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**JUSTICE CLARENCE THOMAS AND
INCOMMUNICADO DETENTION:
JUSTIFICATIONS AND RISKS**

by

Christopher E. Smith* and Cheryl D. Lema**

I. INTRODUCTION

The reelection of President George W. Bush in 2004 coincided with the announcement that Chief Justice William Rehnquist was diagnosed with thyroid cancer at the age of eighty.¹ Based on the chemotherapy and radiation treatments prescribed for Rehnquist, medical experts speculated that Rehnquist had the most serious form of thyroid cancer.² News reports predicted Rehnquist's "imminent departure" from the Court and speculated about who President Bush might appoint as a replacement.³ One rumored replacement for Rehnquist as Chief Justice is Justice Clarence Thomas who, according to his biographer, has been interviewed by Bush administration officials as a possible choice for elevation to Chief Justice.⁴ Because Thomas has been named, along with Justice Antonin Scalia, as one of the justices that President Bush most admires,⁵ it is possible that the next Chief Justice could come from

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¹ Bill Mears et al., *Rehnquist Has Thyroid Cancer Surgery*, CNN.COM, Oct. 25, 2004, available at www-cgi.cnn.com/2004/LAW/10/25/rehnquist.

² Neil A. Lewis & Linda Greenhouse, *New Round of Speculation About Rehnquist's Farewell*, THE NEW YORK TIMES, Feb. 22, 2005, at 10.

³ *Id.*

⁴ Anne Gearan, *Thomas Could Be Next Chief Justice, Writer Says*, DETROIT FREE PRESS, Aug. 7, 2004, available at http://www.freep.com/news/nw/thomas7e_20040807.htm.

⁵ Michael McGough, *Bush Has a Chance to Remake High Court*, PITTSBURGH POST-GAZETTE, Nov. 6, 2004, available at www.post-gazette.com/pg/04311/407789.stm.

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among the Court's most conservative sitting justices.⁶ Thomas may be an especially intriguing choice for Bush because he is the only Rehnquist Court Justice below the age of sixty, and thus he may be able to serve on the Court for many years to come.⁷

In light of Thomas's prominence as a potential Chief Justice and as the current justice who may have the longest term of service yet ahead of him, there is good reason to examine Thomas's judicial philosophy and decisions. In this Article, I look closely at one of Thomas's key opinions concerning deprivations of liberty and consider its implications in light of Thomas's opinions on related issues.

Thomas prides himself on his fealty to the intentions of the Constitution's framers in order to, in his words, "fulfill our constitutionally assigned role of giving full effect to the mandate of the Framers without infusing the constitutional fabric with our own political views."⁸ In his opinions, Thomas consistently advocates interpretation of the Constitution according to the intentions of the document's authors.⁹ Thomas describes the Supreme Court as "bound by the text of the Constitution and by the intent of those who drafted and ratified it."¹⁰ Critics of original intent jurisprudence have illuminated many of its problems, including the difficulty of identifying a single intended

⁶ Scholars' analyses of Thomas's performance on the Supreme Court frequently note his commitment to conservative philosophies and outcomes. For example, Professor Mark Graber observes that "[n]o good reason exists why [Thomas] believes conservative historians when historians clash or why he discards originalism completely when that philosophy is hostile to certain conservative interests." Mark A. Graber, *Clarence Thomas and the Perils of Amateur History*, in REHNQUIST JUSTICE: UNDERSTANDING THE COURT DYNAMIC 71 (Earl M. Maltz ed., 2003). Graber's analysis concludes that "[w]hat unites Thomas's important concurring and dissenting opinions in constitutional cases is his commitment to conservative or libertarian results rather than a commitment to any particular theory of the judicial function." *Id.* at 77. In addition to scholars' substantive assessments of his opinions, Thomas's conservatism is evidenced by empirical studies that show him to be one of the justices least likely to support individuals' claims of right. See Christopher E. Smith, *The Rehnquist Court and Criminal Justice: An Empirical Assessment*, 19 J. CONTEMP. CRIM. JUST. 161, 171 (2003).

⁷ Thomas was born in 1948. Graber, *supra* note 6, at 71.

⁸ *Lewis v. Casey*, 518 U.S. 343, 367 (1996) (Thomas, J., concurring).

⁹ See Christopher E. Smith, *Bent on Original Intent: Justice Thomas Is Asserting a Distinct and Cohesive Vision*, 82 A.B.A.J. 48, 48 (Oct. 1996) ("Thomas consistently advocates the strict application of key tools for interpreting the Constitution: its text and history. Thomas' opinions are replete with references to the original intent of the Constitution's Framers, English common law, and Anglo-American legal traditions.").

¹⁰ *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 370-71 (1995) (Thomas, J., concurring in judgment).

meaning of each phrase to use as the definitive interpretation.¹¹ Moreover, Thomas regularly demonstrates his disregard for historical scholarship that runs counter to interpretations that support his desired outcomes¹² so that, ultimately, “[h]istory guides only some of his judicial opinions.”¹³ Despite these flaws and inconsistencies in Thomas’s judicial philosophy, he can be characterized as “espousing an interpretive approach” that emphasizes obedience to the framers’ values and intentions.¹⁴ As he seeks to carry out his version of the framers’ vision, Thomas’s opinions can be assessed both in terms of their impact on the lives of individual human beings and in terms of their consistency with his other decisions and with the framers’ desire to protect the value of liberty.

II. THE *HAMDI* CASE

An important test of Thomas’s view of the Constitution and its meaning for governmental power and individual liberty arose in the case of a U.S. citizen who was taken into custody in Afghanistan during American military action against the Taliban regime and the al Qaeda

¹¹ See, e.g., Judith A. Baer, *The Fruitless Search for Original Intent*, in *JUDGING THE CONSTITUTION: CRITICAL ESSAYS ON JUDICIAL LAWMAKING* 59 (Michael W. McCann & Gerald L. Houseman eds., 1989).

So no jurisprudence of original intention is possible, because original intention is undiscoverable. We can and should go to the primary sources to learn about the origins of the Constitution, but the past is something we can only learn about and learn from, not learn per se. The records are too incomplete, and the nature of lawmaking too imprecise, to enable us to discover original meaning.

Id.

¹² See Jeffrey Rosen, *Moving On*, *THE NEW YORKER*, Apr. 29 & May 6, 1996, at 73. [Thomas] has shown little familiarity with the most recent scholarship about Reconstruction Republicans and the limited scope of their color-blind vision. This scholarship, embraced by liberal and conservative legal historians, suggests that Thomas is wrong to insist that the Fourteenth Amendment to the Constitution was intended to forbid racial discrimination in all circumstances . . . [I]n 1868, when the Fourteenth Amendment was ratified, [the rights it included] were *not* clearly understood to include the right to attend desegregated schools, or the right to receive federal contracts, or the right to vote. Thomas is trapped, in short, between his moral commitment to a color-blind Constitution and an interpretative methodology that compels him to reject it.

Id.

¹³ Graber, *supra* note 6, at 88.

¹⁴ Smith, *supra* note 9, at 48.

organization in 2001, *Hamdi v. Rumsfeld*.¹⁵ This was one of three related cases heard by the Supreme Court. Another of the cases concerned hundreds of non-U.S. citizens labeled as “unlawful combatants” and placed in indefinite, incommunicado detention at the U.S. Naval base at Guantanamo Bay, Cuba.¹⁶ The third case concerned an American arrested inside the United States and held incommunicado at a military jail.¹⁷

A. *The Other Justices’ Opinions*

Yaser Esam Hamdi grew up in Saudi Arabia and was captured in Afghanistan by the Northern Alliance military forces, Taliban opponents who cooperated with American personnel during fighting to take control of the country.¹⁸ The U.S. government declared that Hamdi was an “enemy combatant” and thereby ineligible for the legal protection that the Geneva Conventions provide for soldiers in countries’ regular armies.¹⁹ When placed in custody of American officials, Hamdi was sent initially to the detention facility at the U.S. Naval Base at Guantanamo Bay, Cuba; however, when it was discovered that he was a U.S. citizen by virtue of being born in Louisiana during a time period when his parents resided in the United States, he was transferred to a military jail in South Carolina.²⁰ The government claimed that the “enemy combatant” label that it applied to Hamdi “justifies holding him in the United States indefinitely—without formal charges or proceedings—unless and until [the government] makes the determination that access to counsel or further process is warranted.”²¹ Thus, the government asserted that it had the authority to hold a U.S. citizen incommunicado for an indefinite time period without the provision of any legal rights or access to the courts.

Hamdi’s father filed a petition for a writ of habeas corpus and the U.S. District Court appointed a federal public defender to represent

¹⁵ 124 S. Ct. 2633, 2635 (2004). In the weeks following the terror attacks on September 11, 2001, against the World Trade Center and the Pentagon, the United States and allied countries invaded Afghanistan after the Taliban government refused to act against al Qaeda leaders living in their country. Julian Gearing, *The Next Front*, ASIA WEEK (Nov. 23, 2001), available at www.asiaweek.com/asiaweek/magazine/dateline/0,8782,184614,00.html.

¹⁶ *Rasul v. Bush*, 124 S. Ct. 2686, 2690 (2004).

¹⁷ *Rumsfeld v. Padilla*, 124 S. Ct. 2711, 2715 (2004).

