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# WILEY RUTLEDGE, EXECUTIVE DETENTION, AND JUDICIAL CONSCIENCE AT WAR

CRAIG GREEN\*

Judicial biography has never been more popular than it is today, nor more politically relevant. Felix Frankfurter as a law professor announced the need for full-length stories of Supreme Court Justices “to rescue the Court from the limbo of impersonality.”<sup>1</sup> “Until we have penetrating studies of the influence of these men,” he wrote, “we shall not have an adequate history of the Supreme Court, and, therefore, of the United States.”<sup>2</sup> Frankfurter’s call has been answered for many jurists,<sup>3</sup> yet even fifty years after Wiley Rutledge died, there was no adequate account of Frankfurter’s colleague, leaving modern readers with little to no impression of Justice Rutledge or his work.<sup>4</sup>

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1. FELIX FRANKFURTER, *THE COMMERCE CLAUSE: UNDER MARSHALL, TANEY AND WHITE* 6 (1937) [hereinafter FRANKFURTER, *THE COMMERCE CLAUSE*]. Frankfurter claimed that “[a] full-length analysis of only two or three of the seventy-eight Supreme Court Justices has been attempted.” *Id.* That appraisal was exaggerated when written. *See, e.g.*, ALBERT J. BEVERIDGE, *THE LIFE OF JOHN MARSHALL* (1916); WILLIAM GARRETT BROWN, *THE LIFE OF OLIVER ELLSWORTH* (1905); FRANK MONAGHAN, *JOHN JAY: DEFENDER OF LIBERTY* (1935); JAMES PIKE, *CHIEF JUSTICE CHASE* (1873); BERNARD STEINER, *LIFE OF ROGER BROOK TANEY: CHIEF JUSTICE OF THE UNITED STATES SUPREME COURT* (1922); CARL BRENT SWISHER, *STEPHEN J. FIELD: CRAFTSMAN OF THE LAW* (1930). Frankfurter himself also contributed to the field. *See* FELIX FRANKFURTER, *MR. JUSTICE HOLMES* (1937); *cf.* MR. JUSTICE BRANDEIS (Felix Frankfurter ed., 1932).

2. FRANKFURTER, *THE COMMERCE CLAUSE*, *supra* note 1, at 6.

3. If any “impersonality” continues to cloak modern Courts, it does not owe to a dearth of biographies. For recent examples, see DENNIS J. HUTCHINSON, *THE MAN WHO ONCE WAS WHIZZER WHITE: A PORTRAIT OF JUSTICE BYRON R. WHITE* (1998); JOHN C. JEFFRIES, *JUSTICE LEWIS F. POWELL, JR.* (1994); BRUCE ALLEN MURPHY, *WILD BILL: THE LEGEND AND LIFE OF WILLIAM O. DOUGLAS* (2003); ANDREW PEYTON THOMAS, *CLARENCE THOMAS: A BIOGRAPHY* (2001); JUAN WILLIAMS, *THURGOOD MARSHALL: AMERICAN REVOLUTIONARY* (1998); TINSLEY E. YARBROUGH, *MR. JUSTICE BLACK AND HIS CRITICS* (1988); TINSLEY E. YARBROUGH, *DAVID HACKETT SOUTER: TRADITIONAL REPUBLICAN ON THE REHNQUIST COURT* (2005). *See also* LIVA BAKER, *FELIX FRANKFURTER* (1969); J. WOODFORD HOWARD, JR., *MR. JUSTICE MURPHY: A POLITICAL BIOGRAPHY* (1968); ANDREW L. KAUFMAN, *CARDOZO* (1998); ALPHEUS THOMAS MASON, *HARLAN FISKE STONE: PILLAR OF THE LAW* (1956); ALPHEUS THOMAS MASON, *BRANDEIS: A FREE MAN’S LIFE* (1946); ROGER K. NEWMAN, *HUGO BLACK: A BIOGRAPHY* (1994); TINSLEY E. YARBROUGH, *JOHN MARSHALL HARLAN: GREAT DISSENTER OF THE WARREN COURT* (1992).

4. The only book-length treatment of Rutledge before John Ferren’s was FOWLER V. HARPER, *JUSTICE RUTLEDGE AND THE BRIGHT CONSTELLATION* (1965), which does not aspire to true biography and is of varied quality. Until recently, the best sources on Rutledge were two essays, John Paul Stevens, *Mr. Justice Rutledge*, in MR. JUSTICE 319 (Allison Dunham & Phillip B. Kurland eds., 1956),

John Ferren's *Salt of the Earth, Conscience of the Court* is the first full biography of Rutledge, and the book not only lifts Rutledge from obscurity's shadow; it also dispels any "limbo" surrounding the Court he served.<sup>5</sup> Part I of this Article offers a brief biographical sketch showing that Rutledge deserves that much. His pre-judicial life as dean, legal reformer, and advocate of progressive politics provides context for his work on the bench. Also, Rutledge's tale illuminates broader issues, including FDR's transformative judicial appointments, early twentieth-century legal education, and the New Deal's influence on both. Students of history, and especially students of the Court, will appreciate Ferren's introduction to this unknown, important Justice.

Part II shifts from the historical to the modern, analyzing the impact of Rutledge's judicial work on today's cases concerning executive detention. In recent Supreme Court litigation, President Bush has claimed the power to detain individuals without judicial oversight, without criminal charges, and with at most hand-tailored military commissions to punish violations of the law of nations.<sup>6</sup> Such issues might seem novel today, but they would not to Rutledge. The most important cases of his era concerned the executive's authority to detain. And Rutledge's career, more than that of any other judge, exemplifies the challenges and mistakes affecting the rule of law in wartime.

Three pairs of "old" and "new" cases illustrate Rutledge's modern relevance. *First*, a 1948 Rutledge opinion about habeas jurisdiction demonstrates the force of a certain style of legal reasoning.<sup>7</sup> The calm,

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and Louis H. Pollak, *Wiley Blount Rutledge: Profile of a Judge*, in SIX JUSTICES ON CIVIL RIGHTS 177 (Ronald D. Rotunda ed., 1983) [hereinafter Pollak, *Profile of a Judge*]. Also, the Indiana Law Journal and Iowa Law Review jointly published several memorial essays, Symposium, *Mr. Justice Rutledge*, 25 IND. L.J. 421 (1950); and Symposium, *Mr. Justice Rutledge*, 35 IOWA L. REV. 541 (1950); see also David M. Levitan, *Mr. Justice Rutledge*, 34 VA. L. REV. 393, 526 (1948); Louis H. Pollak, *Wiley B. Rutledge, 1943-1949*, in THE SUPREME COURT JUSTICES, ILLUSTRATED BIOGRAPHIES, 1789-1993, 41 (Clare Cushman ed., 1993); Landon G. Rockwell, *Justice Rutledge on Civil Liberties*, 59 YALE L.J. 27 (1949).

5. JOHN M. FERREN, *SALT OF THE EARTH, CONSCIENCE OF THE COURT: THE STORY OF JUSTICE WILEY RUTLEDGE* (2004). In describing how his book came about, Ferren explains that he long desired to write a full biography of "someone in our national political life." *Id.* at 543. Ferren's search for a subject led him to the Library of Congress's Assistant Chief of Manuscripts, who "immediately" named Wiley Rutledge as someone who had escaped due attention, and "whose papers, he assured me, contained a book worth writing." *Id.* Ferren also identified Professor Andrew L. Kaufman of Harvard Law School as supporting the choice of Rutledge. *Id.*

6. See generally *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006) (addressing military commissions); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (addressing indefinite detention without charges); *Rasul v. Bush*, 542 U.S. 466 (2004) (addressing federal jurisdiction over executive detainees in Guantanamo Bay).

7. *Ahrens v. Clark*, 335 U.S. 188, 194 (1948) (Rutledge, J., dissenting).

technical, value-laden analysis of Rutledge's opinion did not persuade his colleagues at the time, but the Court decades later adopted Rutledge's approach in the wartime detention context that concerned him most.<sup>8</sup> *Second*, Rutledge was the decisive fifth conference vote to support the government in *Korematsu v. United States*.<sup>9</sup> *Korematsu*, and its precursor *Hirabayashi v. United States*,<sup>10</sup> show the immense dangers of "small" judicial errors regarding executive power. My thesis is that analysis of Rutledge's role not only transforms those cases' meaning; it also offers a crucial benchmark for modern efforts in *Hamdi v. Rumsfeld* to avoid "another *Korematsu*."<sup>11</sup> *Third*, Rutledge's most famous opinion concerned limits on presidential authority to try defendants in military commissions, and the Court revisited that same issue in *Hamdan v. Rumsfeld*.<sup>12</sup> Rutledge's analysis yields singular perspective in discerning what *Hamdan* did, and what we might expect in future executive detention cases. Given the ongoing coincidence of legal issues between Rutledge's time and ours, lessons from his success and failure may be more valuable than ever.

Part III connects Rutledge's life and Ferren's book to the deepest issues underlying any judicial biography—namely, what judges should do and who they should be. Consider why judicial biographies are read in the first place. Compared to politicians, movie stars, generals, and other "biographees," judges fill their lives with plodding, sedentary events that do not produce a gripping read. The unacknowledged appeal of judicial biographies, however, is the light that their subjects' stories cast on general issues of judging and judicial role. In our legal culture, biography is a repository for stories about "great" and "villainous" judges. These stories shape the context of modern judicial performance and, in turn, how such performance is itself judged.

Using the genre of judicial biography to build and store legal icons has undeniable benefits, but it also carries risks. To maximize public currency, biographies typically describe only judges who served the Court for decades and who radically reformed some field of (preferably constitutional) law. Against that tradition, Ferren's book introduces a judge who meets neither criterion. Insofar as Rutledge is a distinctive

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8. *Rasul*, 542 U.S. at 466.

9. 323 U.S. 214, 223 (1944).

10. 320 U.S. 81 (1943).

11. *Hamdi*, 542 U.S. at 507.

12. *Hamdan v. Rumsfeld*, 415 F.3d 33, 35 (D.C. Cir. 2005), *cert. granted*, 126 S. Ct. 1606 (2006) (No. 05-184).

“type” of judge and a role model for judicial behavior, Ferren’s book invites us to reevaluate how judicial heroes are chosen for study and celebration. Such questions are especially important today, as Justices join the Court and define new approaches to the nation’s great legal work.

In the final analysis, I suggest that judicial biography—done well, at the right time—can focus much-needed attention on questions of judicial role. And although the character and talents of judges are always important, they are distinctively so under the pressures of our War on Terror. It may be plain good luck that Ferren has written such a fine book about such a fine judge at this moment, when judicial excellence is at an undeniable premium. As a legal community, let us make the most of it.

### I. AN ALL-AMERICAN JURIST

Before considering Rutledge’s work as a judge, some readers may appreciate certain pre-judicial details that affected his life in the law.<sup>13</sup> In 1894, the boy who became Justice Rutledge was born to a Southern Baptist preacher and a mother who died of tuberculosis nine years later. After living with his father and other relatives in Kentucky, North Carolina, and Tennessee, Rutledge studied at the small Maryville College, where he joined the Law Club and undertook public debates and oratory. Rutledge was an outgoing student who earned social respect and academic success, especially in the humanities. Before his senior year, however, Rutledge transferred to the University of Wisconsin to focus on chemistry, which he hoped would produce a better career than, for example, law.

Fortunately, Rutledge was no great chemist. After graduation, he studied shorthand and moved to Bloomington, Indiana, to take law classes in the morning and teach high school in the afternoon. After three semesters, the double-shifts proved unmanageable. Because Rutledge could not afford to be a full-time student, he moved again and taught high school in eastern Indiana.

In 1916, a twenty-two-year-old Rutledge was diagnosed with tuberculosis and sought treatment in North Carolina. The next eight

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13. Discussion in this Part draws heavily upon Ferren, *supra* note 5, at 13–31 (describing Rutledge as a youth and collegian); *id.* at 31–38 (treatment and teaching in New Mexico); *id.* at 38–51 (law school and private practice); *id.* at 51–52 (teaching at the University of Colorado); *id.* at 55–80 (teaching at Washington University); *id.* at 81–83, 100–30 (teaching at the University of Iowa); *id.* at 137–50 (consideration for Justice Cardozo’s vacancy); *id.* at 151–70 (consideration for Justice Brandeis’s vacancy); *id.* at 173–207 (work on the Court of Appeals for the District of Columbia); *id.* at 208–21 (nomination to the Supreme Court); *id.* at 222–415 (work on the Supreme Court); and *id.* at 416–22 (death and memorials).

months could have been isolating; instead, Rutledge's impulse toward interpersonal contact introduced him to people from all walks of life, with more serious ailments than his own. After his inpatient treatment ended, Rutledge's weak health barred him from military service and almost kept him out of the public schools. Nonetheless, Rutledge married his lifelong love (a former Maryville teacher) and moved to New Mexico to teach high school in a climate congenial to his recovery. Rutledge's wife also taught, and the young couple saved to complete Rutledge's education, which he compared to "a house, built to the roof, the rafters laid . . . but there's *no top*."<sup>14</sup>

In 1920, Rutledge began law school at the University of Colorado in Boulder while also teaching high school. This time, he flourished in both capacities. Professor Herbert Hadley, Missouri's former Governor and Attorney General, was so impressed that he let Rutledge as a third-year student teach much of a first-year criminal law class. After graduation, Rutledge joined a local firm and became a father. Two years later, Professor Hadley left Colorado to be chancellor at Washington University in St. Louis; another professor followed, and Rutledge filled the latter's vacancy. Rutledge soon earned reports of "very considerable success" as a teacher, and although Rutledge's expertise was in corporations and business law, he spent several years "teaching around the curriculum," as was common practice in those days.<sup>15</sup>

In 1926, Chancellor Hadley invited Rutledge to teach law at Washington University. Rutledge accepted not only for "usual considerations of advancement," but also so his family (now with a second child) could be closer to relatives.<sup>16</sup> In St. Louis, Rutledge joined an institution in flux. The law school's faculty was of mixed quality, its move to "case method" instruction was overdue, its students were undercredentialed, its finances were limited, and the Association of American Law Schools ("AALS") had imposed a two-year probation for poor performance. Rutledge nonetheless excelled as one of the school's best, hardest, and fairest teachers. For example, Rutledge would slam his book shut and leave class if students were unprepared, but many viewed him as the most outstanding professor they ever met and a man of great character. Four years after arriving in St. Louis, Rutledge—at age thirty-

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14. *Id.* at 34.

15. *Id.* at 51–52.

16. *Id.* at 52.

seven—became dean, and eighty percent of the graduating class petitioned the board of directors to support that appointment.<sup>17</sup>

Rutledge's deanship from 1930 to 1935 was impressive. He restructured law review admissions to improve student writing and access. He organized lectureships integrating law and social science.<sup>18</sup> He raised admission standards, consolidated the curriculum, expanded ethics instruction, began a legal aid clinic, started a master of laws degree, bolstered the school's thesis requirement, and strengthened synergies between the law school, lawyers, and social workers. Progress was by no means universal; for example, Rutledge did not publicly challenge his university's racial segregation, nor did he commit to increasing women's enrollment.<sup>19</sup> Still, Dean Rutledge led the law school many steps forward, and in doing so he attracted attention in academic circles and beyond.

In addition to his parental responsibilities (now with three children), Rutledge was active in St. Louis public life and advocated legal reforms such as criminal code revision, the use of women jurors, access to criminal defense, and apolitical bar standards. Rutledge worked with St. Louis's Social Justice Commission, which sought to reduce racial and religious tensions, and was a director of the St. Louis Civil Liberties Committee. On the national stage, Rutledge was a member of the AALS, the American Law Institute, and the National Conference of Commissioners on Uniform State Laws.<sup>20</sup>

The issue that most drew Rutledge's attention was child labor, which had increased rates of illiteracy, accidents, and tuberculosis as the Great Depression worsened. The Supreme Court twice invalidated statutes restricting child labor,<sup>21</sup> and many lawyers (including the American Bar Association's President) opposed populist efforts to annul such rulings by

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17. *Id.* at 66.

18. In Rutledge's day, interdisciplinary work was a politically progressive "alternative" to the formalism that made Langdell famous. *See generally* FERREN, *supra* note 5, at 87–89 (comparing Rutledge's legal philosophy to Roscoe Pound's).

19. From 1896 through the late 1940s, Washington University, including the law school, was completely segregated by race. Indeed, in 1947, the law school rejected a donor's grant to the scholarship fund because the donor demanded a color-blind admissions policy. *Id.* at 72.

20. One significant social activity for Rutledge was the "Public Question Club," a group of professionals that discussed issues from economics to football, philosophy, science, politics, and drama. Such talks led Rutledge to refine not only his public speaking, but his private thinking as well. In particular, Ferren suggests that these meetings fed Rutledge's skepticism of religious dogma and racial barriers. *Id.* at 72–73 (identifying Rutledge's wife as another important influence on Rutledge's racial views).

21. *United States v. Darby*, 312 U.S. 100 (1941); *Hammer v. Dagenhart*, 247 U.S. 251 (1918).

constitutional amendment.<sup>22</sup> Rutledge's attacks on child labor were broad and vehement:

Social progress . . . is faced constantly with the three hurdles of so-called "natural rights," "state rights," and "republican institutions." . . . [These] are the sheep's wool in which the institution of human slavery was legally clothed; the guise under which . . . trusts sought . . . to establish monopoly; . . . the basis upon which workmen's compensation acts, minimum wage laws, laws regulating hours of labor, and all other forms of legislation in the public interest have been resisted. Nowhere have these hoary philosophies been more effectively employed than in tying the hands of the federal government in the protection of children.<sup>23</sup>

Missouri never did ratify the Child Labor Amendment, but Rutledge's speeches showcased his commitment to broad federal power and his opposition to contemporary Supreme Court jurisprudence.

In 1935, Rutledge left St. Louis to become dean at the University of Iowa. Though the move owed mainly to disputes among other Washington University administrators, the result raised Rutledge's profile and gave him an academic home with more resources and talent, albeit less open to internal change.<sup>24</sup> Rutledge continued to succeed as a teacher, and he pursued extracurricular activities as before, including many speeches to social organizations, and continued service to the National Conference on Uniform State Laws. Rutledge also drafted an AALS report criticizing inadequate legal services for unemployed persons and the bar's "almost appalling apathy and indifference" to providing effective legal aid; the report concluded that "[n]o legal system can survive . . . [when] so large a proportion of the general population" is ignored.<sup>25</sup> At the state level, Rutledge proposed changing bar standards and "unauthorized practice" rules to increase indigent persons' access to laymen and nonlegal experts.

Perhaps Rutledge's most controversial activity was his support for FDR's "court-packing plan," which would have added fifty judges to the

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22. FERREN, *supra* note 5, at 74–76.

23. *Id.* at 75.

24. For example, when Rutledge sought to increase interdisciplinary and clinical education, the faculty assented to adding only one "judicial process" class, which was taught by Rutledge himself. *Id.* at 104–05.

25. *Id.* at 120. Some law school deans did not welcome the unapologetic tenor of Rutledge's draft. *See id.* at 121 (quoting the University of Illinois's dean, who called the report "too contentious," and Yale's dean, who predicted it would "probably offend not merely the lawyers, but also the law teachers. . . . [Y]ou would be well advised to change the tone of the report quite considerably."). *But see id.* (quoting other deans' support for the draft as "splendid" in its "provocative character").



federal bench, including six Supreme Court Justices, wherever existing judges were seventy years old with ten years of service.<sup>26</sup> Rutledge shared other intellectuals' concerns about overwhelming the Judiciary, but he viewed the Court as unbearably resistant to legislation addressing underconsumption, employment displacement, land planning, conservation, social security, and other urgent issues. Illustrating his flexible view of constitutional structure, Rutledge characterized the Court's cases as threatening "basic principles of national democracy," possibly risking "another Dred Scott situation."<sup>27</sup> Rutledge concluded that if States like Missouri would not correct the Court's errors through constitutional provisions like the Child Labor Amendment,<sup>28</sup> a change in judicial personnel was the only feasible option.<sup>29</sup>

Although Rutledge agreed to support court-packing plan by testifying before Congress,<sup>30</sup> the Court displaced any need for such testimony—and for the proposal itself—by suddenly changing direction. Even as legislative hearings began in March 1937, the Court effectively reversed a one-year-old precedent to uphold a state minimum wage law; in April, the Court upheld the National Labor Relations Act; and in May, it upheld the Social Security Act.<sup>31</sup> Given such profound jurisprudential shifts, Congress was ultimately content to offer septuagenarian Justices with ten years' service *the option* of full-salary retirement.<sup>32</sup>

Roosevelt thus failed to reorganize the Court's institutional structure, but he did influence that organ by appointing eight Justices.<sup>33</sup> Rutledge was considered several times among FDR's nominees, first as a successor

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26. Judiciary Reorganization Bill of 1937, S. 1392, 62d Cong. (1937). *See generally, e.g.,* WILLIAM E. LEUCHTENBURG, *THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT* 133–34 (1995) (describing the court-packing plan in more detail).

27. FERREN, *supra* note 5, at 124.

28. *See id.* at 76–77 (describing the amendment movement's failure).

29. Even in such seemingly dire circumstances, Rutledge did not support other proposals to rein in the Supreme Court, such as requiring a supermajority of Justices to invalidate legislation, or granting Congress general constitutional authority to reenact statutes that the Court struck down. *Id.* at 127.

30. This willingness to support the court-packing proposal set Rutledge in opposition to the dean of the University of Michigan Law School, a fact which was reported in the *Des Moines Register*, again emphasizing Rutledge's pro-Roosevelt views. *Id.* at 127–28.

31. *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (distinguishing *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587 (1936), and upholding a state minimum wage law); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (upholding the National Labor Relations Act); *Steward Mach. Co. v. Davis*, 301 U.S. 548 (1937) (upholding the Social Security Act); *Helvering v. Davis*, 301 U.S. 619 (1937) (upholding the Social Security Act).

32. Supreme Court Retirement Act, 28 U.S.C. § 375 (1937).

33. One of those, Justice James F. Byrnes, served for only sixteen months before resigning to direct Roosevelt's Office of Economic Stabilization. FERREN, *supra* note 5, at 206–08.

to Justice Cardozo in 1938.<sup>34</sup> Irving Brant, a Democratic writer from St. Louis,<sup>35</sup> brought Rutledge to Roosevelt's attention partly due to Rutledge's views on child labor and legal reform. Brant saw in Rutledge a young, liberal thinker who could combine interpersonal skills, legal talents, and perseverance to "win over" the Court's moderate and conservative members.

The frontrunner for Cardozo's seat, however, was the brilliant Professor Felix Frankfurter, whom even Brant preferred. Frankfurter's candidacy was blocked only by pressures to nominate a "westerner," and to avoid (or appease) anti-semitic sentiment about appointing a second Jewish Justice.<sup>36</sup> Brant therefore endorsed Rutledge as a second-best option, or perhaps for future vacancies. Describing Iowa's dean as a man of "extreme modesty and simplicity," Brant added that "[h]e has met what I regard as the one and only absolute test of liberalism—he has been a liberal in conservative communities and against all counterpressures, when all logical prospect of gain to himself, and all social factors, ran in the other direction."<sup>37</sup> Rutledge unknowingly confirmed praise of his humility by writing Brant that Frankfurter would be "an ideal selection," and that geography should be irrelevant because there was not "anyone west of the Mississippi that I know who would be even within close distance to Frankfurter on the basis of qualifications, with the possible exception of [Fifth Circuit Judge] Hutcheson of Texas."<sup>38</sup>

Brant and other Rutledge supporters, including faculty and luminaries from the St. Louis and Iowa bar, buoyed Rutledge as an alternative to Frankfurter throughout a long nomination process. When Frankfurter was finally chosen, Rutledge advocates looked forward to other vacancies, and they did not wait long, as Justice Brandeis retired just weeks after Frankfurter was confirmed. Although Rutledge was seriously considered for Brandeis's vacancy, he was again passed over. This time, Roosevelt chose William O. Douglas for the Supreme Court and placed Rutledge on the United States Court of Appeals for the District of Columbia.

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34. Before the Cardozo vacancy, Roosevelt appointed Hugo Black to succeed Willis Van Devanter, and Stanley Reed to succeed George Sutherland. *Id.* at 131–37.

35. Notable among Brant's writings is a six-volume biography of James Madison. 1 IRVING BRANT, JAMES MADISON (1941). The later volumes were published in 1948, 1950, 1953, 1956, and 1961.

36. President Hoover had overcome the latter objection when he appointed Cardozo to a Court where Louis Brandeis also served. FERREN, *supra* note 5, at 139.

37. *Id.* at 143.

38. *Id.*

In 1939, Rutledge began a decade of judicial service with “perhaps the most strenuous year” of his life.<sup>39</sup> The many causes of Rutledge’s stress included his penchant for long writing, his academic curiosity, his drive to maintain personal ties and correspondence, his close attention to cases’ factual records, his insistence on teaching summer school, and the inherent demands of the court he served. Serving double- and triple-duty was nothing new to Rutledge, and he seldom let his judicial work curtail outside commitments. For example, he continued to speak nationwide about legal services for indigent populations. Rutledge also helped a young Herbert Wechsler restructure the federal personnel system, and he served on the National Railway Labor Panel, which provided advice when mediation could not resolve disputes affecting war efforts. Continuing his efforts toward populist reform, Rutledge floated a proposal to amend the District of Columbia’s government and grant residents congressional representation.

