Combatant Status Review Tribunals to provide some minimal review of the evidence against the detainees and also blocked access to the ordinary courts for habeas petitions. The DTA 2005 was a response to *Rasul*.²⁵⁴ Congress had also passed the Military Commissions Act of 2006 (MCA 2006), which in addition to lending congressional support to the President’s military commissions had also extended the habeas ban to all pending cases (in reaction to *Hamdan*).²⁵⁵

The Supreme Court well might have thought, “been there, done that.” It had forced the President to govern with the Congress in an emergency. Like *Rasul*, *Boumediene* was another case in which the basic habeas rights of Guantánamo

²⁵¹ *Boumediene v. Bush*, 553 U.S. 723 (2008).

²⁵² This account of the background is given by his lawyers in *Guantanamo: Boumediene v. Bush*, WILMERHALE, <http://www.wilmerhale.com/boumediene> (last visited Oct. 17, 2011).

²⁵³ *Id.*

²⁵⁴ See *supra* note 207.

²⁵⁵ WILMERHALE, *supra* note 252. The *Hamdan* case had held that, after the DTA 2005 stripped Guantánamo detainees of their habeas rights, pending cases could still go forward. *Hamdan v. Rumsfeld*, 548 U.S. 557, 575-78 (2005). After *Hamdan*, the MCA 2006 once again removed all habeas rights, this time making it clear that the law should apply to all cases, including pending ones. Military Commissions Act of 2006, Pub L. No. 109-366, § 7, 120 Stat. 2600, 2636-37. Moreover the MCA 2006 also made it impossible for anyone to invoke the Geneva Conventions in support of any claim in federal court. *Id.* at § 5, 120 Stat. at 2631-32. For accounts of the effects of *Hamdan*, see Jack Balkin, *What Hamdan Hath Wrought*, BALKINIZATION (Sept. 29, 2006), <http://balkin.blogspot.com/2006/09/what-hamdan-hath-wrought.html>, and Jack Balkin, *Has Congress Unconstitutionally Suspended the Writ of Habeas Corpus?*, BALKINIZATION (Oct. 3, 2006), <http://balkin.blogspot.com/2006/10/has-congress-unconstitutionally.html>.

detainees to an evidentiary hearing were to be determined. Four years after *Rasul* settled the matter in theory, the practical answer to that question was nowhere near resolved because the intervening acts of Congress had changed the legal landscape. And Congress had said clearly to the Court, “Keep out!”

In its *Rasul* decision, the Court had avoided explaining precisely where the habeas rights to which Guantánamo detainees were located in the law. If habeas rights were based in the habeas statute,²⁵⁶ then Congress could change its terms and the Court would have to defer. If the rights inhered in the Constitution, however, then there were limits to how fundamentally Congress could alter their parameters. Now that Congress had acted to modify the detainees’ habeas rights, that question was squarely presented to the Court: Was habeas a statutory claim or a constitutional one? Was the congressional ban on habeas petitions from the Guantánamo detainees constitutional?

In a five-to-four decision in which the majority opinion was written by Justice Kennedy and joined by Justices Stevens, Souter, Ginsburg and Breyer, the Court found that the habeas right in question was indeed of constitutional proportions.²⁵⁷ As a result, even though the President had done what the Court had indicated he should do – go to the Congress for approval of his detention policy – the Court held that it was the policy and not just the pedigree that was constitutionally deficient. The provision of the MCA 2006 that effectively suspended habeas for the Guantánamo detainees was therefore found to be unconstitutional in light of the history and purpose of the writ. Moving between English and American legal history and noting the frequent executive and parliamentary abuse of detention authority that had been well known to the Framers of the U.S. Constitution, the Court noted that the writ of habeas corpus found a place in the U.S. Constitution as a counterpoint to that checkered history:

In our own system the Suspension Clause is designed to protect against these cyclical abuses . . . by a means consistent with the essential design of the Constitution. It ensures that, except during periods of formal suspension, the Judiciary will have a time-tested device, the writ, to maintain the “delicate balance of governance” that is itself the surest safeguard of liberty.²⁵⁸

Using its role within this delicate balance to analyze the issue, the Court found that neither the alien status of those who would claim the writ’s protection nor the unusual geographical status of Guantánamo posed a clear bar to a habeas claim.²⁵⁹ Moreover, the question of habeas rights for petitioners could not be avoided under the political question doctrine.²⁶⁰ The

²⁵⁶ 28 U.S.C. § 2241 (2006).

²⁵⁷ *Boumediene v. Bush*, 553 U.S. 723, 732-33 (2008).

²⁵⁸ *Id.* at 745 (citations omitted) (quoting *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004)).

²⁵⁹ *Id.* at 746-47.

²⁶⁰ *Id.* at 755.

Court held that its earlier *Eisentrager* decision had refused the writ where the detainees had been held abroad in U.S. military custody, but that did not mean that the Court had adopted a “formalistic, sovereignty-based test for determining the reach of the Suspension Clause” of the sort that the government had urged.²⁶¹ Instead, the Court held, the determination of “questions of extraterritoriality turn on objective factors and practical concerns, not formalism.”²⁶²

The Court then rejected the government’s cramped reading of the boundaries within which the Constitution applied because such a reading would permit the government to simply disclaim sovereignty anywhere and then “it would be possible for the political branches to govern without legal constraint.”²⁶³ The Court, by now clearly believing that the government had designed the rules at Guantánamo precisely to avoid judicial review of the detentions, then spoke bluntly:

Our basic charter cannot be contracted away like this. The Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, not the power to decide when and where its terms apply. Even when the United States acts outside its borders, its powers are not “absolute and unlimited” but are subject “to such restrictions as are expressed in the Constitution.” Abstaining from questions involving formal sovereignty and territorial governance is one thing [for this Court]. To hold the political branches have the power to switch the Constitution on or off at will is quite another. The former position reflects this Court’s recognition that certain matters requiring political judgments are best left to the political branches. The latter would permit a striking anomaly in our tripartite system of government, leading to a regime in which Congress and the President, not this Court, say “what the law is.”

. . . The test for determining the scope of [the Suspension Clause] must not be subject to manipulation by those whose power it is designed to restrain.²⁶⁴

It is hard to imagine a more thoroughgoing rejection of old deference. Instead, the Supreme Court in *Boumediene* held itself out as the only institution that could keep the others constitutionally honest in times of crisis. The Court’s powers were *not* limited by deference; instead, the Constitution required the Court to keep the other branches within their constitutional limits. Where the earlier enemy combatant judgments had refused deference to the President acting alone, forcing him instead to work with the Congress, this judgment gave no deference to either branch, nor did it give deference to both

²⁶¹ *Id.* at 762.

²⁶² *Id.* at 764.

²⁶³ *Id.* at 765.

²⁶⁴ *Id.* at 765-66 (citations omitted) (quoting *Murphy v. Ramsey*, 114 U.S. 15, 44 (1885); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

together. Instead, in *Boumediene*, the Court held itself out as the only branch that could determine what the Constitution required of all.

What were the consequences of this decision for the detainees? The Court held that the Guantánamo detainees, as a matter of constitutional right, had to be permitted to bring their habeas cases to the federal courts for review unless Congress formally suspended the writ:

We hold that Art. I, § 9, cl. 2, of the Constitution has full effect at Guantánamo Bay. If the privilege of habeas corpus is to be denied to the detainees now before us, Congress must act in accordance with the requirements of the Suspension Clause. This Court may not impose a *de facto* suspension by abstaining from these controversies.²⁶⁵

In this analysis, the Court flipped the accusation of activism back at its critics. Addressing the argument that the Court exceeded its powers by having decided in this way, as its detractors and dissenters would claim, the Court argued instead that it would have exceeded its powers by *not* acting and so collaborating in a suspension of the writ that it had no power to accomplish. The Court boldly dared the Congress to suspend the writ overtly as the only option left if the detainees were to be denied regular judicial process. Had Congress already effectively suspended the writ by setting up the Combatant Status Review Tribunals (CSRTs) as a substitute mechanism for a habeas hearing? Implicit suspension was not enough, the Court ruled. Instead, in the absence of a formal and explicit suspension, the Court found that writ still ran and that the CSRTs did not provide enough procedural protection to the detainees to meet the standards for habeas review.²⁶⁶ Congress may have *tried* to suspend the writ, but the effort failed.

Finally noticing that the detainees “have been denied meaningful access to a judicial forum for a period of years” and realizing that remanding to the court of appeals would generate further delays,²⁶⁷ the Court went ahead and finally outlined what, at minimum, a habeas review had to provide. Among other things, each detainee had to have a “meaningful opportunity to demonstrate that he is being held pursuant to ‘the erroneous application or interpretation’ of relevant law” and that the reviewing court had to be able to order the release of an individual who is unlawfully detained.²⁶⁸ Other specifics of a habeas action could be flexible because the “necessary scope of habeas review in part depends upon the rigor of the earlier proceedings” that the detainee in question had already been accorded.²⁶⁹ While a habeas court might reasonably give deference to the judgment of a court of record, the Court stated by way of illustration, such deference was not appropriate where a person was detained

²⁶⁵ *Id.* at 771 (citation omitted).

²⁶⁶ *Id.* at 767.

²⁶⁷ *Id.* at 772.

²⁶⁸ *Id.* at 779 (quoting *INS v. St. Cyr*, 533 U.S. 289, 302 (2001)).

²⁶⁹ *Id.* at 781.

by executive order.²⁷⁰ In the CSRTs, where the detainees were highly constrained in their ability to rebut the evidence against them, did not have assistance of counsel, and did not necessarily know the most critical allegations against them, the risk of error in determining who was properly detained was “a risk too significant to ignore.”²⁷¹ The opportunity to present relevant exculpatory evidence not considered in the initial proceeding was, as a result, also “constitutionally required.”²⁷²

The Court was well aware that its lack of deference to the other branches would make it appear that it had usurped their powers. But the canon of constitutional avoidance, through which the Court has traditionally upheld statutes if there is a single constitutional interpretation of what might otherwise be an unconstitutional act, had no place here, according to the majority. Its reason? “We cannot ignore the text [of the statute] in order to save it.”²⁷³

The government had asserted that, in a time of terrorism, granting habeas jurisdiction would interfere with the government’s ability to counter the threat. The Court, however, disagreed. Rehearsing a number of situations in which a real and practical exigency would prevent habeas hearings from being conducted in an expeditious manner, the Court concluded that the Guantánamo cases were no longer of that sort, if indeed they had ever been:

In some of these cases six years have elapsed without the judicial oversight that habeas corpus or an adequate substitute demands. And there has been no showing that the Executive faces such onerous burdens that it cannot respond to habeas corpus actions. . . . While some delay in fashioning new procedures is unavoidable, the costs of delay can no longer be borne by those who are held in custody. The detainees in these cases are entitled to a prompt habeas corpus hearing.²⁷⁴

Finally, the detainees received a direct order from the Supreme Court that countenanced no further delay. Still, the Court’s decision applied only to the petitioners directly before it.²⁷⁵ And what of the others still held at Guantánamo? According to the Court, both the military commission procedures enacted by Congress and the CSRT procedures designed by Congress for the preliminary review of cases otherwise remained generally “intact.”²⁷⁶ As a result, “[t]he Executive is entitled to a reasonable period of time to determine a detainee’s status before a court entertains that detainee’s habeas corpus petition.”²⁷⁷ Then the Court waffled again on the ultimate

²⁷⁰ *Id.* at 782-83.