¹⁸ *Hamdi*, 124 S. Ct. at 2635.

¹⁹ *Id.* at 2636-38.

²⁰ *Id.* at 2636.

²¹ *Id.*

Hamdi and ordered that Hamdi be permitted to meet with the attorney. The U.S. Court of Appeals for the Fourth Circuit reversed that decision and order.²² When the case reached the United States Supreme Court, it held “that although Congress authorized the detention of combatants in the narrow circumstances alleged here, due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker.”²³ Justice Sandra O’Connor’s plurality opinion, joined by Chief Justice William Rehnquist and Justices Anthony Kennedy and Stephen Breyer, announcing the judgment of the Court noted “‘the risk of erroneous deprivation’ of a detainee’s liberty interest” if the government were permitted to have absolute control over determining a detainee’s status and preventing any contact with courts and the outside world.²⁴

Justice David Souter, joined by Justice Ruth Bader Ginsburg, concurred in part, dissented in part, and concurred in the judgment.²⁵ The concurring opinion disagreed with O’Connor’s conclusion that the Authorization for the Use of Military Force (“AUMF”), a resolution passed by Congress after the terror attacks of September 11, 2001, granted the government the authority to detain Hamdi.²⁶ According to Souter, “[t]he Government has failed to demonstrate that the Force Resolution authorizes the detention complained of here even on the facts the Government claims. If the Government raises nothing further than the record now shows, the Non-Detention Act²⁷ entitles Hamdi to be released.”²⁸ The Non-Detention Act states that “[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.”²⁹

In a dissenting opinion, Justice Antonin Scalia, joined by Justice John Paul Stevens, argued that the government was obligated to prosecute detained U.S. citizens for alleged crimes and accord them full legal protections under the Bill of Rights.³⁰ Justice Scalia, who agrees with

²² Hamdi v. Rumsfeld, 296 F.3d 278, 283 (4th Cir. 2002).

²³ Hamdi, 124 S. Ct. at 2635.

²⁴ Id. at 2648.

²⁵ Id. at 2652 (Souter, J., concurring in part and dissenting in part).

²⁶ Id. at 2653 (Souter, J., concurring in part and dissenting in part).

²⁷ 18 U.S.C. § 4001(a) (2000) (citation added).

²⁸ Hamdi, 124 S. Ct. at 2653 (Souter, J., concurring in part and dissenting in part).

²⁹ Id. (Souter, J., concurring in part and dissenting in part).

³⁰ Id. at 2660 (Scalia, J., dissenting).

Justice Thomas in most cases³¹ and who also advocates the importance of the framers' intentions,³² emphasized the value of liberty when he concluded that "[t]he very core of liberty secured by our Anglo-Saxon system of separated powers has been freedom from indefinite imprisonment at the will of the Executive."³³ Justice Scalia noted that *The Federalist Papers* quoted a famous passage from Blackstone that demonstrated the central importance of individual liberty: "Of great importance to the public is the preservation of this personal liberty: for if once it were left in the power of any, the highest, magistrate to imprison arbitrarily whomever he or his officers thought proper . . . there would soon be an end of all other rights and immunities."³⁴

B. Justice Thomas's Opinion

The three different opinions described in the foregoing section indicate that the justices were divided in their assessments of the appropriate reasoning for the issues presented by *Hamdi*. However, a closer examination reveals that the eight justices involved in all three opinions—plurality, concurring in part and dissenting in part, and dissenting—agreed on the fundamental issue concerning Hamdi's liberty interest. All eight justices agreed that the executive branch lacks the authority to hold U.S. citizens indefinitely in incommunicado detention without any constitutional rights or access to the courts. By contrast, Justice Thomas stood out all alone, in sharp contrast even with his usual philosophical allies, Chief Justice Rehnquist and Justice Scalia,³⁵ by endorsing virtually unfettered executive authority to deprive U.S. citizens of liberty indefinitely and without any proof of wrongdoing. According to Thomas, Hamdi's "detention falls squarely within the Federal Government's war powers, and we lack the expertise and capacity to second-guess that decision."³⁶

Justice Thomas did not explicitly endorse inherent presidential authority to detain American citizens indefinitely in all circumstances.

³¹ For example, Justices Scalia and Thomas agreed in more than ninety percent of the Supreme Court's civil rights and liberties decisions during Thomas's first five terms on the Court. Christopher E. Smith, *Clarence Thomas: A Distinctive Justice*, 28 SETON HALL L. REV. 1, 4 (1997).

³² See Antonin Scalia, *Originalism: The Lesser Evil*, 57 CIN. L. REV. 849 (1989).

³³ *Hamdi*, 124 S. Ct. at 2661 (Scalia, J., dissenting).

³⁴ *Id.* (Scalia, J., dissenting) (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *132-33).

³⁵ Empirical analyses of patterns in Supreme Court decision-making demonstrate that Thomas agrees with Rehnquist and Scalia in various categories of cases at rates as high as ninety percent. See, e.g., Smith, *supra* note 31, at 4.

³⁶ *Hamdi*, 124 S. Ct. at 2674 (Thomas, J., dissenting).

However, he did indicate his belief that “the President very well may have inherent authority to detain those arrayed against our troops.”³⁷ He saw the presidential power to detain individuals in this case as flowing from the congressional enactment of the AUMF,³⁸ which authorized the president to “use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks.”³⁹ Thomas’s position gave the four-member plurality (O’Connor, Rehnquist, Kennedy, and Breyer) the needed fifth vote to justify the president’s authority to detain individuals upon labeling them as enemy combatants.⁴⁰ Notwithstanding Thomas’s allusion to inherent presidential authority to detain U.S. citizens,⁴¹ he relied on the AUMF as the source of the president’s authority and, therefore by implication, as a limitation on presidential power. Although arguably Thomas’s reliance on AUMF is not an endorsement of plenary presidential authority to detain U.S. citizens, as a practical matter Congress virtually always falls into line with the president’s wishes when the executive asserts a need to use American military power to counteract a perceived enemy.⁴² Under Thomas’s vision of presidential authority in wartime eras and threats to national security, judicial review, such as that requested by Hamdi

³⁷ *Id.* at 2679 (Thomas, J., dissenting).

³⁸ *See id.* (Thomas, J., dissenting) (“I agree with the plurality that we need not decide that question because Congress has authorized the President to [detain those arrayed against our troops through the Authorization for Use of Military Force]”).

³⁹ *Id.* at 2635.

⁴⁰ The justices concurring in part and dissenting in part (Ginsburg and Souter) and the other dissenting justices (Scalia and Stevens) did not agree that the AUMF gave the president the authority to undertake such detentions of American citizens. *Id.* at 2671 (Scalia, J., dissenting); *Id.* at 2653 (Souter, J., concurring in part and dissenting in part).

⁴¹ *See supra* note 37 and accompanying text.

⁴² At the outset of the Vietnam War, for example:

[The United States] provoked the Tonkin Gulf incident of August 1964, the clashes between torpedo boats of Hanoi’s navy and U.S. Navy destroyers, which [President Lyndon] Johnson used to trick the Senate into giving him an advance declaration of war for the far higher level of force he had decided by then he was probably going to have to employ to bend Hanoi to his will.

NEIL SHEEHAN, *A BRIGHT SHINING LIE: JOHN PAUL VANN AND AMERICA IN VIETNAM* 379 (1988). Although Congress enacted the War Powers Resolution after the Vietnam War in an ostensible effort to prevent presidents from involving U.S. troops in hostilities without congressional authorization, “[s]ome critics of the legislation claimed that it did not restrict presidential power as much as extend a free hand to wage war for up to sixty days.” KENNETH JANDA ET AL., *THE CHALLENGE OF DEMOCRACY* 645 (7th ed. 2002). As observers note, “[t]he actual impact of the War Powers Resolution is probably quite minimal . . . [Presidents] have all questioned its constitutionality, and no president has ever been punished for violating its provisions.” *Id.*

concerning his detention, appears to be the only practical check on assertions of power by the president. Because Thomas argues against the existence or assertion of judicial power in such situations, his position comes close to the endorsement of unfettered executive authority.

Justice Thomas purported to rely on his originalist philosophy by stating that “[t]he Founders intended that the President have primary responsibility—along with the necessary power—to protect the national security and to conduct the Nation’s foreign relations.”⁴³ He linked this deference to the executive’s discretionary authority in wartime to the highest priority to be placed on the value of national security.⁴⁴ His opinion also emphasized the judiciary’s lack of capability to make decisions concerning issues involved with national security⁴⁵ and the corresponding need for judges to show deference to decisions by executive officials.⁴⁶

When Thomas addressed the consistency of his positions with the constitutional protection against being “deprived of . . . liberty . . . without due process of law,”⁴⁷ he effectively dismissed any practical protections that could flow from the Due Process Clause by declaring:

In this context, due process requires nothing more than a good-faith executive determination. To be clear: The Court has held [in prior cases] that an executive, acting pursuant to statutory and constitutional authority may, consistent with the Due Process Clause, unilaterally

⁴³ *Hamdi*, 124 S. Ct. at 2675 (Thomas, J., dissenting).