When Rutledge joined the United States Court of Appeals for the District of Columbia, that court had a unique docket, including appeals from federal district court, review petitions from administrative agencies, and appeals from municipal courts concerning contracts, torts, criminal law, family law, and the like.<sup>40</sup> The court had six members, five of whom were Roosevelt appointees; four of the six were former academics, and two were staunch conservatives. Although Rutledge never said so, his experience on this small appellate court, with its diverse docket and divided membership, was a fine training ground for what would come next.<sup>41</sup>

While Rutledge served on the court of appeals, Roosevelt made four Supreme Court appointments, but Rutledge was not a serious candidate until James Byrnes’s resignation in 1943. Unlike previous occasions, Rutledge discouraged the President from appointing him to the Court, partly due to the job’s staggering workload.<sup>42</sup> Three factors pushed the

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39. *Id.* at 181.

40. See JEFFERY BRANDON MORRIS, CALMLY TO POISE THE SCALES OF JUSTICE: A HISTORY OF THE COURTS OF THE DISTRICT OF COLUMBIA CIRCUIT 85–109 (2001).

41. See Pollak, *Profile of a Judge*, *supra* note 4, at 183 (describing this period as a “substantial apprenticeship for . . . the Supreme Court”).

42. See, e.g., FERREN, *supra* note 5, at 209 (writing to a friend that a Supreme Court post would be undesirable because, “[w]hile I enjoy judging, I have had enough of it to know one has to make great sacrifices . . . This includes giving up time with friends and family, foregoing many of the most pleasant associations in life, and grinding away at all hours of the day and night on hard, tough, legal knots.”); *id.* at 210 (writing to another friend, “For God’s sake, don’t do anything about stirring up the matter! I am uncomfortable enough as it is.”); *id.* (writing to Attorney General Francis Biddle, “I hope you will believe me when I say that I do not have Supreme Courtitis. . . . [T]he President should

other way. First, Attorney General Francis Biddle sought advice from Chief Justice Stone, Justice Black, and Justice Douglas, and each confirmed Rutledge as the best available option, with Black and Douglas expressing particular “enthusias[m].”<sup>43</sup>

Second, Biddle asked his assistant, Herbert Wechsler, to evaluate several candidates’ judicial work. Wechsler’s memorandum noted his earlier experience with Rutledge, but more importantly, the report offered a rare appraisal of judicial product without flattery or exaggeration.<sup>44</sup> Wechsler described Rutledge as having a “soundness of judgment, a searching mind, a properly progressive approach to legal issues, some mastery of phrase and style . . . and a dominating effort to answer all the problems in terms that will satisfy the litigant and his lawyer that their points have not been ignored.”<sup>45</sup> Wechsler continued that “Rutledge’s most striking trait [is] his warm sense for real people as the ultimate concern of law and his awareness of what real people are like throughout this broad land.”<sup>46</sup> And he stressed “constant evidence of the quality—so treasured in Holmes—of pointing [out] the implications of small things, if only by defining an underlying reason for a rule or a concealed principle of its growth.”<sup>47</sup> Wechsler lastly noted that, in Rutledge’s cases, “[c]ivil liberty problems and review of administrative agencies . . . have been the major issues. His work leaves no . . . doubt that these values are safe in his hands. More than this, however, I think it shows independence of mind . . . . There is none of the easy factionalism to which so many liberals succumb.”<sup>48</sup>

The third factor supporting Rutledge’s nomination was Brant, who again coordinated a tireless campaign of endorsements from lawyers and politicians, and even made a visit to FDR himself. As before, Roosevelt was pressured to appoint a Justice from west of the Mississippi, and it is telling that, when FDR finally greeted Rutledge as his Supreme Court nominee, he said—to the boy from Kentucky, North Carolina, and

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appoint a Republican to this vacancy . . . . If [rumors about my Supreme Court nomination] should prove to be true I merely want to request that before any action is taken I be given an opportunity to talk with you.”)

43. Another candidate endorsed by sitting Justices was Learned Hand, who was thought too old for the post, especially given FDR’s insistence on young, vigorous Justices during his court-packing efforts. *Id.* at 213, 217.

44. Many characteristics identified in Wechsler’s private report are corroborated by Rutledge’s memorial eulogies. *See, e.g.*, sources cited *supra* note 4.

45. FERREN, *supra* note 5, at 215.

46. *Id.*

47. *Id.*

48. *Id.*

Tennessee, the teacher from New Mexico and Colorado, the dean from Missouri and Iowa, and the judge from the District of Columbia—“Wiley, you have a lot of geography.”<sup>49</sup>

When Rutledge reached the Supreme Court in February 1943, his colleagues suffered serious interpersonal frictions, and matters soon worsened. Although seven of nine Justices were FDR appointees, Jackson and Frankfurter were conservatives who combined with Roberts and Reed to oppose the Court’s liberal wing (Murphy, Douglas, Black, Rutledge, and occasionally Stone).<sup>50</sup> All ideological divisions, however, paled beside the conflicts over propriety and ethics during the Court’s next few years.<sup>51</sup>

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49. *Id.* at 219.

50. Although Stone was nominated to the Court by Republican Calvin Coolidge in 1925, it was FDR who promoted him to Chief Justice. Stone voted with the more liberal Justices in rejecting *Lochner*-era substantive due process and in upholding congressional commerce power. However, “[i]n some of the most contested cases of his last years on the Bench involving civil liberties problems . . . Stone was on the side of restriction. . . . Stone’s lone dissent in the first *Flag Salute* case, . . . plus Stone’s very important intellectual contribution in the *Carolene Products* case, [have] tended to overemphasize the orientation of Stone’s views in matters of personal liberty.” John P. Frank, *Harlan Fiske Stone: An Estimate*, 9 STAN. L. REV. 621, 624 (1957).

51. A few examples may serve. See FERREN, *supra* note 5, at 272–83. In January 1944, someone leaked to the press that Rutledge could not decide how to vote in a pending administrative law case. Furious with the breach of confidence, Roberts demanded a meeting, and Frankfurter suggested that Murphy or Douglas was responsible. Both denied the charge, which in turn only exacerbated their existing dislike of Frankfurter. Roberts tried but failed to make Black disclose the leaker’s name, and Roberts thereafter refused to speak to any Justice except Frankfurter and Jackson, decrying the rest as “men without honor.” *Id.* at 272–77.

Frankfurter annoyed Black, Murphy, Douglas, and others with pedantry, condescension, and intracourt scheming. Douglas’s political ambitions were chronic irritants, as was his practice of taking summer recess before others’ opinions circulated. Many at the Court were unhappy that Jackson agreed to prosecute at the Nuremberg Trials without advising even Chief Justice Stone, especially because that departure shifted heavy burdens to others on the Court. Black and Jackson had a terrible dispute over whether Black should recuse himself from a case argued by his former law partner. That fight culminated in loud argument with pounded tables. Also, Black and Stone divided bitterly over the language of a proposed retirement letter to Roberts, resulting in no letter’s being sent. *Id.* at 279–83.

Ferren summarized the Court’s interpersonal relations when Chief Justice Stone died in 1946: “Jackson and Black were feuding. Douglas and Frankfurter were ignoring each other. Frankfurter and Murphy exhibited mutual disdain and, with Black, were still smarting after the [above press leak]. Jackson and Murphy continued to feel a mutual antipathy . . . . And tempers were smoldering since the fiasco surrounding Roberts’s resignation letter.” *Id.* at 325. As the President sought Stone’s successor, the press wrote that Black and Douglas would resign if Jackson were promoted to Chief, and that Jackson would resign if Black were chosen. When Truman nominated Fred Vinson, Jackson wrote a truly disgraceful letter from Nuremberg to the chairmen of the Senate and House Judiciary Committees, reporting that his fight with Black went beyond a “mere personal vendetta,” and struck at “the reputation of the court for nonpartisan and unbiased decision.” *Id.* at 328; see Dennis J. Hutchinson, *The Jackson-Black Feud*, 1988 SUP. CT. REV. 203 (1989).

For other sources describing the Court’s conflicts during this period, see, for example, PETER IRONS, *JUSTICE AT WAR: THE STORY OF THE JAPANESE-INTERMENT CASES 229* (1983) (“Frankfurter did not hide his contempt for [Black, Douglas, and Murphy], whom he collectively derided as ‘the Axis.’ . . . Frankfurter reviled Douglas as ‘the most systematic exploiter of flattery I have ever encountered in my life.’”), and Frank, *supra* note 50, at 628 (noting that Stone “got on very happily

Such controversies are remarkable in their own right, but most important for this Article is the absence of bad behavior, and bad blood, on Rutledge's part. Whether it was his temperament, his experience as dean (presiding over institutions where factiousness can be common), or something else, Rutledge kept his interjudicial relations, like his public opinions, free of vitriol and snipe, despite working closely with men sometimes afflicted by both.<sup>52</sup>

In terms of legal opinions, a full account of Rutledge's contributions in such fields as religion, federalism, criminal procedure, and free speech is beyond this Article's scope. Nonetheless, Ferren demonstrates that, despite Rutledge's lack of seniority (and therefore limited assignments on the Court), he produced a highly distinguished record as a Justice. The "Roosevelt Court" had many distinguished judges—among the finest groups in history—yet Rutledge's overall product compares well with any of his colleagues' during that time.

The temporal caveat, "during that time," is important because Rutledge served the Court for only six years—shorter than any of his colleagues. In 1947, Rutledge learned he had high blood pressure, which was not helped by his poor eating habits, heavy smoking, lack of exercise, and exhausting extrajudicial commitments. Clerks and family urged him to slow down, but in 1949, during the Court's summer recess, a stroke caused Rutledge to collapse while driving, and he died a few weeks later at the age of fifty-five.

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The foregoing sketch aims to reinforce the value of full-length biographies like Ferren's. Any Rutledge opinion is the work of a professor, a New Dealer, a dean, a midwesterner, and someone who earned and granted near-universal personal respect. Rutledge's career caps President Roosevelt's efforts at "court-picking," and it highlights legal issues that occupied the Court between *Lochner's* death and *Brown's* birth. Thus, although Ferren's historical contribution is set in personal terms, his book is a valuable resource for all students of the Supreme Court's significance.

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with Frankfurter before the professor became a justice, but thereafter . . . found his colleague very hard to take"; Stone effectively issued "a press release condemning Black; he described Jackson's Nuremberg adventure . . . as a 'high-grade lynching party' and . . . expressed his complete disapprobation of that Justice's conduct; he thought Murphy an incompetent . . . ; he thought Rutledge a lightweight, and . . . expressed low regard for . . . Roberts, culminating [in] . . . a beauty of a conference room quarrel." (citations omitted).

52. See FERREN, *supra* note 5, at 329.

Two items need brief mention. First is Ferren's focus on Rutledge's character and warmth, which appears from the book's first page to its last. Some readers will recoil from such sentimentality, but the book musters ample evidence for its point of view. Interviews with students and colleagues from Washington University and Iowa, stories from family members, interviews with the clerks of Rutledge and other Justices, memoranda from presidential advisers, and abundant personal correspondence confirm a link between Rutledge's personality and his success. As Rutledge wrote after his nomination to the Court:

I kn[ow] enough of myself to realize . . . that some mysterious leaven works up a very small amount of real merit into a big return. The leaven isn't brains, or knowledge, or grandeur of character, or any such unusual thing. So far as I can guess what it is—it's that I like people, have some sort way of letting them know it, and in turn they like me regardless of all the other deficiencies.<sup>53</sup>

A second personal dimension of the Rutledge story concerns his law clerks. In the late nineteenth century, Supreme Court Justices began hiring recent law graduates to manage certiorari requests, research, and sometimes draft opinions.<sup>54</sup> Although American legal education once relied entirely on apprenticeship, clerkships (at the Supreme Court and elsewhere) are our last great example of institutionalized mentoring. Obviously, clerkships vary with the personalities involved, but that experience, while propelling lawyers toward a newfound profession, often leaves indelible impressions of what counts as good law and good judgment.

For most of Rutledge's tenure, Justices hired one law clerk per year; in 1948 and 1949, they hired two. Thus, Rutledge had nine clerks at the Court. One is a Harvard law professor, one was a two-time law school dean and is a district court judge, another served the Seventh Circuit, and another is Justice John Paul Stevens. Even among the lofty ranks of Supreme Court clerks, such distinctions stand out,<sup>55</sup> and several Rutledge

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53. FERREN, *supra* note 5, at 219. Ferren also suggests that Rutledge's humility and compassion spurred his concern for minority religious and racial groups and his attention to procedural fairness. *See, e.g.*, FERREN, *supra* note 5; *cf.* sources cited *supra* note 4.

54. *See* ALEXANDER M. BICKEL & BENNO C. SCHMIDT, JR., HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE JUDICIARY AND RESPONSIBLE GOVERNMENT 1910–21, at 82–84 (1984) (summarizing the early history of Supreme Court law clerks); Chester A. Newland, *Personal Assistants to Supreme Court Justices: The Law Clerks*, 40 OR. L. REV. 299 (1961).

55. *Cf.* Pollak, *Profile of a Judge*, *supra* note 4, at 190 n.4 (cataloguing the similarly extraordinary accomplishments of Frankfurter's clerks).

clerks name their former boss as a permanent influence upon their view of life and law.<sup>56</sup> This aspect of Rutledge's legacy is a lasting testament to his force as a teacher and role model, which, as the next Part indicates, has more than purely historical relevance.

## II. EXECUTIVE POWER, JUDICIAL LIMITS

Although Ferren's book and Rutledge's story satisfy Frankfurter's historical aims for judicial biographies, for many readers, history isn't enough. After all, biography always contextualizes its subject, yet few seek books on just any Justice. Especially in today's biography-rich landscape, it is Rutledge's tie to modern circumstances that calls attention, and the greatest such link concerns executive detention.<sup>57</sup> After decades of jurisprudential quiet, the President's authority to detain individuals without criminal process is again important, and Rutledge's career shows how such executive detention tests the limits of judicial competence and legal principle.

This Part divides judicial review of executive detention into three stages: (i) jurisdiction to review detention's legality; (ii) standards for detaining individuals without charges; and (iii) standards for trying detainees in military tribunals. With respect to each of these stages, Rutledge played a critical role in landmark World War II decisions. And those decisions, in turn, intimately affect cases in today's Court. By comparing three pairs of "old" and "new" cases, I suggest that the World War II precedents illustrate how well and badly courts behave in addressing executive detention issues; they thus offer vital standards for judging modern courts' performance in this sensitive area of law.

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56. Cliff Sloan, *The Mourning After: John Roberts Grieves for His Mentor*, SLATE, Sept. 7, 2005, available at <http://www.slate.com/id/2125848> ("The influence on these former-clerk justices of the justices for whom they once worked is profound. Stevens speaks and writes reverentially of the little-known Wiley Rutledge more than five decades after his clerkship."); see Joseph P. Thai, *The Law Clerk Who Wrote Rasul v. Bush: John Paul Stevens's Influence from World War II to the War on Terror*, 92 VA. L. REV. 501, 502–03 (2006) (linking Stevens's current jurisprudence to his experience as a Rutledge clerk); see also Diane Marie Amann, *John Paul Stevens, Human Rights Judge*, 74 FORDHAM L. REV. 1569, 1589–92, 1595–1600 (2006) (exploring similarly important connections between Stevens and Rutledge).

57. For other doctrinal parallels, compare, for example, *Everson v. Board of Education*, 330 U.S. 1 (1947) (addressing the constitutionality of public payments to religious schools); *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947) (analyzing due process constraints on state capital punishment); and WILEY B. RUTLEDGE, A DECLARATION OF LEGAL FAITH (1947) (discussing the structure of congressional commerce power), with, for example, *Gonzales v. Raich*, 545 U.S. 1 (2005) (upholding Commerce Clause regulation of medical marijuana); *Roper v. Simmons*, 543 U.S. 551 (2005) (invalidating the execution of juvenile defendants); and *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (upholding the expenditure of government vouchers on religious education).



The first pair of cases concerns Rutledge's dissent in *Ahrens v. Clark*, which addressed the territorial limits of habeas jurisdiction, and *Rasul v. Bush*, involving detentions at Guantanamo Bay.<sup>58</sup> Justice Stevens was the Rutledge law clerk who helped draft the *Ahrens* dissent, and it was Stevens a half-century later who wrote the Court's opinion in *Rasul*. From a historical perspective, Rutledge's *Ahrens* dissent evinces a commitment to judicial craft and constitutional value. And in the modern context, the opinion is a peerless lens for examining weaknesses in *Rasul*'s dissents, as well as ambiguities in the *Rasul* majority itself.

The second pair of cases, concerning uncharged executive detention, connects *Korematsu v. United States*, which involved Japanese-Americans' relocation during World War II, with *Hamdi v. Rumsfeld*, concerning the detention of "enemy combatants" who are United States citizens.<sup>59</sup> Rutledge was the decisive fifth vote at conference in *Korematsu*, and the fractured majority in *Hamdi* self-consciously tried to craft legal safeguards to reduce the risk of "another *Korematsu*."

As a matter of Supreme Court history, Rutledge's role in the "internment cases" shows that modern conventional wisdom about *Korematsu* is flawed. Judicial support for civil liberties was even weaker, and less principled, than *Korematsu*'s six to three vote indicates. To understand the nature and scope of Rutledge's mistake offers unique insights about whether today's courts are doomed to repeat it.

Third, Rutledge's best-known opinion is his dissent in *In re Yamashita*, concerning the military commission trial of a Japanese general.<sup>60</sup> Just weeks ago, the Court unexpectedly overruled *Yamashita* in *Hamdan v. Rumsfeld*, which involved the military commission trial of Osama bin Laden's driver.<sup>61</sup> Here again, Rutledge's example sets a crucial standard for analyzing presidential authority in national crisis. The *Yamashita* dissent was indispensable to *Hamdan*'s result, yet the normative depth of Rutledge's methodology stands in stark contrast with the modern Court's preference for narrow reasoning. Future cases may test whether the modern approach is enough to protect fundamental values, and whether the Court might go farther. Thus, at every stage of executive detention

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58. *Rasul v. Bush*, 542 U.S. 466 (2004); *Ahrens v. Clark*, 335 U.S. 188, 194 (1948) (Rutledge, J., dissenting); see *infra* Part II.A.

59. *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Korematsu v. United States*, 323 U.S. 214, 223 (1944); see *infra* Part II.B.

60. *In re Yamashita*, 327 U.S. 1, 42, 46–47 (1946) (Rutledge, J., dissenting).

61. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006); see *infra* Part II.C.

jurisprudence, Rutledge's story is not just history for historians; it is history for now.

A. *Habeas Jurisdiction: Comparing Ahrens and Rasul*

In *Ahrens v. Clark*,<sup>62</sup> the Attorney General deported over a hundred German nationals pursuant to the Alien Enemy Act of 1798, which grants broad power to remove citizens of nations at war with the United States.<sup>63</sup> While the *Ahrens* deportees were held at Ellis Island, they filed habeas petitions in the District of Columbia, claiming that their deportation orders were unlawful because the German war had ended. In the Supreme Court, the decisive jurisdictional issue was whether the District of Columbia's district court could grant habeas relief to detainees held in New York. Seeking a quick merits resolution, the United States did not dispute jurisdiction and waived all defenses against hearing the case in the District of Columbia.<sup>64</sup>

Voting six to three, the Supreme Court denied jurisdiction. The federal habeas statutes allow judges, "*within their respective jurisdictions, . . . to grant writs of habeas corpus for . . . inquiry into the cause of restraint of liberty.*"<sup>65</sup> In *Ahrens*, the respondent Attorney General was undeniably "within" the district court's jurisdiction, but Douglas wrote for the Court that jurisdiction was lacking because the *detainees* were not "within" the District of Columbia.<sup>66</sup> The Court discussed possible travel and security problems if prisoners nationwide could seek habeas, and ultimately appear, in courts where only their custodians were located.<sup>67</sup> Accordingly, the Court held that Congress had allowed jurisdiction only for detainees who were themselves within the deciding court's territorial boundaries.<sup>68</sup>

Rutledge's *Ahrens* dissent has been described as "sufficiently representative to provide . . . an introduction to its author's judicial career."<sup>69</sup> Meeting the majority's five-page opinion with eighteen in response, Rutledge surveyed statutory language, legislative history, and

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62. 335 U.S. 188 (1948).

63. See 50 U.S.C. §§ 20–21 (2000); Proclamation No. 2655, 10 Fed. Reg. 8947 (1945).

64. *Ahrens*, 335 U.S. at 193.

65. *Id.* at 189–90 (emphasis added). Compare 28 U.S.C. § 2241(a) (2000) with Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 82 (1789) (authorizing habeas relief for prisoners "in custody, under or by colour of the authority of the United States, or are committed for trial before some court of the same").

66. *Ahrens*, 335 U.S. at 190–92.

67. *Id.* at 190–93.

68. *Id.*

69. Stevens, *supra* note 4, at 178.

prior precedents, showing that none compelled the majority's result.<sup>70</sup> He also explained that travel and convenience issues should be addressed by venue, not jurisdictional rules, because the latter cannot be waived or relaxed even under extraordinary circumstances. Rutledge knew it would be "only the exceptional case" that would require a district court to hear from detainees located outside the court's territorial jurisdiction, but "[i]t is one thing to lay down a rule of discretion adequate to prevent flooding the courts . . . . It is entirely another to tie their hands . . . with a strict jurisdictional limitation which can only defeat the writ's efficacy in many cases where it may be most needed."<sup>71</sup> Rutledge rebutted every step of the majority's reasoning, and the Court did not try to respond.

Rutledge also indicated that, for him, *Ahrens* had deeper significance.<sup>72</sup> Although the majority focused on litigative convenience, Rutledge treated *Ahrens* as a case about the nature of habeas corpus itself, with potential to affect future detainees many miles from Ellis Island. Describing habeas review as basic to the "personal security of every citizen," Rutledge could not accept that a detainee's physical location was prerequisite to judicial oversight.<sup>73</sup> He found the majority's "place-of-the-body" jurisdictional rule especially inapt when: (i) a prisoner's location is unknown, (ii) the detainee is held somewhere that her custodian cannot be served, or (iii) detention occurs outside any district court's territorial jurisdiction.<sup>74</sup>

From Rutledge's perspective, the *Ahrens* majority might allow illegal detention and no chance of relief for detainees held "in places unknown to those who would apply for *habeas corpus* in their behalf. Without knowing the district of confinement, a petitioner would be unable to . . . [establish] jurisdiction in any court in the land."<sup>75</sup> Such events could arise from "military detention," from "mass evacuation of groups . . . in time of emergency," or "possibly . . . even from wilful misconduct by arbitrary

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70. *Ahrens*, 335 U.S. at 201–07 (Rutledge, J., dissenting).

71. *Id.* at 209–10. Rutledge noted that the majority "reserved decision upon cases where the place of confinement is not within the territorial jurisdiction of any court," but stated that such a reservation "goes far to destroy the validity of the present decision's grounding." *Id.* at 208. Rutledge also discussed *Ahrens*'s impact on the District of Columbia, which (as Rutledge knew from his service on the court of appeals) confined some of its prisoners in Virginia. *Id.* at 207 n.24.

72. *Id.* at 193 (explaining that "[t]he jurisdictional turn this case has taken gives it importance far beyond the serious questions tendered on the merits of petitioners' application").

73. *Id.* at 194.

74. *Id.* at 195. Once-Professor Rutledge's statement of these points reads like a classroom transcript, asking hypothetical questions not directly at issue yet possible as extensions of the decisive principle.

75. *Id.* at 210.

executive officials overreaching their constitutional or statutory authority.”<sup>76</sup>

Although those specific scenarios did not materialize after World War II, Rutledge’s concerns about wartime confinement marked the *Ahrens* dissent as a work of its time; it also explains the opinion’s emergence in our new war and detentions. Rutledge’s dissent is just the kind of opinion that great judges strive to write: technically dominant without quibbling, normatively grounded without preaching, and urgent without fretting.

Two cases between *Ahrens* and *Rasul* merit note. In *Johnson v. Eisentrager* (decided the year after Rutledge died), the Court disclaimed habeas jurisdiction over foreigners held in Germany by the United States Army.<sup>77</sup> The detainees had been convicted by a military commission for continuing hostilities after Germany’s surrender. The Court cited historical examples where judicial access was denied to nonresident enemy aliens, and concluded that “[n]othing in the text of the Constitution . . . [or] our statutes” grants habeas jurisdiction to such detainees outside any district court’s territorial jurisdiction.<sup>78</sup> *Eisentrager* thus reversed the court of appeals, which had invoked constitutional norms and “fundamentals” to avoid *Ahrens*’s statutory place-of-the-body rule,<sup>79</sup> and affirmed the district court, which had embraced *Ahrens*’s view of territorial jurisdiction.

In contrast, *Braden v. 30th Judicial Circuit Court*<sup>80</sup> signaled dissatisfaction with *Ahrens*. Braden was an Alabama prisoner who claimed that his conviction on a stale Kentucky indictment violated his speedy trial rights.<sup>81</sup> Because Braden sought habeas relief from Kentucky’s district court, despite his being held in Alabama, the first question was whether his case lay “within” the Kentucky district court’s “respective jurisdiction[.]”<sup>82</sup> The Court held that jurisdiction was proper, because (as Rutledge argued in *Ahrens*) “[t]he writ of habeas corpus does not act *upon the prisoner* who seeks relief, but *upon the person who holds him* in what is alleged to be unlawful custody.”<sup>83</sup> *Braden* viewed statutory and doctrinal developments as having “a profound effect on [*Ahrens*’s]

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76. *Id.*

77. 339 U.S. 763 (1950). Justice Black dissented, joined by Justices Douglas and Burton.

78. *Id.* at 768.

79. *Id.* at 768, 790.

80. 410 U.S. 484 (1973).

81. *Id.* at 486.

82. 28 U.S.C. § 2241(a) (2000). The case also addressed various timing and exhaustion requirements for speedy trial claims. *Braden*, 410 U.S. at 488–93.