²⁷¹ *Id.* at 785.

²⁷² *Id.* at 786.

²⁷³ *Id.* at 787.

²⁷⁴ *Id.* at 794-95.

²⁷⁵ *Id.* at 795.

²⁷⁶ *Id.*

²⁷⁷ *Id.*

standards, announcing that “[c]ertain accommodations can be made to reduce the burden habeas corpus proceedings will place on the military without impermissibly diluting the protections of the writ,”²⁷⁸ without beginning to say what those accommodations could be.

At the end of what appeared a bold judgment, the lip service to old deference emerged, tempered by the new deference that has come to be the signature of the post-9/11 jurisprudence:

In considering both the procedural and substantive standards used to impose detention to prevent acts of terrorism, proper deference must be accorded to the political branches. Unlike the President and some designated Members of Congress, neither the Members of this Court nor most federal judges begin the day with briefings that may describe new and serious threats to our Nation and its people. The law must accord the Executive substantial authority to apprehend and detain those who pose a real danger to our security.

. . . Security depends upon a sophisticated intelligence apparatus and the ability of our Armed Forces to act and to interdict. There are further considerations, however. 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.

Our opinion does not undermine the Executive’s powers as Commander in Chief. On the contrary, the exercise of those powers is vindicated, not eroded, when confirmed by the Judicial Branch. 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. . . .

Because our Nation’s past military conflicts have been of limited duration, it has been possible to leave the outer boundaries of war powers undefined. If, as some fear, terrorism continues to pose dangerous threats to us for years to come, the Court might not have this luxury. This result is not inevitable, however. The political branches, consistent with their independent obligations to interpret and uphold the Constitution, can engage in a genuine debate about how best to preserve constitutional values while protecting the Nation from terrorism.²⁷⁹

This was the new world of separation of powers in wartime. The Court reminded the other branches of their constitutional obligations, all the while preserving for itself the last word on whether the other branches had fulfilled them.

²⁷⁸ *Id.*

²⁷⁹ *Id.* at 796-98 (citation omitted).

The dissenters, Chief Justice Roberts, along with Justices Scalia, Thomas, and Alito, gave full vent to the logic of old deference by blasting the majority's assessment of its own role. Calling the procedures struck down "the most generous set of procedural protections ever afforded aliens detained by this country as enemy combatants," the dissent argued that the Court substituted its judgment about fair procedures for the judgment of the political branches "amidst an ongoing military conflict."²⁸⁰ Instead of insisting on habeas, and working backwards from there to what the detainees' rights were, the Court should have first determined what the detainees' rights were and then set out to ensure that these rights were realized, explained Chief Justice Roberts.²⁸¹ Perhaps the CSRT system in fact vindicated all of the rights to which the detainees were entitled without getting into the thicket of habeas. But the Court had not given the CSRT system set up by Congress a chance to work to see whether detainee's rights were safeguarded adequately, nor had the Court allowed the Court of Appeals for the District of Columbia, the court charged with reviewing CSRT judgments, a chance to fill in what its role would be. Having the Supreme Court take the case at all, Chief Justice Roberts argued, was both misguided and premature.²⁸²

So what rights did these detainees have, according to the dissenters? The Chief Justice argued that the rights that had been accorded the alien Guantánamo petitioners seemed to be in excess of those that the Court had argued were due Hamdi, an American citizen. In *Hamdi*, the Court had said that a military commission with a burden of proof favoring the government was fine for a citizen; here the Court seemed to say that more was required for Boumediene and the others still held at Guantánamo.²⁸³ Congress had relied on the Court's ruling in *Hamdi* and designed a procedure that gave aliens the same rights that the Court had said a citizen had, "only to find itself the victim of a constitutional bait and switch."²⁸⁴

Alien detainees held abroad surely had fewer rights than American citizens held within the United States, Chief Justice Roberts argued, and therefore the hearings for Guantánamo detainees surely did not need to build in more protections than Hamdi could have claimed. Take the production of defense witnesses at hearings. Of necessity, hearings taking place during times of war would not be able to provide every bit of evidence a detainee might want, because "[t]he dangerous mission assigned to our forces abroad is to fight terrorists, not serve subpoenas."²⁸⁵ The majority, however, provided no guidance on how the habeas hearings should avoid hearsay when witnesses were on the other side of the earth. Nor did the majority grapple with how to

²⁸⁰ *Id.* at 801 (Roberts, C.J., dissenting).

²⁸¹ *Id.* at 802.

²⁸² *Id.* at 802-04.

²⁸³ *Id.* at 804.

²⁸⁴ *Id.* at 811.

²⁸⁵ *Id.* at 816.

protect classified information in these hearings. Instead, according to Chief Justice Roberts, the majority found the existing procedures unconstitutional on the basis of improbable hypotheticals without dealing with the perfectly predictable problems that would result from the sorts of hearings that the majority seemed to require.²⁸⁶

And then Chief Justice Roberts spotted the logic of the new judicial deference:

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 procedure. 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 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.²⁸⁷

The Court's decision in *Boumediene* might have appeared to put a check on what the political branches could do in wartime. But so many questions were left unanswered by the majority's decision that Chief Justice Roberts was no doubt right that the remedies the detainees were apparently awarded would take a long time to become real, if indeed they ever did.

Justice Scalia, joined in dissent by the Chief Justice as well as with Justices Thomas and Alito, had an even more scathing assessment of what the majority had done in this case:

Today, for the first time in our Nation's history, the Court confers a constitutional right to habeas corpus on alien enemies detained abroad by our military forces in the course of an ongoing war. . . .

The game of bait-and-switch that today's opinion plays upon the Nation's Commander in Chief will make the war harder on us. It will almost certainly cause more Americans to be killed. That consequence would be tolerable if necessary to preserve a time-honored legal principle vital to our constitutional Republic. But it is this Court's blatant *abandonment* of such a principle that produces the decision today. . . .

²⁸⁶ *Id.* at 824-25.

²⁸⁷ *Id.* at 826 (citation omitted) (quoting *Hamdan v. Rumsfeld*, 548 U.S. 577, 636 (2006) (Breyer, J., concurring)).

. . . [T]he Court's decision today accomplishes little, except perhaps to reduce the well-being of enemy combatants that the Court ostensibly seeks to protect.²⁸⁸

Justice Scalia asserted that detainees who had already been released upon the military's judgment that they no longer posed a threat had returned to the fight against Americans. Surely, he said, a civilian court could do no better in assessing the threat that detainees posed.²⁸⁹ Neither, he argued, could his colleagues:

What competence does the Court have to second-guess the judgment of Congress and the President on such a point? None whatever. But the Court blunders in nonetheless. Henceforth, as today's opinion makes unnervingly clear, how to handle enemy prisoners in this war will ultimately lie with the branch that knows least about the national security concerns that the subject entails.²⁹⁰

Justice Scalia urged not only deference to Congress's judgment in determining how to handle military and foreign affairs but also "great deference even when the President acts alone in this area."²⁹¹ The Court's actions itself violated separation of powers, according to Justice Scalia: "'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."²⁹² He added, "What 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."²⁹³

The press clearly got the message that the *Boumediene* Court had done something earth-shattering:

- Michael Doyle, *Supreme Court Rules Terror Prisoners Have Basic Rights to Challenge Jailing*, McClatchy Newspapers, June 12, 2008;
- Josh White & Del Quentin Wilber, *Detainees Now Have Access to Federal Court*, Washington Post, June 13, 2008;
- Michael Abramowitz, *Administration Strategy for Detention Now in Disarray*, Washington Post, June 13, 2008;

²⁸⁸ *Id.* at 826-28 (Scalia, J., dissenting).

²⁸⁹ *Id.* at 828-29.

²⁹⁰ *Id.* at 831.

²⁹¹ *Id.* at 832.

²⁹² *Id.* at 834.

²⁹³ *Id.* at 842.

- Joan Biskupic & Alan Gomez, *Ruling Lays Path from Guantanamo to U.S. Courts; Justices' 5-4 Vote Bucks Bush's Detainee Policy*, USA Today, June 13, 2008;
- *The End of Guantanamo as We Know It* (National Public Radio broadcast June 13, 2008);
- William Glaberson, *Guantanamo's Detention Camp Remains, but Not Its Legal Rationale*, New York Times, June 13, 2008;
- Editorial, *Made in America: Where Else Would Enemies Be Given the Run of the Courthouse?*, Augusta Chronicle (Ga.), June 14, 2008;
- *Courts Take Charge of National Security*, Mobile Register (Ala.), June 14, 2008;
- *American Justice Affirmed; Court Majority Refused to Let Fear Compromise Our Basic Principles*, Sarasota Herald-Tribune (Fla.), June 14, 2008.

While editorial reaction ranged from delight to fury, the press from left to right agreed that something major had been done. In particular, the Bush Administration had lost.

The majority in *Boumediene* had indeed found that the political branches had designed a system that violated the Constitution. The majority in *Boumediene* hardly looked deferential, at least when one examines the reasoning. But the signature element of the new judicial deference is that the Court *does not* defer in principle; it defers in practice.

The petitioners won the right to have a regular court hear their habeas petitions. But what should such a court say about the Guantánamo detentions after this case? The majority frankly admitted that “our opinion does not address the content of the law that governs petitioners’ detention. That is a matter yet to be determined.”²⁹⁴ So, while the Court appeared to take seriously the years of delay in granting the petitioners any independent review of the bases for their detention, the Court would still not explain when and by what evidentiary standard detention would be permissible. That required more litigation. And that process would require more time, which would in turn allow the executive to detain the petitioners longer.