⁴⁴ According to Thomas’s opinion, “It is ‘obvious and unarguable’ that no governmental interest is more compelling than the security of the Nation.” *Id.* (Thomas, J., dissenting) (quoting *Haig v. Agee*, 453 U.S. 280, 307 (1981) (quoting *Aptheker v. Sec’y of State*, 378 U.S. 500, 509 (1964)).

⁴⁵ In Thomas’s words, “with respect to certain decisions relating to national security and foreign affairs, the courts simply lack the relevant information and expertise to second-guess determinations made by the President based on information properly withheld.” *Id.* at 2676 (Thomas, J., dissenting).

⁴⁶ Even when Thomas sees a decision-making role for the judiciary, those decisions are to be deferential. He has stated:

I acknowledge that the question whether Hamdi’s executive detention is lawful is a question properly resolved by the Judicial Branch, though the question comes to the Court with the strongest presumptions in favor of the Government . . . [W]e lack the information and expertise to question whether Hamdi is actually an enemy combatant, a question the resolution of which is committed to other branches.

Id. at 2678 (Thomas, J., dissenting).

⁴⁷ U.S. CONST. amend. V.

decide to detain an individual if the executive deems this necessary for the public safety *even if he is mistaken*.⁴⁸

Because Thomas would grant to the executive “an authority that includes making virtually conclusive factual findings” about the need to detain individuals,⁴⁹ it is difficult to see how Thomas gives any weight to the value of the liberty interest emphasized by the framers.⁵⁰ Indeed, he specifically declined to balance individuals’ liberty interests against the national security claims put forward by the executive as part of his analysis in the case.⁵¹ He only engaged in the exercise of undertaking a balancing analysis as a means to refute the reasoning of the plurality opinion after he had already stated his own conclusions about the executive’s virtually unfettered authority. In undertaking this exercise, he clearly states that executive claims about national security threats trump any protections purported to exist in the Due Process Clause:

Undeniably, Hamdi has been deprived of a serious interest, one actually protected by the Due Process Clause. Against this, however, is the government’s overriding interest in protecting the nation. If a deprivation of liberty can be justified by the need to protect a town, the protection of the nation, a fortiori, justifies it.⁵²

Although the foregoing statement purports to present how Thomas would balance the interests at stake if he believed that a balancing test was appropriate, his formulation does not accurately reflect the implications of the analysis he articulated earlier in the opinion that actually shaped his decision. His use of the word “justified” might be perceived to imply that the executive is actually required to either present persuasive evidence about the danger posed by a specific individual or that the evidence presented must, in fact, be accurate in identifying the individual as presenting a danger. In fact, neither

⁴⁸ *Hamdi*, 124 S. Ct. at 2680-81 (Thomas, J., dissenting).

⁴⁹ *Id.* at 2680 (Thomas, J., dissenting).

⁵⁰ *See infra* text accompanying notes 124-143.

⁵¹ Thomas stated:

I conclude that the Government’s detention of Hamdi as an enemy combatant does not violate the Constitution. By detaining Hamdi, the President, in the prosecution of a war and authorized by Congress, has acted well within his authority. Hamdi thereby received all the process to which he was due under the circumstances. I therefore believe that this is no occasion to balance the competing interests, as the plurality unconvincingly attempts to do.

Hamdi, 124 S. Ct. 2683 (Thomas, J., dissenting).

⁵² *Id.* at 2685 (Thomas, J., dissenting).

implication need be true according to the analysis presented by Thomas. Hamdi's detention was justified by the government through the Mobbs Declaration, a recitation of statements by a Special Advisor to the Under Secretary of Defense for Policy alleging that Hamdi "affiliated with a Taliban military unit and received weapons training."⁵³ Moreover, Thomas had already indicated that it did not matter whether these unsubstantiated statements were true.⁵⁴ Thus, a more accurate paraphrasing of Thomas's conclusion would be as follows: "If a deprivation of liberty can be rationalized by untested and unsubstantiated statements by the Government, an indefinite, incommunicado detention is permissible, whether or not those justifying statements were accurate." Clearly, Thomas's analysis gave scant attention to the framers' emphasis on individual liberty in the Constitution and the Bill of Rights.

III. CONSISTENCY

More so than any other contemporary justice, "Thomas consistently advocates the strict application of key tools for interpreting the Constitution: its text and history."⁵⁵ He sees himself as a principled decision maker with a consistent, coherent judicial philosophy.⁵⁶ Because Thomas seeks to distinguish himself from "the other justices [who] appear to engage in ad hoc decision making as they react to the legal issues that confront them in each individual case,"⁵⁷ his opinions invite analysis regarding consistency and contradictions. This section will examine whether Thomas's opinion in the *Hamdi* case is consistent with his judicial philosophy and his reasoning in prior cases.

A. *Philosophical Orientation Toward Diminishing Judicial Activity and Power*

Justice Thomas emphasized that judges lack the capability to determine whether Hamdi should be labeled as an "enemy combatant,"⁵⁸ and therefore, the judiciary should step aside in order to permit other branches of government to handle matters related to national security.⁵⁸ This denigration of judicial capacity and desire for a diminution of judicial activity are consistent with his underlying belief that the

⁵³ *Id.* at 2637.

⁵⁴ *See supra* text accompanying note 48.

⁵⁵ Smith, *supra* note 9, at 48.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Hamdi*, 124 S. Ct. at 2676, 2678 (Thomas, J., dissenting).

judiciary “exercises excessive power,” and thus “he “seeks to restore the democratic equilibrium that, in his view, the Constitution’s Framers intended.”⁵⁹ Indeed, this philosophical orientation underlies his advocacy of originalism because he “believes that fidelity to text and history will keep judges faithful to the law and prevent them from imposing their personal values on society.”⁶⁰ Justice Thomas emphasized this theme in other decisions, including his implicit criticism of judges’ excessive intrusion into public policy when he attacked a prisoners’ rights opinion as “yet another manifestation of the pervasive view that the Federal Constitution must address all ills in our society.”⁶¹

B. Purported Adherence to Legal Principle Without Regard for Social Reality

1. Thomas and Social Reality

Because Thomas aspires to follow a principled judicial philosophy of constitutional interpretation by original intent, he has been described as “a voice for a formal, even rigid approach to constitutional interpretation, a rejection of the idea that modern influences might cast a new light on the intentions of the Framers.”⁶² While other justices frequently indicate that the potential consequences of their decisions on people’s lives can influence their analysis of issues,⁶³ Thomas insists that the Court is “bound by the text of the Constitution and by the intent of those who drafted and ratified it.”⁶⁴ With respect to constitutional rights, for example, Thomas says:

⁵⁹ Smith, *supra* note 9, at 50.

⁶⁰ *Id.*

⁶¹ Hudson v. McMillian, 503 U.S. 1, 28 (1992) (Thomas, J., dissenting).

⁶² David J. Garrow, *On Race, It’s Thomas v. An Old Ideal*, N.Y. TIMES, July 2, 1995, at E1.

⁶³ For example, with respect to the applicability of the Eighth Amendment’s prohibition on cruel and unusual punishment to convicted offenders in prison, Thomas states flatly that the framers “simply did not conceive of the Eighth Amendment as protecting inmates from harsh treatment.” Hudson, 505 U.S. at 19-20 (Thomas, J., dissenting). Therefore, he espouses the idea that the Eighth Amendment should not even be used to examine conditions of confinement. *Id.* (Thomas, J., dissenting). By contrast, other justices, such as Justice Stevens, emphasize looking at the social reality of prison conditions in order to determine whether they are “cruel and unusual” under the Eighth Amendment. For example, in examining conditions in isolation cells at an Arkansas prison, Justice Stevens focused on aspects of actual conditions: “It is equally plain, however, that the length of confinement cannot be ignored in deciding whether the confinement meets constitutional standards. A filthy, overcrowded cell and a diet of ‘grue’ might be tolerable for a few days and intolerably cruel for weeks and months.” Hutto v. Finney, 437 U.S. 678, 686-87 (1978).

⁶⁴ McIntyre v. Ohio Elections Comm’n, 514 U.S. 334, 370-71 (1995) (Thomas, J., concurring).

It is a bedrock principle of judicial restraint that a right be lodged firmly in the text or tradition of a specific constitutional provision before we will recognize it as fundamental. Strict adherence to this approach is essential if we are to fulfill our constitutionally assigned role of giving full effect to the mandate of the Framers without infusing the constitutional fabric with our own political views.⁶⁵

As one manifestation of his aspiration to create principled decisions based entirely on the words and original intent of the Constitution, Thomas castigates the use of social science evidence by judges in making decisions.⁶⁶ Social science attempts to use scientific methods to describe and analyze social reality,⁶⁷ including counting and classifying observable objects and phenomena,⁶⁸ in order to gain “an empirically based understanding”⁶⁹ of people and the world in which they live. According to Thomas, “[t]he lower courts should not be swayed by the easy answers of social science, nor should they accept the findings, and the assumptions, of sociology and psychology at the price of constitutional principle.”⁷⁰

The foregoing description of Thomas’s aspirations for judicial decision making should not be perceived to mean that he never takes facts into account in making decisions. In supporting an individual’s claim about a violation of the Eighth Amendment Excessive Fines Clause, the amount of money in question was apparently relevant to Thomas’s decision since the framers did not give adequate guidance on the definition of the word “excessive.”⁷¹ Indeed, Thomas sometimes attempts to influence decisions by putting forth his own conclusions

⁶⁵ *Lewis v. Casey*, 518 U.S. 343, 367 (1996) (Thomas, J., concurring).