83. *Braden*, 410 U.S. at 494–95 (emphasis added); see *Ahrens*, 335 U.S. at 196–97 (Rutledge, J., dissenting). Incidentally, Justice Brennan wrote *Braden*’s majority opinion, and he was the lineal successor to Rutledge’s seat on the Court.

continuing vitality,” and held that *Ahrens* no longer stood as “an inflexible jurisdictional rule,” but only as a decision applying “traditional principles of venue.”<sup>84</sup>

Then, decades later, came Guantanamo Bay. After the September 11 attacks, Congress issued an “Authorization for Use of Military Force,” which allowed 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 . . . or harbored such organizations or persons.”<sup>85</sup> As the President ordered military attacks on Afghanistan, the United States began to capture hundreds of non-American citizens for detention at the Guantanamo Bay Naval Base, on Cuba’s southeastern coast. A 1903 lease stated that “the United States recognizes . . . the ultimate sovereignty of the Republic of Cuba over [Guantanamo Bay],” but that “the Republic of Cuba consents that . . . the United States shall exercise complete jurisdiction and control over and within said areas.”<sup>86</sup> The United States and Cuba later made the lease indefinite, lasting as long as the United States does not abandon the base.<sup>87</sup>

In 2002, foreign detainees at Guantanamo filed habeas petitions in the District of Columbia against Defense Secretary Rumsfeld. In that case, later captioned *Rasul v. Bush*, the petitioners claimed that they did not commit terrorist acts, never fought the United States, and were unlawfully held without charges, counsel, or access to any legal tribunal.<sup>88</sup> In response, the government cited *Eisentrager*, arguing that federal courts lacked authority to review Guantanamo detentions because those detainees were not “within [any district court’s] respective jurisdiction[.]”<sup>89</sup>

The district court and court of appeals denied habeas jurisdiction in *Rasul*, but the Supreme Court reversed. Justice Stevens’s majority opinion relied on the *Ahrens* dissent that law clerk Stevens had helped compose more than fifty years earlier.<sup>90</sup> Like his mentor, Stevens declared the

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84. *Id.* at 493, 497, 500. Notwithstanding *Braden*’s attempt at revisionism, it is absolutely clear that *Ahrens*’s holding cannot be explained through venue. The government waived any defenses to hearing *Ahrens* in the District of Columbia, thereby rendering irrelevant all waivable defenses—such as venue, but not jurisdiction. *See Ahrens*, 335 U.S. at 193.

85. Authorization for Use of Military Force, Pub. L. No. 107-40, §§ 1–2, 115 Stat. 224 (2001).

86. *Rasul v. Bush*, 542 U.S. 466, 471 (2004).

87. *Id.*

88. *Id.* at 471–72 & n.4.

89. *See id.* at 473, 475–76.

90. *Id.* at 477 & n.7 (citing and quoting the Rutledge dissent); *id.* at 479 & n.9 (interpreting *Braden* as having overruled *Ahrens*); *see also* John Paul Stevens, *What I Did This Summer*, 18 CHI. BAR ASS’N REC. 34, 35 (Oct. 2004) (“[H]istory played an important role in [*Rasul*] . . . [*Eisentrager*] was decided before *Ahrens* was overruled and had treated *Ahrens* as controlling precedent. . . . However, because the Court had not had the opportunity to revisit *Eisentrager*, . . . many observers

historic importance of habeas “as a means of reviewing the legality of Executive detention” and stressed its broad availability “in wartime as well as in times of peace.”<sup>91</sup> Rebutting the government’s reliance on *Eisenrager*, Stevens held that *Braden* had unsettled *Ahrens* as precedent, thereby making *Eisenrager*’s constitutional and quasi-constitutional analysis unnecessary.<sup>92</sup> Indeed, the *Eisenrager* detainees had urged a constitutional or quasi-constitutional basis for habeas jurisdiction *only because* they accepted the *Ahrens* “place-of-the-body” rule as authoritative. Because *Braden* repudiated that analysis, Stevens wrote, *Ahrens*’s holding was relevant “only to the question of the appropriate forum, not to whether the claim can be heard at all.”<sup>93</sup>

Some observers have had great difficulty understanding *Rasul*’s reasoning.<sup>94</sup> Part of that confusion stems from the limited attention paid to

wrongly assumed that the case would control the outcome of our Guantanamo decision. Thus the Rutledge dissent written in 1948 significantly influenced an important case decided less than three months ago.”).

Professor Thai’s detailed account of Stevens’s role in *Ahrens* largely parallels that offered here; a small difference between the two is emphasis. Thai stresses law-clerk Stevens’s role in the *Ahrens* drafting process, though Thai acknowledges an inability to know whether Stevens’s written product sought to implement Rutledge’s view of the law or vice versa. See Thai, *supra* note 56, at 508 n.39. What one needs is “inside information,” which neither Thai nor I possess. *Id.* at 501 n.\*. In my own view, all historical “ties” go to the Justice, giving Rutledge presumptive credit for *Ahrens*, and Stevens credit for *Rasul* (rather than any of his law clerks). Indeed, if further speculation were warranted, one might imagine Rutledge and his former clerk each striving to give the other recognition for their “joint” product’s importance. Cf. FERREN, *supra* note 5, at 227–29 (describing Rutledge’s mutually admiring relationship with his first law clerk, Victor Brudney).

91. *Rasul*, 542 U.S. at 474. Although this Article seeks to highlight Rutledge’s influence, it must be said that Stevens has written other important opinions allowing habeas relief for non-criminal detainees. See *INS v. St. Cyr*, 553 U.S. 289 (2001).

92. *Id.* at 478 (“Because subsequent decisions of this Court [*i.e.*, *Braden*] have filled the statutory gap that had occasioned *Eisenrager*’s resort to ‘fundamentals’, persons detained outside the territorial jurisdiction of any federal district court no longer need rely on the Constitution as the source of their right to federal habeas review.”). Justice Stevens also noted that *Rasul*’s facts differed from *Eisenrager*’s because the *Rasul* petitioners were not citizens of “enemy nations,” were not tried in a military tribunal, were imprisoned for over two years, and denied committing any aggression against the United States. *Id.* at 475–76.

93. *Id.* at 479.

94. See, e.g., Douglas W. Kmiec, *Observing the Separation of Powers: The President’s War Power Necessarily Remains “The Power to Wage War Successfully,”* 53 DRAKE L. REV. 851, 876 (2005) (expressing bewilderment at *Rasul*’s “startling result,” and characterizing its approach as “less than convincing, highly ambiguous,” and a “tortured statutory tale”); *id.* at 877–81 (criticizing *Rasul*’s tension with *Eisenrager*, without acknowledging the importance of *Ahrens*, and without rebutting the analysis of Rutledge’s dissent); Tung Yin, *The Role of Article III Courts in the War on Terrorism*, 13 WM. & MARY BILL RTS. J. 1035, 1039, 1047–51, 1089 (2005) (characterizing *Rasul*’s majority as “dubious,” “superficial,” “strained,” and “unpersuasive,” without mentioning the Rutledge dissent). *But cf.* Yin, *supra*, at 1089 (concluding that “despite the analytic flaws of the opinion, and despite the potentially limited nature of the relief afforded . . . , *Rasul* actually achieves a workable balance between judicial abdication and judicial intrusiveness in the war on terrorism”).

Rutledge and his dissent.<sup>95</sup> Kennedy's concurrence in *Rasul* and Scalia's dissent exemplify this problem; both Justices protested that the *majority opinions* in *Braden* and *Ahrens* did not address detainees outside the United States.<sup>96</sup> Thus, Kennedy and Scalia thought *Eisentrager* should control based on its factual similarity to *Rasul*, if nothing else.<sup>97</sup> That argument overlooks that *Rasul*'s majority did more than restate *Braden*'s attack on *Ahrens*; it also embraced the Rutledge dissent. And although Kennedy and Scalia are right that the *Ahrens* majority did not address international detention, Rutledge's analysis was conceived with precisely that circumstance in mind.

Kennedy and Scalia did not cite Rutledge's dissent, much less did they address its extensive arguments about habeas jurisdiction. And it is Rutledge's conceptual analysis—which remains unanswered by anyone on the Stone Court, the Rehnquist Courts or otherwise—that forms the core of the *Rasul* majority opinion.<sup>98</sup> The risk that legal technicalities might block review of wartime detention is what led Rutledge to support habeas jurisdiction over Ellis Island detainees whose jurisdictional arguments were otherwise unsympathetic.<sup>99</sup> Although *Eisentrager* extended *Ahrens* and denied habeas jurisdiction for detainees overseas,<sup>100</sup> it was Rutledge's

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95. Another part of that confusion owes to the Court's choice not technically to overrule *Eisentrager*, nor to hold that *Braden* had done so. *See supra* note 92 and sources cited. *Rumsfeld v. Padilla*, 542 U.S. 426 (2004), decided the same day as *Rasul*, further complicates matters. In *Padilla*, a majority of the Court required a detainee to file his habeas petition against his immediate custodian, located in South Carolina, rather than against Secretary Rumsfeld in the Southern District of New York.

96. *Rasul*, 542 U.S. at 485 (Kennedy, J., concurring in the judgment); *Id.* at 488 (Scalia, J., dissenting); *cf. Ahrens*, 335 U.S. at 192 n.4 ("We need not determine the question of what process, if any, a person confined in an area not subject to the jurisdiction of any federal court may employ to assert federal rights.").

97. *Cf. Kmiec, supra* note 94, at 877–81 (criticizing *Rasul*'s tension with *Eisentrager*, but neglecting *Ahrens*, and declining even to mention Rutledge's dissent).

98. As should be clear, my view is not that dissents, even good ones, are themselves authoritative. Rather, my claim is that *Ahrens*'s dissent laid the intellectual groundwork for *Rasul*'s result. Thus, anyone who would better understand (or criticize) the latter should start with the former.

99. To see why the *Ahrens* petitioners were unsympathetic, imagine Douglas and the *Ahrens* Court asking the following question: "Why *shouldn't* detainees on Ellis Island be required to seek habeas in New York, rather than D.C.? It just makes practical sense." The problem with such a question is its failure to distinguish venue from jurisdictional rules, and that technical distinction is precisely the foundation of Rutledge's view. *See supra* note 71 and accompanying text. Questions of venue, convenience, and similar issues are exclusively in the parties' hands and may be waived, as the government did in *Ahrens*. Thus, the Court considered only arguments concerning subject-matter jurisdiction, which cannot be waived.

100. Rutledge might also have been disappointed by *Ex parte Quirin*, 317 U.S. 1 (1942), decided just before he joined the Court, which allowed trials by military commission of anti-American saboteurs. *But see In re Yamashita*, 327 U.S. 1, 46–47 (1946) (Rutledge, J., dissenting) (distinguishing *Quirin* without seeking to overrule it).

principled discussion that ultimately allowed the Court, in its recent detention jurisprudence, to reach a result that was hard to anticipate and is difficult otherwise to explain. The fact that Justice Stevens wrote the opinion producing that result is astonishing, but also appropriate.

On the other hand, strong substantive echoes between Stevens's *Rasul* opinion and Rutledge's *Ahrens* dissent cannot obscure the two opinions' very different styles. Rutledge systematically disassembled the *Ahrens* majority, confronting each point with counterpoints and filling footnotes with legal research. By contrast, the *Rasul* opinion has just three elements: (i) a general celebration of the writ,<sup>101</sup> (ii) a rebuttal of *Eisentrager*,<sup>102</sup> and (iii) a rebuttal of the presumption against extraterritoriality.<sup>103</sup> The latter held that Guantanamo Bay should not be considered "extraterritorial" at all, because the indefinite lease brings that area within the territorial jurisdiction of the United States for habeas purposes.<sup>104</sup>

As *Rasul*'s responsive structure suggests, its affirmative argument for habeas jurisdiction is spare; indeed, even its link to Rutledge is underemphasized.<sup>105</sup> Furthermore, the Court's two rebuttals stand in seeming tension. As Scalia puzzled:

[Part III of the Court's opinion holds] that the place of detention of an alien has no bearing on the statutory availability of habeas relief, but "is strictly relevant only to the question of the appropriate forum." . . . Once that has been said, the status of Guantanamo Bay is entirely irrelevant . . . . The habeas statute is (according to the Court) being applied *domestically*, to "petitioners' custodians," and the doctrine that statutes are presumed to have no extraterritorial

101. *Rasul*, 542 U.S. at 473–76.

102. *Id.* at 474–79.

103. *Id.* at 480–85.

104. *Id.* at 480–81 (internal quotation marks omitted). As a technical matter, the Court's holding lies embodied in a general statement of law: "Whatever traction the presumption against extraterritoriality might have in other contexts, it certainly has no application to the operation of the habeas statute with respect to persons detained within 'the territorial jurisdiction' of the United States." *Id.* at 480. In the same paragraph, however, the Court applied that principle to the particular details of Guantanamo Bay, and concluded that "[a]liens held at the base, no less than American citizens, are entitled to invoke the federal courts' authority under [28 U.S.C. § 2241]." *Id.* at 481.

Kennedy's opinion concurring in the judgment expresses a similar view: "Guantanamo Bay is in every practical respect a United States territory, and it is one far removed from any hostilities. . . . From a practical perspective, the indefinite lease of Guantanamo Bay has produced a place that belongs to the United States, extending the 'implied protection' of the United States to it." *Id.* at 487 (Kennedy, J., concurring in the judgment).

105. Perhaps the opinion's clearest statement of its holding is the oddly textualist declaration: "No party questions the District Court's jurisdiction over petitioners' custodians. Section 2241, by its terms, requires nothing more." *Id.* at 438–84 (citations omitted).



effect simply has no application. Nevertheless, the Court spends most of Part IV rejecting respondents' invocation of [extraterritoriality] doctrine on the peculiar ground that it has no application to Guantanamo Bay.<sup>106</sup>

To rephrase Scalia's point, if *Rasul* fully adopted the *Ahrens* dissent, why did the Court's extraterritoriality analysis discuss the particular status of Guantanamo Bay?<sup>107</sup> By contrast, if the decision rested on incidental facts about Guantanamo Bay's lease, why did the Court more broadly hold that custodial presence is sufficient for habeas jurisdiction?

One obvious reason for vagueness was Justice Stevens's need to write for a tentative majority. Academics often admire dissents and concurring opinions because they can state principles broadly without risking votes or unintended lawmaking; indeed, it may be a professorial hazard to favor quotable phrases and broad-based ideals above other judicial virtues. Nevertheless, in a case like *Rasul*, Stevens perhaps chose not to overrule *Eisenrager*, and to add language about Guantanamo Bay, in the hope of attracting Kennedy's vote or in fear of losing O'Connor's.<sup>108</sup>

Rutledge, an academic who was often dissatisfied with terse judicial explanations, may have felt driven in *Ahrens* to offer a consistent view of habeas jurisdiction that could apply to a range of unforeseen circumstances. That very characteristic, which marks the *Ahrens* dissent's long shelf-life, could have blocked the *Rasul* majority from fully accepting it. Some modern Justices, after finding jurisdiction for Guantanamo detainees, might have been unwilling to endorse broad judicial oversight of detention elsewhere in the world, at least until contours of our present

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106. *Id.* at 500 (Scalia, J., dissenting); see Thai, *supra* note 56, at 530–31 (endorsing Scalia's assessment).

107. Stevens also discussed, in this part of the Court's opinion, the application of traditional habeas jurisdiction to England's "exempt jurisdictions" and "dominions." *Id.* at 480–82.

108. Of course, vote-counting is not strictly necessary to explain *Rasul*'s dualist structure. Perhaps Part III was strictly limited to analyzing the habeas statutes' jurisdictional content. Then Part IV separately analyzed whether such content applied to Guantanamo Bay. Each step would be logically necessary because, on the one hand, the habeas statutes could geographically apply to Guantanamo Bay, yet grant no jurisdiction to Rasul in the District of Columbia's district court because of *Ahrens*'s place-of-the-body rule. On the other hand, even if *Ahrens* were generally wrong as a statutory matter, petitioners would nonetheless lose if the habeas statutes themselves did not apply to Guantanamo.

To give meaning to both of *Rasul*'s parts has underanalyzed consequences, as I suggest *infra*, note 331. At this point, however, *Rasul*'s critics might simply note that, despite Scalia's charge of inconsistency, Stevens's opinion lacks any explanation like the one in this footnote. *Cf.* Thai, *supra* note 56, at 526, 528 (calling Stevens's approach "clever" and "unlikely," while arguing that "the most remarkable aspect of *Rasul* may be less doctrinal and more personal"). And that would return us to noting the unresolved split among *Rasul*'s majority over whether habeas jurisdiction indeed "extends . . . to the four corners of the earth." *Id.* at 531 (citing *Rasul*, 542 U.S. at 498 (Scalia, J., dissenting)).

“War On Terror” more clearly emerge. The general merits of “broad” versus “narrow” legal decisions in wartime are canvassed elsewhere.<sup>109</sup> But my own reasons for distinguishing the Rutledge and Stevens opinions are to illustrate Rutledge’s judicial tendency toward full legal explanation (as opposed to “minimalism”), and to flag *Rasul*’s extraterritoriality analysis, which may create interesting doctrinal opportunities in future detention cases.<sup>110</sup>

### B. *Uncharged Detainees: Comparing Hirabayashi, Korematsu and Hamdi*

If *Rasul* vindicated Rutledge’s dissent in *Ahrens*, *Hamdi* condemned his vote in *Korematsu*.<sup>111</sup> Many details of the Japanese-American cases are well known, but some are not.<sup>112</sup> For example, attention to Rutledge’s unrecognized role in those decisions subverts much conventional wisdom about the source and nature of the Court’s error. Such lessons are vitally important today, as the modern Court builds doctrinal safeguards against possible repetition of wartime abuses.

109. See, e.g., Cass R. Sunstein, *Minimalism at War*, 2004 Sup. Ct. Rev. 47 (2004); Neil S. Siegel, *A Theory in Search of a Court, and Itself: Minimalism at the Supreme Court Bar*, 103 MICH. L. REV. 1951 (2005); Cass R. Sunstein, *Testing Minimalism: A Reply*, 104 MICH. L. REV. 123 (2005).

110. See *infra* note 331 and accompanying text.

111. Some might think it more apt to compare *Hamdi* with *Ex parte Quirin*, 317 U.S. 1 (1942), which was decided just before Rutledge joined the Supreme Court. *Quirin* held, in relevant part, that an American citizen may be tried and sentenced to death by a military commission. *Id.* at 15–16. Thus, *Quirin* was cited in *Hamdi* to oppose Justice Scalia’s view that American citizens may not be punished outside the ordinary procedures of criminal law unless habeas is suspended. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 521–23 (2004) (plurality); *cf. id.* at 563–73 (Scalia, J., dissenting); *infra* text accompanying notes 189–204. Aside from rebutting Justice Scalia’s position, however, *Quirin* is not so relevant to this Article. For example, *Quirin* did not address what procedures are required in a military commission. Nor did *Quirin* address *Hamdi*’s core question, namely, when and how a President may detain United States citizens without criminal charges or any form of process. See *infra* Part II.B.2.

112. The four “internment cases” are discussed extensively in IRONS, *supra* note 51, at viii–ix: Th[e] documentary record reveals a legal scandal without precedent in the history of American law. Never before has evidence emerged that shows a deliberate campaign to present tainted records to the Supreme Court. The Justice Department files in these cases . . . include documents in which the government’s own lawyers charged their superiors with the “suppression of evidence” and with presenting to the Supreme Court a key military report that contained “lies” and “intentional falsehoods.” My research also uncovered military files that disclose the alteration and destruction by War Department officials of crucial evidence in those cases.

This Article owes much to Irons and Ferren with respect to the facts surrounding these cases. My main contribution to this well-traveled field of legal history lies in my revisionist approach to the link between *Hirabayashi* and *Korematsu*, and the consequences thereof.

### 1. World War II Detentions

In February 1942, President Roosevelt cited his Commander-in-Chief power and ordered the establishment of “military areas . . . from which any or all persons may be excluded, and with respect to which, the right of any person to enter, remain in, or leave shall be subject to whatever restrictions the Secretary [or commanders] . . . may impose in [their] discretion.”<sup>113</sup> Implementing that order, Lieutenant General DeWitt divided the Pacific Coast into “military areas” that were deemed particularly vulnerable to attack, sabotage, and espionage.<sup>114</sup> In March 1942, Congress criminalized any violation of military-area regulations, authorizing penalties up to a \$5000 fine and one year in prison.<sup>115</sup>

A few weeks later, DeWitt issued an order governing all alien Germans and Italians and all “persons of Japanese ancestry” in parts of Arizona, California, Washington, and Oregon. Euphemistically called a “curfew,” the order required such persons to be home from 8:00 p.m. to 6:00 a.m., and at all other times to be in their residence, in their workplace, traveling between the two, or within five miles of their residence.<sup>116</sup> DeWitt also ordered that “to insure the orderly evacuation and resettlement of Japanese *voluntarily migrating*” from the Pacific Coast, no person of Japanese ancestry could leave the area unless so instructed.<sup>117</sup> DeWitt’s “anti-migration order” was particularly odd because, contrary to security-minded intuitions, it blocked innocent persons (who might wish to avoid even *appearing* dangerous) from leaving areas that were militarily vulnerable.<sup>118</sup>

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113. Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942). Well before this, FDR had proclaimed under the Enemy Aliens Act that any Japanese alien “deemed dangerous to the public peace or safety of the United States” by the Attorney General or the Secretary of War” would be subject to “summary apprehension.” See IRONS, *supra* note 51, at 18. See generally Ahrens v. Clark, 335 U.S. 188 (1948) (applying the Enemy Alien Act to German nationals); *supra* Part II.A.

114. Proclamation No. 1, 7 Fed. Reg. 2320 (Mar. 2, 1942).

115. Act of March 21, 1942, Pub. L. No. 77-503, 56 Stat. 173 (1942).

116. Proclamation No. 3, 7 Fed. Reg. 2543 (Apr. 2, 1942). Regulated persons were also permitted to do business at a Post Office, Employment Service Office, or Wartime Civil Control Administration Office. *Id.*

117. Proclamation No. 4, 7 Fed. Reg. 2601, (Apr. 4, 1942) (emphasis added).

118. An earlier order had allowed persons of Japanese descent to migrate away from sensitive areas. Most Japanese-Americans did not take “advantage” of this legal migration period, however, due to a combination of patriotic optimism, frozen bank accounts, limited family or friends outside the West Coast, growing hostility from interior states, and the geographic expansion of military regulations. IRONS, *supra* note 51, at 66 (“In the end, fewer than ten thousand of the Japanese Americans affected by DeWitt’s initial proclamation moved from Military Area No. 1, and most members of this group resettled within Military Area No. 2 and were later caught in the internment trap that snapped shut in both areas.”).

Beginning in May 1942, DeWitt ordered all persons of Japanese ancestry to “evacuate” from designated military zones.<sup>119</sup> One member of every Japanese family had to report to “Civil Control Stations,” and the only exemption was for individuals already held in governmental “Assembly Centers.”<sup>120</sup> These mandates were called “exclusion orders,” but that name misleads insofar as affected persons had nowhere much to go. Still bound by DeWitt’s anti-migration order, they could not travel elsewhere in the United States, and to arrive at an “Assembly Center” almost inevitably led to temporary detention, followed by indefinite confinement at a “Relocation Center.”<sup>121</sup> In due course, federal judges would call the government’s various confinement facilities “internment camps,” “detention camps,” “prisons,” and “concentration camps.”<sup>122</sup> But whatever their name, such sites were used by the War Relocation Authority—a civilian agency overseeing evacuation—to house over 100,000 Japanese-American persons for almost two years after their removal from homes, jobs, and communities.<sup>123</sup> Relocation and detention were deemed necessary to investigate the detainees’ loyalty in ways that were presumptively impossible if Japanese-Americans remained

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The reason for the government’s shift from a policy of migration to anti-migration owed mainly to the racism of western politicians and citizenries. *See, e.g., id.* at 71 (“The governors, attorneys general, and other officials of all the western states but California attended [a meeting in Salt Lake City on April 7, 1942]. . . . What the governors wanted . . . was a concentration camp regime for the Japanese Americans.”); *id.* at 71 (listing calls from Utah’s governor that evacuees “be put into camps” as forced agricultural laborers, complaints that the federal government was “much too concerned about the constitutional rights of Japanese-American citizens,” and suggestions that “the constitution could be changed” to allow internment); *id.* at 71–72 (recording the Wyoming Governor’s statement that his constituents “have a dislike of any Orientals, and simply will not stand for being California’s dumping ground” such that, if Japanese Americans were to buy land and resettle, “[t]here would be Japs hanging from every pine tree”).

119. DeWitt ultimately issued 108 such orders. IRONS, *supra* note 51, at 70.

120. *E.g.*, Exclusion Order No. 34, 7 Fed. Reg. 3967 (May 28, 1942).

121. *Cf. Korematsu v. United States*, 323 U.S. 214, 243 (1944) (Jackson, J., dissenting) (“[T]he series of military orders . . . were so drawn that the only way Korematsu could avoid violation was to give himself up to the military authority. This meant submission to custody, examination, and transportation out of the territory, to be followed by indeterminate confinement in detention camps.”); *id.* at 230 (“[Korematsu] was forbidden, by Military Order, to leave the zone in which he lived; he was forbidden, by Military Order . . . to be found within that zone unless he were in an Assembly Center . . . General DeWitt’s report . . . makes it entirely clear . . . that an Assembly Center was a euphemism for a prison. No person within such a center was permitted to leave except by Military Order.”).

122. *Korematsu*, 323 U.S. at 223; *id.* at 230 (Roberts, J., dissenting) (“prison” and “concentration camp”); *id.* at 243 (Jackson, J., dissenting) (“detention camps”); *Korematsu v. United States*, 140 F.2d 289, 300 (9th Cir. 1943) (Denman, J., dissenting) (“internment camps”).