The irony did not escape Chief Justice Roberts, who pointed out that the delays inherent in litigating those issues would likely take much longer than the procedure the Court’s decision had bypassed. As a result, if the Court was worried about the length of the detentions that the petitioners had already

²⁹⁴ *Id.* at 798 (majority opinion).

experienced, the judgment of the majority would serve only to make the process last even longer.²⁹⁵

What happened to the detainees? As Justice Roberts predicted, the lack of specificity in the Court's description of what the habeas process should look like resulted in a new wave of litigation, though it still took a while to get the courts working from a common set of standards.²⁹⁶

Lakhdar Boumediene himself, whose habeas petition had generated the case, was at the head of the line to proceed with habeas review. Right after his summer 2008 victory in the Supreme Court, the government dropped charges in the military commissions against him and the other Bosnian detainees.²⁹⁷ They had been accused of being part of a plot to bomb the U.S. Embassy in Sarajevo in 2001, and that claim had once been given a high profile when President Bush mentioned the charge in his 2002 State of the Union Address.²⁹⁸ In November 2008, Judge Leon of the District Court for the District of Columbia, one of the judges who had been hardest on detainee claims before that point,²⁹⁹ ruled that the government had provided no convincing evidence against five of the six detainees who had been apprehended in Bosnia, including Boumediene. He ordered them released.³⁰⁰ Judge Leon took the unusual step of asking the Bush Administration not to

²⁹⁵ *Id.* at 806-07 (Roberts, C.J., dissenting).

²⁹⁶ Common standards for the review of these cases have been developed through a combination of case management orders that attempt to streamline and regularize the process on one hand and case-by-case common-law-style development of procedures on the other. As a consequence, it has taken several years for the courts to work out how the cases should be handled. For contradictory evaluations of the results, see BEN WITTES, BOBBY CHESNEY & LARKIN REYNOLDS, *THE EMERGING LAW OF DETENTION 2.0: THE GUANTÁNAMO HABEAS CASES AS LAWMAKING 3* (2011), available at http://www.brookings.edu/~media/Files/rc/papers/2011/05_guantanamo_wittes/05_guantanamo_wittes.pdf (reporting that by May 2011, on a number of issues, "the law remains more or less as it was then, uncertain and subject to greatly divergent approaches by district judges with profoundly differing instincts"), and HUMAN RIGHTS FIRST & THE CONSTITUTION PROJECT, *HABEAS WORKS: FEDERAL COURTS' PROVEN CAPACITY TO HANDLE GUANTÁNAMO CASES: A REPORT FROM FORMER FEDERAL JUDGES 1* (2010), available at <http://www.humanrightsfirst.org/wp-content/uploads/pdf/Habeas-Works-final-web.pdf> ("Habeas is working. The judges of the U.S. District Court for the District of Columbia have ably responded to the Supreme Court's call to review the detention of individuals at Guantánamo Bay, Cuba.").

²⁹⁷ This account of the denouement of Boumediene's personal case is given by the Wilmer Hale law firm, which handled this litigation as part of their pro bono work. *Guantanamo: Boumediene v. Bush*, WILMERHALE, <http://www.wilmerhale.com/boumediene/> (last visited Oct. 10, 2011).

²⁹⁸ *Id.*

²⁹⁹ Dalia Lithwick, *Supreme Chickens? The High Court's Gitmo Confusion Comes Home to Roost*, SLATE (Feb. 1, 2005, 5:56 PM), <http://www.slate.com/id/2113003>.

³⁰⁰ *Boumediene v. Bush*, 579 F. Supp. 2d 191, 199 (D.D.C. 2008) (ordering the government "to take all necessary and appropriate diplomatic steps to facilitate the release of Petitioner[] Lakhdar Boumediene.").

appeal his decision because the detainees had been held for seven years at that point and no one had ever seen any convincing evidence against them.³⁰¹ The government agreed and sent three of the Bosnian detainees back to Sarajevo in December 2009.³⁰² Lakhdar Boumediene and Saber Lahmar, the other two, were released to France in 2009.³⁰³ Later, the only Bosnian detainee whose continued detention Judge Leon had approved appealed to the District of Columbia Circuit Court of Appeals. That court reversed Judge Leon and remanded the case to the district court for further hearings.³⁰⁴

The other hearings did not go so fast. Three years after *Boumediene*, only fifty-seven of the Guantánamo detainees had had their cases heard in federal court and thirty-seven of them had had their habeas petitions granted.³⁰⁵ Of that number, twenty-four had actually been released while thirteen were cleared for release but were still detained.³⁰⁶ For the twenty detainees whose petitions were denied, continued detentions were authorized.³⁰⁷ But less than one-third of all remaining Guantánamo detainees had had their detentions reviewed by U.S. federal courts within three years of the Supreme Court decision authorizing this review.³⁰⁸ And while many were ordered released, not even those who won necessarily saw freedom.

The Supreme Court did not have the last word on the Guantánamo detentions, nor did it seem to want that role. Instead, consistent with new

³⁰¹ One news article read:

In an unusual moment, [Judge Leon] also pleaded with Justice Department lawyers not to appeal his order, noting that the men have been imprisoned since shortly after the attacks of Sept. 11, 2001.

“Seven years of waiting for a legal system to give them an answer . . . in my judgment is more than enough,” he said. He urged the government “to end this process.”

Del Quentin Wilber, *Guantanamo Ordered Released; Men Not Considered Enemy Combatants*, WASH. POST, Nov. 21, 2008, at A2.

³⁰² William Glaberson, *U.S. Is Set to Release 3 Detainees from Base*, N.Y. TIMES, Dec. 16, 2008, at A28.

³⁰³ See Steven Erlanger, *France: Algerian Freed from Guantánamo Prison*, N.Y. TIMES, Dec. 2, 2009, at A10; *France to Accept Guantánamo Detainee*, N.Y. TIMES, May 7, 2009, at A12.

³⁰⁴ *Bensayah v. Obama*, 610 F.3d 718, 727 (D.C. Cir. 2010). Bensayah’s case was remanded because the government eschewed reliance on some evidence that had been offered when the case was heard before the district court, thereby bringing Bensayah below the preponderance of the evidence threshold needed to maintain his detention. As of this writing, he is still held in U.S. custody after nine years and ten months. *The Guantánamo Docket*, *supra* note 168.

³⁰⁵ For the Guantanamo scorecard maintained by the Center for Constitutional Rights, see *Guantanamo Bay Habeas Decision Scorecard*, CENTER FOR CONSTITUTIONAL RIGHTS, <http://ccrjustice.org/GTMOscorecard> (last visited Oct. 10, 2011).

³⁰⁶ *Id.*

³⁰⁷ *Id.*

³⁰⁸ *Id.*

judicial deference, the Court left the details to be worked out by others in long processes that allowed the situation on the ground to remain the same during negotiations over the new policy. Since the Court decided *Boumediene*, the bold guarantees of due process that the Court announced have been turning into something less robust on the ground, as a result of decisions by the Court of Appeals for the District of Columbia spelling out the details.³⁰⁹ Several judges on that court have made no secret of the fact that they believed that the Supreme Court overstepped its authority in deciding *Boumediene* in the first place.³¹⁰ As a result, the emerging legal standards for the detention created by the D.C. Circuit are often much more deferential to executive detention than the Supreme Court decision was.³¹¹ For example, the D.C. Circuit's jurisprudence in these cases has permitted continued detention where the

³⁰⁹ Robert Barnes, *Supreme Court Declines to Clarify Rights of Guantanamo Bay Detainees*, WASH. POST, Apr. 10, 2011, http://www.washingtonpost.com/politics/supreme-court-declines-to-clarify-rights-of-guantanamo-detainees/2011/04/07/AFGN1VGD_story.html; Jonathan Hafetz, *The Unraveling of Boumediene: Habeas Still a Right Without a Remedy*, BALKINIZATION, Apr. 18, 2011, http://balkin.blogspot.com/2011/04/unraveling-of-boumediene-habeas-still_18.html.

One perceptive analysis of the patterns in D.C. Circuit's Guantánamo decisions has been carried out by Stephen Vladeck. He argues that virtually all of the *Boumediene*-undermining rulings are attributable to four judges on that court: Judges Janice Rogers Brown and Bert Kavanaugh and Senior Judges Laurence Silberman and A. Raymond Randolph. The rest of the judges on that court have fallen into line with the Supreme Court:

[This essay's] central conclusion is that, in their opinions and their rhetoric, these four jurists are effectively fighting a rear-guard action while their colleagues coalesce around substantive and procedural rules that are materially consistent with what little guidance the Supreme Court has provided in these cases – and, as importantly, that have the general endorsement of virtually all of the district judges and the executive branch.

Stephen I. Vladeck, *The D.C. Circuit After Boumediene*, 42 SETON HALL L. REV. 1451, 1456 (2011).

³¹⁰ Judge Silberman, a senior judge in the D.C. Circuit who has sat on many Guantánamo cases, has been one of the most outspoken, issuing a concurring opinion in *Esmail v. Obama* that blasts “the Supreme Court's defiant – if only theoretical – assertion of judicial supremacy” in the Guantánamo cases. *Esmail v. Obama*, 639 F.3d 1075, 1078 (D.C. Cir. 2011) (Silberman, J., concurring). Senior Circuit Judge A. Raymond Randolph of the same court has been perhaps even more critical of the Supreme Court's decision in *Boumediene*. He gave a speech entitled “The Guantanamo Mess” criticizing the Court for getting the judiciary involved in these cases. See Lyle Dennison, *A Judge Blasts the Court*, SCOTUSBLOG, Apr. 8, 2011, <http://www.scotusblog.com/2011/04/a-judge-blasts-the-court>. Not surprisingly, these judges have almost always ruled against the habeas petitions of Guantánamo detainees. Andy Worthington, *More Judicial Interference on Guantánamo*, FUTURE OF FREEDOM FOUNDATION, Apr. 18, 2001, <http://www.fff.org/comment/com1104k.asp>.

³¹¹ For another detailed analysis to date of the emerging legal standards, see WITTES, CHESNEY & REYNOLDS, *supra* note 296.

evidence against the detainee consists entirely of hearsay.³¹² The government only has to show “a preponderance of the evidence” in order to sustain detentions, according to some of the judges, while other judges have argued that an even lower standard suffices for the government to carry its burden of proof in these cases.³¹³ These are standards designed to give the benefit of the doubt to the government and to allow detentions to continue even with shaky proof.

That said, the habeas process, grinding slowly along, constituted the first time that any evidence was put before independent judges since the detainees started being sent to Guantánamo in early 2002.³¹⁴ And, not surprisingly for those who have followed these cases, evidence against many of the detainees has turned out to be virtually non-existent. When one considers the global figures – thirty-six of the first fifty detainees whose cases were reviewed in U.S. federal court were ordered released on standards ungenerous to the detainees – it appears that many of the detentions at Guantánamo were baseless.³¹⁵ Mixed into the set of fifty were seventeen Uighurs, Muslims from Western China, whom the Bush Administration had already admitted were still detained even though they posed no threat to the United States. They were easily ordered released.³¹⁶ If one takes the Uighurs out of the fifty cases already resolved, however, then the government has actually won half of contested habeas cases that have been heard so far, which makes the government’s track record somewhat better outside the specifics of the Uighur context.³¹⁷ The fifty percent of detainees who brought and won their cases to date, however, were imprisoned for almost nine years before they finally established that the government had almost no evidence to keep them at Guantánamo.³¹⁸ Even though many had won repeated judicial victories in the interim, the resolution of their particular cases was still painfully slow.³¹⁹ Those who lost their cases and have remained at Guantánamo are often held on the basis of very little evidence indeed, virtually all of it hearsay.³²⁰

³¹² *Id.* at 55-65.