⁶⁶ For example, in considering an equal protection issue, Thomas wrote that “[t]he judiciary is fully competent to make independent determinations concerning the existence of state action without the unnecessary and misleading assistance of the social sciences.” *Missouri v. Jenkins*, 515 U.S. 70, 121 (1995) (Thomas, J., concurring).

⁶⁷ The collection of data in social science is based primarily on observation, experiments, and surveys. See STEVEN VAGO, *LAW AND SOCIETY* 292-305 (3d ed. 1991).

⁶⁸ For example, the quantitative methods in social science can facilitate the collection of data so that it is comprehensive, precise, efficient, and reliable. THOMAS R. HENSLEY ET AL., *THE CHANGING SUPREME COURT: CONSTITUTIONAL RIGHTS AND LIBERTIES* 866 (1997).

⁶⁹ RICHARD LEMPert & JOSEPH SANDERS, *AN INVITATION TO LAW AND SOCIAL SCIENCE* 1 (1986).

⁷⁰ *Jenkins*, 515 U.S. at 122-23 (Thomas, J., concurring).

⁷¹ *United States v. Bajakajian*, 524 U.S. 321, 335 (1998) (involving a traveler at an international airport who forfeited \$357,000 in cash being carried in a suitcase for failing to file a form declaring the transportation of the cash out of the country).

about social reality, even though his conclusions may be either unsubstantiated by evidence⁷² or demonstrably incorrect.⁷³ As indicated by these examples, Thomas is not completely consistent in rejecting considerations of social reality. However, because he emphasizes the principle of fealty to original intent, he often disregards the practical consequences of decisions, and therefore his refusal to acknowledge or consider the potential impact of his conclusions in the *Hamdi* case is consistent with his approach to judicial decision-making.

2. The Risk of Error in Choosing Individuals for Indefinite Detention

In the *Hamdi* case, Thomas' gave scant attention to any aspects of social reality that might raise concerns about practical risks to individuals from indefinite, incommunicado detention based on the government's discretionary decisions. Thomas purports to rely on facts in characterizing the government's actions as "detaining an enemy soldier" in order to "gather critical intelligence regarding the intentions and capabilities of our adversaries."⁷⁴ Yet Thomas does not require the government to substantiate its claim that the individual is, in fact, an enemy soldier and, moreover, Thomas would permit indefinite detentions even when the government wrongly labeled an American as an enemy.⁷⁵

After the government labeled detained individuals as "unlawful combatants" and began to send them from Afghanistan to Guantanamo Bay,⁷⁶ Secretary of Defense Donald Rumsfeld justified their

⁷² Thomas has asserted, for example, without any supporting evidence that it can be "reasonably surmised, without direct evidence in any particular case, that all-white juries might judge black defendants unfairly." *Georgia v. McCullom*, 505 U.S. 42, 61 (1992) (Thomas, J., concurring).

⁷³ With respect to the currently outlawed practice of mandatory death sentences for first-degree murder and other crimes, Thomas has said, "One would think, however, that by eliminating explicit jury discretion and treating all defendants equally, a mandatory death penalty scheme was a perfectly reasonable legislative response to the concerns [about racial discrimination and arbitrariness] expressed in *Furman*." *Graham v. Collins*, 506 U.S. 461, 487 (1993) (referring to *Furman v. Georgia*, 408 U.S. 238 (1972)). Social science knowledge about judicial processes indicates, however, that mandatory sentences cannot eliminate racial discrimination because prosecutors still possess discretion to determine which defendants will be charged with capital crimes, juries possess discretion about whether to convict or, sometimes, find guilt for a lesser offense, and judges make discretionary decisions about evidentiary issues, jury selection, and other matters that can make similarly situated cases produce divergent results. Christopher E. Smith, *The Supreme Court and Ethnicity*, 69 OR. L. REV. 797, 830 (1990).

⁷⁴ *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2683 (2004) (Thomas, J., dissenting).

⁷⁵ See *supra* text accompanying notes 48-50.

⁷⁶ CHRISTOPHER E. SMITH, CONSTITUTIONAL RIGHTS: MYTHS & REALITIES 197 (2004).

incommunicado detentions by characterizing them as “people [who] were involved in an effort to kill thousands of Americans These are very tough, hard-core, well-trained terrorists.”⁷⁷ Brigadier General Michael Lehnert, the commander of the Guantanamo Bay prison, labeled the detainees as “the worst of the worst.”⁷⁸ Despite these drastic, categorical declarations reflecting the government’s labeling and treatment of suspected terrorists, by the time that the Supreme Court decided the *Hamdi* case in 2004, the government had released at least 119 of these supposedly “hard-core, well-trained terrorists.”⁷⁹ It turned out that dozens of these individuals who were detained without rights for two years were not Taliban soldiers and had actually been kidnapped by warlords in Afghanistan who told Americans officials that these individuals were supporters of the Taliban or al Qaeda in order to collect bounty money from the U.S. government.⁸⁰ Despite this available information about the fallibility of the government’s judgments concerning suspected terrorists, Thomas would grant the executive unlimited authority to undertake mistaken detentions without any possibility of judicial review and correction.

The hyperbolic nature of the government’s statements about detainees became even clearer within months after the Supreme Court’s *Hamdi* decision when the government released Hamdi and deported him to Saudi Arabia rather than participating in any judicial processes to justify his detention.⁸¹ Hamdi’s release conveyed the impression that the drastic characterizations about the need to hold him in incommunicado detention and the government’s dogged determination to fight the case through every level of the federal court system had more to do with the desire to gain judicial endorsement of unfettered executive power than with any actual danger that Hamdi posed to the United States.

⁷⁷ U.S. Department of Defense News Transcript, *Secretary Rumsfeld Media Stakeout at NBC*, Jan. 20, 2002, available at www.dod.mil/transcripts/2002/t01222002_t0120so.html.

⁷⁸ Esther Schrader, *Response to Terror; Base Awaits ‘the Worst of the Worst,’* L.A. TIMES, Jan. 10, 2002, available at <http://pqasb.pqarchiver.com/latimes/99034514.html>.

⁷⁹ Int’l Information Programs, U.S. Department of State, *Defense Department Releases 26 More Detainees from Guantanamo*, Mar. 16, 2004, available at usinfo.state.gov/dhr/Archive/2004/Mar/17-436215.html.

⁸⁰ Nancy Gibbs & Viveca Novak, *Inside “The Wire,”* TIME, Dec. 8, 2003, available at <http://www.time.com/time/archive/preview/0,10987,1006372,00.html>.

⁸¹ Jerry Markon, *Hamdi Returned to Saudi Arabia; U.S. Citizen’s Detention as Enemy Combatant Sparked Fierce Debate*, THE WASHINGTON POST, Oct. 12, 2004, at A02.

3. Incommunicado Detention and the Risk of Torture

The practical risks of unlimited executive authority were also illustrated by oral arguments in the *Hamdi* case and events that followed soon after it. Incommunicado detention is not merely a threat to individual liberty; it also raises risks that the government will employ torture or impose inhumane conditions of confinement.⁸² Indeed, the United States has been hiding nearly two dozen high-profile terrorism suspects from the International Committee of the Red Cross at undisclosed overseas locations, apparently so that no one can learn about the interrogation techniques and conditions of confinement being applied to these individuals who are believed to possess valuable information.⁸³ During oral arguments, Paul D. Clement, the deputy solicitor general, responded to Justice Anthony Kennedy's question of whether the government could punish or shoot detainees since the government claims that these individuals are not entitled to any rights in part by saying, "We couldn't take somebody like Hamdi, for example, now that he's been removed from the battlefield and is completely—poses no threat unless he's released, and use that kind of force on him."⁸⁴ Justice Ruth Bader Ginsburg subsequently asked: "Suppose the executive says, 'Mild torture, we think, will help to get this information?'" It's not a soldier who does something against the code of military justice, but it's an executive command. Some systems do that to get information."⁸⁵

In response to the query from Ginsburg, Clement said, "Well, our executive doesn't [use torture]," and he later added, "[T]he fact that executive discretion in a war situation can be abused is not a good and sufficient reason for judicial micromanagement and overseeing that authority [Y]ou have to trust the executive to make the kind of quintessential judgments that are involved in things like that."⁸⁶

⁸² Indeed, evidence emerged that the United States employed torture techniques in attempting to gain information from some terrorism suspects, such as "waterboarding" subjects by thrusting them headfirst into water and holding them there so that they believe they will drown. Suzanne Goldenberg, *U.S. Forces Were Taught Torture Techniques*, THE GUARDIAN, May 14, 2004, available at <http://www.guardian.co.uk/international/story/0,3604,1216438,00.html>.

⁸³ Jon Manel, *U.S. Hides High-Profile Prisoners*, BBC NEWS, May 21, 2004, available at news.bbc.co.uk/go/pr/fr/-/2/hi/americas/3736157.stm.

⁸⁴ Linda Greenhouse, *The Supreme Court Asks: Who Will Guard the Guardians?*, N.Y. TIMES, May 9, 2004, § 4, at 7.