123. *See* IRONS, *supra* note 51, at vii; ERIC K. YAMAMOTO ET AL., RACE, RIGHTS AND REPARATION: LAW AND THE JAPANESE AMERICAN INTERNMENT 194 (2001); *see also* ERIC L. MULLER, FREE TO DIE FOR THEIR COUNTRY: THE STORY OF JAPANESE AMERICAN DRAFT RESISTERS OF WORLD WAR II (2001).

unsupervised at home.<sup>124</sup> Thus, within six months of Pearl Harbor, the United States had implemented an unprecedented race-based “curfew,” which approached house arrest, and a program of mass detention and relocation.

The “curfew” and “exclusion” programs were both eventually tested before the Supreme Court. First, in 1943, *Hirabayashi v. United States* unanimously upheld application of the race-based curfew to an American citizen.<sup>125</sup> Kiyoshi “Gordon” Hirabayashi was convicted on two counts: violating the curfew order by not being at home after 8:00 p.m., and violating the exclusion order by not reporting to a Civil Control Station. For each count, he was sentenced to three months, which ran concurrently.<sup>126</sup> Hirabayashi challenged both the curfew order and the exclusion order as unconstitutionally delegating power to the military and unconstitutionally discriminating against Japanese-Americans.<sup>127</sup> However, because lawful conviction on either count could support Hirabayashi’s three-month sentence, the Supreme Court chose to rule only on his curfew conviction and did not address the exclusion offense.

Stone’s majority opinion took three critical steps. First, with high deference to military officials, the Court accepted that at least some persons of Japanese ancestry, in “numbers and strength [that] could not be

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124. Brief for the United States at 11–13, 21–23, *Korematsu v. United States*, 323 U.S. 214 (1944) (No. 45-22). Nanette Dembitz, who had worked for the federal government during this period, IRONS, *supra*, note 51, at 196, later criticized this rationale. Nanette Dembitz, *Racial Discrimination and the Military Judgment: The Supreme Court’s Korematsu and Endo Decisions*, 45 COLUM. L. REV. 175 (1945). She thought it “startling” that detecting disloyalty among citizens of Japanese ancestry “was viewed as necessitating their mass racial exclusion [in the West] but was not viewed as sufficiently grave to require . . . special precautionary measures with respect to the activities of any of the evacuees in any other part of the country.” *Id.* at 201. She concluded, “from . . . statements of the military authorities, from the attempts to secure migration prior to the initiation of detention, and from the fact that no program for the segregation of the loyal from the disloyal was commenced until established by the War Relocation Authority approximately four months after the detentions in Assembly Centers began,” that segregation to investigate loyalty “was not the purpose of the Assembly Center detention in the *Korematsu* case.” *Id.* at 201–02 (footnotes omitted).

125. 320 U.S. 81 (1943).

126. *Id.* at 85. Two random events were critically important to Hirabayashi’s case. First, when Hirabayashi presented himself for arrest, he sought solely to challenge DeWitt’s evacuation order, but he brought with him a briefcase, and in it a diary described various curfew violations. Based on that diary and Hirabayashi’s corroborative confession, the government charged him with violating the curfew order. IRONS, *supra* note 51, at 92.

Second, after Hirabayashi’s conviction on both counts, the district judge initially imposed a sentence of thirty days on count one, followed by thirty days on count two, but Hirabayashi requested at least a ninety-day sentence, because that was the minimum term that would allow him to work at a roadcamp. In response, the district judge sentenced Hirabayashi to ninety days on each count to run concurrently. *Id.* at 159. These two circumstances are what combined to defeat Hirabayashi’s challenge to DeWitt’s exclusion order, thereby allowing the Court to decide only the curfew’s legality.

127. *Hirabayashi*, 320 U.S. at 89.

precisely and quickly ascertained,” were a “menace to the national defense and safety, which demanded that prompt and adequate measures be taken.”<sup>128</sup> Second, the Court accepted that innocent Japanese-American and Japanese persons “could not readily be isolated” from dangerous ones.<sup>129</sup> Third, the Court denied that a curfew must be imposed on “all

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128. *Id.* at 99; *see also id.* at 101 (“We cannot close our eyes to the fact . . . that in time of war residents having ethnic affiliations with an invading force may be a greater source of danger than those of a different ancestry.”). The Court also noted “support” for the view that Japanese-Americans had failed “in large measure” to assimilate into white populations, partly due to the racism of white residents themselves:

[I]n the Pacific Coast area, there has been relatively little intercourse between [Japanese aliens and citizens] and the white population. The restrictions, both practical and legal, affecting the privileges and opportunities afforded to persons of Japanese extraction residing in the United States, have been sources of irritation and may well have tended to increase their isolation, and in many instances their attachment to Japan and its institutions.

*Id.* at 98; *accord id.* at 96.

129. *Id.* at 99. This argument’s strongest iteration appeared in Judge William Denman’s dissent in *Hirabayashi v. United States*, printed in *Korematsu v. United States*, 140 F.2d 289, 302–03 (9th Cir. 1943) (Denman, J., concurring in the result):

Because of [segregated housing and limited] social intercourse, [white] people do not become familiar with the Mongolian physiognomy. The uniform yellow skin, and on first impression, a uniformity of facial structure, make “all Chinks and Japs look alike to me,” a common colloquialism. Hence arises a difficulty . . . in picking out from the other Japanese crowded together in the segregated districts, . . . the suspected saboteurs or spies or fugitives from a commando landing or hiding parachutists. Also the difficulty of identification of Japanese of known or suspected enemy aid, by descriptions telegraphed or written to white enforcement officers.

Other federal officials expressed comparably offensive views. An early memorandum for Attorney General Biddle concerning evacuation stated that “[s]ince the Occidental eye cannot readily distinguish one Japanese resident from another, effective surveillance of the movements of particular Japanese residents suspected of disloyalty is extremely difficult if not practically impossible.” IRONS, *supra* note 51, at 55 (quoting memorandum). That argument alleged that it was unnecessary “‘to bar the millions of persons of German or Italian stock from either seacoast area,’ since ‘the normal Caucasian countenances of such persons enable the average American to recognize particular individuals by distinguishing minor facial characteristics.’” *Id.*

Secretary of War Henry J. Stimson’s diary also explained the need for evacuation based on racial untrustworthiness. *Id.* at 56 (“‘The second generation of Japanese can only be evacuated as part of a total evacuation [of all citizens], . . . or by frankly [admitting] . . . that their racial characteristics are such that we cannot understand or trust [them]. This latter is the fact but I am afraid it will make a tremendous hole in our constitutional system.’”).

The government’s lower-court briefs relied on similar racism. *See id.* at 138 (quoting the government’s tactical memorandum in *Yasui v. United States*, 310 U.S. 115 (1943): “[I]t is impossible . . . to make a particular investigation of the loyalty of each person in the Japanese community. . . . Such an investigation would be hampered in any case by the difficulties which the Caucasian experiences with Oriental psychology.”); *cf. id.* at 139–40 (quoting a district court brief in *Yasui*: “‘Jap citizens are inevitably bound, by intangible ties, to the people of the Empire of Japan. . . . They are alike, physically and psychologically. . . . Even now, though we have been separated from the English people for over 100 years, we still take pride in the exploits of the R.A.F. over Berlin, and the courageous fighting of the Aussies in Northern Africa. Why? Because they are people like us. They are Anglo-Saxons. . . . Who can doubt that the Japs in this country, citizens as well as aliens, feel a

citizens, . . . or on none,” because that would force the military either to “inflict[] *obviously needless* hardship on the many, or sit[] passive and unresisting in the presence of the threat.”<sup>130</sup>

Although the Court in *Hirabayashi* stated that “[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality,”<sup>131</sup> it ultimately held that:

The adoption by the Government, in the crisis of war and . . . threatened invasion, of measures for the public safety, based upon the recognition of facts and circumstances which indicate that a group of one national extraction may menace that safety more than others, is not wholly beyond the limits of the Constitution and it is not to be condemned merely because in other and in most circumstances racial distinctions are irrelevant.<sup>132</sup>

Three Justices filed concurring opinions: Douglas, Rutledge, and Murphy (who changed his initial dissenting vote under pressure from Frankfurter).<sup>133</sup> Yet every Justice joined Stone’s opinion, and none disputed his analysis.

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sense of pride in the feats of the Jap Army—this feeling of pride is strong in some, weak in others, but the germ of it must be present in the mind of every one of them.”).

But perhaps most extraordinary is Justice Black’s statement in 1971 defending the World War II internments: “I would do precisely the same thing today . . . I would probably issue the same order were I president. We had a situation where we were at war. . . . People were rightly fearful of the Japanese,” he explained, because “they all look alike to a person not a Jap.” *Id.* at 356.

Given such corrosive beliefs’ prevalence, it is unclear as a matter of logic why neither the federal government nor other political interests proposed to exclude and confine persons of Chinese, Korean, and other “occidentally indistinguishable” peoples—just to be “safe.” As a matter of politics, however, the likely reason is that other East Asian nations were United States allies against Japan, and might not have tolerated such flagrant discrimination against their citizens and emigrants.

130. *Korematsu*, 320 U.S. at 95 (“We think that constitutional government, in time of war, is not so powerless and does not compel so hard a choice if those charged with the responsibility of our national defense have reasonable ground for believing that the threat is real.”).

131. *Id.* at 100.

132. *Id.* at 101.

133. See FERREN, *supra* note 5, at 244 (describing Murphy’s change); IRONS, *supra* note 51, at 243 (similar). See generally *id.* at 239 (“Frankfurter’s law clerk in 1943, . . . [said that Frankfurter] ‘saw himself as a member of the President’s war team . . . . He went to war on December 8, 1941, literally.’”).

These concurring opinions deserve brief discussion. Douglas’s opinion endorsed broad military discretion to detain Japanese-American citizens because he found that such decisions’ “wisdom or expediency” was beyond judicial review. See *Hirabayashi v. United States*, 320 U.S. 81, 106–07 (1943) (Douglas, J., concurring). However, Douglas reserved judgment as to whether a detainee might need post-detention administrative review to determine her actual threat and loyalty. *Id.* at 108–09; cf. IRONS, *supra* note 51, at 238 (“Douglas’s law clerk [explained:] ‘Douglas encountered DeWitt on the West Coast . . . [who] filled him with horrible stories about Japanese submarines lurking off the coast.

In 1944, one year after *Hirabayashi*, and only months from the war's end, the Court decided *Korematsu v. United States*, which addressed DeWitt's exclusion orders. Toyosaburo "Fred" Korematsu was an American citizen convicted of being present in California after DeWitt's exclusion order took effect;<sup>134</sup> he challenged this conviction as unconstitutional discrimination.

The Supreme Court rejected Korematsu's argument six to three, but it is less well-known that the conference vote was much closer.<sup>135</sup> Stone, Black, Frankfurter, and Reed voted to affirm Korematsu's conviction; Roberts, Murphy, Jackson, and Douglas voted to reverse. Because Justices at conference speak in order of seniority—and eight members of the Court were evenly divided—the final decision fell to Wiley Rutledge. Stone gently prodded: "If you can do it for curfew you can do it for exclusion."<sup>136</sup> Then, in what must have been a "moment of high drama on the nation's highest court," Rutledge told his colleagues: "I had to swallow *Hirabayashi*. I didn't like it. At the time I knew if I went along with that [curfew] order I had to go along with detention for [a] reasonably necessary time. Nothing but necessity would justify it."<sup>137</sup> Rutledge therefore voted to affirm, and Douglas later switched to join the majority, leaving as the only dissenters the very liberal Murphy and two moderate conservatives, Roberts and Jackson.

He really thought we had a hell of an emergency . . . . I argued with him about paying so much attention to the military but I didn't get anywhere."

Murphy's opinion harshly described the government's race-based program. *Hirabayashi*, 320 U.S. at 110–11 (Murphy, J., concurring) ("Distinctions based on color and ancestry are utterly inconsistent with our traditions and ideals. . . . The result is the creation in this country of two classes of citizens for purposes of a critical and perilous hour. . . . In my opinion, this goes to the very brink of constitutional power."). But even Murphy ultimately concluded that the racist curfew represented an "allowable judgment" by the military in confronting the "peril of imminent enemy attack." *Id.* at 113.

Rutledge's concurrence stated only that, despite *Hirabayashi*'s pro-government result, federal courts reserved formal power to review detention decisions. *Id.* at 114 (Rutledge, J., concurring) ("[A military officer] of course must have wide discretion and room for its operation. But it does not follow there may not be bounds beyond which he cannot go and, if he oversteps them, that the courts may not have power to protect the civilian citizen."). An earlier Rutledge draft had stated: "I have strong sympathy with Mr. Justice Murphy's views . . . . Judged by peacetime standards, the statute involves a delegation of concentrated, unconfined power over civilian citizens and the order a racial discrimination only war's highest emergency could sustain." IRONS, *supra* note 51, at 247. The early draft also described DeWitt's curfew order as "something which approaches the ultimate stain on democratic institutions constitutionally established." *Id.* It is unclear why such language vanished from Rutledge's published opinion.

134. *Korematsu v. United States*, 323 U.S. 214 (1944).

135. See FERREN, *supra* note 5, at 249.

136. IRONS, *supra* note 51, at 322.

137. See FERREN, *supra* note 5, at 249.



Modern lawyers can imagine few cases more wrongly decided than *Korematsu*, but of course that view is informed by hindsight.<sup>138</sup> When Roosevelt and DeWitt issued their orders in 1942, the United States had suffered an unthinkable surprise attack, from an enemy whose military capabilities were less familiar than the other Axis powers'. Major sabotage and espionage seemed realistic, and although invasion was less likely, some readers will recall that a Japanese warplane shelled the Pacific Coast, and submarines surfaced just offshore.<sup>139</sup> There was certainly reason to doubt the military's threat assessments even in 1942<sup>140</sup>—and the government concealed information from the Supreme Court that would have raised more doubts.<sup>141</sup> But few commentators (and fewer judges)

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138. For general debate over how hindsight does, and should, figure into analysis of wartime security measures, compare Neil S. Siegel, *A Prescription for Perilous Times*, 93 GEO. L.J. 1645, 1654–56 (2005), with RICHARD A. POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* 299 (2003).

139. See, e.g., WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* 188–92 (1998) (collecting contemporaneous evidence of the domestic threats and their popular perception); see also IRONS, *supra* note 51, at 26–27 (“[I]n the weeks that followed Pearl Harbor the prospect of a Japanese attack on the mainland simply could not be dismissed out of hand. . . . [F]rom December 17 to December 23, four Japanese submarines made eight or nine attacks on American shipping vessels, sank two tankers, and damaged one freighter[, all of which] caused great apprehension in DeWitt’s headquarters.”).

140. For example, the LA Times cautioned in a December 10, 1941 editorial entitled “Let’s Not Get Rattled,” that it would take several aircraft carriers “together with a good-sized fleet of covering war vessels and fuel supply ships, to carry on a sustained campaign” against the Pacific Coast. IRONS, *supra* note 51, at 6–7 (quoting editorial). “Could such an aggregation of surface craft sneak up on this Coast undetected by our now aroused sky scouting forces?” *Id.*; see Yin, *supra* note 94, at 1098 n.420 (documenting the decreased risk of attack by mid-1942).

On December 8, 1941, an Army spokesman caused a huge blackout by reporting that thirty Japanese planes had “reconnoitered the San Francisco Bay area and other sections of California.” *Id.* at 26. This warning proved to be false. Furthermore, “[reports] the following week of a Japanese fleet steaming toward the West Coast and of further air attacks convinced [Major General Joseph W. Stilwell] that DeWitt’s intelligence units were ‘amateur’ and that the public warnings of an impending Japanese attack . . . had been irresponsible.” *Id.*; cf. *id.* at 179 (“When Judge Denman asked . . . whether there had been ‘a single case from Pearl Harbor to the evacuation’ where any Japanese American had been ‘found by competent authority to be a menace’ to military security, [the government’s attorney] admitted without hesitation that he knew of none.”).

141. Here are some examples of information that the Court did not know when it decided *Korematsu* in December 1944. In July 1944, General DeWitt’s successor, upon reviewing anti-sabotage measures wrote to his superior: “My study . . . leads me to a belief . . . that the great improvement in the military situation . . . indicates that there is no longer a military necessity for the mass exclusion of the Japanese from the West Coast as a whole.” *Id.* at 273.

In February 1944, J. Edgar Hoover issued a “Personal and Confidential” memorandum, summarizing the FBI’s investigation of claims that “there was a possible connection between the sinking of United States ships by Japanese submarines and alleged Japanese espionage activity on the West Coast.” *Id.* at 280–81. Hoover wrote that “there is no information in the possession of this Bureau . . . which would indicate that the attacks made on ships or shores in the area immediately after Pearl Harbor have been associated with any espionage activity ashore or that there has been any illicit shore-to-ship signaling, either by radio or lights.” *Id.* at 280–81.

would have staked national survival on such doubts until quite late in the war.<sup>142</sup> Indeed, today's most damning evidence that Japanese-Americans were targeted due to prejudice and racial stereotypes is our modern knowledge of how grievously federal officials exaggerated domestic perils.<sup>143</sup> The Court in 1943 and 1944 had only partial knowledge of these exaggerations.<sup>144</sup>

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In May 1944, Solicitor General Fahy received documentation that FCC staff had personally informed DeWitt, both before his evacuation recommendation and afterward, that *not one* report of illicit radio transmissions had been verified. *Id.* at 282. The FCC Chairman reported: "The fact is that military personnel was entirely incapable of determining whether or not the many reports of illicit signaling were well-founded. . . . The basic trouble observed was the lack of training and experience of military personnel carrying on the monitoring and direction-finding work." *Id.* at 282; *see id.* at 283 ("[The head of the FCC's Radio Intelligence Division] confessed[:]. . . 'Frankly, I have never seen an organization that was so hopeless to cope with radio intelligence requirements.'"). An Assistant to the Solicitor General described the impact of these revelations: "We are now therefore in possession of substantially incontrovertible evidence that [General DeWitt's] most important statements of fact . . . to justify the evacuation and detention were incorrect, and furthermore that General DeWitt . . . in all probability did know that they were incorrect [when] he embodied them in his final report . . . ." *Id.* at 285.

142. For an example of one judge's threat assessment in April 1942, consider Judge Lloyd L. Black's decision denying a habeas petition. He "raised the specter of 'fifth columnists . . . pretending loyalty to the land where they were born,' but who might 'become enemy soldiers over night.'" *Id.* at 113. "How many believe that if our enemies should manage to send a suicide squadron of parachutists to Puget Sound that the Enemy High Command would not hope for assistance from many such American-born Japanese?" *Id.* Judge Black later wrote, in an opinion upholding Hirabayashi's indictment, that, "since Pearl Harbor last December, we have been engaged in a total war with enemies unbelievably treacherous and wholly ruthless, who intend to totally destroy nation, its Constitution, our way of life, and trample all liberty and freedom everywhere from this earth." *Id.* at 155. "Of vital importance . . . is the fact that the parachutists and saboteurs, as well as the soldiers, of Japan make diabolically clever use of infiltration tactics. They are shrewd masters of tricky concealment among any who resemble them." *Id.* "With the aid of an artifice or treachery they seek such human camouflage and with uncanny skill discover and take advantage of any disloyalty among their kind." *Id.*

Justice Douglas, many years after the war, recalled the government's argument "that if the Japanese landed troops on our West Coast nothing could stop them west of the Rockies." *Id.* at 362. The Court had been particularly impressed, Douglas added, by Solicitor General Fahy's assertion that "the enclaves of Americans of Japanese ancestry should be moved inland, lest the invaders by donning civilian clothes would wreak even more serious havoc on our Western ports." *Id.* Douglas later characterized that scenario as "not much of an argument, but it swayed a majority of the Court, including myself." *Id.*; *cf. id.* at 129 (describing an ACLU resolution that "supported the government's right during wartime 'to establish military zones and to remove persons, either citizens or aliens, from such zones when their presence may endanger national security, even in the absence of a declaration of martial law[, if the evacuation was] based upon a classification having a reasonable relationship to the danger intended to be met'").

143. *See, e.g., id.* at ix-x; YAMAMOTO *supra* note 124, at 9.

144. *But cf. IRONS, supra* note 51, at 306 ("Between them, the ACLU and JACL briefs [in *Korematsu*] questioned virtually every assertion in [General DeWitt's] *Final Report*. [The former brief's] attack on the factual veracity of DeWitt's espionage claims was matched by [the latter brief's] argument that racist motivations had led to evacuation.").

Putting hindsight aside, however, it is uniquely valuable to reconstruct Rutledge's perspective to understand *Korematsu*'s mistake. Rutledge was relatively sensitive to racial discrimination.<sup>145</sup> And he had a strong reputation as a champion of individual rights—alongside Douglas, who joined the majority's opinion, and Black, who authored it. How could he vote against Fred Korematsu? The question is important, but the two-fold answer is not easy or satisfying. First, Rutledge trusted FDR in ways that modern readers may struggle to grasp. Roosevelt had led the country through a Great Depression, using “fireside chats” to legitimate policies and build his personal image.<sup>146</sup> When *Korematsu* was decided in 1944, Roosevelt was en route to winning his country's largest foreign war and had just earned an unprecedented fourth presidential term; he had also picked seven of the nine sitting Justices. If Roosevelt said something was militarily necessary—as his Solicitor General did in *Hirabayashi* and *Korematsu*—that must have seemed to Rutledge, his colleagues, and much of the country a strong reason to believe it.

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145. FERREN, *supra* note 5, at 387 (quoting Louis Pollak's prediction that Rutledge “‘would have moved’ against racial discrimination in public schools ‘if he’d had the chance’”). See also Rutledge's conduct in *Morgan v. Virginia*, 328 U.S. 373 (1946), where Thurgood Marshall and William H. Hastie from the NAACP's Legal Defense Fund argued that a Virginia statute requiring racially discriminatory service travel impermissibly burdened interstate commerce. Pollak, *Profile of a Justice*, *supra* note 4, at 208–10. At oral argument, Rutledge asked Hastie whether the main objection to the Jim Crow law should lie with the equal protection clause, not dormant commerce jurisprudence. Hastie responded that he and Marshall were not making any equal protection argument, but that they “would return to the Court with a case making that argument in due course.” *Id.* at 210. A majority in *Morgan* accepted the NAACP's commerce argument. But Rutledge, unwilling to paper over such momentous issues of equality, wrote a one-line opinion: “Mr. Justice Rutledge concurs in the result.” *Id.* at 209. “It is not unreasonable to speculate that Rutledge's laconic concurrence was a constitutional utterance of, ultimately, the first magnitude,” *id.*, namely, it indicated Rutledge's view, as early as 1946, that the “separate but equal” doctrine was unacceptable.

146. See generally Lawrence M. Friedman, *The One-Way Mirror: Law Privacy, and the Media*, 82 WASH. U. L.Q. 319, 326 (2004) (describing the effect of Roosevelt's image control on his political success).

Surprising deference to FDR persisted even among persons who opposed the government's evacuation program. See IRONS, *supra* note 51, at 80–81 (“[Saburo Kido, a founding member of the JACL] denounced evacuation . . . [but] nonetheless expressed ‘implicit confidence in President Roosevelt and the gratitude of the JACL ‘for the fairness with which our case has been handled. We are glad that we can become the wards of our government for the duration of the war.’”); *id.* at 134 (explaining the “‘shift in opinion within the [ACLU] Board’ . . . [as based on] the nature of World War II as a global crusade against Nazi and fascist aggression and terror. Like most other Americans, members of the ACLU board were willing to countenance every effort to win the war. . . . The man who authorized the evacuation was not only the President but Commander in Chief of the troops who fought to preserve democracy.”); *cf. id.* at 180–81 (“As the only national organization of ‘progressive’ lawyers, the [National Lawyers Guild] . . . actually backed the wartime internment program. . . . This sentiment illustrates as well the influence of the government lawyers who made up a substantial bloc of the Guild's membership.”).

In a sense, the government used its institutional credibility as a litigating tactic, arguing that courts could not accurately judge national security risks, particularly because World War II presented “new” security risks “wholly unprecedented in the history of this country,” including unconventional warmaking through “fifth column” espionage and sabotage.<sup>147</sup> Rutledge’s conversations with his first law clerk, Victor Brudney, confirm the effect in *Hirabayashi* of such arguments for deference. When Brudney suggested that the Court should request access to an FBI report casting doubt on the need for mass curfews and evacuations, Rutledge replied with defensive astonishment:

What do you think you are doing? Don’t you understand that there are only nine of us sitting here, and that the generals have said this [curfew] is necessary for the preservation and security of the country? Pearl Harbor was attacked and more may happen! Who are we to question this? What makes you think any of us will question this? Too much is at stake, and we are too far removed from the realities.<sup>148</sup>

Part of Rutledge’s deferential posture surely reflected his trust, not in military officials generally, but in Roosevelt himself.

Second, Rutledge’s *Ahrens* dissent illustrates his commitment to legal principle, and he saw *Korematsu* as conceptually inseparable from *Hirabayashi*—despite academics’ consistently opposite view.<sup>149</sup> Modern jurists study *Korematsu* as indefensibly embracing Japanese-American internment, and *Hirabayashi* (if at all) as a curfew case of marginal

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147. Brief for the United States at 16, 34, 60, *Hirabayashi v. United States*, 320 U.S. 81 (1943) (No. 43-870); see generally IRONS, *supra* note 51, at 21 n.\* (“The term ‘fifth column’ [was] coined during the Spanish Civil War by an observer who remarked that General Franco had four military columns marching on Madrid and a ‘fifth column’ of civilian sympathizers already within the Capital.”). In modern parlance, fifth columnists would be called “terrorist sleeper cells”; further parallels to modern governmental rhetoric need no elaboration.

