1. The Combatant Detention Trilogy Through the Lenses of History

Seth P. Waxman

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

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

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

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

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

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

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

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

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

I.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

---

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

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

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

8. Curtis, at 90.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

15. Brennan, at 15.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

---

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

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

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

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

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

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

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

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

authorizing military force did, in fact, permit such detentions. The plurality was careful, however, to limit the scope of that authorization to citizens who are "'part of or supporting forces hostile to the United States or coalition partners' *in Afghanistan* and who 'engaged in an armed conflict against the United States' there"[27] (emphasis added).

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

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

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

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

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

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

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

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

29. *Id.*

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

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

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

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

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

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

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

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

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

34. *Id.*

35. *Id.* at 2696–97.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

55. *Id.*

56. *Id.*

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

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

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

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

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

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

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

58. *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

â€œUndeadâ€ wartime cases. This Article seeks to cut through the confusion and determine when, if ever, history should counsel disregarding a prior wartime case. It seeks to develop an operational framework for using historyâ€™s lessons, not only as rhetoric, but as part of stare decisis doctrine.Â Congressional apology and compensation of detainees, passage of the Non-Detention Act, President Clintonâ€™s bestowal of the Medal of Freedom on Fred Koremastu, the vacating of Korematsuâ€™s conviction by a district court, apparently incontrovertible historical evidence that the threat of Japanese espionage was willfully exaggerated, if not maliciously fabricated, offhanded remarks by current Supreme Court Justices denouncing the decision, and unending. This enemy combatant policy is really an ad hoc system of preventive detention whereby U.S. citizens or foreign nationals are detained against their will without the filing of criminal charges for the purposes of incapacitation and interrogation. President Bush has justified his unilateral decisions to label individuals as enemy combatants on the exercise of his war power as Commander in Chief under Article II of the Constitution and the Joint Resolution passed by Congress after 9/11 to use all â€œnecessary and appropriate forceâ€ against those who â€œplanned, authorized, committed or aided the ter "Unlawful combatant (also illegal combatant or unprivileged combatant) describes a person who engages in combat without meeting the requirements for a lawful belligerent according to the laws of war as specified in the Third Geneva Convention."--Ben 01:28, 18 Mar 2005 (UTC). This article might give you an idea of why putting these two together is a bad idea until the legality is sorted out [1]. In case you don't check it out, in it, the writer, a law professor at Columbia, writes regarding the question of what an unlawful combatant is, that "the short answer is that a priso...Â In contrast, an unlawful combatant is a fighter who does not play by the accepted rules of war, and therefore does not qualify for the Convention's protections."