⁸⁵ *Id.*

⁸⁶ *Id.*

A few hours after Clement denied that the government uses torture, the CBS program *60 Minutes II* broadcast footage of Iraqi detainees in Abu Ghraib prison being humiliated and abused by American military personnel.⁸⁷ Stories and pictures about abuses at Abu Ghraib dominated television and newspaper stories in the weeks that followed and were undoubtedly seen by the justices at the Supreme Court.⁸⁸ In addition, as the justices drafted their opinions before issuing the *Hamdi* decision on June 28, 2004, news reports revealed that attorneys in the Justice Department's Office of Legal Counsel had sent the White House memos saying that the use of torture on suspected terrorists "may be justified" and that international laws against torture "may be unconstitutional."⁸⁹ The memos define interrogation methods as constituting torture only when they cause extreme harms, such the infliction of pain equivalent in intensity to "severe physical injury, such as organ failure, impairment of bodily function, or even death" or psychological harm that lasts for "months or even years."⁹⁰ This definition permits significantly more harsh and painful interrogation methods than those permitted under the definitions of torture in international law, such as the United Nations Convention Against Torture and Other Cruel or Inhuman or Degrading Treatment or Punishment.⁹¹ News reports also revealed that the CIA had used these memos as the basis for approving more aggressive interrogation techniques by its agents.⁹² In sum, at the same time that the lawyers representing the government before the Supreme Court denied that the executive branch would participate in the torture of detainees, other lawyers advising the president were endorsing just such actions, and these endorsements apparently contributed to the use of torturous interrogation techniques that violate international law.⁹³

⁸⁷ Warren Richey, *When Do News Reports Influence Those in Black Robes?*, CHRISTIAN SCI. MONITOR (Jul. 7, 2004), available at www.csmonitor.com/2004/0707/p02s02-usju.html.

⁸⁸ *Id.*

⁸⁹ Mike Allen & Dana Priest, *Memo on Torture Draws Focus to Bush*, WASH. POST, Jun. 9, 2004, at A03.

⁹⁰ *Id.*

⁹¹ See Association for the Prevention of Torture Paper, *Compilation Under International Law: Definition of Torture*, May 11, 2001, available at www.ap.torture.ch/un/definition.shtml ("'[T]orture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession.").

⁹² Allen & Priest, *supra* note 89, at A03.

⁹³ See, e.g., *The Torture Memos Series: Editorials*, ST. PETERSBURG TIMES, Jun. 13, 2004, at 2P, available at <http://pqasb.pqarchiver.com/sptimes/650526751.html> ("But an ever-expanding body of evidence shows that the president, vice president, defense secretary and attorney general sought ways to defend the use of abusive tactics on the part of American

Observers speculated that the availability of information about American complicity in torture and its stark refutation of the government's claims that it could be trusted to treat detainees in a proper and humane fashion might affect the justices' assessment of Hamdi's case and the attendant risks of indefinite incommunicado detention.⁹⁴ After all of the news reports on torture during the Court's deliberation period, "in the end, only one justice, Clarence Thomas, fully embraced the administration's 'trust us' argument."⁹⁵ Justice Thomas's position in the *Hamdi* case provides further evidence of his desire to exclude any consideration of the practical consequences of judicial decisions on actual human beings, no matter how torturous those consequences may be.

4. The Infinite Duration of the "War" on Terrorism

Justice Thomas also implies the potential existence of a practical limitation on the executive power endorsed by his opinion through characterizing the power as existing "in the war context."⁹⁶ However, this qualifying phrase provides no realistic limitation on the extent and duration of executive power, as noted by one commentator:

The war on terrorism is being waged against a hidden enemy who is not going to surrender in a ceremony aboard the USS Missouri. There is indeed no way to foresee how or when this war will end. The fear of terrorism may well go on for the rest of our lives.⁹⁷

Moreover, Thomas also indicates that he would take a broad, deferential view of the circumstances that justify detentions, and he would not tie the president's power to the continuation of active military actions:

[T]he plurality relies primarily on Article 118 of the Geneva Convention (III) Relative to the Treatment of Prisoners of War . . . for the proposition that "[i]t is a clearly established principle of the law of war that detention may last no longer than active hostilities." It

military personnel and intelligence agents that violate international law and American tradition.").

⁹⁴ See Richey, *supra* note 87.

⁹⁵ *Id.*

⁹⁶ *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2684 (2004) (Thomas, J., dissenting).

⁹⁷ Anthony Lewis, *Security and Liberty: Preserving the Values of Freedom, in THE WAR ON OUR FREEDOMS* 50-51 (Richard C. Leone & Greg Anrig, Jr., eds., 2003).

then appears to limit the President's authority to detain by requiring that the record establish that United States troops are still involved in active combat in Afghanistan because, in that case, detention would be "part of the exercise of 'necessary and appropriate force.'" But I do not believe that we may diminish the Federal Government's war powers by reference to a treaty . . . [W]e are bound by the political branches' determination that the United States is at war . . . And, in any case, the power to detain does not end with the cessation of formal hostilities.⁹⁸

Thus, in Thomas's view, the duration of the extensive powers of the president during wartime, including the power to detain American citizens without any access to the courts, is defined by Congress and the president, regardless of practical circumstances concerning the existence of active combat or other military operations.

5. Unfettered Wartime Authority and the Lessons of History

Although Thomas presents himself as relying on history in his approach to constitutional interpretation,⁹⁹ his *Hamdi* opinion evinces little recognition of the realities of American history. The United States has repeatedly experienced wartime episodes in which the government asserted the authority to override the liberty and rights of individuals in the name of national security.¹⁰⁰ However, retrospective analyses of

⁹⁸ *Hamdi*, 124 S. Ct. at 2679 (Thomas, J., dissenting) (citations omitted).

⁹⁹ Smith, *supra* note 9, at 48.

¹⁰⁰ See Geoffrey R. Stone, *Justices Who Won't "Run with the Wolves,"* L.A. TIMES, Nov. 15, 2004, at B9.

In time of war, Americans have too often responded to fear and anxiety by harshly restricting constitutional liberties.

At the end of the [eighteenth] century, for example, when the nation faced the threat of war with France, the government enacted the Sedition Act of 1798, which effectively made it a crime for any person to criticize the president, Congress or government of the United States.

During the Civil War, President Lincoln repeatedly suspended the writ of habeas corpus, allowing as many as 38,000 individuals to be seized and imprisoned by military authorities without any recourse to judicial review.

During World War I, the government enacted the Espionage Act of 1917 and the Sedition Act of 1918 to quell antiwar dissent. More than 2,000 opponents of the war were prosecuted.

In World War II, the United States interned nearly 120,000 people of Japanese descent, 90,000 of whom were American citizens,

governmental actions against Japanese-Americans during World War II, the Cold War period of McCarthyism, or other “wars” consistently lead to the following conclusion: “[T]he history of civil liberties in times of emergency suggests that governments seldom react to crises carefully and judiciously. They acquiesce to the most alarmist proponents of repression.”¹⁰¹ Justice Thomas rejects considerations of social reality in favor of judicial decision making based on legal principles,¹⁰² but his approach simultaneously blinds him to the practical implications of history and the potential impact of his principles on the lives of his fellow Americans.

Justice Thomas’s lack of consideration for the practical risks and problems of his *Hamdi* opinion is consistent with his espoused approach to constitutional interpretation that focuses on purported constitutional principles rather than social reality. However, the nature of the risks and problems attendant to this view, such as erroneous detentions, torture, and perpetual unfettered executive authority in a “war” without end, highlight the potential for significant adverse consequences for many people if the Court had followed Thomas’s formalistic approach.

C. *Disregard for the Treatment and Fates of Individuals Held in Custody*

As indicated by the previous discussion of risks of erroneous detentions and torture,¹⁰³ Thomas’s opinion in *Hamdi* showed little concern for the fates and treatment of individuals detained by executive fiat. His opinions in cases concerning convicted criminal offenders

removing them from their homes and relocating them in crude concentration camps.

During the Cold War, the U.S., fearful of Soviet espionage and sabotage, fell into a mindless witch hunt implemented through brutal legislative investigations, pervasive blacklists and criminal prosecutions.

During the Vietnam War, the government aggressively infiltrated antiwar organizations to disrupt and neutralize the antiwar movement. The FBI compiled files on more than half a million Americans purely because of their opposition to the nation’s policy in Vietnam.

Id.

¹⁰¹ Alan Brinkley, *A Familiar Story: Lessons from Past Assaults on Freedoms*, in *THE WAR ON OUR FREEDOMS* 45 (Richard C. Leone & Greg Anrig, Jr. eds., 2003).

¹⁰² For example, Thomas has criticized courts’ utilizing social science research concerning the detrimental impacts of racial segregation because he believes judicial decisions should rest entirely on legal principles. See *Missouri v. Jenkins*, 515 U.S. 70, 114 (1995) (Thomas, J., concurring) (“This approach not only relies upon questionable social science research rather than constitutional principle . . .”).

¹⁰³ See *supra* text accompanying notes 48-50 and 75-81.