148. FERREN, *supra* note 5, at 246.

149. For early examples of the academic consensus that *Hirabayashi* and *Korematsu* are different, see Dembitz, *supra* note 124, at 189–97, and Eugene V. Rostow, *The Japanese-American Cases—A Disaster*, 54 YALE L.J. 489 (1945). Interestingly, with the exception of Justice Roberts, whose reasoning is discussed herein, few judges have agreed with these academics’ view. In 1986, for example, Judge Donald Vorhees opined in *Hirabayashi*’s *coram nobis* proceeding that *Hirabayashi*’s conviction on the evacuation should be vacated, but that his curfew conviction should remain because the curfew had constituted a “relatively mild” burden “contrasted with the harshness of the exclusion order.” *Hirabayashi v. United States*, 627 F. Supp. 1445, 1457 (W.D. Wash. 1986). The Ninth Circuit promptly reversed on that issue. *Hirabayashi v. United States*, 828 F.2d 592 (9th Cir. 1987).

significance.<sup>150</sup> Justice Roberts's *Korematsu* dissent states current orthodoxy:

[*Korematsu*] is not a case of keeping people off the streets at night as was [*Hirabayashi*], . . . nor a case of temporary exclusion of a citizen from an area for his own safety or that of the community . . . . On the contrary, it is the case of convicting a citizen as a punishment for not submitting to imprisonment in a concentration camp based on his ancestry, and solely because of his ancestry, without evidence or inquiry concerning his loyalty and good disposition towards the United States.<sup>151</sup>

The briefs in *Korematsu* and *Hirabayashi* yield a very different picture. To start with obvious similarities, both cases concerned the validity of military orders from the same officer, authorized by the same statute and presidential order, based on the same asserted emergency, incorporating the same racial presuppositions, supported by the same dubious social science, asserting the same need for military deference, and invoking the same claim of judicial incompetence.<sup>152</sup>

150. A recent essay suggests that legal education about the World War II cases fails adequately to recognize *Ex Parte Endo*. Patrick O. Guthridge, *Remember Endo?*, 116 HARV. L. REV. 1933 (2003). *Endo* granted habeas relief to a Japanese-American who the military authorities had determined to be loyal. By contrast, Irons makes a strong argument that *Endo* is not so important:

All that [the *Endo* Court] . . . intended, was to strike down the WRA's requirement that [detainees who were deemed harmless] complete the leave forms as a condition for release. . . . 'Neither the Act nor the orders use the language of detention,' [Douglas] wrote . . . . Given this literal approach, of course, the Court's opinions in the *Hirabayashi* and *Korematsu* cases would equally fail the test imposed by Douglas. . . . 'We do not mean to imply,' he explained on the Court's behalf, 'that detention in connection with no phase of the evacuation program would be lawful. The fact that the Act and the orders are silent on detention does not of course mean that any power to detain is lacking.' The silence of the President and Congress meant only that 'any such authority which exists must be implied.'

IRONS, *supra* note 51, at 342. Whatever one thinks of *Endo*, however, the greatest oversight is most lawyers' widespread unfamiliarity with *Hirabayashi*, which set forth a complete doctrinal groundwork for the now-infamous *Korematsu* decision.

151. *Korematsu v. United States*, 323 U.S. 214, 225–26 (1944) (Roberts, J., dissenting).

152. Compare Brief for the United States at 3–32, *Hirabayashi v. United States*, 320 U.S. 81 (1943) (No. 43–870) (discussing various racist and quasi-sociological theories arguing that people of Japanese descent were especially likely to be spies, saboteurs, and terrorists), with Brief for the United States at 3–15, *Korematsu v. United States*, 323 U.S. 213 (1944) (No. 45–22) (reciting and explicitly incorporating the *Hirabayashi* brief's discussion of racial tensions and military necessity). See also *Korematsu*, 323 U.S. at 217 ("Exclusion Order No. 34, which the petitioner . . . admittedly violated, was one of a number of military orders and proclamations . . . . One of the series of orders and proclamations, a curfew order, which like the exclusion order here was promulgated pursuant to Executive Order 9066, subjected all persons of Japanese ancestry . . . to remain in their residences from 8 p.m. to 6 a.m. As is the case with the exclusion order here, that prior curfew order was designed as a 'protection against espionage and against sabotage.'").

Of course it is true that a curfew, even one approaching house arrest, is substantially less disruptive than relocation and detention, which often wrecked jobs and property. Yet that line between *Korematsu* and *Hirabayashi* also blurs upon second glance. *Hirabayashi* was convicted not only of breaking curfew. He was also convicted of violating DeWitt's exclusion order by failing to report to a Civil Control Station. The latter "exclusion count" was litigated and was squarely before the Court (though no Justice addressed the subject). By comparison, *Korematsu*'s case did not challenge indefinite detention—as many today believe—nor did it seek relief from relocation. *Korematsu* himself had not been indefinitely detained or relocated. Instead, he filed a direct appeal from his criminal conviction, and that conviction—just like *Hirabayashi*'s—concerned the failure to report to a Civil Control Station in violation of DeWitt's exclusion order.<sup>153</sup>

Analysis of disputed legal issues reveals more similarities. The military defended, and the Court upheld, the convictions in *Korematsu* and *Hirabayashi* for the same reasons: (i) they involved persons of presumptively "menac[ing]" Japanese descent (ii) who "could not readily be isolated and separately dealt with," and (iii) the military was allowed to use racial filters that might seem "odious" during peacetime, to avoid inflicting "obviously needless hardship" on the general (principally white) populace.<sup>154</sup> The military deemed both the curfew and relocation programs necessary to counteract possible invasion, sabotage, and espionage. And although that conclusion was wrong, based on deeply flawed evidence, even modern readers must labor to draw constitutionally solid distinctions between the curfew and the relocation.

In fact, only one of *Korematsu*'s dissenters—Justice Roberts—even tried to distinguish the unanimous *Hirabayashi* decision.<sup>155</sup> The others quietly renounced their year-old votes.<sup>156</sup> Roberts tried to distinguish

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153. *Korematsu*, 323 at 215–16.

154. See *supra* text accompanying notes 128–30.

155. *Korematsu*, 323 U.S. at 225–26, 231–32 (Roberts, J., dissenting).

156. Murphy's dissent neither explains nor cites his concurrence in *Hirabayashi*. See *id.* at 233–42 (Murphy, J., dissenting). But cf. *id.* at 233 (quoting without citation his earlier phrase, "the very brink of constitutional power"). His changed view may have resulted from information released in a post-*Hirabayashi* government report concerning DeWitt's justification and motives. *Id.* at 236 n.1 (noting explicitly that DeWitt's latest report was not made public until after *Hirabayashi* was decided).

Jackson's dissent also does not deny that *Korematsu*'s result follows logically from *Hirabayashi*. *Id.* at 246–47 (Jackson, J., dissenting). Instead, he lists *Hirabayashi*'s principled expansion as exemplifying inherent risks of wartime jurisprudence. In Jackson's words, "we should learn something from [the *Hirabayashi*] experience," and, his *Korematsu* vote indicates, we should not repeat it. *Id.* at 246.

*Korematsu* from *Hirabayashi* because the government's exclusion order was "part of an over-all plan for forceable detention,"<sup>157</sup> but that argument is unpersuasive. The link between exclusion and detention was manifest in *Hirabayashi*. Indeed, *Hirabayashi* explicitly held that the relevant statute, executive orders, and military proclamations about Japanese-Americans were "not to be read in isolation" but were "parts of a single program [that] must be judged as such."<sup>158</sup> Was any part of that program, in Roberts's words, *for* "forceable detention"? Or was every part of the program *for* security against threats?<sup>159</sup> Roberts failed to recognize that, although *Hirabayashi*'s curfew and travel limits were milder than evacuation and relocation, each measure was obviously part of the same racially targeted security plan. It was clear to the Court, and was dispositive for Rutledge, that the practical effects of *Korematsu* and *Hirabayashi* differed, but their legal foundations were similar indeed. As the *Korematsu* majority wrote: "In the light of the principles we announced in the *Hirabayashi* case, we are unable to conclude that it was beyond the war power of Congress and the Executive to exclude those of Japanese ancestry from the West Coast war area at the time they did."<sup>160</sup>

None of this remotely suggests that Rutledge voted correctly in *Korematsu*, but it does shift the error's root to *Hirabayashi*, a case where (in Rutledge's first year at the Court) Frankfurter and Reed pressured even the stalwart liberal Murphy to support the government.<sup>161</sup> Perhaps the strongest critique of *Korematsu* is that the exclusion order *was not necessary* for national survival—as should have been evident from the government's weak arguments at the time. But the same is true of *Hirabayashi*'s curfew. There was no adequate reason to impose a mass curfew and travel restrictions on any population along the Pacific Coast. And even if there were, such regulations should have governed *all persons* in sensitive areas. If one must imagine packs of midnight saboteurs,

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157. *Id.* at 232 (Roberts, J., dissenting). Roberts also seems to imply that the "emergency" basis for the exclusion order is less solid than that for the curfew order. *Id.* at 231–32. That argument is hard to credit, insofar as both measures seem to be military responses to the same asserted (albeit false) threats of sabotage, espionage, and invasion. In support of this viewpoint, Roberts cites "the facts above recited, and those set forth in [*Endo*]," *id.* at 232, but without more specificity, his intended referents are not clear.

158. *Hirabayashi v. United States*, 320 U.S. 81, 103 (1943).

159. For a detailed analysis of complexities in identifying what discriminatory programs are "for," see Roger Craig Green, *Interest Definition in Equal Protection: A Study of Judicial Technique*, 108 YALE L.J. 439 (1998).

160. *Korematsu*, 323 U.S. at 217–18.

161. FERREN, *supra* note 5, at 244. For praise of Murphy's *Korematsu* dissent, see generally Yin, *supra* note 94, at 1097 & n.411 (collecting sources).

seeking to bomb factories or shipping docks, it is hard to see why skin color or ancestry should matter much.<sup>162</sup> Moreover, there was no evidence of post-Pearl Harbor sabotage or espionage by persons of Japanese descent, though such activities had been undertaken by non-Japanese persons during the war in Europe.<sup>163</sup>

The irrationality of the curfew and exclusion orders also reveals an obvious source of revulsion at *Korematsu*, namely, its racism; but once more, *Korematsu* and *Hirabayashi* are predominantly similar rather than different. Under an anti-discrimination model of equal protection, *Hirabayashi* and *Korematsu* were equally wrongheaded because both drew racial distinctions without a compelling, narrowly-tailored interest.<sup>164</sup> Similarly, under an anti-subordination model, to exclude a racial group from home and community might be more offensive than house arrest because the former yields a class of “domestic exiles.”<sup>165</sup> Yet race-based curfews and travel restrictions also produce “outsiders” within society’s gates and would undoubtedly violate anti-subordination norms.

For purposes of this Article, what is most important is the anachronism of judging the Japanese-American cases under any modern theory of equal

162. Ironically, a variant of this argument appeared in Walter Lippman’s newspaper column, “The Fifth Column On the Coast,” which deplored “the unwillingness of Washington to adopt a policy of mass evacuation and mass internment of all those who are technically enemy aliens.” IRONS, *supra* note 51, at 60. “*Nobody*’s constitutional rights include the right to reside and do business on the battlefield,” he wrote. “And *nobody* ought to be on a battlefield who has no good reason to for being there. There is plenty of room elsewhere for him to exercise his rights.” *Id.* (emphasis added). If access restrictions, or detentions, were necessary, the most security-oriented policy would be to apply such restrictions to all civilians. (The anomaly, of course, is that Lippman’s article used the word “nobody” in this context to denote “no Japanese people.”)

The government’s counterarguments against universally applicable security measures were that (i) loyalty and ancestry correlate, (ii) Japanese people cannot be distinguished by “Occidental eyes,” and (iii) applying the curfew to white and other Californians would impose “*obviously* needless hardship.” *Hirabayashi*, 320 U.S. at 95 (emphasis added). For discussion of such arguments, see *supra* note 129.

163. Compare, e.g., YAMAMOTO, *supra* note 123, at 364, and IRONS, *supra* note 51, at 22–23 (discussing the arrest of Itaru Tachibana, a Japanese naval officer masquerading as an English-language student, in June 1941, and noting that the FBI, the Office of Naval Intelligence, and Army Intelligence all agreed “that the Japanese espionage ring had been broken before Roosevelt signed Executive Order 9066 [in February 1942]”), and *id.* at 52 (mentioning a report by J. Edgar Hoover on February 1942 “discounting the Army’s claims of sabotage and espionage on the part of Japanese Americans”), with *Ex Parte Quirin*, 317 U.S. 1 (1942) (addressing case of German and United States citizen saboteurs, deposited on the East Coast by a German submarine to commit assorted acts of sabotage).

164. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 235 (1995).

165. See Owen Fiss, *Groups and the Equal Protection Clause*, in EQUALITY AND PREFERENTIAL TREATMENT 84 (Marshall Cohen et al. eds., 1977); see also Owen M. Fiss, *The Immigrant as Pariah*, in A COMMUNITY OF EQUALS: THE CONSTITUTIONAL PROTECTION OF NEW AMERICANS (Joshua Cohen & Joel Rogers eds., 1999).



protection, none of which had emerged in World War II.<sup>166</sup> When *Korematsu* was decided, *Brown* was still a decade away, and the District of Columbia—like large swaths of the country—was unflinchingly segregated, with explicit discrimination from public education to the Capitol cafeteria.<sup>167</sup> Nor were the Justices ignorant of links between United States racism and the Japanese-American cases. Indeed, the United States' brief in *Hirabayashi* (which the government incorporated by reference in *Korematsu*) cited *Plessy v. Ferguson* as ordinary precedent, not as the constitutional pariah it would later become.<sup>168</sup>

Such historical context helps explain why the strong anti-racist language in Murphy's dissent and the Court's opinion did not ring with the clarity of principle that it holds today.<sup>169</sup> The Justices lived and worked in a Jim Crow District of Columbia, and the Court oversaw a Jim Crow nation, with countless discriminatory acts against non-whites each day. Indeed, the United States military itself remained segregated.<sup>170</sup> A more pointed question is how the Court could earnestly write that “[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people,” and could, without mentioning legalized racism, describe the United States as having “institutions founded upon the doctrine of equality.”<sup>171</sup> The *Korematsu* opinion upholding military racial

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166. The earliest hallmark of modern equal protection theory was not yet published. Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341 (1949). Also, equal protection had not been incorporated against the federal government. See *Bolling v. Sharpe*, 347 U.S. 497 (1954). *But cf.* Dembitz, *supra* note 124, at 188 (proposing, in an echo of equal protection jurisprudence decades later, that “[w]hen the method chosen to meet the danger is one of racial discrimination, it should not be deemed reasonable unless the Government sustains the burden of demonstrating that available less stringent and more limited alternatives could not reasonably have been considered adequate”).

167. See, e.g., RICHARD KLUGER, *SIMPLE JUSTICE* 129 (1977) (“[As Herbert] Wechsler hurried out from the Court, then housed in the old Senate Office Building, he bumped into [the Dean of Howard Law School, Charles] Houston, who had come by to file a petition for rehearing. ‘I proposed that we have lunch in the Capitol,’ Wechsler would remember more than forty years afterward, ‘and he said no, we couldn’t do that, but we might go over to Union Station for a bite.’”); GUNNAR MYRDAL, *AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY* (1944), *cited in* *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 n.11 (1954).

168. Brief for the United States at 60, *Hirabayashi v. United States*, 320 U.S. 81 (1943) (No. 43-870); Appellant’s Reply Brief at 10, *Hirabayashi*, 320 U.S. 81.

169. See, e.g., *Korematsu v. United States*, 323 U.S. 215, 242 (1944) (Murphy, J., dissenting) (“Racial discrimination in any form and in any degree has no justifiable part whatever in our democratic way of life.”).

170. See KLUGER, *supra* note 167, at 226, 255; IRONS, *supra* note 51, at 364 (“During the evacuation debate in 1942, [Secretary of War Henry J. Stimson] defended the Army’s segregation of black soldiers . . . [He] denounced the ‘foolish leaders of the colored race’ who failed to understand ‘the basic impossibility of social equality’ in a society that forced the races apart by law.”).

171. *Hirabayashi*, 320 U.S. at 100. Incidentally, an early draft of Justice Black’s *Korematsu* opinion admitted that “the course of American life and thought has been increasingly

classification and evacuation was a predictably difficult occasion for the Court to proclaim (for the first time) that “all legal restrictions which curtail the civil rights of a single racial group are immediately suspect.”<sup>172</sup> At best, such phrases voiced dreams that the civil rights movement would struggle to realize. At worst, the Court’s holding that racial restrictions need “the most rigid scrutiny” bordered insincerity.<sup>173</sup> Thus, although legal principle did not support Rutledge’s vote to join his colleagues in *Hirabayashi*,<sup>174</sup> Rutledge did not see, and the dissents did not offer, a satisfying basis for changing course in *Korematsu*.<sup>175</sup>

It may be too late to reinvent conventional wisdom about *Hirabayashi* and *Korematsu*, which has long understated the former’s legal significance and overstated the latter’s. Two modern lessons nonetheless appear. First, to understand the true relationship between *Hirabayashi* and *Korematsu* is to illuminate the dangers of arguably “small” errors in executive detention cases. As Chief Justice Stone encouragingly suggested: “If you can do it for curfew you can do it for exclusion.”<sup>176</sup> And as Justice Souter has written: “Not every epochal case has come in epochal trappings.”<sup>177</sup> From Rutledge’s perspective as the decisive fifth vote, the Court’s mistake in *Korematsu* was to slip down the treacherous slope that *Hirabayashi* had constructed. For modern readers to overlook that aspect of the internment cases misses something important.

Second, insofar as even *Korematsu*’s dissenters hesitated to invoke now-conventional arguments about the military curfew’s “small impact” to explain their year-old change in votes, one might seek explanations elsewhere. For some Justices, what most separated *Hirabayashi* from *Korematsu* was a year’s passed time, and the government’s reaction

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polluted by the warped psychology of race hatred,” but characterized that circumstance less as a domestic problem than as “a reflection of the witch’s brew that has lately been served up abroad.” IRONS, *supra* note 51, at 337.

172. *Korematsu*, 323 U.S. at 216. See generally IRONS, *supra* note 51, at 340 (speculating that “[t]he odd placement of [this phrase] in the opinion—stuck in the middle of the chronology of the case—suggests that Black inserted it at the last minute, more as window dressing than as a plank in the opinion’s foundation”).

173. *Korematsu*, 323 U.S. at 216.

174. Rutledge wrote to Chief Justice Stone, “I have had more anguish over [Hirabayashi] than any I have decided, save possibly one death case in the [Court] of Appeals.” FERREN, *supra* note 5, at 245. It is an irreducible shortcoming that Rutledge did not follow through on such concerns, which could have changed his vote.

175. Also interesting is the fact that none of *Korematsu*’s dissenters proposed to overrule *Hirabayashi* as a virulent mistake.

176. IRONS, *supra* note 51, at 322.

177. *United States v. Lopez*, 514 U.S. 549, 615 (1995) (Souter, J., dissenting).

thereto.<sup>178</sup> When *Korematsu* reached the Court in 1944, the United States was far more secure than when *Hirabayashi* was decided. Despite that increased security, the government's arguments and policies concerning race-based confinement were unchanged. Even years after Pearl Harbor, Japanese-American detainees remained in prison, even those whom the government found to be innocent and loyal.<sup>179</sup> For skeptics of Japanese-American internment, it must have seemed absolutely clear in 1945 that the government's detention program encompassed—to say the least—disturbing excesses and oversimplifications.

From this unconventional perspective, *Korematsu*'s dissents look quite different. These opinions perhaps voiced frustration and dissatisfaction with the government's exhausted, decreasingly credible arguments in its "second round" of detention litigation. None of this changes the misfortune that Rutledge, and with him a majority of the Court, used *Korematsu* to confirm, not reject, *Hirabayashi*'s missteps. But recreating Rutledge's perspective crystallizes how a better path might have been clearer if any of *Korematsu*'s dissenters had been methodical, or perhaps candid, in analyzing the two cases together.

## 2. "Enemy Combatants"

Hindsight and doctrinal shifts have discredited *Korematsu* and *Hirabayashi*, yet the Court had no occasion to reconsider the wartime executive detention of uncharged citizens until *Hamdi v. Rumsfeld*.<sup>180</sup> In late 2001, the United States took custody of Yaser Esam Hamdi, who was captured by the Northern Alliance in Afghanistan. The United States transferred Hamdi to Guantanamo Bay, but upon learning that he was born an American citizen, the government transferred him to Virginia and then to South Carolina.<sup>181</sup>

In June 2002, Hamdi's father filed for habeas corpus, claiming that the government should stop questioning Hamdi and give him counsel, and that Hamdi's detention without charges or a hearing was illegal. The petition claimed that Hamdi was doing short-term relief work in Afghanistan, and had neither trained nor fought against the United States.<sup>182</sup> The government replied that Hamdi's detention was proper under the

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178. Cf. *supra* note 156 (discussing Murphy's reliance on new information).

179. *Ex parte Endo*, 323 U.S. 283, 300 (1944).

180. 542 U.S. 507 (2004).

181. *Id.* at 510.

182. *Id.* at 511.

Authorization for Use of Military Force<sup>183</sup> because he had helped the Taliban as an “enemy combatant,” *i.e.*, “part of or supporting forces hostile to the United States” who “engaged in an armed conflict against the United States.”<sup>184</sup> As proof, the government offered a declaration from an official with second- and third-hand knowledge of the case, but the district court ordered *in camera* review of numerous documents concerning Hamdi’s capture and detention. The Fourth Circuit reversed, allowing the government to detain any person in a combat zone based on an executive finding of enemy combatant status, without judicial review of the supporting evidence.<sup>185</sup>

In 2004, *Hamdi* reached the Court under *Korematsu*’s shadow. Fred Korematsu himself filed a brief seeking certiorari, and several merits briefs cited the World War II cases.<sup>186</sup> There were, however, obvious differences between the two. For example, *Hamdi* did not concern racial discrimination or mass removal of citizens. *Hamdi* did, however, involve the detention of potentially innocent citizens based on executive judgments of fact and military necessity. And the latter principle struck some observers as unsound in a “war” whose uncertain duration might support exceedingly long confinement.<sup>187</sup>

The Supreme Court ruled eight to one that the Fourth Circuit was wrong, but it could not reach consensus as to why. The majority divided among three opinions, each of which may be judged by its capacity to prevent “another *Korematsu*.”<sup>188</sup> O’Connor wrote for four Justices that Congress’s Authorization of Military Force allowed the President to detain any “enemy combatant” on the battlefield who supported hostile forces

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183. *See supra* note 85 and accompanying text.

184. *Hamdi*, 542 U.S. at 510, 516.

185. *Id.* at 514.

186. Brief of Amicus Curiae Fred Korematsu in Support of Petitioners, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (No. 03-6696); *see, e.g.*, Brief Amici Curiae of the ACLU et al. in Support of Petitioners at 25, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (No. 03-6696); Brief of Washington Legal Foundation et al. as Amici Curiae in Support of Respondents at 20–21, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (No. 03-6696); *see also, e.g.*, Brief for United States Senators John Cornyn et al. as Amicus Curiae in Support of Donald H. Rumsfeld at 17 n.9, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (No. 03-6696).

187. Mark Tushnet, *Defending Korematsu?: Reflections on Civil Liberties in Wartime*, 2003 WISC. L. REV. 273, 279 (“The already long duration of the “war on terrorism” suggests that we ought not think of it as a war in the sense that World War II was a war. . . . To say that law is silent during a more-or-less permanent condition is quite different from saying that law is silent during wartime.”).

188. As should be clear, I use this label for convenience, and perhaps for effect, to indicate the danger of excessive executive detention. I do not mean to suggest that wholesale racist internment is upon us, or is at all likely. Much less should the term counterindicate my personal preference for the (never-used) term “another *Hirabayashi*.”

and took up arms against the United States.<sup>189</sup> For citizen detainees who denied committing hostile acts against the United States, however, O'Connor stated that procedures for deciding enemy combatant status must—as a matter of due process—balance detainees' interests in liberty and accuracy against military interests in security and convenience.<sup>190</sup> In striking that balance, the plurality required that detainees be able to dispute the government's enemy combatant finding before a neutral decisionmaker, but the plurality also suggested that the government might sometimes use hearsay evidence, withhold military documents, and use independent military tribunals as decisionmakers.<sup>191</sup> Finally, in providing instructions on remand, O'Connor endorsed broad district court discretion:

We anticipate that a District Court would proceed with the caution that we have indicated is necessary in this setting, engaging in a factfinding process that is both prudent and incremental. 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 constitutional limitations safeguarding essential liberties that remain vibrant even in times of security concerns.<sup>192</sup>

Interspersed with these fairly mild substantive rulings, O'Connor used sharp language to reject *Korematsu's* legacy.<sup>193</sup> Indeed, O'Connor cited

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189. *Hamdi*, 542 U.S. at 521 (stating that persons determined to be Taliban fighters may be detained at least during active United States combat in Afghanistan). O'Connor's opinion was joined by Chief Justice Rehnquist, Justice Kennedy, and Justice Breyer.

190. *Id.* at 528–35 (applying this balance); *see also* Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (outlining the general methodology).

191. *Hamdi*, 542 U.S. at 534 (“Any factfinding imposition created by requiring a knowledgeable affiant to summarize [documents regarding battlefield detainees] to an independent tribunal is a minimal one.”).

192. *Id.* at 538–39.

193. *Id.* at 530–31 (acknowledging the lessons of “history and common sense . . . that an unchecked system of detention carries the potential . . . for oppression and abuse of others who do not present [a] threat,” and “reaffirming . . . the fundamental nature of a citizen's right to be free from involuntary confinement by his own government without due process of law”); *id.* at 532–33 (“It is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in these times that we must preserve our commitment at home to the principles for which we fight abroad. . . . These essential constitutional promises may not be eroded.”). In *Hamdi's* most quoted phrase, O'Connor wrote:

We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens. Whatever power the United States Constitution envisions for the Executive . . . in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake.