³¹³ *Id.* at 15.

³¹⁴ William Glaberson, *Judge Declares Five Detainees Held Illegally*, N.Y. TIMES, Nov. 21, 2008, at A1.

³¹⁵ For these figures, see HUMAN RIGHTS FIRST & THE CONSTITUTION PROJECT, *supra* note 296 at 3.

³¹⁶ *Id.*

³¹⁷ *Id.*

³¹⁸ See WITTES, CHESNEY & REYNOLDS, *supra* note 296, at 55.

³¹⁹ See HUMAN RIGHTS FIRST & THE CONSTITUTION PROJECT, *supra* note 296, at 6-8.

³²⁰ Habeas hearings in the Guantánamo cases have been typically conducted on the basis of documentary proof, full of hearsay. For one vivid example, see *Petition for Writ of Certiorari at 7, al Odah v. U.S.*, 611 F.3d 8 (D.C. Cir. 2010) (No. 10-439), available at <http://sblog.s3.amazonaws.com/wp-content/uploads/2010/09/Al-Odah-cert-petition-9-28-10.pdf> (“The government did not call a single witness at the hearing, nor did it offer any testimony by affidavit relating directly to Petitioner. The only evidence offered by the

By the time that the habeas judges started ordering detainees to be released, the U.S. government had changed hands, and the Obama Administration was in fact attempting to release many of the detainees even without habeas hearings. The appointment in 2009 of Ambassador Daniel Fried, charged with the full-time responsibility to relocate cleared Guantánamo detainees,³²¹ has shown that this task is difficult to accomplish even with a willing administration.³²² The problem is that the detainees have to be released *to somewhere*. In some cases, the detainees' home countries would likely subject them to torture and persecution, so the U.S. needs to find some other country to take them. That has not been easy precisely because Guantánamo detainees seem dangerous even when they have been cleared. Not surprisingly, even when Guantanamo detainees have been cleared and released, they have a hard time fitting into anything like normal life again.³²³ Moreover, even if the detainees were fit and normal adults when they were first captured, they have suffered from years of detention in isolation so they may suffer from declining mental health.³²⁴

Nonetheless, for the first seven years of their detention, no evidence about specific detainees and the reasons why they were held was evaluated by a neutral decision-maker, nor was any Guantánamo detainee ordered released by a court, until the habeas process started in earnest close to the end of President Bush's two terms in office. Despite all of the court judgments that attempted to establish judicial review over these detentions, President Bush was still given years to hold the detainees until his legally permitted time ran out. By

government at the hearing consisted of 162 documentary exhibits, largely consisting of unsworn interrogation reports of subjects about whom little or nothing is known, most of which were taken years after the fact under undisclosed circumstances by unknown interrogators whom the government did not make available for cross-examination or to answer interrogatories.”).

³²¹ Press Release, Robert Wood, Dep't of State, Appointment of Ambassador Daniel Fried (March 12, 2009), <http://www.state.gov/r/pa/prs/ps/2009/03/120298.htm>.

³²² The Obama Administration reviewed the files of all 240 detainees still held at Guantánamo when it took office and cleared 127 for release without the need for habeas review. The difficulties of finding countries to take the detainees accounted for the delays in releasing them. *Guantanamo Detainee Transfer Policy and Recidivism: Hearing Before the Subcomm. on Oversight and Investigations of the H. Armed Serv. Comm.*, 112th Cong. 3 (2011) (testimony of Ambassador Daniel Fried, Special Envoy for the Closure of the Guantanamo Detainee Facility), available at http://armedservices.house.gov/index.cfm/files/serve?File_id=8e786aeb-a0c0-4651-bb54-40a9e98775aa.

³²³ LAUREL FLETCHER & ERIC STOVER, *THE GUANTANAMO EFFECT: EXPOSING THE CONSEQUENCES OF U.S. DETENTION AND INTERROGATION PRACTICES* 122-23 (2009).

³²⁴ A 2008 Human Rights Watch report evaluated the conditions under which Guantánamo detainees were held and concluded that many suffered from deteriorating mental health. HUMAN RIGHTS WATCH, *LOCKED UP ALONE: DETENTION CONDITIONS AND MENTAL HEALTH AT GUANTANAMO 2* (2008), available at http://www.hrw.org/sites/default/files/reports/us0608_1.pdf.

that time, there was a new President who had campaigned for closing Guantánamo entirely³²⁵ and who, immediately upon taking office, set up a review process to evaluate the detainees with the goal of releasing as many detainees as possible.³²⁶ As a result, there was much less overt pushback against the Court's decisions from the executive branch once President Bush left office. That said, the Obama administration still defended many detentions in the federal courts and appealed cases they lost.³²⁷

By this point in the Guantánamo story, presidential determination to close the detention camp was not enough. Congressional Republicans, agitated that dangerous terrorists would be brought into the United States or released under permissive conditions,³²⁸ inserted a provision in the Defense Authorization Bill in 2011 that banned the use of federal funds to bring detainees to trial or for further detention in the United States – or even to release them to other countries unless complex security agreements could be worked out.³²⁹ As a result, despite being cleared for release by the Obama Administration's Guantánamo Review Task Force, many of the Guantánamo detainees still languish in the detention center unable to go anywhere.³³⁰ In addition, a number of the detainees have failed in their habeas reviews at the district court level and have had their detentions prolonged.³³¹ On appeal, the D.C. Circuit Court of Appeals often has been unsympathetic to those who lost below. In

³²⁵ Andrew Malcolm, *Obama and Guantanamo: A Chronology of his Broken Promise*, L.A. TIMES, July 2, 2010, <http://latimesblogs.latimes.com/washington/2010/07/obama-guantanamo.html>.

³²⁶ In its 2009 review of the 240 detainees still held there, the Guantánamo Review Task Force concluded that 126 could be cleared for release. In their view, forty-eight detainees were too dangerous to release, but the evidence that sustained this judgment could not be presented either to military commissions or to Art. III courts. Another forty-four could be referred for prosecution, in the view of the Task Force. The remaining thirty were Yemenis whose release was conditional upon an improved security situation in their home country. GUANTÁNAMO REVIEW TASK FORCE, FINAL REPORT ii (2010), available at <http://www.justice.gov/ag/guantanamo-review-final-report.pdf>.

³²⁷ See HUMAN RIGHTS FIRST & THE CONSTITUTION PROJECT, *supra* note 296, at 3 (stating that since the *Boumediene* ruling in 2008, the government has prevailed in more than forty percent of habeas petitions and that, of the eighteen appeals currently pending, the government brought six).

³²⁸ Michael Stransky, *Releasing Terrorists, or Bringing Them to the US*, U.S. SENATE, REPUBLICAN POLICY COMM. BLOG (July 6, 2011), http://rpc.senate.gov/public/index.cfm?p=Blog&ContentRecord_id=70572cc8-1af8-4fc6-b8b6-3a25e79d51be.

³²⁹ Ike Skelton National Defense Authorization Act for Fiscal Year 2011, H.R. 6523, 111th Cong.; Warren Richey, *Obama Blasts Congress's Limits on Guantánamo Transfers*, CHRISTIAN SCI. MONITOR, Jan. 7, 2011, available at <http://www.csmonitor.com/USA/Justice/2011/0107/Obama-blasts-Congress-s-limits-on-Guantanamo-transfers>.

³³⁰ GUANTÁNAMO REVIEW TASK FORCE, FINAL REPORT 15, Jan. 22, 2010, available at <http://www.justice.gov/ag/guantanamo-review-final-report.pdf>.

³³¹ See *Guantanamo Bay Habeas Decision Scorecard*, CENTER FOR CONSTITUTIONAL RIGHTS, <http://ccrjustice.org/GTMOscorecard> (last visited Oct. 10, 2011).

addition, when the government has decided to challenge some of the rulings ordering detainees released, the D.C. Circuit has always sided with the government.³³²

The Supreme Court's Guantánamo cases examined whether the Court should defer to the political branches in wartime or whether the Court should hold the other branches to their constitutional commitments in time of crisis. Compared with the World War II cases, the post 9/11 detention cases showed that the Supreme Court (and many lower courts) refused to exercise old deference.³³³ Instead, during the heat of the crisis, the courts repeatedly stood up to the President, the Congress, and the President and Congress combined, making them all provide more procedural protections for crisis detainees.

The decisions, as the headlines revealed, were trumpeted as major victories for the detainees and setbacks for the Bush Administration. And yet, more than two years into the Obama Administration's kinder, gentler Guantánamo policy, most of the detainees who were held at Guantánamo when President Obama took office were still there.³³⁴ If in fact Guantánamo housed the worst of the worst, this would not be surprising or even troubling. But even those detainees against whom little evidence has ever been provided to a neutral decision-maker are still there.³³⁵ The continued detentions are, of course, not solely the fault of the courts. Since the Obama Administration took office, Congress has objected to releasing detainees, which has clearly slowed, and in fact almost completely stopped, the process.³³⁶ But the courts have contributed their part as well, by slowing review of individual cases and developing standards in individual cases that favor the government in determining the legality of continued detention.

If one compares what happened to the detainees themselves, the World War II cases and the post-9/11 cases look very different, but not in the direction one would expect. However horrible the Japanese internment was (and it is surely now recognized as one of the most egregious actions the U.S. government has ever taken),³³⁷ it lasted less than half as long as the Guantánamo detentions

³³² This was true through July 2011. Peter Finn & Del Quentin Wilber, *On Appeals, Detainees Have Never Won*, WASH. POST, July 6, 2011, at A1.

³³³ See *supra* Parts I & II.

³³⁴ In the first two years of the Obama Administration, the number of Guantánamo detainees went from 242 to 172. Though seventy had been released, most were still there. Scott Shane & Mark Landler, *Obama, in Reversal, Clears Way for Guantanamo Trials to Resume*, N.Y. TIMES, Mar. 8, 2011, at A19.

³³⁵ See *supra* notes 315-320 and accompanying text.

³³⁶ See *supra* notes 328-332 and accompanying text.