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demonstrate a parallel absence of concern for individuals incarcerated in the American criminal justice system.¹⁰⁴ In applying his original intent philosophy to the Eighth Amendment, Thomas says that the framers “simply did not conceive of the Eighth Amendment as protecting inmates from harsh treatment.”¹⁰⁵ Thomas reiterated the point in writing:

At a minimum, I believe that the original meaning of “punishment,” the silence in the historical record, and the 185 years of uniform precedent shift the burden of persuasion to those who would apply the Eighth Amendment to prison conditions. In my view, that burden has not yet been discharged.¹⁰⁶

Thus Thomas and Scalia have been the lone dissenters in cases in which the other justices, including their usual philosophical ally Chief Justice William Rehnquist, found in favor of prisoners’ Eighth Amendment claims.¹⁰⁷ Indeed, Thomas argues, by implication, that prisoners should not even be granted a limited constitutional entitlement to medical care in prison when he says that he “seriously doubts”¹⁰⁸ that the precedent establishing prisoners’ limited right was decided

¹⁰⁴ For example, two of the Court’s other conservative justices, Justices O’Connor and Kennedy, joined the majority’s opinion in *Hope v. Pelzer* by declaring that Alabama corrections officials lost any claim to qualified immunity when their conduct constituted an obvious violation of the Eighth Amendment’s Cruel and Unusual Punishments Clause by chaining a prisoner to a hitching post in the prison yard. 536 U.S. 730, 731-32 (2002). According to the facts recounted by the Court:

The guards made him take off his shirt, and he remained shirtless all day while the sun burned his skin. He remained attached to the post for approximately seven hours. During the 7-hour period, he was given water only once or twice and was given no bathroom breaks. At one point, a guard taunted Hope about his thirst. According to Hope’s affidavit: “[The guard] first gave water to some dogs, then brought the water cooler closer to me, removed its lid, and kicked the cooler over, spilling the water onto the ground.”

Id. at 734-35. In his dissenting opinion arguing for qualified immunity to block a civil rights lawsuit by the prisoner, Thomas said, “[T]he Eighth Amendment violation in this case is far from ‘obvious.’” *Id.* at 751 (Thomas, J., dissenting).

¹⁰⁵ *Hudson v. McMillian*, 503 U.S. 1, 19-20 (1993) (Thomas, J., dissenting).

¹⁰⁶ *Helling v. McKinney*, 509 U.S. 25, 40 (1993) (Thomas, J., dissenting).

¹⁰⁷ See, e.g., *Hudson*, 503 U.S. at 4 (prisoner beaten by corrections officers permitted to sue for Eighth Amendment violation despite the lack of a serious injury); *Helling*, 509 U.S. at 35 (non-smoking prisoner placed in a small cell with a chain-smoking cellmate permitted to raise claim about potential health threat from environmental exposure to tobacco smoke).

¹⁰⁸ *Helling*, 509 U.S. at 37 (Thomas, J., dissenting).

correctly.¹⁰⁹ Thomas's position with respect to medical care is problematic with respect to human consequences because "for prisoners, who, by virtue of their incarceration, could not obtain such services for themselves, . . . the deprivation of medical care can inflict pain and, in worst-case situations, lead to 'physical torture or a lingering death.'"¹¹⁰

Consistent with his view that Hamdi was not entitled to have access to the courts, Thomas is among the justices who has sought to limit access to habeas corpus for convicted offenders in American prisons. In a case raising the issue of federal judges' obligation to defer to state court findings rather than conduct *de novo* reviews in habeas corpus cases,¹¹¹ Thomas wrote the plurality opinion that was interpreted by scholars to "conclud[e] that the Chief Justice and Justices Thomas and Scalia would now adopt a deference rule for all the issues in habeas corpus cases."¹¹² Even more revealing of Thomas's desire to limit effective judicial review of prisoners' cases was his opinion in *McFarland v. Scott*.¹¹³ Prior Supreme Court decisions emphasized that prisoners must file all of their claims in a single habeas petition and they cannot file successive petitions based on the discovery of new claims.¹¹⁴ Under a federal statute, capital defendants are entitled to legal representation in any "post conviction proceeding."¹¹⁵ The majority of justices in *McFarland* said that such defendants can request counsel under the statute prior to filing their habeas petition in order to have professional assistance in preparing their one permitted petition containing constitutional claims.¹¹⁶ By contrast, Thomas's dissenting opinion asserted that the Court was obligated to follow a literal interpretation of the statute, which, according to Thomas, Scalia, and Rehnquist, would require the prisoner to prepare and file the habeas petition on his own first, and request representation by counsel later.¹¹⁷ Many prisoners suffer from

¹⁰⁹ Prisoners' limited entitlement to medical care is merely a right to not have prison officials be "deliberately indifferent" to "serious medical needs." *Estelle v. Gamble*, 429 U.S. 97, 106 (1976). This right does not constitute an entitlement to good, prompt, or complete medical care. See CHRISTOPHER E. SMITH, LAW AND CONTEMPORARY CORRECTIONS 64-71, 208-214.

¹¹⁰ SMITH, *supra* note 109, at 210.

¹¹¹ *Wright v. West*, 505 U.S. 277 (1992).

¹¹² Larry W. Yackle, *The Habeas Hagioscope*, 66 S. CAL. L. REV. 2331, 2394 (1993).

¹¹³ 512 U.S. 849, 864-73 (1994) (Thomas, J., dissenting).

¹¹⁴ See, e.g., *McCleskey v. Zant*, 499 U.S. 467 (1991).

¹¹⁵ 21 U.S.C. § 848(q)(4)(B) (2000).

¹¹⁶ *McFarland*, 512 U.S. at 858.

¹¹⁷ *Id.* at 866 (Thomas, J., dissenting) ("In short, the terms of § 848(q)(4)(B) indicate that Congress intended that legal assistance be made available under the provision only after a habeas proceeding has been commenced by the filing of an application for habeas relief.").

educational deficiencies, problems of literacy, and mental illnesses, and almost no prisoners have formal training in law.¹¹⁸ Thomas would effectively require that inadequate, doomed pro se petitions be filed before the provision of counsel, thereby assuring that potentially valid claims would be lost due to the rule against successive petitions. In capital cases, the loss of valid constitutional claims could obviously have the most severe possible impact on the life of the incarcerated individual.

IV. CONTRADICTIONS

Because Thomas aspires to make principled decisions by using the strict application of the Constitution's text and history,¹¹⁹ he would appear to be better positioned to demonstrate consistency in his decision making than would "the other justices [who] appear to engage in ad hoc decision making."¹²⁰ Although many aspects of his *Hamdi* opinion are consistent with his other decisions, as indicated by the previous discussion, Thomas is not always completely consistent.¹²¹ Moreover, his *Hamdi* opinion includes elements that appear to clearly contradict his espoused philosophy and approach to decision-making.

A. Liberty in the Constitution

Thomas effectively rejects the larger principles underlying the Constitution concerning limited governmental power and the protection of individual liberty. As described by Stephen Schulhofer,

The central premise of government under law is that executive officials, no matter how well intentioned, cannot be allowed unreviewable power imprison a citizen However much we respect the good intentions of the current attorney general and secretary of defense, such disregard for traditional checks and

¹¹⁸

For example, in Florida's prisons, more than fifty percent of the inmates were found to read at or below the sixth grade level Furthermore, in several states, there are significant proportions of inmates who are not fluent in English A prisoner who has college level reading ability would still not be able to utilize a law library effectively without extensive training and experience in legal research and procedure.

Christopher E. Smith, *Examining the Boundaries of Bounds: Prison Law Libraries and Access to the Courts*, 30 HOW. L. J. 27, 34-35 (1987).

¹¹⁹ Smith, *supra* note 9, at 48.

¹²⁰ *Id.*

¹²¹ See *supra* notes 71-73 and accompanying text.

balances is a recipe for bad mistakes and serious abuses of power.¹²²

Schulhofer characterizes limited government and individual rights, the concepts that are effectively rejected by Thomas's opinion, as the "bedrock constitutional principles."¹²³

Individual liberty stands out as a central value of the framers. This value did not merely inspire Patrick Henry's famous declaration "give me liberty, or give me death."¹²⁴ It also sparked the initiation of the Revolutionary War¹²⁵ and found expression in the country's founding documents, including the Declaration of Independence's prominent inclusion of liberty among people's "inherent and unalienable rights."¹²⁶ In the words of legal historian Kermit Hall, "[t]he framers of the Constitution in 1787 worried incessantly about protecting liberty from encroaching governmental power . . ."¹²⁷ The founders of the United States were significantly influenced by the writings of various philosophers, such as John Locke, who "saw government—any government—as by nature hostile to liberty, and argued therefore that it should survive only on the tolerance of those whom it governed."¹²⁸ Moreover, the founders, viewing themselves and their values as products of English history, saw their efforts as the continuation and preservation of a "tradition of liberty [that] stretched back to at least 1215, when the English barons had forced King John to sign the Magna Carta or Greater Charter."¹²⁹

The Preamble to the U.S. Constitution states the objective of "secur[ing] the Blessings of Liberty for ourselves and our Posterity" as a primary goal of the new governing system.¹³⁰ Liberty is given special emphasis and importance in the Preamble because "it is only with

¹²² Stephen J. Schulhofer, *No Checks, No Balances: Discarding Bedrock Constitutional Principles*, in *THE WAR ON OUR FREEDOMS* 98 (Richard C. Leone & Greg Anrig, Jr. eds. 2003).