*Id.* at 536; *id.* at 536–37 (“[I]t would turn our system of checks and balances on its head to suggest that a citizen could not make his way to court with a challenge to the factual basis for his detention by his

Murphy's *Korematsu* dissent as evidence that, while courts afford the greatest respect to the judgments of military authorities "in matters relating to the actual prosecution of a war, . . . it does not infringe on the core role of the military for the courts to exercise their own time-honored and constitutionally mandated roles of reviewing and resolving claims like [Hamdi's]." <sup>194</sup>

O'Connor's broad, anti-detention rhetoric indicated an understanding that the World War II cases' failures sounded not only in racism, but also in a misallocation of institutional power and trust. Even as she acknowledged that profound problem, however, O'Connor's multifactor test left federal courts to balance, on a case-specific basis, private liberty interests versus asserted military needs. The obvious risk is that such a flexible approach may not sufficiently discipline executive decisions, especially when the government controls the flow of information, and may even change a detainee's location to seek a more favorable forum. <sup>195</sup>

What made the World War II cases incredibly hard was the Court's inability to assess whether the government's claims of dire threats were true, false, or somewhere in between. This is why no Justice criticized the government's flawed factual arguments until the threat of domestic attack receded in 1944. <sup>196</sup> By comparison, Hamdi's case was more important for politics than national security. Hamdi's detention affected few apparent security interests from the start, and any specific threats requiring uncharged detention seemed less urgent with each passing month and year. Also, the Court decided *Hamdi* just as the national media reported stories and pictures of terrible abuses in Abu Ghraib and elsewhere. <sup>197</sup> In such a

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government, simply because the Executive opposes making available such a challenge."); *id.* at 537 ("Any process in which the Executive's factual assertions go wholly unchallenged or are simply presumed correct without any opportunity for the alleged combatant to demonstrate otherwise falls constitutionally short.").

194. *Id.* at 535.

195. *Cf. Rumsfeld v. Padilla*, 542 U.S. 426 (2004).

196. *Compare, e.g., Hirabayashi v. United States*, 320 U.S. 81, 112–13 (1943) ("[T]he military authorities could have reasonably concluded at the time that determinations as to the loyalty and dependability of individual . . . persons of Japanese extraction on the West Coast could not be made without delay that might have had tragic consequences.") (Murphy, J., concurring), *with Korematsu v. United States*, 323 U.S. 214, 235 (1944) (Murphy, J., dissenting) ("[T]he exclusion . . . of all persons with Japanese blood in their veins has no . . . reasonable relation [to invasion, sabotage, and espionage]. And that relation is lacking because the exclusion order necessarily must rely . . . upon the assumption that *all* persons of Japanese ancestry may have a dangerous tendency to commit sabotage and espionage and to aid our Japanese enemy . . .").

197. For discussion among popular print media, see, for example, Mark Bowden, *Lessons of Abu Ghraib*, *THE ATLANTIC MONTHLY*, July/Aug. 2004, at 37; Seymour M. Hersh, *Torture at Abu Ghraib*, *THE NEW YORKER*, May 10, 2004, at 42; Josh White, *Army General Advised Using Dogs at Abu Ghraib, Officer Testifies*, *WASH. POST*, July 27, 2004, at A18. Television images and internet sources

climate, the government's strict litigating position—which would have displaced all judicial review of alien terrorists' detention, regardless of that confinement's duration or conditions—threatened the governmental credibility that was critical to earning Rutledge's "swing vote."<sup>198</sup> Hamdi's attorney stressed this credibility problem at oral argument, sardonically summarizing the government's overall position as: "Trust us."<sup>199</sup>

In any event, although O'Connor would not accept Hamdi's indefinite, uncharged detention without some form of additional process, her doctrinal test overlooked the institutional problems plaguing this field of the law. For example, if the United States had a popular President like FDR, and if there were more demonstrable threats to national survival than presently appear, O'Connor's flexible analysis would seem far easier to satisfy than the Court's "most rigid scrutiny," which failed to protect Japanese-Americans during World War II. Thus, although *Hamdi's* plurality is sometimes praised for having resisted executive muscle-flexing, a historical focus suggests that its precedent might fail in times of evident, pressing crisis.<sup>200</sup>

Four Justices in *Hamdi*, in two separate opinions, rejected the government's argument for indefinite detention, but also rejected O'Connor's balancing test. Scalia, joined by Stevens, viewed

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of such information were also prevalent during this time. For analysis of how this media attention affected the Court's cases, see Diane Marie Amann, *Abu Ghraib*, 153 U. PA. L. REV. 2085, 2090–93 (2005).

198. See *supra* notes 146–48 and accompanying text.

199. Transcript of Oral Argument at 45, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (No. 03-6696), 2004 WL 1066082; cf. Neal K. Katyal, *Executive and Judicial Overreaction in the Guantanamo Cases*, 2004 SUP. CT. REV. 49.

200. The Court's power to control executive decisions during true crisis is, under any doctrinal architecture, certainly debatable. Cynics might suggest that, for popular Presidents facing demonstrable threats, it makes no difference what any court says. A popular touchstone for that view is Biddle's statement that "[t]he Constitution has not greatly bothered any wartime President," FRANCIS BIDDLE, IN BRIEF AUTHORITY 218 (1962), but one might also reach back to Hamilton's *Federalist* 78, which describes the judiciary as "least dangerous" precisely because it lacks the military and financial force to implement its decisions. THE FEDERALIST No. 78 (Alexander Hamilton).

Such arguments may undervalue the modern Court's political authority. When the Court ordered Roosevelt to release Endo, he not only complied, he also began drawing down the mass detention program. See, e.g., YAMAMOTO, *supra* note 100, at 174–75. The most egregious interbranch conflict regarding detention was Lincoln's famous failure to comply with Chief Justice Taney's order in *Merryman*. See REHNQUIST, *supra* note 131, at 32–43. But even in that one case concerning one detainee, Lincoln quickly sought a congressional remedy, and defied only a Chief Justice riding circuit (speaking only for himself) whose reputation had been badly bruised by *Dred Scott*. Indeed, among the great fortuities of United States history is a record of federal compliance with unfavorable Supreme Court decisions. *But cf.* IRONS, *supra* note 88, at 154 (noting that, even though the ACLU posted Korematsu's bail, "[t]he military policeman insisted that he had orders to take Korematsu into custody, and [the district judge] finally gave in. Korematsu left the courtroom under armed guard, taken first to the Presidio and then escorted back to the Tanforan internment camp.").

constitutional due process as requiring full criminal process before any citizen could be detained, unless Congress suspended habeas corpus.<sup>201</sup> Scalia's position was hard to square with a World War II precedent, *Ex Parte Quirin*,<sup>202</sup> and his broad constitutional pronouncement risked imposing significant, potentially premature burdens on the government's War on Terror.<sup>203</sup> Also, if the other branches deemed Scalia's constitutional rule unworkable, the only political solution would be for Congress to suspend habeas corpus altogether, thereby allowing even unconstitutional detention to escape judicial remedy.<sup>204</sup>

Souter, joined by Ginsburg, took a more promising approach, one grounded in history and responsive to the systemic pressures of national crisis. Souter avoided any need for Scalia's constitutional analysis by invoking the Non-Detention Act of 1971, which states that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress."<sup>205</sup> Souter described the statute's purpose by explicit reference to World War II internment:

[T]he Emergency Detention Act of 1950 [that prompted enactment of the Non-Detention Act]. . . authorized the Attorney General, in times of emergency, to detain anyone reasonably thought likely to engage in espionage or sabotage. That statute was repealed in 1971 out of fear that it could authorize a repetition of the World War II internment of citizens of Japanese ancestry; Congress meant to preclude another episode like the one described in *Korematsu v. United States*.<sup>206</sup>

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201. *Hamdi*, 542 U.S. at 554 (Scalia, J., dissenting). Scalia also endorsed the clear statement rule that Souter defended in detail. *Id.* at 574. For a superb discussion comparing Scalia's view to the plurality's, see Trevor W. Morrison, *Hamdi's Habeas Puzzle: Suspension as Authorization?*, 91 CORNELL L. REV. 411 (2006).

202. 317 U.S. 1 (1942) (upholding trial of a United States citizen before a specially composed military commission).

203. *Cf. supra* text accompanying notes 107–08 (noting some Justices' apparent hesitation to make broad judicial pronouncements in *Rasul* until more details of the new "war" became known).

204. *Cf. Hamdi*, at 502–14 (Thomas, J., dissenting). Our tradition of infrequently suspending habeas corpus might have survived Scalia's constitutional proposal, Dembitz, *supra* note 124, at 178 & n.11 (documenting historical examples of suspending the writ), but of course we cannot be sure.

205. 18 U.S.C. § 4001(a) (2000).

206. *Hamdi*, 542 U.S. at 542 (Souter, J., concurring in the judgment); *see id.* at 543 ("[Congress] adopted § 4001(a) for the purpose of avoiding another *Korematsu*."); *id.* at 547 n.2 (noting "the congressional object of avoiding another *Korematsu*"). Scalia agreed with Souter's statutory result, but, consistent with his distaste for legislative history, he declined to acknowledge the statute's historical pedigree and objectives. *Id.* at 573–74 (Scalia, J., dissenting). By contrast, the plurality agreed with Souter's general characterization of the statute, but not with his application thereof. *Id.* at



Souter repeatedly characterized the Non-Detention Act as “intended to guard against a repetition of the World War II internments”; thereby, he linked modern repulsion at wartime internment with legal authority to stop its recurrence, at least for citizens.<sup>207</sup> Souter went further, stating a constitutional basis for his statutory approach:

The defining character of American constitutional government is its constant tension between security and liberty, serving both by partial helpings of each. . . . For reasons of inescapable human nature, the [Executive] branch of the Government asked to counter a serious threat is not the branch on which to rest the Nation’s entire reliance in striking the balance between the will to win and the cost in liberty on the way to victory; the responsibility for security will naturally amplify the claim that security legitimately raises. . . . Hence the need for an assessment by Congress before citizens are subject to lockup, and likewise the need for a clearly expressed congressional resolution of the competing claims.<sup>208</sup>

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517–19 (plurality). Oddly, Thomas’s dissent did not even mention 18 U.S.C. § 4001(a). *Id.* at 579 (Thomas, J., dissenting).

207. Souter also rested his analysis on a presumption against executive detention that allegedly derived from *Endo*. *Id.* at 2654–55. The other side of *Endo*, however, is that *Korematsu* was decided the same day. *Cf.* Guthridge, *supra* note 150, at 1965–70. Thus, it is hard to find in *Endo* any general presumption against executive detention. Such broad principles would seem inconsistent with *Korematsu* itself, where executive power was not limited to implementing the least restraint “clearly and unmistakably indicated by the language [Congress] used.” *Ex parte Endo*, 323 U.S. 283, 300 (1944). Most likely, *Endo* differed from *Korematsu* chiefly in that the government had explicitly found that *Endo* was loyal to the United States. *Id.* at 294; *see* IRONS, *supra* note 51, at 342.

It is also important that Souter’s analysis and the Non-Detention Act’s terms only reach citizens. *See* David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953 (2002) (discussing myriad risks of allowing liberty protections to hinge on citizenship). The sharp legal distinction between citizens and non-citizens is what allowed Murphy to say in *Hirabayashi*: “Today is *the first time*, so far as I am aware, that we have sustained a substantial restriction of the personal liberty of citizens of the United States based upon the accident of race or ancestry.” *Hirabayashi v. United States*, 320 U.S. 81, 111 (1943) (emphasis added). To be sure, antebellum victims of racist slavery were not technically “citizens.” But the failure even to mention slavery as part of our national history of discrimination illustrates how unsatisfying and misleading citizenship-based legal rules can be. *See also* Dembitz, *supra* note 124, at 176 (“[T]he Japanese ancestry program brought to our law the first Federal measure of racial discrimination applicable to citizens . . .”).

208. *Handi*, 542 U.S. at 545 (Souter, J., concurring in the judgment). Implicit in this analysis, and in Souter’s opinion more generally, is the premise that the Non-Detention Act binds the President even in his efforts to prosecute the War on Terror. No Justice other than Thomas cast doubt on that proposition. *Cf.* *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2774 n.23 (“Whether or not the President has independent power, absent congressional authorization, to convene military commissions, he may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers.”).

The government claimed that Hamdi's detention complied with the Non-Detention Act because it did occur "pursuant to an Act of Congress," namely, the Authorization for Use of Military Force.<sup>209</sup> Thus, the operative question was how specific a congressional statute must be to satisfy the Non-Detention Act and authorize the detention of United States citizens. Souter replied by again resorting to history, comparing the post-9/11 statute to statutes invoked in the World War II cases.<sup>210</sup> The Japanese-American detentions were arguably supported by two congressional authorizations: the declaration of war against Japan and the statute criminalizing violation of any military exclusion order.<sup>211</sup>

If the Anti-Detention Act was drafted to prevent another *Korematsu*, it *simply must* require a clearer, more specific statutory basis for detention than appeared in World War II.<sup>212</sup> Measured by that standard, the Authorization for Use of Military Force fails. Although the modern resolution may be a broad, general license to make war, it is not more specific than World War II's declaration of war, and is clearly *less* specific than the statutes enforcing military-zone regulations. Souter did not explain his use of World War II history as a benchmark with maximal clarity, but that core historical comparison is what distinguishes his construction of the Non-Detention Act from other, more malleable "clear statement rules." Under Souter's approach, the backdrop of World War II presents an objective standard to measure future assertions of authorized executive detention.<sup>213</sup>

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209. The government's other argument was that the Non-Detention Act applied only to detention by civil authorities, not to detention by military authorities. *Id.* at 517 (plurality).

210. *Id.* at 543, 547 (Souter, J., concurring in the judgment). For reasons disputed, *supra* note 207, Souter stressed *Endo*, rather than *Korematsu*, as the decisive precedent in interpreting these statutes.

211. Act of March 21, 1942, Pub. L. No. 77-503, 56 Stat. 173; *see supra* note 115 and accompanying text.

212. *Hamdi*, 542 U.S. at 543 (Souter, J., concurring in the judgment). Souter explained the World War II cases' background as follows:

Although an Act of Congress ratified and confirmed an Executive order authorizing the military to exclude individuals from defined areas and to accommodate those it might remove, the statute said nothing whatever about the detention of those who might be removed . . . . When, therefore, Congress repealed the 1950 Act and adopted § 4001(a) for the purpose of avoiding another *Korematsu*, it intended to preclude reliance on vague congressional authority . . . . In requiring that any Executive detention be "pursuant to an Act of Congress," then, Congress necessarily meant to require a congressional enactment that [more] clearly authorized detention or imprisonment.

*Id.* (internal citations omitted).

213. For criticism of Souter's opinion, see Cass R. Sunstein, *Minimalism at War*, 2004 Sup. Ct. Rev. 47, 94-95 (2004), and Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2103-06 & n.271 (2005). Neither of these articles addresses the heart of Souter's argument, namely, that the Non-Detention Act was designed to produce a different outcome in cases like *Korematsu*. If one accepts that premise, Souter's conclusion seems

Souter acknowledged two implicit exceptions to the Non-Detention Act's protection against executive imprisonment. First, "in a moment of genuine emergency, when the Government must act with no time for deliberation, the Executive may be able to detain a citizen if there is reason to fear that he is an imminent threat to the safety of the Nation and its people."<sup>214</sup> Souter clearly viewed extant criminal law as sufficient to manage such threats, but he noted in any event that Hamdi had been detained for over two years with no asserted or demonstrated emergency in sight; thus, any common-law "emergency exception" to the Non-Detention Act was not applicable.<sup>215</sup>

Second, Souter agreed that the Authorization for Use of Military Force implicitly allowed the President not only to engage troops, but also to "deal with enemy belligerents according to the treaties and customs known collectively as the laws of war."<sup>216</sup> In Souter's view, however, the government must demonstrate that its actions actually satisfied the laws of war, and he found that requirement unmet in Hamdi's case.<sup>217</sup> Specifically, Souter cited the Geneva Convention's mandate that captives be treated as prisoners of war until their status is individually determined by a "competent tribunal."<sup>218</sup> The President in 2002 proclaimed that al Qaeda and Taliban detainees are not entitled to prisoner-of-war status under the Geneva Convention.<sup>219</sup> However, Souter denied that such categorical proclamations could resolve Hamdi's individual status until some competent tribunal considered his factual claim *not to be* a member of al Qaeda or the Taliban. Souter did not technically resolve whether the government violated the Geneva Convention or other laws of war. Instead, he simply wrote that "the Government has not made out its claim that in detaining Hamdi in the manner described, it is acting in accord with the laws of war authorized to be applied against citizens by the Force

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directly to follow. For a modest defense of Souter's opinion based on general habeas principles and institutional process theory, see Morrison, *supra* note 201, at 449–50.

214. *Hamdi*, 542 U.S. at 552 (Souter, J., concurring in the judgment).

215. Souter punctuated this conclusion with a flourish: "Whether insisting on the careful scrutiny of emergency claims or on a vigorous reading of [the Non-Detention Act], we are heirs to a tradition given voice 800 years ago by Magna Carta, which, on the barons' insistence, confined executive power by 'the law of the land.'" *Id.*

216. *Id.* at 548 (Souter, J., concurring in the judgment).

217. *Id.* at 551.

218. *Id.* at 549 (citing Articles 4 and 5 of the Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, [1955] 6 U.S.T. 3316, 3320, 3324 T.I.A.S. No. 3364).

219. *Id.* at 549–50.

Resolution.”<sup>220</sup> Thus, the “laws-of-war” exception could not support Hamdi’s detention either.

For readers focused on Rutledge’s role in *Korematsu*, Souter’s concurrence is especially striking because his decision to acknowledge judicial errors in World War II led to an analysis of the Non-Detention Act that safeguards constitutional values. Unlike the Constitution itself, with its long and mixed history of protecting rights in wartime (see, e.g., *Quirin* and *Korematsu*), the post-war statute was more easily construed as an uncontaminated, though limited, expression of ideals protecting individual liberty during crisis. Souter’s statutory rationale also left open the chance for further congressional involvement in detention policy, short of the extraordinary step of suspending habeas corpus. By shifting responsibility for detention decisions to Congress—instead of to judicial constitutional analysis—Souter’s approach furthered several institutional interests, including flexibility to meet new threats, power to collect empirical and political data, and time for unfolding events to confirm or dispel initial (potentially overdrawn) assessments of military necessity.<sup>221</sup> All of these institutional benefits are of course tailored to ameliorate problems that emerged with a vengeance in *Hirabayashi* and *Korematsu*.<sup>222</sup>

By contrast, O’Connor’s opinion only partly addressed the perils of governmentally manipulated facts and risk assessments in wartime. If, for example, the government may rely solely on a federal official’s unconfirmed affidavit, and the affidavit is factually distorted by institutional pressures or worse, how will any judicial balancing of due process interests be useful? The plurality seemed not even to recognize such possibilities’ existence. Souter called historically grounded risks firmly to mind and took strong steps to prevent them from repeating. By requiring a clear congressional statement before citizens are detained

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220. *Id.* at 551.

221. Cf. *supra* text accompanying notes 176–79 (discussing the delay separating *Hirabayashi* from *Korematsu*). Souter’s reliance on statutory law also blunts critiques of “judicial lawmaking.” The constitutional question (addressed by Scalia) of whether Congress and the President may ever detain civilian citizens without initiating ordinary criminal proceedings or suspending the writ of habeas corpus is a deep one, and the Solicitor General said—in surprisingly charged language—that a ruling against the government would be “constitutionally intolerable.” Brief for the Respondents at 46, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (No. 03-6696) 2004 WL 724020.

222. To be clear, Souter’s opinion did not abandon the constitutional field altogether. He suggested that notice, fair rebuttal, a neutral decisionmaker, and counsel are required—presumably as a matter of constitutional law. But he could not agree with the plurality’s suggestion that evidentiary presumptions against the defendant or the use of military tribunals might be legally acceptable. *Hamdi*, 542 U.S. at 553 (Souter, J., concurring in the judgment). By leaving deeper constitutional issues aside, Souter’s approach also allowed that the political branches might endorse more presidential power than an Article III judge would have found apt.

without charges, and by recalling what may happen when presidential detention authority is not carefully supervised, Souter (who now holds Rutledge's seat on the Court) offered just the sort of calm, normatively grounded analysis that Rutledge would have admired, especially in an opinion to correct his own greatest mistake.<sup>223</sup>

### C. *Military Commissions: Yamashita and Hamdan*

Our last paired cases are Rutledge's celebrated dissent in *In re Yamashita*<sup>224</sup> and the Court's recent decision, *Hamdan v. Rumsfeld*,<sup>225</sup> both of which address the President's authority to try detainees in military tribunals. For the second time in three years, Justice Stevens has written a majority opinion validating his former employer's dissent. More important, Hamdan's case again raises questions of law's status in crisis, and Rutledge's work once more sheds significant light.

#### 1. *A Japanese Commander*

Lieutenant General Tomoyuki Yamashita took command of Japan's 14th Area Army in October 1944, two weeks before General MacArthur's

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223. A final, possibly coincidental link to Rutledge is Souter's disposition in *Hamdi*. Justice O'Connor's plurality voted to remand Hamdi's case for a *Mathews v. Eldridge* balancing as to the accuracy of Hamdi's "enemy combatant" status determination. Four other Justices—Souter, Ginsburg, Scalia, and Stevens—voted to release Hamdi from detention, and only Justice Thomas voted to affirm the Fourth Circuit's decision. With no majority of Justices supporting any one disposition, that four-to-four vote would have affirmed the Fourth Circuit's judgment by divided Court. The Court also could have dismissed the writ of certiorari as improvidently granted, which likewise would have left the Fourth Circuit's ruling intact. To avoid this anomaly, Souter and Ginsburg compromised and accepted the plurality's result, citing a Rutledge opinion that was the first to explain the need for such accommodations. *Screws v. United States*, 325 U.S. 91, 134 (Rutledge, J., concurring in the result). Souter's *Hamdi* opinion presented a clear and unyielding articulation of his substantive commitments, yet out of respect for the Court, his colleagues, and the individual interests at stake, Souter was able to reach a practical compromise—just as Rutledge did in his time.

224. 327 U.S. 1, 41 (1946) (Rutledge, J., dissenting). For contemporary praise of Rutledge's dissent, see, for example, HOWARD, JR., *supra* note 3, at 374 (describing it as "undoubtedly a great opinion," and "a careful examination of detail" that articulates a vision of fairness that is "commend[ed] as a precept"); Charles Fairman, *The Supreme Court on Military Jurisdiction: Martial Law in Hawaii and the Yamashita Case*, 59 HARV. L. REV. 833, 870 (1946) (explaining that "[w]hether one agrees with him or not on his several points . . . one must respect the ideal of justice" that Rutledge advocates); John T. Ganoe, *The Yamashita Case and the Constitution*, 25 OR. L. REV. 143, 148 (1946) (calling the opinion "masterful" and "penetrating"). Neal Katyal recently stated that the Rutledge dissent "is one of the most powerful decisions I've ever read, and I commend each of you [to] read it." Webcast: Panel Discussion on the Supreme Court decision in the case of *Hamdan v. Rumsfeld*, held by the Georgetown University Law Center Supreme Court Institute (June 30, 2006), available at <http://www.law.georgetown.edu/webcast/eventDetail.cfm?eventID=155> [hereinafter Georgetown Panel].

225. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006).

famous “return” to the Philippines.<sup>226</sup> Outnumbered by advancing Americans four to one, Yamashita could not control his subordinates. Some officers disobeyed orders to withdraw from Manila, and their troops committed unspeakable atrocities against civilians until United States forces overran the city; other Japanese officers led counter-guerilla missions that killed 25,000 civilians.

Japan surrendered on September 2, 1945, and Yamashita did so one day later. On September 25, the United States charged Yamashita with violating the law of war, and he was later arraigned before a commission of five American military officials, none of whom was a lawyer.<sup>227</sup> The government’s bill of particulars listed sixty-four war crimes committed by Yamashita’s subordinates, claiming that Yamashita “unlawfully disregarded and failed to discharge his duty as commander to control the operations of the members of his command, permitting them to commit [the enumerated] brutal atrocities and other high crimes against the people of the United States and of its allies and dependencies, particularly the Philippines.”<sup>228</sup> Yamashita pled not guilty, and three days before trial, the prosecution issued new charges concerning fifty-nine more atrocities committed by other officers. Defense attorneys were denied a continuance to address the new allegations.

At trial, the prosecution presented 286 witnesses’ testimony and 423 exhibits, the vast majority of which contained hearsay. Yamashita testified that he had not known of any of the charged misconduct, and two officers who had personally directed atrocities corroborated his account. Indeed, only two witnesses even purported to connect Yamashita directly to any atrocity, and those statements were so discredited that the prosecution’s closing arguments did not mention them.<sup>229</sup> Nonetheless, on December 7, 1945—four years to the day after Pearl Harbor—the military commission found Yamashita guilty “upon secret written ballot, two-thirds or more of the members concurring,” and sentenced him to death by hanging.<sup>230</sup>

Yamashita sought a writ of habeas corpus directly from the Supreme Court;<sup>231</sup> his chief objections were that (i) his military commission was illegal because the war with Japan had ceased, (ii) the charges against him

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226. FERREN, *supra* note 5, at 2.

227. *Id.* at 4. Although the commission was officially convened by a military officer, President Roosevelt approved the trial of Japanese officials by military commissions, and General MacArthur issued rules and regulations governing such trials. *Yamashita*, 327 U.S. at 10–11.

228. FERREN, *supra* note 5, at 5.

229. *Id.* at 6.