³³⁷ Among other things, the U.S. government has officially apologized for the mistake. Bill Clinton sent a letter of apology to formerly interned Japanese Americans in 1993. Letter from William Clinton, President of the U.S. (October 1, 1993), available at <http://www.pbs.org/childofcamp/history/clinton.html>. Congress gave an apology and reparations in 1988. Joe Leo, *An Apology to Japanese Americans*, TIME, May 2, 1988, at 70, available at <http://www.time.com/time/magazine/article/0,9171,149131,00.html>.

lasted before serious review of the Guantánamo cases began after *Boumediene*. The Japanese internments began with President Roosevelt's order on February 19, 1942 and ended when the last camp was closed on March 20, 1946.³³⁸ The courts did nothing, but most Japanese internees were held less than four years.³³⁹ The war's end provided the reason for the closure of the internment camps, not any intervention of the judiciary.³⁴⁰ By contrast, in the post-9/11 cases, the courts were very active, right from the start. But the Guantánamo detention center was opened in January 2002 – and it remains open for the foreseeable future. Many of the men have been held at that center for nearly a decade, winning case after case, without being released and without having their cases reviewed by anyone but their immediate captors.³⁴¹ The long process of winning cases while remaining in detention for the Guantánamo detainees has already lasted more than twice as long as the Japanese internment. As many of the detainees have now asked their lawyers, what does it mean to keep winning cases if nothing in fact changes?

“Misery is not a competition,”³⁴² and the internment of the Japanese becomes no less serious because other detainees in other national crises have been imprisoned for longer. I compare the two situations simply to note that judicial involvement under the new deference model has produced no obviously better outcomes for the detainees than old judicial deference did. One has to ask why detentions under the post-9/11 litigation where detainees kept “winning” have lasted much longer than detentions in World War II when the courts refused to intervene.

Of course, the “war on terror” has lasted longer than the U.S. involvement in World War II, and the 9/11 detainees now are at least getting some due process while the “war” is still ongoing. One might well say that the length of the conflict that accounts for the comparative length of the detentions in WWII and after 9/11. But that is not the whole story. When one examines the cases up close, the Guantánamo litigation in the end seems to have *delayed* the release of some of the detainees, not least because the Court kept stopping processes in train and requiring the political branches to design new frameworks, without the Court also telling the other branches just where the serious constitutional constraints were. For example, had Hamdi actually waited for the courts to get around to designing a procedure through which his claims could be heard, he would probably have gone on being detained for

³³⁸ See The Japanese American Legacy Project, *Timeline*, DENSHO, <http://www.densho.org/causes/default.asp> (follow “Timeline” hyperlink on left-hand menu under “Related Content”) (last visited Oct. 19, 2011); see also PETER IRONS, *JUSTICE AT WAR: THE STORY OF THE JAPANESE-AMERICAN INTERNMENT CASES* 38, 358 (1983).

³³⁹ See Grossman, *supra* note 74, at 660.

³⁴⁰ See *id.*

³⁴¹ See *supra* notes 315-323 and accompanying text.

³⁴² Patricia Williams, Columbia Law School, said this once as part of a discussion that was not recorded. But the image is a powerful one and deserves repeating.

years longer than he was held in the end.³⁴³ The legal wrangling over José Padilla's detention went on long enough for the government to invent a totally different rationale for holding him, and his punishment in the criminal case that the government brought against him was surely far worse than he would have received had he simply been detained as an "enemy combatant."³⁴⁴ Salim Hamdan was eventually convicted of charges that were only made possible by the Court's intervention, requiring Congress to act. Had he been tried by military commission under the procedures and charges available at the time he began his challenge, he probably would not have been convicted, because he was acquitted of the charges that were initially brought against him and convicted only of new crimes added after Congress revised the law under which he was tried.³⁴⁵ And while Lakdar Boumediene himself was released quite quickly after he won the right to habeas review (though more because the government changed its mind than because he won on the evidence presented), the long drawn-out process, against substantial judicial resistance from the D.C. Circuit, has not resulted in speedy resolution of the claims of others.³⁴⁶

Had the Court really had its eye on the detainees instead of on the other branches of government as its main audience, the Court might have moved more quickly to put effective, constitutionally vetted procedures in place at the first opportunity. It didn't. Instead, the Court gave only very general guidance both to the other branches and to the courts below, and the time it took for those others to respond dragged out the detentions further.³⁴⁷

This is why we should consider the brave and bold decisions that found for the suspected terrorists not as an *absence* of deference, as the judgment themselves often trumpeted, but instead as a *new* form of deference. As separation of powers cases, the decisions reviewed here created a bold place for the judiciary and stood firm against go-it-alone executive action, both important principles to maintain during a crisis. But as individual rights cases, these decisions provided little immediate relief because they were not specific enough about the next steps for vindicating the rights that detainees were found to have. The combination – long on principle, short on immediate results – is *new* judicial deference. The government may have lost as a general matter in these cases, but it won by getting effective permission to keep the offending practices in effect long after the government lost in court.

³⁴³ This was Chief Justice Roberts's point in his *Boumediene* dissent. See *supra* notes 280-282.

³⁴⁴ See *supra* notes 120-125 and accompanying text.

³⁴⁵ See *supra* notes 236-247.

³⁴⁶ See *supra* notes 298-301 and accompanying text (discussing Boumediene's Supreme Court victory and subsequent release); *supra* note 308 and accompanying text (claiming that the "other hearings did not go so fast" and that a relatively small number of the detainees' cases had been heard and resolved).

³⁴⁷ See *supra* note 296 and accompanying text.

III. WHAT NEW JUDICIAL DEFERENCE IS NOT

New judicial deference may seem like other judicial tactics that are already staples of the literature on courts and politics. Aren't there always gaps between law on the books and law in action? Aren't courts counseled to engage in judicial minimalism, proceeding incrementally so that decisions do not upset too much at one time? Don't the courts have a long track record of using cases in which nothing much happens in the world to make points of principle, a practice dating back to *Marbury v. Madison*? In this Part, I will review the alternative explanations for what we have seen in the post-9/11 cases and will show that new judicial deference is in fact something different from what other analysts of American courts have identified.

A. *The Gap Between Law on the Books and Law in Action*

A gap between law on the books and law in action is commonplace, and in fact, its examination forms one of the key pillars of the law and society movement.³⁴⁸ To law and society scholars, the formal sources of law virtually always deviate from law as practiced because of inconsistent enforcement, interpretive differences, strategic ignorance, practical limitations, the avoidance of formality, or outright flouting. Laws against murder do not prevent murders from happening,³⁴⁹ just as constitutional provisions against forced confessions do not always protect those held in custody from being beaten secretly into submission.³⁵⁰ Everyone is supposed to have her day in court, but nearly all cases – both civil and criminal – settle, often by agreeing to a fiction that is not true – that a lesser included offense was all that really happened in the events that led up to a plea bargain or that no one was responsible for anything in a settlement that nonetheless transfers money from the defendant to the claimant.³⁵¹ Someone may settle out of court for an agreed-upon amount, but then she never gets what was promised her.³⁵² Gaps between law on the books and law in action happen all the time.

³⁴⁸ Susan S. Silbey, *The Law and Society Movement*, in LEGAL SYSTEMS OF THE WORLD: A POLITICAL, SOCIAL AND CULTURAL ENCYCLOPEDIA 860, 861 (Herbert M. Kritzer, ed., 2000), available at http://web.mit.edu/anthropology/faculty_staff/silbey/pdf/10kritzer.pdf. An early conceptualization of the gap between law in action and law on the books can be found in Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12 (1910).

³⁴⁹ U.S. national statistics in the Uniform Crime Reports bear out the truism that every criminal provision has its violations. See *Uniform Crime Reports*, FEDERAL BUREAU OF INVESTIGATION, <http://www.fbi.gov/ucr/ucr.htm> (last visited Oct. 20, 2011).

³⁵⁰ See RICHARD LEO, POLICE INTERROGATION AND AMERICAN JUSTICE 196 (2008).

³⁵¹ See Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMP. LEG. STUD. 459, 525-26 (2004).

³⁵² One famous study found that claimants who settled out of court received nothing in thirty-four percent of the cases studied because the judgments were unenforceable. H. LAURENCE ROSS, SETTLED OUT OF COURT: THE SOCIAL PROCESS OF INSURANCE CLAIMS ADJUSTMENT 182 (1980).

But the new judicial deference is different. New judicial deference occurs not when there is a gap between the law as announced by one set of actors (legislators and judges) and the law as carried out by another (citizens, lawyers, prosecutors, and police). Instead, new judicial deference occurs when a single judicial opinion pulls in both directions at once. In these cases, law on the books is not different from law in action. Law on the books is different from law on the books. Courts say one thing and permit another thing to be done, and they do both within the four corners of the same judgment.

Our review of the 9/11 cases has emphasized that inspiring rhetoric has generally been paired with incomplete detail about what should happen next. As a result, actors to whom the opinions were directed had to work out new solutions within very general outlines. Because opinions in these high-profile detention cases spectacularly lacked any detail that would have provided logical remedies to follow easily, those who won their cases had to start out on a new road full of uncertainties and novel hurdles while the government against which the decisions ran could find endless ways to block speedy resolution of the issues.

In designing a gap between right and remedy, the post-9/11 cases are not alone. In other highly contested, high-visibility cases, courts have used this strategy before. Take, for example, abortion cases. In *Roe v. Wade*,³⁵³ the Court created what appeared to be an expansive right, but then in subsequent cases permitted so many regulations about parental consent, waiting times, clinic requirements, and appropriate medical procedures that, in practice, abortion providers found it very difficult to maintain easy access to abortion services.³⁵⁴ Moreover, abortion services in the United States can be expensive because they are often not covered by insurance.³⁵⁵ The much-trumpeted general right was not backed up by easy access to abortion services. This gap occurred not because reality fell short of a legal promise (the usual law and society problem) but instead because the apparently general right was whittled away by restrictive laws that were in practice inconsistent with the practical realization of the general right.³⁵⁶ Both the right and the restrictions were built into doctrine. By contrast, in Germany, where the Federal Constitutional Court found that a woman's general right to obtain an abortion was far more limited

³⁵³ 410 U.S. 113 (1973).

³⁵⁴ Christine Vestal, *Abortion Rates Down, Restrictions Up*, STATELINE (Jan. 18, 2008), <http://www.stateline.org/live/details/story?contentId=272870>; CENTER FOR REPRODUCTIVE RIGHTS, DEFENDING HUMAN RIGHTS: ABORTION PROVIDERS FACING THREATS, RESTRICTIONS AND HARASSMENT 15 (2000), available at <http://reproductiverights.org/sites/crr.civicaactions.net/files/documents/DefendingHumanRights.pdf>.