¹²³ See Schulhofer, *supra* note 122, at 74.

¹²⁴ Patrick Henry, *Give Me Liberty or Give Me Death* (Mar. 23, 1775), available at www.law.ou.edu/hist/henry.html.

¹²⁵ See, e.g., JANDA ET AL., *supra* note 42, at 60. ("The taxation [without representation] issue became secondary [to the American colonists]; more important was the conflict between British demands for order and American demands for liberty.").

¹²⁶ THOMAS JEFFERSON, THOMAS JEFFERSON ON DEMOCRACY 13 (Saul K. Padover ed., 1939).

¹²⁷ Kermit L. Hall, *Framing the Bill of Rights*, in *BY AND FOR THE PEOPLE: CONSTITUTIONAL RIGHTS IN AMERICAN HISTORY* 17 (Kermit L. Hall ed., 1991).

¹²⁸ MELVIN UROFSKY, *A MARCH OF LIBERTY: A CONSTITUTIONAL HISTORY OF THE UNITED STATES* 43 (1988).

¹²⁹ Hall, *supra* note 127, at 14.

¹³⁰ U.S. CONST. pmb.

respect to liberty that a concern is explicitly indicated for ‘our Posterity’ as well as for ‘ourselves.’”¹³¹ Thus, liberty appears to be such an important value to the framers that “it seems to be something that people can believe they have a duty to preserve not only for themselves but also for those who follow them.”¹³²

Elsewhere in the original Constitution, the framers devoted scant discussion to protections for individuals.¹³³ Despite the presence of very few references to individuals’ rights, the Constitution states specifically that “[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”¹³⁴ This emphasis reflects a clear desire to protect individuals’ liberty by preventing arbitrary, incommunicado detentions and making access to the courts available to detainees.¹³⁵ Scholars have described habeas corpus as “the Great Writ of Liberty—the means by which English courts could enforce the ‘law of the land’ against governmental power.”¹³⁶ Despite expressing opposition to the creation of a Bill of Rights, Alexander Hamilton emphasized that habeas corpus, along with the prohibitions on *ex post facto* laws and titles of nobility, “are perhaps greater securities to liberty and republicanism” than any other specific rights in state constitutions.¹³⁷ Although the framers’ initial inclination was to adopt Alexander Hamilton’s view that the Constitution did not need a written Bill of Rights,¹³⁸ they were sufficiently concerned about the liberty interests at stake in the government’s power to detain individuals that they placed the Habeas Suspension Clause in Article I of the Constitution to emphasize the

¹³¹ GEORGE ANASTAPLO, *THE CONSTITUTION OF 1787: A COMMENTARY* 15 (1989).

¹³² *Id.*

¹³³ The Bill of Rights was later added to the original Constitution because of critics’ concerns about the absence of specifically articulated protections for individuals in the nation’s foundational document. HENSLEY ET AL., *supra* note 68, at 95.

¹³⁴ U.S. CONST. art. I, § 9, cl. 2.

¹³⁵ As described by Malcolm Feeley and Edward Rubin, “Habeas corpus, a venerable English writ, had evolved during the seventeenth century into a means by which courts could review the legality of a prisoner’s confinement and order release in appropriate circumstances.” MALCOLM M. FEELEY & EDWARD L. RUBIN, *JUDICIAL POLICY MAKING AND THE MODERN STATE* 31 (1998).

¹³⁶ Yackle, *supra* note 112, at 2337.

¹³⁷ THE FEDERALIST NO. 84, at 435 (Alexander Hamilton) (Garry Wills ed., 1982).

¹³⁸ *See id.* at 437 (“I go further, and affirm that bills of rights, in the sense and in the extent in which they are contended for, are not only unnecessary in the proposed constitution, but would even be dangerous.”).

existence of a protection against detentions undertaken on arbitrary or otherwise inappropriate bases.¹³⁹

The first amendments added to the Constitution as the Bill of Rights “concretely articulated the Constitution’s aim of securing personal liberty.”¹⁴⁰ Within these amendments, there are many examples of specific legal protections established to protect aspects of liberty. For example, the Fifth Amendment seeks to protect against compelled self-incrimination¹⁴¹ and against deprivations of life, liberty, or property imposed by the federal government without due process of law.¹⁴² The Sixth Amendment rights concerning criminal prosecutions impose various procedural requirements, including rights to trial, confrontation, and counsel, as a means to prevent arbitrary and unfair deprivations of liberty for people facing the prospect of punishment.¹⁴³

In light of this evidence of the importance of liberty as a preeminent value for the framers of the Constitution, one might expect Justice Thomas, the foremost advocate of fealty to the framers’ intentions, to be one of liberty’s greatest defenders in light of his outspoken advocacy of constitutional interpretation by original intent. In fact, however, Thomas’s opinion completely overrides the framers’ emphasis on individual liberty by treating executive authority and claims of national security threats as the preeminent and nearly exclusive priorities.

B. *Hamdi*, the Constitution, and the Framers’ Intent

Thomas’s opinion in *Hamdi* looked for evidence of original intent and also cited the text of the Constitution. However, the nature and strength of that evidence cast doubt on whether it genuinely supports Thomas’s absolutist endorsement of executive authority.

The textual aspect of the Constitution cited by Thomas¹⁴⁴ is Article II’s designation of the president as “the Commander in Chief of the

¹³⁹ See U.S. CONST. art. I, § 9, cl. 2.

¹⁴⁰ ROGERS M. SMITH, *CIVIL IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY* 135 (1997).

¹⁴¹ U.S. CONST. amend. V (stating that none “shall be compelled in any criminal case to be a witness against himself . . .”).

¹⁴² *Id.* The Due Process Clause of the Fourteenth Amendment applies against the states, but the Due Process Clause of the Fifth Amendment applies only against the federal government. BERNARD SCHWARTZ, *A HISTORY OF THE SUPREME COURT* 301 (1993).

¹⁴³ U.S. CONST. amend. VI.

¹⁴⁴ *Hamdi v. Rumsfeld*, 124 S. Ct. 2533, 2675 (2004) (Thomas, J., dissenting).

Army and Navy.”¹⁴⁵ This phrase, by itself, does not clearly convey an intention to grant to the president the authority to hold American citizens in indefinite, incommunicado detention on U.S. soil, so Thomas explained his reliance on the phrase through Supreme Court precedents concerning presidential power.¹⁴⁶ Thomas brought forth language from prior opinions that speak about broad presidential power in time of war and perceived national security risks, such as Justice Robert Jackson’s 1940’s era comment that “[i]t would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret.”¹⁴⁷ Such reliance on precedent is awkward for Thomas because he repeatedly emphasizes that constitutional interpretation should rely on the text and the framers’ intent;¹⁴⁸ this approach frequently leads Thomas to reject precedents and, in effect, advocate radical changes or wholesale reversals of established doctrines.¹⁴⁹ Moreover, the author of a Thomas biography project, with which the justice cooperated, quotes Justice Scalia, who frequently joins Thomas’s opinions, as saying that Thomas “doesn’t believe in *stare decisis*, period. If a constitutional line of authority is wrong, [Thomas] would say, let’s get it right.”¹⁵⁰ Meanwhile, Scalia says of himself, “I wouldn’t do that.”¹⁵¹ Thus, there is a question about whether Thomas’s efforts to use case precedent to support the limited textual reference available in the Constitution is actually consistent with his judicial philosophy and his usual method of interpretation.

¹⁴⁵ U.S. CONST. art. II, § 2.

¹⁴⁶ See *Hamdi*, 124 S. Ct. at 2676-77 (Thomas, J., dissenting) (quoting *Prize Cases*, 67 U.S. 635 (1862); *Dames & Moore v. Regan*, 453 U.S. 654, 678 (1981) and citing *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936)).

¹⁴⁷ *Chi. & S. Air Lines Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948).

¹⁴⁸ See *supra* text accompanying notes 8-10.

¹⁴⁹ For example, Thomas endorses tossing aside seven decades of Commerce Clause jurisprudence in order to return to the late nineteenth century’s limitations on congressional power. CHRISTOPHER E. SMITH & JOYCE A. BAUGH, *THE REAL CLARENCE THOMAS: CONFIRMATION VERACITY MEETS PERFORMANCE REALITY* 155-56 (2000). Justice Thomas also asserts the novel idea that there would be no Establishment Clause violation if a state established an official religion. See *Elk Grove Unified Sch. Dist. v. Newdow*, 124 S. Ct. 2301, 2327-33 (2004) (Thomas, J., concurring in judgment). This assertion flies in the face of the Court’s precedents going back for more than four decades. See HENSLEY ET AL., *supra* note 68, at 130-91. Justice Thomas appears eager to reverse instantly a number of established precedents concerning such issues as affirmative action, *Grutter v. Bollinger*, 539 U.S. 306, 349-78 (2003) (Thomas, J., concurring in part and dissenting in part), prison conditions, *Helling v. McKinney*, 509 U.S. 25, 37-42 (1993) (Thomas, J., dissenting), and abortion, *Stenberg v. Carhart*, 530 U.S. 914, 980-1020 (2000) (Thomas, J., dissenting).

¹⁵⁰ Cliff Sloan, *Radical Justice*, NEWSWEEK (Dec. 10, 2004), available at <http://www.msnbc.msn.com/id/6672836/site/newsweek/>.