230. *Id.*

231. *Id.* at 4–6.

did not state violations of the law of war, and (iii) the government's use of depositions and hearsay evidence violated due process, the Geneva Conventions of 1929, and the Articles of War (statutory rules governing the Army's military justice).<sup>232</sup> At first, General MacArthur wished to execute Yamashita without judicial approval, but he was ordered to wait. In turn, the Supreme Court first wished not to hear Yamashita's case, but it relented and granted certiorari under pressure from Rutledge.<sup>233</sup>

The Court voted six to two to deny Yamashita's claims.<sup>234</sup> Stone's majority opinion listed extensive historical support for convening military commissions to try offenses against the "law of war."<sup>235</sup> In such cases, the Court held that the only proper judicial review was a habeas corpus proceeding that left all examination of factual disputes to military officials. Nonetheless, the Court noted that Congress had at least implicitly recognized the existence of military commissions, and had also implicitly recognized "the right of the accused to make a defense," including a "right to contend that the Constitution or laws of the United States withhold authority to proceed with the trial."<sup>236</sup>

On the merits, the Court upheld presidential authority to conduct trials by commission after hostilities ceased, "at least until peace has been officially recognized by treaty or proclamation."<sup>237</sup> Next, the Court upheld the government's theory of "ineffective command," which punished military leaders like Yamashita for unknowingly "permitting" subordinates to commit atrocities.<sup>238</sup> The Court supported such liability by citing international conventions that arguably presupposed effective

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232. See Jack Goldsmith & Cass R. Sunstein, *Military Tribunals and Legal Culture: What a Difference Sixty Years Makes*, 19 CONST. COMMENT. 261, 283 (2002) (discussing changes in the military justice system). Yamashita also alleged that the United States wrongfully failed to provide advance notice to Switzerland, the neutral power representing Japan's interests, in violation of the Geneva Convention. *Yamashita*, 327 U.S. at 6.

233. FERREN, *supra* note 5, at 8 ("To a former law clerk, Victor Brudney, Rutledge later wrote: '[T]here was a three-day battle in conference over whether we would hear the thing at all. From then on the pressure was on full force.'").

234. *Yamashita*, 327 U.S. at 26. Jackson did not participate because he was at the Nuremberg trials.

235. *Yamashita*, 327 U.S. at 7-9; see *Ex parte Quirin*, 317 U.S. 1 (1942); U.S. CONST., art. I, § 8, cl. 10 (granting Congress power "[t]o define and punish . . . Offenses against the Law of Nations").

236. *Yamashita*, 327 U.S. at 9.

237. *Id.* at 12. That conclusion rested on practicalities of capturing war criminals, a scholarly consensus, and examples from United States history. *E.g.*, *id.* ("No writer on international law appears to have regarded the power of military tribunals . . . as terminating before the formal state of war has ended."); *id.* ("[O]nly after [hostilities'] cessation could the greater numbers of [war criminals] and the principal ones be apprehended and subjected to trial.").

238. *Id.* at 13-18.

military command.<sup>239</sup> But the Court's main argument was that command responsibility was necessary for the law of war "to protect civilian populations and prisoners of war from brutality."<sup>240</sup>

Finally, the Court rejected challenges to the military commission's evidentiary standards.<sup>241</sup> Yamashita invoked the Articles of War, which barred the use of depositions in capital cases before "any military court or commission," and forbade hearsay or opinion evidence "before courts-martial, courts of inquiry, military commissions, and other military tribunals."<sup>242</sup> The Court rebuffed those arguments because the Articles named only United States Army and similar personnel as "persons . . . subject to these articles"; enemy combatants were not included.<sup>243</sup> The Court found that, despite Congress's statutory recognition of military commissions' existence, Congress had left control over procedures "where it had previously been, with the military command."<sup>244</sup>

Yamashita also relied on the Geneva Conventions of 1929, which required prisoners of war to be tried "only by the same courts and according to the same procedure as in the case of persons belonging to the armed forces of the detaining Power."<sup>245</sup> As discussed *supra*, Yamashita's trial violated evidentiary standards under the Articles of War, which undoubtedly would have governed a trial of United States personnel.<sup>246</sup> The Court found the Geneva Conventions inapplicable, however, because they regulated only prisoner-of-war prosecutions for acts committed *while in detention*, not (like Yamashita's) before capture.<sup>247</sup>

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239. *Id.* at 15–16 (citing an Annex to the Fourth Hague Convention of 1907, the Tenth Hague Convention, and the Geneva Red Cross Convention); *cf. id.* at 16 (citing United States military tribunals rulings and international arbitrations to similar effect).

240. *Id.* at 15. *But cf. id.* at 16 (holding, with gross overstatement, that international law "plainly imposed" on Yamashita "an affirmative duty to take such measures as were within his power and appropriate in the circumstances to protect prisoners of war and the civilian population."); *id.* at 16 ("We do not make the laws of war but we respect them so far as they do not conflict with the commands of Congress or the Constitution.").

241. "The regulations prescribed by General MacArthur . . . directed that the commission should admit such evidence 'as in its opinion would be of assistance in proving or disproving the charge, or such as in the commission's opinion would have probative value in the mind of a reasonable man.'" *Id.* at 18.

242. *Id.* at 18 & nn.5–6 (quoting the relevant statutes).

243. *Id.* at 19.

244. *Id.* at 20.

245. *Id.* at 20–21.

246. *See supra* note 218 (citing Articles of War regulating the use of hearsay and documentary evidence).

247. *Yamashita*, 327 U.S. at 23.



Yamashita objected that the commission's evidentiary standards also violated constitutional rights. The Court summarily dismissed that argument, with only the following explanation:

For reasons already stated we hold that the commission's rulings on evidence and on the mode of conducting these proceedings . . . are not reviewable by the courts, but only by the reviewing military authorities. From this viewpoint it is unnecessary to consider what, in other situations, the Fifth Amendment might require, and as to that no intimation one way or the other is to be implied.<sup>248</sup>

That analysis fails because the Court's interpretation of statutory and international law was barely tangential to any constitutional objection.<sup>249</sup> Nevertheless, the Court held without further discussion that Yamashita's trial "did not violate any military, statutory, or constitutional command."<sup>250</sup>

Two dissents issued. Murphy's was a fierce attack on the government's "command responsibility" theory. Citing the Fifth Amendment, and a "philosophy of human rights" underlying the Constitution as a "great living document," Murphy did not accept that Yamashita should die for subordinates' wrongdoing—of which he was not alleged to have known—especially when American forces themselves had dismantled Japanese command lines to disrupt control of Yamashita's troops.<sup>251</sup> Striking an ominous tone, Murphy implied that Yamashita's trial was affected by "a prevailing degree of vengeance," at a time when "emotions are understandably high" and it is "difficult to adopt a dispassionate attitude."<sup>252</sup>

Rutledge's dissent (which Murphy joined) focused on the procedures in Yamashita's trial, which he viewed as raising three fundamental issues of fairness and judicial role:

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248. *Id.*

249. The Court's reference to reviewability is opaque at best, especially given the earlier holding that "Congress by sanctioning trials . . . by military commission . . . [implicitly] recognized the right of the accused to make a defense," including a "right to contend that the Constitution or laws of the United States withhold authority to proceed with the trial." *Id.* at 9. The Court perhaps envisioned a distinction between a petitioner's contesting the "authority to proceed" and contesting the authority to proceed using constitutionally offensive procedures. The proposed scope or basis for such a distinction, however, has no further explanation.

250. *Id.* at 25.

251. *Id.* at 26 (Murphy, J., dissenting).

252. *Id.* at 40.

At bottom my concern is that [1.] we shall not forsake in any case, whether Yamashita's or another's, the basic standards of trial which, among other guarantees, the nation fought to keep; that [2.] our system of military justice shall not alone among all our forms of judging be above or beyond the fundamental law or the control of Congress within its orbit of authority; and that [3.] this Court shall not fail in its part under the Constitution to see that these things do not happen.<sup>253</sup>

After listing many specific deviations from criminal-law traditions in Yamashita's prosecution—including ex post facto substantive liability, inadequate notice, liability without knowledge, inadequate time to prepare a defense, and proof without confrontation—Rutledge concluded that “[w]hether taken singly . . . as departures from specific constitutional mandates or in totality as in violation of the Fifth Amendment's command . . . a trial so vitiated cannot stand constitutional scrutiny.”<sup>254</sup> Given such massive and numerous procedural shortfalls, Rutledge stated that “this was no trial in the traditions of the common law and the Constitution.”<sup>255</sup>

Of course, the government and the majority did not believe that Yamashita's trial satisfied due process under civilian law. Instead, the Court held that trials by military commission stood outside civil law standards and civil courts' oversight. Rutledge believed that, although extraordinary deference was plausible in contexts of true “military necessity” or “battlefield” authority, it was not so after hostilities' end. For Rutledge, the ancient maxim that laws are silent in the noise of arms had less force when the arms themselves are quiet.<sup>256</sup>

With respect to the Articles of War and the Geneva Convention, the Rutledge dissent (like his *Ahrens* opinion) was detailed and exhaustive. For each of the majority's arguments, Rutledge offered counterarguments, which the Court did not try to answer. The *Yamashita* opinions merit closer attention than this space permits, but as in *Ahrens*, what is most important is the normative commitments underlying Rutledge's technical

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253. *Id.* at 42 (Rutledge, J., dissenting).

254. *Id.* at 45; *id.* at 60–61 (declaring that a military commission with such inadequate procedures “has no place in our system of justice, civil or military,” due to its “wide departure from the most elemental principles of fairness”).

255. *Id.* at 56; *cf. id.* at 61 (explaining that the impossible time pressures on Yamashita's defense counsel “deprived the proceeding of any semblance of trial as we know that institution”).

256. *Id.* at 47 (“There is a maxim about the law becoming silent in the noise of arms . . . . [*Inter armas silent leges.*] But it does not follow that this would justify killing by trial after capture or surrender, without compliance with laws or treaties made to apply in such cases, whether trial is before or after hostilities end.”).

analysis. As Rutledge explained: “The difference between the Court’s view of this case and my own comes down to . . . [the Court’s holding] that no law restrictive upon these proceedings other than whatever rules and regulations may be prescribed . . . by the executive authority or the military . . . .”<sup>257</sup>

The majority’s legal vacuum would allow the executive to apply serious punishment—including death in Yamashita’s case—without respecting even the most basic procedural rights or fairness concerns. Rutledge’s forty-page dissent firmly rejected that result: “I cannot accept . . . that anywhere in our system resides or lurks a power so unrestrained to deal with any human being through any process of trial. . . . Nor has any human being heretofore been held to be wholly beyond elementary procedural protection by the Fifth Amendment.”<sup>258</sup> For Rutledge, proper limits upon executive power could be derived from common-law fairness, constitutional due process, the Articles of War, international law, or all of the above. But nothing could reconcile his own dedication to legal rule and adjudicative process with “trial” procedures as shoddy as those that led to Yamashita’s death.

## 2. *Bin Laden’s Driver*

Although Rutledge worried that *Yamashita*’s decision to disregard conventional safeguards might portend a decline in all United States criminal procedure, those broad effects never materialized.<sup>259</sup> Indeed, until recently, the Court’s decision to uphold *Yamashita*’s conviction—despite its ex post facto strict liability, hearsay evidence, and politicized time constraints—might have been forgotten or dismissed as simply “not th[e] Court’s finest hour.”<sup>260</sup> Today’s War on Terror, however, has returned military commissions to the limelight. On November 13, 2001, citing the Authorization for Use of Military Force, Commander-in-Chief power, and the Uniform Code of Military Justice, President Bush ordered that non-citizen al Qaeda members and other international terrorists should, upon

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257. *Id.* at 81.

258. *Id.*

259. *See id.* at 79 (“For once [the door against procedural abuse] is ajar, even for enemy belligerents, it can be pushed back wider for others, perhaps ultimately for all.”). Similarly, although Rutledge’s post-War hopes of entering “a new era of law in the world” were never fully realized, *id.* at 43, it is hard to lay much of the blame upon the Court’s largely ignored result in *Yamashita*.

260. *Hamdi v. Rumsfeld*, 542 U.S. 507, 569 (2004) (Scalia, J., dissenting) (criticizing *Ex parte Quirin*, 317 U.S. 1 (1942), which upheld a military commission’s decision to execute German saboteurs, including one United States citizen).

presidential designation, be tried in a military commission for violating the law of war.<sup>261</sup>

One person directly affected by military commissions' resurgence is Salim Ahmed Hamdan. In November 2001, Hamdan was captured by militia forces; the United States then took custody and transferred him to Guantanamo. In July 2003, Bush announced "reason to believe" that Hamdan was a member of al Qaeda, or had aided terrorism against the United States, and designated him for trial in a military commission.<sup>262</sup> Until October 2004, Hamdan was held in solitary confinement; he was then evaluated by a Combatant Status Review Tribunal, which found he was an enemy combatant, thus (in the government's view of *Hamdi*) justifying his detention without any further process.<sup>263</sup>

Hamdan was later charged before a military commission with conspiring to commit murder, attack civilians, attack civilian property, and commit terrorism.<sup>264</sup> The government claimed that Hamdan was Osama bin Laden's driver and bodyguard, who delivered arms to al Qaeda members and trained with high performance weapons, all with knowledge that bin Laden and al Qaeda organized the September 11 terrorist attacks.<sup>265</sup> Hamdan's military commission was composed of three U.S. colonels, and its procedures were set by regulation.<sup>266</sup>

Hamdan sought habeas relief in federal district court, claiming *inter alia* that trial by military commission was improper, and that the commission's procedures were unlawful. As the case advanced, Hamdan focused on three arguments: (i) that the Geneva Conventions of 1949 required a "competent tribunal" to decide his prisoner-of-war status before any trial by military commission,<sup>267</sup> (ii) that he could not attend all proceedings against him, in violation of the Geneva Conventions of 1949, the Uniform Code of Military Justice, the Constitution, and common

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261. Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 21, 2001).

262. *Hamdan v. Rumsfeld*, 415 F.3d 33, 35 (D.C. Cir. 2005).

263. *Id.* at 36.

264. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2761 (2006).

265. *Id.*

266. *Hamdan*, 415 F.3d at 36.

267. The basic logic of this argument relied on Article 5 of the Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, [1955] 6 U.S. T. 3316, 3324 T. I. A. S. No. 3364, which requires signatory states to presume prisoner-of-war status unless that status is rebutted. A prisoner of war, in turn, is entitled to trial by the same procedures that are used to try the signatory nation's own troops—a requirement that undeniably was not satisfied in Hamdan's case.

law,<sup>268</sup> and (iii) that the military commission at issue was unlawful because it was not authorized by Congress.<sup>269</sup>

Applying the Geneva Conventions of 1949, the district court ordered that a “competent tribunal” must find that Hamdan was not a prisoner of war before he could be tried in a military commission. Otherwise, the district court held that Hamdan must be tried before an ordinary court martial, like those that try United States personnel.<sup>270</sup> The D.C. Circuit reversed and held that Congress had authorized the use of military tribunals.<sup>271</sup> The panel rejected Hamdan’s international law claims for three reasons. First, it found that the Geneva Conventions were unenforceable in federal courts. Second, it held that Hamdan could not assert prisoner-of-war status and, in the alternative, that the military tribunal was “competent” to reject any such assertion. Third, it found that the Geneva Conventions were inapplicable to al Qaeda’s activities.<sup>272</sup> The D.C. Circuit also denied Hamdan’s claims under the Uniform Code of Criminal Justice because it found those statutory restrictions almost entirely inapplicable to military commissions.<sup>273</sup>

### 3. *Rutledge Once More*

Three weeks before this Article reached final edits, the Supreme Court reversed the D.C. Circuit, ruling in Hamdan’s favor and overturning *Yamashita*.<sup>274</sup> For Rutledge, this would have been an unsurpassed triumph; it also may be his former clerk’s greatest success.<sup>275</sup> *Hamdan* was a hard case, with details that will draw other commentators’ attention,<sup>276</sup> but what

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268. All sides agreed that Hamdan had been excluded from the voir dire process of selecting commissioners from his trial, and that Hamdan would also have been excluded from at least two days of testimony during presentation of the government’s case. *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152, 171 (D.D.C. 2004).

269. See Neal Katyal & Laurence Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259, 1280–93 (2002).

270. *Hamdan*, 344 F. Supp. 2d at 173.

271. *Hamdan*, 413 F.3d at 38.

272. *Id.* at 38–42.

273. *Id.* at 42–43.

274. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2759, 2788–90 (2006).

275. The latter claim remains plausible despite Stevens’s thirty years of service and countless jurisprudential contributions. For just a few recent examples, see *Gonzales v. Raich*, 545 U.S. 1 (2005); *United States v. Booker*, 543 U.S. 220 (2005); *Tennessee v. Lane*, 541 U.S. 509 (2004); *McCormell v. Fed. Election Comm.*, 540 U.S. 93 (2003); *Atkins v. Virginia*, 536 U.S. 304 (2002); *Immigration and Naturalization Serv. v. St. Cyr*, 533 U.S. 298 (2001); and *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

276. Particularly notable were the government’s arguments that the Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(e)(1), 119 Stat. 2742, stripped the Supreme Court’s jurisdiction to

is important for this Article is the Court's basic decision to place procedural constraints on military commissions. As Rutledge put it, "our system of military justice shall not alone . . . be above or beyond the fundamental law or the control of Congress," and the Court must "not fail in its part under the Constitution" to prevent such overreaching.<sup>277</sup>

Two structural features of *Hamdan* are also pertinent. First, despite its statutory pretensions, *Hamdan's* limits on presidential power are mainly common-law in nature, with important parallels to Souter's concurrence in *Hamdi*. Second, *Yamashita* presented a potentially decisive barrier against *Hamdan's* common-law analysis, and the only adequate refutation of *Yamashita* is the Rutledge dissent, which *Hamdan* cites but does not explicitly adopt. Before addressing these points in detail, a brief introduction may be appropriate.

*Hamdan* was decided five to three,<sup>278</sup> with Stevens's lead opinion joined by Souter, Ginsburg, Breyer, and in most parts Kennedy. The Court's core holding was to require presumptive "uniformity" between military commission procedures and those in courts martial.<sup>279</sup> The majority particularly criticized the military commission system for departing from court-martial evidence standards and for excluding Hamdan from his trial.<sup>280</sup> The Court derived its uniformity requirement

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hear Hamdan's case, and that the Supreme Court should "abstain" from judging the procedures and propriety of Hamdan's military commission until that tribunal reached a final decision. *See Hamdan*, 126 S. Ct. at 2762–72 (rejecting both of these arguments).

277. *In re Yamashita*, 327 U.S. 1, 42 (1946) (Rutledge, J., dissenting).

278. Chief Justice Roberts was recused due to his part in the D.C. Circuit decision under review. *See Hamdan v. Rumsfeld*, 415 F.3d 33, 34 (D.C. Cir. 2005).

279. *Hamdan*, 126 S. Ct. at 2788–97.

280. *See, e.g., id.* at 2792 ("Without for one moment underestimating [the danger of international terrorism], it is not evident to us why it should require, in the case of Hamdan's trial, *any variance* from the rules that govern courts martial." (emphasis added)); *id.* at 2797 ("At a minimum, a military commission 'can be "regularly constituted" by the standards of our military justice system only if some practical need explains deviations from court-martial practice.'" (quoting *id.* at 2804 (Kennedy, J., concurring in part)); *cf. id.* at 2808 (Kennedy, J., concurring in part) ("For all the Government's regulations and submissions reveal, it would be feasible for most, if not all, of the conventional military evidence rules and procedures to be followed.")).

A deep puzzle in Kennedy's concurrence is the fact that he joined the majority's general principle of procedural uniformity, including its criticisms concerning confrontation rights, *see supra*, yet he *refused* to invalidate Hamdan's military commission for violating his right to be present. *See id.* at 2809 (Kennedy, J., concurring in part). If the uniformity principle requires military commissions to match court-martial evidentiary standards, appellate procedures, and composition standards, *id.* at 2805–08, it seems obvious that identical logic requires parity with respect to a defendant's right to be present.

In explaining his result, Kennedy observed that Hamdan might not actually suffer any prejudicial exclusion from the trial. *Id.* at 2809. But that is also true of the commission's evidentiary standards and the Appointing Authority's supervisory powers, each of which Kennedy found to be unacceptable departures from court-martial practice. Likewise, Kennedy seemed reluctant to interpret the guarantees

jointly from Uniform Code of Military Justice Article 21 and Article 36(b),<sup>281</sup> even though no party addressed made either such argument. To explore links between *Hamdan* and general issues concerning executive detention, my first step is to show that the specific statutes the Court relied on are insufficient to support its rule.

Article 21 does not acknowledge even the existence of military commissions, our “common-law war courts,” except by indirection: “The provisions of this code conferring jurisdiction upon courts martial shall not be construed as depriving military commissions . . . of concurrent jurisdiction of *offenders or offenses* that by statute or by the law of war may be tried by such military commissions . . . .”<sup>282</sup> At most, this language implies that commissions may try offenders or offenses specified by statute or the law of nations. Yet *Hamdan*’s majority went beyond the text and held that Article 21 codified a pre-statutory power “to convene military commissions” and added an “*express condition* that the President . . . comply with the law of war.”<sup>283</sup> On that basis, the Court invalidated *Hamdan*’s commission because the Geneva Conventions (part of “the law of war”) require detainees to be tried before a “regularly constituted tribunal,” with court-martial procedures where practicable.<sup>284</sup> *Hamdan*’s

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of Common Article III or Article 75 of Protocol I to the Geneva Conventions. *Id.* But such issues are entirely irrelevant to whether the military commission’s *departure from court-martial practice* was adequately justified.

281. These statutes provide as follows:

Jurisdiction of courts martial not exclusive. The provisions of this code conferring jurisdiction upon courts martial shall not be construed as depriving military commissions, provost courts, or other military tribunals of concurrent jurisdiction *in respect of offenders or offenses that by statute or by the law of war may be tried* by such military commissions, provost courts, or other military tribunals.

10 U.S.C. § 821 (2000) (emphasis added).

President may prescribe rules. (a) Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts martial, military commissions and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter. (b) *All rules and regulations made under this article shall be uniform insofar as practicable.*

10 U.S.C. § 836 (2000) (emphasis added).

282. 10 U.S.C. § 821 (2000) (emphasis added); *see also supra* note 281. *See generally, e.g.,* *Madsen v. Kinsella*, 343 U.S. 341, 346–47 & n.10 (1952) (“While explaining a proposed reference to military commissions in Article of War 15, Judge Advocate General Crowder, in 1916, said, ‘A military commission is our common-law war court. It has no statutory existence, though it is recognized by statute law.’” (citation omitted)).

283. *Hamdan*, 126 S. Ct. at 2754 (emphasis added).

284. *Id.* at 2793–97.

commission clearly did not follow court-martial procedures, and the Court found no adequate justification for those differences.<sup>285</sup>

By its terms, the Court's statement about Article 21 is false. Article 21 says nothing "express" about procedures in military commission, or about how the President should apply them; indeed, the statute's only link to the "law of war" concerns "offenders or offenses" triable in military commissions.<sup>286</sup> Although Hamdan did object to his alleged status as a triable "offender," and to his charges as triable "offenses," a majority of Justices avoided those arguments.<sup>287</sup> Instead, the Court expanded Article 21 beyond its language and required that military commissions follow all "rules and precepts of the law of nations," including procedural rules, and that such commissions be "justified" in every respect by the law of war.<sup>288</sup> Nothing in Article 21's text, structure, enactment record, or ninety-year history supports such a close tie between the statute and international law.<sup>289</sup>

The *Hamdan* majority's second statutory referent was Article 36(b). Article 36(a) allows the President to regulate military commissions' evidentiary standards and other procedures for all organs of military

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285. See *supra* note 280 and accompanying text.

286. The Court's reliance on *Ex parte Quirin*, 317 U.S. 1, 28–29 (1942), is also no help. See *Hamdan*, 126 S. Ct. 2274–75 & n.24. *Quirin* stated that Congress granted "jurisdiction [for] military commissions to try persons for offenses which, according to the . . . law of nations . . . are cognizable by such tribunals," 317 U.S. at 28 (emphasis added), and described its judicial inquiry as "whether any of the acts charged is an offense against the law of war cognizable before a military tribunal, and if so whether the Constitution prohibits the trial." *Id.* at 29 (emphasis added). Cf. *Hamdan*, 126 S. Ct. at 2274 (muddying the latter description through the passive voice, asking "whether the law of war had indeed been complied with" (emphasis added)).

*Quirin*, unlike the majority in *Hamdan*, analyzed whether the defendant was charged with violating the law of war. Also unlike *Hamdan*, the *Quirin* Court never questioned whether the military commission's procedures, applied by "the President and those under his command," satisfied international law. *Hamdan*, 126 S. Ct. at 2274.

287. For example, the district court found that Hamdan was presumptively a prisoner of war and thus was not a proper "offender" for trial by military commission. Compare *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152, 155, 158–65 (D.D.C. 2004), with *Hamdan*, 126 S. Ct. at 2795 n.61 (declining to decide the merits of this argument). And a plurality of the Supreme Court (not including Kennedy) held that the Hamdan's charges were not valid "offenses" under the law of war. Compare *id.* at 2775–86 (plurality), with *id.* at 2809 (Kennedy, J., concurring in part).

288. *Id.* at 2755, 2786 (quoting *Quirin*, 317 U.S. at 28); see also *id.* at 2794 ("[C]ompliance with the law of war is the condition upon which the authority set forth in Article 21 is granted."); cf. *id.* at 2845 (Thomas, J., dissenting) ("[T]o the extent Article 21 can be interpreted as authorizing judicial enforcement of aspects of the law of war that are not otherwise judicially enforceable, that authorization only extends to provisions of the law of war that relate to whether a particular 'offender' or a particular 'offense' is triable by military commission. . . . [T]he Court's holding . . . relates to neither.")