³⁵⁵ This may be more rather than less true after national health care reform goes into effect. GUTTMACHER INSTITUTE, RESTRICTING INSURANCE COVERAGE OF ABORTION (2011), available at http://www.guttmacher.org/statecenter/spibs/spib_RICA.pdf.

³⁵⁶ For the general argument that broad constitutional rights are often accompanied by restrictive practices and restricted rights are accompanied by permissive practices, see Scheppele, *supra* note 12, at 29-54.

as a matter of doctrine,³⁵⁷ it has been easier – at least in many parts of the country – to get abortions because the procedure was at that time covered by the public health system, with widespread availability of facilities and (until recently) little cost to the woman.³⁵⁸ These, too, are specified in doctrine, softening the harsh effects of the main decision that allowed a balancing of women’s rights and fetal rights.

Gaps between the expansive rights outlined in a judicial opinion and the limitations on that right permitted in practice by the same judicial opinion are not the usual fare in court decisions, but they are also not completely new. While a more systematic study would have to be done to see whether this strategy is used by judges more frequently in highly visible and socially contested areas of jurisprudence than in other settings, “splitting the difference” between uncompromising sides might seem to judges to be particularly attractive in hot-button political settings. The new judicial deference means that both sides win – with one side getting the right in theory while the other side gets the reality on the ground, each authorized by different aspects of the same judicial decision. By contrast, garden-variety gaps between law in the books and law in action are caused by resistance, evasion, and bureaucratic blocks. New deference builds the conflicts into the legal doctrine.

B. *Judicial Minimalism*

Cass Sunstein’s book, *One Case at a Time*, counsels judicial modesty. In particular, it praises the habit of the U.S. Supreme Court to answer only the questions it absolutely must and leave for the future questions that do not require immediate answers.³⁵⁹ In Sunstein’s view, courts should leave room for democratic deliberation by not overplaying their hands.³⁶⁰ Courts should also resist the urge to engage in a robustly theoretical account of what they are up to.³⁶¹ Sunstein’s account of judicial minimalism is at the same time a description of what the U.S. Supreme Court has done as a routine matter,³⁶²

³⁵⁷ Bundesverfassungsgericht [BVerwG] [Federal Constitutional Court] Feb. 25, 1975, 39 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERWGE] 1, 1975 (Ger.).

³⁵⁸ Scheppele, *supra* note 12, at 38-41. Mary Anne Case, *Perfectionism and Fundamentalism in the Application of the German Abortion Laws*, in CONSTITUTING EQUALITY: GENDER EQUALITY AND COMPARATIVE CONSTITUTIONAL LAW 93, 103 (Susan Williams ed., 2011).

³⁵⁹ See CASS SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* ix (1999).

³⁶⁰ *Id.* at x. As Sunstein says, minimalist judges are “cautious about imposing their own views on the rest of society.” *Id.*

³⁶¹ *Id.* at xi. While *Hamdi*, *Rasul*, and *Hamdan* raised statutory issues, the judgments were also full of constitutional pronouncements about the limits on the power of the president.

³⁶² *Id.* at xiii (“In its enthusiasm for minimalism, the Court is not exactly unique, for

and also a normative argument about what the Court *should* do because a minimalist style promotes democratic values.³⁶³

Are the Court's post-9/11 anti-terrorism cases minimalist? They may appear to be so because they involve "a constitutional issue of high complexity about which many people feel deeply and on which the nation is divided," which is precisely where Sunstein believed that minimalism should occur.³⁶⁴ Moreover, as Sunstein himself showed, much of the old deference jurisprudence that preceded 9/11 could in fact be described as minimalist.³⁶⁵

In many ways, the post-9/11 cases also appeared to be judicially minimalist. Courts in these cases left plenty of questions unanswered; in fact, the sheer volume of questions that the Court avoided resolving was one of the primary reasons why petitioners could not get any immediate relief. *Padilla*, on this criterion, was an extremely minimalist case, since it put off all hard decisions for future resolution.³⁶⁶ But as befits minimalism, most of the other cases pushed lagging democratic processes into action. The Court's decision in *Hamdi* found that Hamdi was legally detained only because the Authorization for the Use of Military Force (AUMF) was Congress's way of giving an associated power to detain battlefield captures to the President.³⁶⁷ The Court's decision in *Rasul* had the (perhaps unintended) effect of spurring Congress into action to block the habeas hearings that the Court had said could proceed.³⁶⁸ While President Bush attempted to go it alone in designing a policy to detain and try "enemy combatants," the Court's decision in *Hamdan* required him to go to Congress for approval of the new tribunals that the administration had already set up.³⁶⁹ Only the *Boumediene* case set meaningful limits on what could be done if the President and Congress acted together, thereby giving the Court the last word.³⁷⁰ But in many ways before *Boumediene*, Congress was kept involved in setting anti-terrorism policy in reaction to the decisions of the Court.

American constitutional law is rooted in the common law, and the common law process of judgment typically proceeds case by case . . .").

³⁶³ *Id.* at xiv.

³⁶⁴ *Id.* at 5.

³⁶⁵ Cass Sunstein, *Minimalism at War*, 2004 SUP. CT. REV. 47, 79-93. In particular, Sunstein argues the *Hirabayashi*, *Korematsu*, and *Endo* decisions were minimalist, which does not in his eyes make them rightly decided. "In none of the three cases did the Court issue a broad ruling on presidential authority. When the executive acted without congressional authorization, it lost; it survived legal attack only when Congress had specifically permitted its action." *Id.* at 92.

³⁶⁶ *Id.* at 60 n.56 (noting that *Padilla* is an example of minimalism).

³⁶⁷ *Hamdi v. Rumsfeld*, 542 U.S. 507, 517 (2004) ("[W]e agree with the Government's alternative position, that Congress has in fact authorized Hamdi's detention, through the AUMF.").

³⁶⁸ See Hafetz, *supra* note 207.

³⁶⁹ Martinez, *supra* note 13, at 1021.

³⁷⁰ *Boumediene v. Bush*, 553 U.S. 723, 792 (2008).

As these post-9/11 cases were being decided by the Supreme Court, Sunstein was critical of the judges in the lower courts who ruled in favor of broad presidential power. He claimed that some lower court judges were in the grips of “national security fundamentalism,” an ideology that gave the president wide discretion in carrying out commander-in-chief powers.³⁷¹ In Sunstein’s analysis, this was a highly anti-minimalist view, and he criticized these “fundamentalist” judges for failing to be appropriately modest about their powers.³⁷²

But Sunstein himself has realized that minimalism is not a very good description of what the Supreme Court was doing in the post-9/11 cases. If anything, Sunstein’s goal in minimalism – to give the Court a low profile in American politics while spurring the political branches to act – seems to have been realized most prominently in *Hamdan*.³⁷³ While Sunstein argued that the *Hamdan* Court engaged in “liberty-promoting minimalism” because “presidential unilateralism” was refused and Congress had to become engaged,³⁷⁴ he could not bring himself to think of *Hamdan* as representing the sort of minimalism he previously defended:

[T]he Court’s ruling was far from minimalist; the Court did not issue a narrow, incompletely theorized opinion. On the contrary, the Court resolved questions to which it did not need to speak, and it showed a degree of theoretical ambition. When I say that the decision reflects liberty-promoting minimalism, I mean only to suggest that it fits easily with other decisions in which the Court protected individual rights, in the face of national security concerns, by requiring clear legislative authorization.³⁷⁵

Were the other Supreme Court decisions any better on minimalism? Picking his way through the other detention cases until his article was published in 2005, Sunstein gave high minimalism marks to Justice Souter’s concurrence in *Hamdi*,³⁷⁶ to the Second Circuit judgment in the *Padilla* case,³⁷⁷ and, conspicuously, to nothing else.

As Sunstein recognized, the Supreme Court’s terrorism jurisprudence was not really minimalist. Yes, courts left many questions open for future resolution. But they hid the incompleteness while trumpeting their more assertive pronouncements in a manner deeply inconsistent with minimalism. Judges in the post-9/11 cases almost seemed to be seeking the headlines that

³⁷¹ Cass Sunstein, *National Security, Liberty, and the D.C. Circuit*, 73 GEO. WASH. L. REV. 693, 702 (2005).

³⁷² *Id.*

³⁷³ Cass Sunstein, *Clear Statement Principles and National Security: Hamdan and Beyond*, 2006 SUP. CT. REV. 1, 6.

³⁷⁴ *Id.* at 5.

³⁷⁵ *Id.* at 29.

³⁷⁶ Sunstein, *supra* note 365, at 94.

³⁷⁷ *Id.* at 96-97.

attributed maximalist intentions to their courts. So, when the newspapers blared “Court Overrules Bush on Enemy Combatants”³⁷⁸ after *Hamdi* or “High Court Rejects Bush’s Claim that He Alone Sets Detainee Rules”³⁷⁹ after *Hamdan*, the press did not see the Court as minimalist. In fact, given the high-flown rhetoric the Court used in these cases – for example, the Court stated, “[A] state of war is not a blank check for the President when it comes to the rights of the Nation’s citizens”³⁸⁰ and “The Constitution is best preserved by reliance on standards tested over time and insulated from the pressures of the moment”³⁸¹ – the Court did not seem to want to *appear* to be minimalist. The Court invited the headlines that the press used.

Moreover, the decisions in the terrorism cases were not in fact minimalist in their broad outlines. They did decide a number of questions that they did not have to reach and in ways that left little scope for democratic debate. In *Hamdi*, the Court may have narrowly permitted Hamdi’s detention on the grounds that the AUMF authorized it in a battlefield context, but the Justices granted habeas rights in such a way that there was nothing for a disagreeing Congress to do but attempt to override the Court. And then, in *Boumediene*, evaluating what Congress had done in democratic response to their handiwork in *Rasul* when Congress blocked the extension of habeas rights to offshore aliens, the Court upped the constitutional ante by elevating the habeas claims to constitutional status.

Of course, the Justices were being minimalist in other ways – but in ways that were hidden from public view. The Justices left many questions open. But it was not minimalist to refuse to answer questions about the specific shape of habeas review once the Court had decided habeas review was required. Instead, the Court failed to provide any guidance to other courts that were trying to carry out what the Court had boldly told them they had to do. The Court issued decisions that were *incomplete* rather than minimalist. The decisions were not restrained; they were vague. It was as if the Justices suddenly required others to march to a new and distant destination and then refused to provide any directions for how to get there. The announcement that there would be a march to the new and distant destination was the bold step that denied minimalism; the lack of directions made the decision not minimalist, only incomplete. Refusing to give directions to those one has ordered off on a new journey does not feel like democratic empowerment to those on the road.