¹⁵¹ *Id.*

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For evidence of original intent, Thomas looked to the *Federalist Papers*. To support his endorsement of plenary presidential power, he quoted Alexander Hamilton in Federalist No. 23 as saying:

[the power to protect the Nation] ought to exist without limitation: Because it is impossible to foresee and define the extent and variety of national exigencies, or the correspondent extent & variety of the means which may be necessary to satisfy them. The circumstances that endanger the safety of nations are infinite; and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed.¹⁵²

Although this quotation appears to strongly support Thomas's argument for unlimited executive authority, its presentation is deceptive because Thomas omitted the first sentence of the paragraph that he is quoting. A complete quotation of the paragraph would include the following introductory sentence:

The authorities essential to the care of the common defence are these—to raise armies—to build and equip fleets—to prescribe rules for the government of both—to direct their operations—to provide for their support. These powers ought to exist without limitation¹⁵³

In light of Hamilton's actual words, the questions arise: In which phrase does Thomas see support for presidential authority to impose indefinite, incommunicado detention on American citizens? Is it a component of "prescrib[ing] rules" for "rais[ing] armies" and "equip[ping] fleets"? Is it implied by the power to "direct th[e] operations" of armies and fleets? Because Hamilton's words seem specifically applied to creating and directing military forces, Thomas's omission of the introductory sentence appears calculated to imply that Hamilton's words endorsed plenary powers that could include unreviewable detentions of U.S. citizens. Thomas's actual conclusions about Hamilton's support for detention powers seem much weaker when the entire quotation is read in context.

Another problem arises because Thomas's presentation of and reliance on Hamilton's words in the *Federalist Papers*, a series of

¹⁵² Hamdi v. Rumsfeld, 124 S.Ct. 2633, 2675 (2004) (quoting THE FEDERALIST NO. 23, at 112 (Alexander Hamilton) (Garry Wills ed., 1982) (emphasis in original)).

¹⁵³ THE FEDERALIST NO. 23, at 112 (Alexander Hamilton) (Garry Wills ed., 1982).

newspaper columns advocating ratification of the Constitution,¹⁵⁴ seem to clash with the actual text of the Constitution. Article I of the Constitution states that “[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”¹⁵⁵ If there is an apparent clash between a newspaper editorial being used to discern original intent and the explicit words of the Constitution, it would seem that Thomas would give greater weight to the text of the founding document. In his opinion, Thomas gave greater weight to the primacy of national security than to the words and intentions of the Habeas Suspension Clause by arguing that there may be circumstances other than rebellion and invasion where national security requires detentions without remedy.¹⁵⁶

Thomas did not address the fact that Hamilton, the source of the framers’ intentions on whom he purports to rely, emphasizes the importance of access to habeas corpus as an essential protection for liberty in *Federalist No. 84*.¹⁵⁷ According to Hamilton:

[T]he practice of arbitrary imprisonments have been in all ages the favourite and most formidable instruments of tyranny. The observations of the judicious Blackstone in reference to the latter, are well worthy of recital. “To bereave a man of life (says he) or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole nation; but confinement of the person by secretly hurrying him to gaol, where his sufferings are unknown and forgotten, is a less public, a less striking, and therefore a *more dangerous engine* of arbitrary government.” And as a remedy for this fatal evil, he is every where peculiarly emphatical in his encomiums on the *habeas corpus* act, which in one place he calls, “the BULWARK of the British constitution.”¹⁵⁸

In looking at both complete Hamilton quotations, the one partially presented by Thomas and the later one concerning habeas corpus, it might be easy to conclude that Hamilton’s words provide stronger

¹⁵⁴ *Id.* at x.

¹⁵⁵ U.S. CONST. art. I, § 9, cl.2.

¹⁵⁶ *See Hamdi*, 124 S. Ct. at 2683. (Thomas, J., dissenting).

¹⁵⁷ THE FEDERALIST NO. 84, at 435-36 (Alexander Hamilton) (Garry Wills ed., 1982).

¹⁵⁸ *Id.* (emphasis in original).

support for the other justices' conclusion that Hamdi is entitled to access to the courts than for Thomas's argument that Hamilton endorses unfettered presidential authority to detain U.S. citizens.

A further difficulty for Thomas's reasoning is the fact that the *Federalist Papers* address the original Constitution and not the subsequently added provisions in the Bill of Rights that grant rights to due process and representation by counsel. Indeed, Hamilton, Thomas's source of original intent, expressed opposition to the creation of a bill of rights and therefore would not be an appropriate source for the framers' later intentions concerning the Constitution's liberty-protecting amendments.¹⁵⁹ Thus, Thomas's examination of original intent is incomplete because it omits consideration of many specific provisions of the Constitution that were added to the original document in order to articulate protections for various aspects of liberty.

V. CONCLUSION

In *Hamdi*, Clarence Thomas distinguished himself as the lone justice who would grant the government virtually unfettered authority to label American citizens as "enemy combatants" and then hold them in indefinite incommunicado detention without any access to the courts and without any legal protections under the Constitution. In many respects, Thomas's opinion in *Hamdi* was consistent with themes and conclusions in his other opinions in which he seeks to limit judicial power, disregards social reality and the human consequences of judicial decisions, and minimizes legal protections for individuals held in government custody. In other ways, however, his opinion in *Hamdi* seems inconsistent with his purported adherence to a judicial philosophy that emphasizes fealty to the Constitution's text and the original intentions of the framers. Despite frequently demonstrating disdain for obedience to Supreme Court precedents, Thomas's *Hamdi* opinion relies heavily on precedents to make his case for plenary presidential power. In purporting to rely on the framers' intentions, Thomas makes an incomplete and misleading presentation of Alexander Hamilton's writings in order to overstate support for unfettered presidential authority while neglecting Hamilton's words about the importance of habeas corpus to prevent arbitrary detentions. Fundamentally, Thomas gives scant attention to the framers' intent to emphasize the protection of individuals' liberty in order to advance his preference for granting broad power to the government, even when it may result in the erroneous

¹⁵⁹ See *id.* at 437.

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detention of innocent Americans.¹⁶⁰ Thus, Thomas's *Hamdi* opinion provides support for Professor Mark Graber's analysis of the justice, which concluded that Thomas "discards originalism completely when that philosophy is hostile to certain conservative interests Justice Thomas the originalist in theory fails to reduce judicial discretion by refusing to be a consistent originalist in practice. History guides only some of his judicial opinions."¹⁶¹

Beyond the ways in which the *Hamdi* opinion illuminates general issues about the consistency of Thomas's judicial decision-making, specific concerns arise when the *Hamdi* opinion is examined in light of the predicted impending retirement of Chief Justice William Rehnquist.¹⁶² In November 2004, President George W. Bush nominated White House counsel Alberto Gonzales to replace retiring U.S. Attorney General John Ashcroft.¹⁶³ Gonzales was involved in crafting or approving legal memoranda that justified the use of torture by American officials as a means to gain information from suspected terrorists.¹⁶⁴ Similarly, Thomas's *Hamdi* opinion contains no recognition or concern about the risks and realities of Americans' use of and complicity in torture as part of the "war on terrorism."¹⁶⁵ Thus, the rumors of Thomas's potential elevation to Chief Justice¹⁶⁶ raise the disturbing possibility that the two most visible officials in the U.S. government with

¹⁶⁰ See *supra* text accompanying notes 48-54.

¹⁶¹ Graber, *supra* note 6, at 71, 88.

¹⁶² See *supra* text accompanying notes 1-2.

¹⁶³ Dan Eggen, *Gonzales Named to Succeed Ashcroft as Attorney General*, WASH. POST, Nov. 11, 2004, at A01.

¹⁶⁴ *Id.*; see also text accompanying notes 89-93.

¹⁶⁵ In addition to questions about torturous techniques used by American interrogators, the U.S. government also hands suspects to other countries that are known to use torture in order to gain their assistance in extracting information. See Rafael Epstein, *Detention and Interrogation Methods in the War on Terror*, LOCAL RADIO-AUSTRALIA, Mar. 3, 2003, available at www.abc.net.au/am/stories/s796322.htm.

After speaking to ten currently serving U.S. national security officials the *Washington Post* revealed the CIA's interrogation or "stress and duress" techniques. Blindfolded and manacled captives are kept standing or kneeling for hours. They're tied up in awkward, painful positions and they're deprived of sleep, held in tiny rooms for days at a time. Those rooms are flooded with light or painfully loud noise. Some are beaten when they're initially arrested, thrown into the walls while blindfolded After questioning, if they don't cooperate, they're handed over, "rendered," in official language, to foreign intelligence services in countries like Morocco, Jordan, and Egypt, countries where torture, including electrocution, has been documented.

Id.

¹⁶⁶ See *supra* text accompanying notes 4-6.

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responsibilities as the guardians and enforcers of law would be oblivious to abuses of the sort that are specifically condemned under international law.¹⁶⁷ Thus, Thomas's judicial opinions may have consequences not only for individual Americans who are detained by the U.S. government but also for the image of the American judiciary and governing system in the eyes of the world.

¹⁶⁷ See United Nations, *Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment* (Feb. 15, 1985), available at www.hrweb.org/legal/cat.html.