Moreover, neither *Hamdi*, nor *Rasul*, nor *Boumediene* did anything for democratic participation, except perhaps for generating congressional

³⁷⁸ Linda Greenhouse, *Court Overrules Bush on Enemy Combatants*, INT’L HERALD TRIB., June 30, 2004, at 4.

³⁷⁹ David G. Savage, *The Guantanamo Decision; High Court Rejects Bush’s Claim That He Alone Sets Detainee Rules*, L.A. TIMES, June 29, 2006, at A1.

³⁸⁰ *Hamdi v. Rumsfeld*, 542 U.S. 507, 535 (2004).

³⁸¹ *Hamdan v. Rumsfeld*, 548 U.S. 557, 637 (2006) (plurality opinion).

opposition to the Court's broad pronouncements. Even *Hamdan*, which required congressional participation before the military commissions could continue, hinted that Congress might itself be constrained by the treaty obligations of the Geneva Conventions, as well as, of course, by future rulings of the Court itself.³⁸²

None of the Supreme Court's holdings in these cases were narrow or shallow, as minimalism counsels. Instead, the broad pronouncements of the Court combined with big theories about the role of the courts in wartime were anti-minimalist. This combination of bold pronouncement with incomplete remedies is the hallmark not of minimalism, but instead of new deference.

C. Marbury-ism

Marbury v. Madison stands as an example of the proposition that judges may do something highly important in a manner that makes no difference to the petitioner before them.³⁸³ The case, of course, announced the principle of judicial review, which was obviously big, bold, and important. But though the petitioner won several of his claims before the Court, he never got what he sought. In that respect, *Marbury* seems like the post-9/11 new deference cases. The comparison is tempting – but wrong.

As all first-year law students learn, William Marbury had been given a commission to serve as a justice of the peace by an outgoing President through a “midnight” appointment at the very end of the President's term of office, only to have the commission withheld by the politically different incoming administration.³⁸⁴ Mr. Marbury's position as justice of the peace was one of twenty-three nominations that outgoing President John Adams made as he was about to leave office, just before his ideological nemesis, Thomas Jefferson, was about to enter the presidency.³⁸⁵

Mr. Marbury challenged the refusal of his commission in an original jurisdiction action before the Supreme Court.³⁸⁶ The Court had been given original jurisdiction in the case under the Judiciary Act of 1789, which assigned the Court the power to issue the writ of mandamus that Mr. Marbury sought in order to compel his commission.³⁸⁷ The Supreme Court ruled that Mr. Marbury should get his commission because once the President had signed off on the appointment, no one who performed a merely ministerial function

³⁸² *Id.* at 567.

³⁸³ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 168-80 (1803).

³⁸⁴ For the conflicting ways in which one can read the facts of this case, see generally Sanford Levinson & Jack M. Balkin, *What Are the Facts of Marbury v. Madison?*, 20 CONST. COMMENT. 255 (2003).

³⁸⁵ Michael W. McConnell, *The Story of Marbury v. Madison*, in CONSTITUTIONAL LAW STORIES 16 (Michael C. Dorf ed., 2004).

³⁸⁶ *Marbury*, 5 U.S. (1 Cranch) at 137.

³⁸⁷ *Id.* at 140.

carrying out the order could legally refuse to follow through with it.³⁸⁸ Mr. Marbury, therefore, was legally entitled to receive his commission. The Court then found that because Mr. Marbury had been denied his commission when it was due him, Mr. Marbury should receive a writ of mandamus against the official withholding the commission, one James Madison.³⁸⁹

But what to make, then, of the law that Congress had passed, giving the Supreme Court itself the power to issue the writ as the Court of original jurisdiction in the matter? As the Court explained, the Constitution gave the Court original jurisdiction in only a small and listed set of particular circumstances; issuing writs of mandamus was not one of the powers that the Constitution granted the Court in its original jurisdiction list.³⁹⁰ In all matters *other* than those listed, according to the Constitution, the Supreme Court had appellate jurisdiction only.³⁹¹ Congress had therefore given original jurisdiction to the Court in a manner that the Constitution seemed to proscribe. Faced with a conflict between a statute and the Constitution, the Court found that the statute was unconstitutional.³⁹² As a result, even though Mr. Marbury won the principle that he should have gotten his commission in the first place and even though Mr. Marbury won the principle that he should be able to get a writ of mandamus against the official withholding the commission to force the official to provide it, he in fact never got his commission. In large part, this was because the Supreme Court said that *it* could not order the commission to be delivered to Mr. Marbury because, under the Constitution, the Court had no capacity to do so.³⁹³ In *Marbury v. Madison*, Mr. Marbury was granted a right but no writ – and therefore, no remedy.

New judicial deference in the post-9/11 terrorism cases may look like *Marbury*-ism because the suspected terrorists who won their cases on principle nonetheless did not get the remedies they sought. And neither had Mr. Marbury. The rights announced in both *Marbury* and the terrorism cases wound up empty.

But the crucial difference between *Marbury* and the post-9/11 cases is that the Court announced the lack of a remedy in *Marbury*. The Court said straight out that it had no power to issue the writ that Mr. Marbury sought. He therefore did not get his commission from the Court because the Court said it would not give it to him.

By contrast, the Supreme Court in the post-9/11 cases always held out the possibility of a remedy and in fact acted as if it had provided one. The petitioners won bold victories on virtually all important questions. The suspected terrorists were told by the Court that they had rights, and the

³⁸⁸ *Id.* at 157-62.

³⁸⁹ *Id.* at 173.

³⁹⁰ *Id.* at 174.

³⁹¹ *Id.*

³⁹² *Id.* at 178.

³⁹³ *Id.*

president, Congress, and the lower courts were told to act accordingly. The petitioners could not realize these rights, however, not because the Court ultimately ruled against them and refused to provide the ticket that would enable them to ride to victory – that was Mr. Marbury’s problem – but instead because the Court gave them rights that were all dressed up but had nowhere to go. The Court failed to provide instructions for the other institutions that had to put into practice what the Court had ordered them to do. The lack of instructions invited another round of litigation to figure out how to make the rights real. This bought time for the government to continue what it had been doing – and that was why there was no speedy remedy. The Court in the terrorism cases, unlike in *Marbury*, did not actually refuse the remedy; the remedy was made impossible because the Court announced rights whose content was not specified in any way that could be enforced, without coming back again through the courts to get more detailed specifications. *Marbury*-ism and new deference may look the same because there is a gap between right and remedy. But *Marbury* denied the remedy while the post-9/11 cases ordered remedies that were impossible to realize.

New deference may also look like *Marbury*-ism because the political context mattered in both cases. *Marbury* was not a boring, technical case, as it may appear from a safe distance, especially if one is confined to the four corners of the opinion itself. Instead, it was a dispute that occurred as the tectonic plates of politics moved beneath the facts.³⁹⁴ Mr. Marbury didn’t get his commission because the incoming president didn’t want him to have it – and nothing that the Supreme Court did changed that ultimate calculus.³⁹⁵ The Court’s refusal to provide the commission took the Court out of the line of political fire and allowed politics to run its course.³⁹⁶

Similarly, in the terrorism cases, politics were deeply engaged. Fans of unconstrained presidential power to detain and interrogate terrorism suspects also happened to be fans of the particular President who ordered the detentions. But the Court’s majority stood up to the President and ordered him to do something that he didn’t want to do. The Court, therefore, put itself *into* the line of political fire rather than taking itself out of the fray. Both *Marbury* and the terrorism cases disguise within their accounts of the facts the way that partisan politics turned these issues into politically charged cases. But there the similarity ends.

In *Marbury*, the Court appeared to do less than it did. It refused the invitation to expand its own powers even as it expanded them. The Court did not grab the power Congress gave it to issue writs, but it grabbed with both hands the power to tell Congress that its laws could be nullified. One might even say that the Court wanted to hide its newly discovered light of judicial

³⁹⁴ Levinson & Balkin, *supra* note 384, at 257 (explaining that the dispute arose because of irreconcilable conflicts between the nation’s original political parties).

³⁹⁵ *Id.* at 258.

³⁹⁶ *Id.* at 259.

review under a bushel by describing the facts of the case so technically that they could barely interest a lay person (or for that matter, a first-year law student³⁹⁷). Beneath that bland exterior which appeared to grant the Court fewer powers, the Court actually announced a giant new power: the power to review statutes for constitutionality.³⁹⁸ But this radical new power was then used in a self-limiting manner in the first case that invoked it, as if pushing the power too hard might generate an unwelcome counter-reaction. In fact, the case played right into the new President's agenda. Through its opinion, the Court avoided the embarrassing political defeat that it might have suffered had it actually awarded Mr. Marbury his commission.³⁹⁹ By having no effect on the ground, the Court indicated that it wasn't going to give Mr. Marbury by law what politics had taken away. In *Marbury*, the Court did something that appeared bold but up close avoided a political fight.

By contrast, the terrorism cases appeared to do *more* than they did – and that was, I argue, their point. In the terrorism cases, the Supreme Court appeared to expand its powers, stand up to the political branches, and change the course of the anti-terror campaign by announcing that the President was constrained by law. These opinions attracted full glare of media attention with dramatic turns of phrase, generating headlines that implied the Court had exercised a great deal of power to change the results on the ground. And the Court appeared to order an unwilling President to do something he had so far refused to do.

But when the effects of the cases are examined, as we have done above, the Court's powers are barely visible.⁴⁰⁰ The Court's public decisions disguised the small effects they actually had because the petitioners could not get much benefit from these rulings without more, much more. The Court did not hide its own judicial power. That, it announced loud and clear! What it hid was precisely what the *Marbury* Court put out in the open: the defeat of the petitioner's main request.

In *Marbury*, the Court actually ruled against Mr. Marbury on the crucial question of whether the Court had the power to give him what he sought. The Court told Mr. Marbury that he had to get his commission from another court. That he ultimately did not was not the fault of the Supreme Court (though given the political context, the Justices surely would have guessed that this would have been the result). Congress repealed the Act that created the justice of the peace offices shortly after the Court's decision, and with it expired all of the unissued commissions of the midnight judges.⁴⁰¹ The Court actually told

³⁹⁷ See Sanford Levinson, *Why I Do Not Teach Marbury (Except to Eastern Europeans) and Why You Shouldn't Either*, 38 WAKE FOREST L. REV. 553, 554-59 (2003) (explaining that first year law students generally do not have the historical knowledge to understand the importance of *Marbury*).

³⁹⁸ Levinson & Balkin, *supra* note 384, at 258.

³⁹⁹ *Id.* at 259.

⁴⁰⁰ See *supra* Part II.A-B.

⁴⁰¹ Levinson & Balkin, *supra* note 384, at 258-59.

Mr. Marbury precisely what he had to do to get his commission; the Court did not lack for detail in that relevant sense. Mr. Marbury did not get his commission because Congress intervened to shut down the course of action that the Court had specified.⁴⁰²

The new deference logic of the terrorism cases, if applied to the facts of *Marbury*, would have produced a different result. Had the Court first made a huge statement that all of the midnight judges would suddenly get their commissions and then quietly knocked out from under them any clear avenue through which they could, this would have paralleled the post-9/11 cases. In the terrorism cases, by contrast, the Court told the relevant political officials and lower court judges to give the suspected terrorists what they sought – and then refused to include the instructions that would have helped them determine how to do so.

In addition, unlike in *Marbury*, the post-9/11 courts practicing new judicial deference did not seem at pains to limit their powers in the short term in order to expand their use in the future. New deference courts are at pains to appear to expand their powers in theory in order to limit their use in practice. And that is the precise inverse of *Marbury*-ism – which appeared to accomplish nothing while doing a lot. The post-9/11 terrorism cases appeared to do a lot while accomplishing much less.

New judicial deference bears a number of resemblances to other judicial strategies we have seen before. But it has features that make it unlike any other clearly identifiable patterns. New judicial deference is not the usual gap between law in action and law on the books, nor is it minimalism, nor is it *Marbury*-ism.

The question now becomes, Is new judicial deference a good thing?

IV. EVALUATING NEW JUDICIAL DEFERENCE

Is the new judicial deference something we ought to praise? Clearly, if you were one of the petitioners in these anti-terrorism cases, the answer would be no. But for constitutionalists who worry about what states do in the times of crisis, these cases have a mixed legacy. In this Part, I will mount a half-hearted defense of the new judicial deference.

On the positive side, the holdings of the post-9/11 crisis cases are clearly better for long-term constitutionalism than the tarnished holdings of cases from

⁴⁰² The parallel in the terrorism context might be the Detainee Treatment Act, which removed the possibility of habeas for the petitioners in *Rasul*. See Hafetz, *supra* note 207. But, of course, the Court barreled right through that obstacle with its decisions in *Hamdan* and *Boumediene*, denying Congress that power. See *supra* Part II.B. By contrast, the Supreme Court upheld the repeal of the Judiciary Act of 1801 in *Stuart v. Laird*, 5 U.S. (1 Cranch) 299 (1803), one week after it decided *Marbury*, thereby giving Mr. Marbury only a short time to believe he had a legal remedy before politics took his remedy away. Levinson & Balkin, *supra* note 384, at 260-61.

earlier wars. Rather than living in peacetime with the results of *Korematsu* or *Quirin*, a peacetime court can easily live with the post-9/11 cases because the line was held against creeping presidential power. By and large, the anti-terrorism cases are not obstacles that will have to be overcome by those who want to protect both separation of powers and individual rights when the “war on terror” is over. Protecting constitutional habeas rights, requiring consent of both executive and legislative branches to emergency measures, and providing guarantees of procedural fairness that are maintained even in the face of threat are policies that constitutionalists can live with over the long term. The fact that those who brought the cases did not benefit immediately from their victories does not affect the validity of the general principles, which are all much better than might have been expected under the old deference model. The relatively good core holdings of these terrorism cases carry the obvious virtue of keeping constitutional doctrine relatively free of the scars of war.

These holdings also carry the not-so-obvious virtue of encouraging litigation. As long as the courts hold out the promise of vindicating rights, those with rights to be vindicated will keep coming to the courts, at least as long as the courts do not make a continual mockery of their claims. Gaps between the promise of doctrine and the reality of governmental abuse generate lawsuits, and perhaps eventually when the crisis passes, courts will find remedies that match the promise of the holdings.

In a time of crisis, the apparent receptivity of courts to those who are the targets of state aggression ensures that those on the losing end of the current political controversies are not completely frozen out of the political space. It keeps those with complaints against the government (and the government itself) in the constitutional system. Moreover, it keeps their arguments framed in light of the values that all can be expected to share. Eventually, when the crisis passes, courts may be more expansive about the concrete remedies available to the petitioners than courts are in the heat of the moment. In fact, in the move from *Rasul*, in which the Court found habeas rights of uncertain provenance, to *Boumediene*, in which the Court found that the habeas rights had a constitutional pedigree, the Court already came closer to commanding real remedies – habeas hearings for the Guantánamo detainees.⁴⁰³

The anti-terrorism cases also show that many judges were braver than we might have expected them to be under the circumstances. This is something constitutionalists can rightly applaud. In the cases we have reviewed, the government was not permitted to carry out draconian terrorism policies without challenge after 9/11. In that sense, new deference is no longer deference at all. This is a huge contrast with the old deference cases in which federal courts permitted the executive branch to act with extraordinary powers during crises.⁴⁰⁴ But while it was taken for granted, as we have seen, that courts would defer to the political branches in times of crisis, up through and

⁴⁰³ See *supra* Part II.B (discussing post-9/11 Guantánamo detainee cases).

⁴⁰⁴ See *supra* Part I.

including World War II, it was simply not an option for courts to walk away from their serious constitutional responsibilities after 9/11. Of course, some judges wanted to increase the President's power and thereby give up any limiting role that they, as judges, might play. But such judges were in the minority, especially as one went up the judicial hierarchy. After 9/11, the vocabulary of judging in times of crisis has changed so that now courts are co-governors with the political branches in times of conflict. The U.S. Supreme Court was not alone in finding fault with post-9/11 policies. As we saw earlier in this Article, many other courts around the world did the same.⁴⁰⁵

This new judicial deference has its negative, or at least cynical, side as well. Courts have tended to act most aggressively in defense of constitutional values when their own fates have been at stake. This is what Brian Simpson observed in the WWII cases in the United Kingdom, when courts bestirred themselves to act primarily in cases where their own jurisdiction was in danger of being whittled away.⁴⁰⁶ And it seems equally true in the new judicial deference cases after 9/11 in the United States as well. In these post-9/11 terrorism cases, courts have been most assertive when their own jurisdiction has been challenged – for example, when the government has tried to take cases out of the ordinary courts into other venues by creating military commissions⁴⁰⁷ or to deny access to counsel and routine habeas hearings before Article III courts.⁴⁰⁸ These matters are particularly salient as they infringe directly on what courts take to be their most distinctive responsibilities. Not surprisingly, then, courts have been most vigorous in protecting the very rights that are most important in their own immediate environs – the power of courts to review executive detention and to oversee special tribunals. Courts have been most aggressive in standing up to governments in the “war on terror” on precisely those subjects most crucial for maintaining the position of the courts themselves.

Another way to interpret these bold constitutional rulings, then, is that courts have been highly alert to keep *themselves* from being a casualty of the crisis. Are suspected terrorists – who are, after all, the direct targets of overbearing government tactics – the ones whose rights are really vindicated? Or are the courts more self-regarding as they protect themselves from the collateral damage of anti-terrorism policies? One suspects in observing this large gap between victories in law and the fates of the concrete petitioners that the plights of the petitioners were not in fact what these courts cared most about. Had the courts decided that assisting these petitioners was their central aim, the courts could have done so much more to help them. Judges have been bold in their opinions, but not in their regard for those who sought their assistance. The constitutional claims most likely to be vindicated in these cases, as a result, have been those of the courts themselves.

⁴⁰⁵ See *supra* note 8.

⁴⁰⁶ SIMPSON, *supra* note 7, at 418-19.

⁴⁰⁷ Hamdan v. Rumsfeld, 548 U.S. 557, 572-73 (2006).

⁴⁰⁸ See *supra* Part II.A-B.

The case for self-regarding courts can be made even more strongly, on the evidence we've seen in this Article. As long as courts still exercise a certain degree of deference to the way that governments are dealing with specific cases, courts can avoid incurring the wraths of those governments. Governments care primarily in times of crisis about having a green light to go on detaining those whom they want to detain and about stringing out the day of reckoning when proof has to be provided. If governments receive that deference, then governments have no reasons to attack the courts when the courts assert themselves on matters of relatively abstract principle. If courts stay within these limits, doing whatever they feel they need to do to the law while letting the governments prevail on the facts, then governments are likely to appear to follow the court decisions, insist on their respect for the courts, and in general let courts get away with issuing governments these "defeats." Of course, governments would probably prefer to do whatever they want without being hauled before courts to justify their actions, but as long as being hauled before courts comes with the territory of being a constitutional state, new judicial deference may be the best they can expect.

As we have seen, courts have slapped the government on the wrist and forced it to readjust its policies at the margins. But courts have not required the release of detainees, the immediate provision of evidence against them, or absolutely normal tribunals. It is much easier for governments to comply with court decisions when those court decisions do not in fact second-guess concrete decisions of the government to detain specific individuals in a crisis. In fact, court decisions that issue a lot of smoke and noise but do little to require immediate action may appear to be upholding constitutional principles while in fact strengthening the hands of governments who can then rightly say that they are doing what the law requires.

After 9/11, then, courts have been willing to stand up to governments in times of crisis, using their substantial heft against the government's bulked-up war powers. Governments, in turn, have been willing to comply with court decisions because doing so has not really threatened the immediate actions they have already taken.

The individuals caught up in the assertions of new governmental powers in times of emergency might disagree that winning their cases actually helped them much, however. If petitioners start to believe that courts can really give them nothing in the end, we may start to see something dangerous. In fact, we have already seen danger signals in the reaction of petitioners who have "won" but do not feel they have gained anything. When Mr. Hamdan said at his military commission hearing that he didn't believe he had won his case yet after his "victory" at the Supreme Court,⁴⁰⁹ or when Mr. Padilla said to his counsel that he wondered how often he would have to win before something good happened in his case,⁴¹⁰ we can see the signs that those who might invoke

⁴⁰⁹ See *supra* text accompanying notes 242-244.

⁴¹⁰ See Martinez, *supra* note 13, at 1017-18.

the courts to help them have already realized that the courts are not particularly helpful after all. If the petitioners who need to bring the cases in order for the government to be kept in line by court decisions refuse to bring more cases, then the limited benefits of new deference for keeping constitutionalism intact through crises will disappear too. There is a very real risk in these new deference cases that the petitioners will turn from a peaceful resolution of their claims through court action to something far less constructive.

With new judicial deference, then, we are left with a dual legacy that consists of both constitutional vindication and disappointed petitioners. The two seemingly contradictory legacies are joined through the specific operation of the new judicial deference. Courts have become more assertive and less willing to tolerate governmental action that violates constitutional principles in time of crisis. They have been most reliable in defending constitutional principles when it has been their own constitutional status that has been threatened. What happens to the petitioners after they win their cases is not something that courts seem to track as their highest priority. And the petitioners who have relied on the courts for help may be excused for thinking that the resolution of their cases has not really been about vindicating their claims, but about something altogether over their heads.

This is the shape of the new judicial deference.