289. Although the Uniform Code of Military Justice was enacted in 1950, Article 21 was copied from the Articles of War, which were enacted in 1916. *Id.* at 2744 & n.22.



justice, including military commissions, but such regulations must follow federal district court rules “so far as [the President] considers practicable.”<sup>290</sup> Section (b) states that “[a]ll rules and regulations made under this article shall be uniform insofar as practicable.”<sup>291</sup> The critical question is what it means for rules to be “uniform,” and at least four possible answers appear.<sup>292</sup>

Article 36(b) might require rules and regulations to be “uniform” in the sense of simple consistency with one another; it might require “uniform” application of rules without unduly specialized or vague exceptions; it might (per Thomas’s dissent) require “uniform” rules across various armed service branches.<sup>293</sup> Or—as the Court held—Article 36(b) might mean that all procedural rules must be applied “uniform[ly]” to military commissions and courts martial alike.<sup>294</sup> The statute’s text is spare and undeniably vague, with none of these possibilities’ seeming self-evidently correct. Nevertheless, the Court refused to acknowledge any ambiguity and thus offered literally no analysis to support its interpretation.<sup>295</sup> As

290. 10 U.S.C. § 836(a) (2000); *see also supra* note 281. Article 36(a) also states that presidential regulations “may not be contrary to or inconsistent with this chapter.” *Id.* Hamdan argued that this language requires military commission regulations to follow every other requirement in the Uniform Code of Military Justice, including many procedural rights that apply to courts martial. Brief for Petitioner at 19-20, *Hamdan*, 126 S. Ct. 2749 (2006) (No. 05-184). The United States argued that regulations concerning military commission cannot be “contrary or inconsistent with” Uniform Code of Military Justice provisions that, by their terms, apply to courts martial but do not mention military commissions. Brief for Respondent at 44, *Hamdan*, 126 S. Ct. 2749 (2006) (No. 05-184). The Court did not resolve this interpretive dispute. *Hamdan*, 126 S. Ct. at 2791 (“Without [deciding] whether any provision of Commission Order No. 1 is strictly ‘contrary to or inconsistent with’ other provisions of the UCMJ, we conclude that the ‘practicability’ determination the President has made is insufficient to justify variances from the procedures governing courts martial.”).

291. 10 U.S.C. § 836(b) (2000).

292. The Oxford English Dictionary defines “uniform” as follows:

I. Of things in respect to their own qualities or constitution.

1. Of one form, character, or kind; having, maintaining, occurring in or under, the same form always; that is or remains the same in different places, at different times, or under varying circumstances; exhibiting no difference, diversity, or variation.

...

II. Of things of the same class in respect of each other, or of one thing in relation to another or others of the same class. . . .

4. Of the same form, character, or kind as another or others; agreeing or according with one another; conforming to one standard, rule, or pattern; alike, similar.

19 THE OXFORD ENGLISH DICTIONARY 59–60 (2d ed. 1989).

293. *Hamdan*, 126 S. Ct. at 2842 n.17 (Thomas, J., dissenting) (citing legislative history from Article 36(b)’s author suggesting that the statute was aimed to ensure inter-service uniformity).

294. *Id.* at 2791–93.

295. Even the majority’s efforts to rebut the Thomas dissent were fairly weak. *See id.* at 2791 n.29. For example, although the Court insisted that Congress *might have* intended to provide both uniformity among the military services *and* uniformity between military commissions and courts martial, the Court cited no evidence to substantiate that possibility. The Court also wrote (with striking

with Article 21, it can only be said that nothing in the structure, enactment record, or judicial history of Article 36(b) confirms the Court's holding; indeed, Hamdan did not even cite Article 36(b) in his merits briefs.<sup>296</sup>

Others may suggest that *Hamdan's* questionable statutory analysis means that its result was wrong. That is not my view at all. Rather, to identify such weaknesses simply proves that *Hamdan* was not a case of routine interpretation "resolved by ordinary rules."<sup>297</sup> On the contrary, the following discussion shows that *Hamdan's* statutory gaps were quietly filled with more eclectic material, including the "common law" of war,

double-negation) that 36(b)'s "textual proximity" to 36(a) disproved "that Congress did *not* intend uniformity across tribunal types." That "proximity" in no way proves that Congress *did* intend uniformity across tribunal types. On the contrary, many interpretations of 36(b)'s "uniformity" requirement (including all four in the text) are consistent with the provision's "proximity," and application, to rules and regulations discussed in 36(a). The obvious link between 36(a) and 36(b) is that the latter's uniformity requirement—*whatever it means*—applies to presidential regulations concerning all organs of military justice listed in 36(a), whether they be courts martial, military commissions, or otherwise.

296. Brief for Petitioner at ix, *Hamdan*, 126 S. Ct. 2749 (2006) (No. 05-184) (table of authorities); Reply Brief at ii-iii, *Hamdan*, 126 S. Ct. 2749 (2006) (No. 05-184) (same). On balance, most interpretive tools support Thomas's view of 36(b), and his dissent may have understated its arguments on this point. Before Congress enacted the "Uniform" Code of Military Justice, law enforcement in the military was governed by the Articles of War, which applied to the Army, and the Articles for Government, which applied to the Navy. These two systems were generally similar, but they also had intricate, confusing variances at the level of practical detail. See, e.g., WILLIAM T. GENEROUS, JR., SWORDS AND SCALES: THE DEVELOPMENT OF THE UNIFORM CODE OF MILITARY JUSTICE 9–11 (1973).

After World War II, control over the various services was consolidated under the Department of Defense, and President Truman extended the Articles of War to govern the Air Force. GENEROUS, *supra*, at 31. When concerns emerged over perceived injustices throughout the range of different military proceedings, the Secretary of Defense appointed a committee, headed by Edmund M. Morgan, Jr., "to integrate the systems of the three services [Army, Navy, and Coast Guard] into a Uniform Code of Military Justice." GENEROUS, *supra*, at 34; see also Edmund M. Morgan, Jr., *The Background of the Uniform Code of Military Justice*, 6 VAND. L. REV. 169, 173 (1952–1953) (explaining his committee's goal of drafting a Code that would apply uniformly to all armed forces); *Uniform Code of Military Justice: Hearings Before the Subcomm. of the Comm. On the Armed Services*, 81st Cong. 600 (1949) (statement of Prof. Edmund M. Morgan, Jr.) (same).

The result was the Uniform Code of Military Justice, which proposed "[t]o unify, consolidate, revise, and codify the Articles of War, the Articles for the Government of the Navy, and the disciplinary laws of the Coast Guard." 64 Stat. 107 (preamble), *quoted in Hamdan*, 126 S. Ct. at 2842 (Thomas, J., dissenting). Even as 36(a) granted the President administrative power to set procedures for all forms of military justice, it makes perfect sense that 36(b)'s "uniformity" would simply require that those sub-statutory rules support the inter-service parity provided by the Code itself. This interpretation of 36(b), which merely forces regulations to comport with the Code's overall aims, thus works in conjunction with 36(a)'s requirement that regulations must not be "contrary to or inconsistent" with Code provisions. 10 U.S.C. § 836(a) (2000); *supra* note 281. Thomas's view of "uniform" also finds specific support in the enactment record of Article 36(b). Compare *Hamdan*, 126 S. Ct. at 2842 n.17 (Thomas, J., dissenting) (collecting sources), with *supra* note 295 (discussing the *Hamdan* majority's response). And it has the advantage of being consistent with the *Yamashita* decision, which was only four years old when Article 36(b) was enacted. See *infra* note 313 and accompanying text.

297. *Hamdan*, 126 S. Ct. at 2799 (Kennedy, J., concurring in part).

Souter's concurrence in *Hamdi*, and ultimately Rutledge's *Yamashita* dissent.

Stevens's opinion recognized that military commissions are "neither mentioned in the Constitution nor created by statute."<sup>298</sup> Authority for such trials thus occupies an important common-law interstice between constitutional war power, traditional practice, unanticipated exigency, and general statutes like the Authorization for Use of Military Force. Details of how military commissions operate are undefined by statute, seldom applied, and almost inevitably open to judicial interpretation. Even as the *Hamdan* Court accepted the President's implicit non-statutory authority to operate military commissions, it was likewise able to impose limits that more closely resemble common-law innovations than "true" statutory interpretation.<sup>299</sup>

An important model for *Hamdan*'s common-law analysis is Souter's concurrence in *Hamdi*. There, Souter purported to apply the Non-Detention Act, which used "severe" language to bar United States citizens' imprisonment and "preclude another episode like" World War II internment.<sup>300</sup> Yet Souter acknowledged an exception—entirely of judicial creation—allowing Presidents to "deal with enemy belligerents according to the treaties and customs known collectively as the laws of war."<sup>301</sup> The Geneva Conventions thus became a limit on executive power, undisputedly amenable to judicial review, rather than a source of detainees' individual rights, which might or might not have been legally self-executing.<sup>302</sup>

Similar common-law decisionmaking emerged in *Hamdan*, with one major difference. *Hamdan* did not involve a common-law exception to a statutory ban; it concerned a common-law limit on the common-law power to operate military commissions in the first place.<sup>303</sup> As we have seen,

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298. *Id.* at 2772–73.

299. Of course, lines between "common law" and "statutory interpretation" often are not exceedingly bright ones, and different scholars use different standards to define what counts as federal common law. See generally, e.g., Martha Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 894 (1986) (detailing this problem).

300. *Hamdi v. Rumsfeld*, 542 U.S. 507, 542 (2004) (Souter, J., concurring in the judgment).

301. *Id.* at 548.

302. In *Hamdan*, Thomas argued in dissent that the Geneva Conventions are not enforceable at all, because they were intended to be enforced only diplomatically. *Hamdan*, 126 S. Ct. at 266–67 (Thomas, J., dissenting). In *Hamdi*, by contrast, Thomas argued only that Hamdi's detention comported with the Geneva Conventions. *Hamdi v. Rumsfeld*, 542 U.S. 507, 597 n.6 (2004) (Thomas, J., dissenting).

303. As discussed *supra*, both the executive power at issue and the limit thereon are of arguably mixed origin. See *supra* note 298 and accompanying text (discussing hybrid nature of presidential power in this area); *supra* notes 282–99 (discussing hybrid nature of *Hamdan*'s limits on military

*Hamdan* did not directly hold that the Geneva Conventions give military commission defendants independently enforceable rights, nor that every court-martial procedure applies in every commission trial.<sup>304</sup> Instead, the Court proclaimed a common-law “principle of procedural parity” or “uniformity,” with correspondingly common-law “flexibility” to “tailor” departures to exigencies—none of which can be squarely located in any statute.<sup>305</sup> The fact that “both sides” of *Hamdan*’s doctrinal analysis rested on common law meant that, where Souter’s relied on the Non-Detention Act’s “severe” language and tone to restrain the President, *Hamdan* turned mainly to history and tradition.

As a matter of craft, the Court’s historical approach was a partial success.<sup>306</sup> Relying on Civil War military commissions, commentators from World War I, and unimplemented plans for tribunals in Korea and Vietnam, the Court ably demonstrated a “general rule” or “background assumption” that military commissions and courts martial follow similar procedures.<sup>307</sup> And although Thomas’s dissent objected that “uniform” practice does not necessarily make uniformity a requirement,<sup>308</sup> he understated the deeper relevance of the Court’s common-law “background assumption.”<sup>309</sup> If statutes concerning military commissions did not specifically authorize the President to freely depart from court-martial procedures, Congress may have expected the President to follow the “general rule” of parity, and courts might justifiably enforce that expectation using otherwise unhelpful statutory text.<sup>310</sup>

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commissions).

304. *Hamdan*, 126 S. Ct. at 2790, 2794.

305. *Id.* at 2788, 2790

306. A notable highlight was the Court’s effort to link military commissions with “military necessity,” thereby explaining why military commissions should not simply be used “to dispense a more summary form of justice than is afforded by courts martial.” *Hamdan*, 126 S. Ct. at 2772–73, 2792. The plurality also applied this theme of “necessity” as a benchmark for criticizing charges against *Hamdan*, but Kennedy refused to join that conclusion. *Id.* at 2777, 2785.

307. Indeed, even Thomas agreed that “it is undoubtedly true that military commissions have invariably employed most of the procedures employed by courts martial.” *Id.* at 2839 n.15 (Thomas, J., dissenting).

308. *Id.* (Thomas, J., dissenting) (citing Winthrop for the proposition that “war-courts are indeed more summary than [courts martial], and . . . their proceedings . . . will not be rendered *illegal* by the omission of details required upon trials by courts martial.” (emphasis original)).

309. Thomas also failed to perceive how the Court uses military commissions’ common-law nature to help *Hamdan*. See *id.* at 2841 n.16 (Thomas, J., dissenting) (seeming to equate “the common-law status of military commissions” with “the corresponding power of the President to set their procedures”).

310. For detailed analysis of federal courts’ common-law authority, in areas of executive power and otherwise, see Craig Green, *Repressing Erie’s Myth* (2006) (unpublished manuscript on file with author).

Thus, the Court's main obstacle lay not in its method, but in historical fact. The foregoing analysis absolutely depends on the existence of a *consistent* background rule, but the Court's proposed rule had one "glaring" exception: *Yamashita*.<sup>311</sup> *Yamashita*'s military commission utterly discarded court-martial procedures,<sup>312</sup> and the Court's decision to deny habeas (in what had been the Court's latest case concerning "law-of-war" commissions) was exceptionally modern history when the Uniform Code of Military Justice was enacted in 1950. It seems implausible that Article 36(b) would reverse that recent pro-government decision, especially because no legislator mentioned any such possibility.<sup>313</sup>

The *Hamdan* Court's treatment of *Yamashita* is thus far more important than it seems. Unless the Court could demolish that World War II precedent, its entire common-law methodology might unravel, leaving *Hamdan*'s statutory arguments uncomfortably exposed. The Court recognized as much, and it forcefully proclaimed that *Yamashita* was overruled, having been "seriously undermined by post-World War II developments" and "stripped of its precedential value."<sup>314</sup> But why? The Court correctly noted that many technical arguments supporting *Yamashita*'s result have changed. Unlike the 1929 Geneva Conventions in *Yamashita*, the Geneva Conventions of 1949 in *Hamdan* regulate trials for misconduct committed before (not just during) detention.<sup>315</sup> Similarly, where *Yamashita* read the Articles of War to regulate only trials of United States military personnel, today's Uniform Code of Military Justice clearly applies to detainees like *Hamdan*.<sup>316</sup>

But those changes are not enough. *Yamashita* did not rely *only* on statutes and treaties; it also embodied a view of the *nature of military commissions*, and the latter analysis was never addressed, much less undermined, by subsequent events:

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311. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2788 (2006); *In re Yamashita*, 327 U.S. 1 (1946).

312. *See supra* Part II.C.1.

313. *Cf. Hamdan*, 126 S. Ct. at 2793 n.54 ("Prior to the enactment of Article 36(b), it may well have been the case that a deviation from the rules governing courts martial would not have rendered the military commission "illegal." Article 36(b), however, imposes a statutory command that must be heeded. (citations omitted)).

314. *Id.* at 2788–90.

315. *Id.* at 2789–90 & n.48; FERREN, *supra* note 5, at 242; Christopher C. Burris, *Time for Congressional Action: The Necessity of Delineating the Jurisdictional Responsibilities of Federal District Courts, Courts Martial, and Military Commissions To Try Violations of the Laws of War*, 2005 FED. CTS. L. REV. 4, at \*VL3 (2005).

316. *Hamdan*, 126 S. Ct. at 2789 & n.47; 10 U.S.C. § 802 (2006) (applying the Uniform Code of Military Justice to, among others, all "prisoners of war in custody of the armed forces").

[T]he military commission before which [Yamashita] was tried, though sanctioned, and its jurisdiction saved, by Article 15 [now Article 21], *was not convened by virtue of the Articles of War, but pursuant to the common law of war. It follows that the Articles of War . . . were not applicable to petitioner's trial and imposed no restrictions upon the procedure to be followed. The Articles left the control over the procedure in such a case . . . where it had previously been, with the military command.*<sup>317</sup>

This part of *Yamashita's* analysis, which placed control over military commission procedures in the unguided hands of military leadership, revealed a potentially devastating flaw in *Hamdan's* account of tradition and common law. What the Court needed was to discredit the *Yamashita* precedent altogether, and its generic citations to statutory and international-law reforms simply could not do the job.

The *only* possible solution—as readers may by now expect—lay in Rutledge's dissent, which Stevens described as “unusually long and vociferous,” and which offered the sole basis for calling *Yamashita* “notorious.”<sup>318</sup> Although *Hamdan* cited several sources discrediting other parts of *Yamashita's* majority opinion, only the Rutledge dissent addressed the basic normative issue of whether military commissions should be subject to any enforceable procedural constraints.<sup>319</sup> Drawing on Rutledge's deep unwillingness to allow any form of “adjudication” that violated basic fairness norms, and on a similarly robust aversion to unbridled executive power, his dissent articulated cogent, value-based reasons to reject *Yamashita* entirely. Just as Rutledge's *Ahrens* dissent refused to permit any governmental detention that was exempt from judicial oversight, his *Yamashita* dissent decried any form of military “adjudication” that might lie beyond all enforceable procedural restraints.

As Professor (and *Hamdan* counsel) Neal Katyal has said publicly: “It's not just that Justice Stevens clerked for Rutledge. I actually think that that opinion, [Rutledge's] dissent in *Yamashita* . . . , is one of the most powerful decisions I've ever read, and . . . a lot of our litigating strategy . . . came out of that.”<sup>320</sup> What has made Rutledge's dissent so powerful, even after reforms superseded its analysis of the Articles of War and the

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317. *In re Yamashita*, 327 U.S. 1, 20 (1946) (emphasis added).

318. *Hamdan*, 126 S. Ct. at 2790.

319. *See Yamashita*, 327 U.S. at 79 (“The Court does not declare expressly that petitioner as an enemy belligerent has no constitutional rights . . . . I think the effect of what it has done is in substance to deny him all [procedural] safeguards. And this is the great issue in the cause.”).

320. Georgetown Panel, *supra* note 224.

Geneva Convention, is its palpable commitment to fairness even under conditions of national crisis:

In this stage of war's aftermath . . . [i]t is not too early, it is never too early . . . for the nation steadfastly to follow its great constitutional traditions, none older or more universally protective than due process of law in the trial and punishment of men, that is, *of all men, whether citizens, aliens, alien enemies or belligerents*. It can become too late.<sup>321</sup>

A testament to the force of Rutledge's opinion is that (as with *Ahrens* and *Rasul*), none of *Hamdan*'s dissenters said much to defend *Yamashita*'s sixty-year-old precedent, and none objected to the Court's overruling it.<sup>322</sup> For Rutledge, *Yamashita* was a national and legal disgrace. And somewhere between the *Hamdan* majority's label of "notorious" and the dissenters' silence, it may be that the modern Court has come to sympathize with Rutledge's point of view.

For readers who are not surprised at *Hamdan*'s heavy reliance on the Rutledge dissent, they may be perplexed that *his arguments* did not appear in the Court's various opinions. Part of this absence owed to *Hamdan*'s procedural posture. Where Rutledge had a full record of injustices against *Yamashita*, and knew that the general's life was at stake, *Hamdan*'s trial barely got off the ground, and could hardly generate a comparable sense of urgency. Another explanation, however, echoes *Rasul* and *Ahrens*, where a tentative fifth vote (*cf.* Kennedy in *Hamdan*) left the Court willing to endorse Rutledge's conclusion, but unable to fully adopt the principles of his argument. In *Yamashita*, Rutledge wrote about unyielding fairness, moral commitments, and the minimum procedures for tolerable adjudication.<sup>323</sup> By contrast, the *Hamdan* majority hardly mentioned such principles.<sup>324</sup> On the contrary, the Court's two concurring opinions (which

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321. *In re Yamashita*, 327 U.S. 1, 20 (1946) (emphasis added). As Rutledge further explained: This long-held attachment marks the great divide between our enemies and ourselves. Theirs was a philosophy of universal force. Ours is one of universal law, albeit imperfectly made flesh of our system and so dwelling among us. Every departure weakens the tradition, whether it touches the high or the low, the powerful or the weak, the triumphant or the conquered.

*Id.*

322. For example, Thomas quoted *Yamashita* only in describing basic legal principles, *see Hamdan* 126 S. Ct. at 2841 n.16 (Thomas, J., dissenting), Alito's dissent did not mention *Yamashita*, and Scalia's dissent did so only once, on a peripheral point concerning reviewability, *see id.* at 2814 n.2 (Scalia, J., dissenting).

323. *See supra* notes 253–58, 319, 321, and accompanying text.

324. The one partial exception is Stevens's discussion of the right to be present: "The absence of

Stevens alone declined to join) focused almost entirely on inadequate statutory authorization and unpersuasive claims of military necessity, thus effectively inviting Congress to alter the framework that sheltered Hamdan from procedural abuse.<sup>325</sup>

As in *Rasul* and *Ahrens*, the *Hamdan* majority's approach represents a very different mode of judicial product than is typical of Rutledge's work. On the facts of a case like *Rasul* or *Hamdan*, the modern Court's narrow, less meticulous methodology can operate alongside and in harmony with the careful, deeply substantive work of someone like Rutledge. That is not always so, however. Time and future cases may yet test whether the Court will embrace Rutledgian principles explicitly, or will continue to invoke them only indirectly and ad hoc. Thus, as a brief conclusion, it seems apt to consider *Hamdan*'s impact on the future of executive detention jurisprudence.

#### 4. *Where From Here?*

With respect to military commissions themselves, there may not be a "next step" after *Hamdan*. That is because, technical problems aside, the Court's result makes appreciable sense: Like Souter's "laws-of-war" exception in *Hamdi*, the *Hamdan* rule limits the President's common-law power over military commissions based on international law and collateral statutory benchmarks, and allows additional "flexibility" to accommodate demonstrated need.<sup>326</sup> The President is thus allowed to use military commissions, but he is required to provide "regularly constituted

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any showing of impracticability is particularly disturbing when considered in light of the clear and admitted failure to apply one of the most fundamental protections afforded [by the UCMJ]: the right to be present. . . . [T]he jettisoning of so basic a right cannot lightly be excused as 'practicable.'" *Hamdan*, 126 S. Ct. at 2792. Although Kennedy technically joined this analysis, he later seemed oddly hesitant to say so. *See supra* note 280 (discussing this confusion).

325. *See id.* at 2799 (Breyer, J., concurring) ("Nothing prevents the President from returning to Congress to seek the authority he believes necessary. . . . The Constitution puts its faith in those democratic means. Our Court simply does the same."); *id.* at 2800 ("If Congress, after due consideration, deems it appropriate to change the controlling statutes, it has the power and prerogative to do so.") (Kennedy, J., concurring in part).

It seems unlikely that Rutledge would have joined such opinions, given the deep fairness issues at stake. *Cf. supra* note 145 (explaining that Rutledge declined to accept a commerce clause rationale in case that raised fundamental questions of racial equality). However, Rutledge almost certainly would have joined Stevens's discussion rejecting Hamdan's conspiracy charge as an improper "offense" under the "law of war." *See Hamdan*, 126 S. Ct. at 2775–86 (plurality); 10 U.S.C. § 821 (limiting implicitly the types of offenses over which military commissions have jurisdiction).

326. *Id.* at 2790 ("The uniformity principle is not an inflexible one; it does not preclude all departures from the procedures dictated for use by courts martial. But any departure must be tailored to the exigency that necessitates it.").



tribunals” that ensure “judicial guarantees . . . recognized as indispensable by civilized peoples” as well as ordinary safeguards in courts martial.<sup>327</sup> Unless political will emerges to revise this framework, the *Hamdan* regime might prove long-lived as, at the very least, a triumph of “judicial statesmanship.”

On the other hand, change may already be afoot. *Hamdan* (like Souter’s *Hamdi* concurrence) left the door open for legislative action,<sup>328</sup> and Congress almost immediately held hearings on whether commissions are needed that depart from international law standards and court-martial procedures.<sup>329</sup> It is too soon to predict whether Congress will, for example, grant the President broad discretion, enact its own military commission procedures, or acquiesce in the status quo.

If Congress does approve a “second generation” of military commission procedures, however, the content of those rules may determine their validity. Recent cases in the War on Terror (*Rasul*, *Hamdi*, *Hamdan*) have interwoven themes of separated powers, legal rule, and individual liberty.<sup>330</sup> But if Congress explicitly authorizes commission procedures, separation of powers objections would dissipate. Also, absent a statutory objection, the Court would have to determine whether Guantanamo Bay detainees have constitutional rights and, if so, whether

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327. Geneva Convention Relative to the Treatment of Prisoners of War, art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135. This requirement of “Common Article 3” is applicable to prisoners of war and civilians alike.

328. See *supra* note 325 (collecting sources). Of course, the President technically could try to satisfy the majority’s rule merely by offering a better “justification” for his departures from court-martial practice. That, however, might seem too brazen to be attempted, and it is unlikely to happen given Congress’s steps to consider the issue.

329. The House Armed Services Committee, Senate Judiciary Committee, and Senate Armed Services Committee met during the week of July 10 to discuss the future of military commissions and to hear testimony from administration officials, military and civilian lawyers, and other personnel. *Military Commissions in Light of the Supreme Court Decision in Hamdan v. Rumsfeld: Hearing of the S. Comm. On the Armed Services*, 109th Cong. (2006); *Standards of Military Commissions and Tribunals: Hearing of the H. Armed Serv. Comm.*, 109th Cong. (2006); *Hamdan v. Rumsfeld: Establishing a Constitutional Process: Hearing before the S. Judiciary Comm.*, 109th Cong. (2006); see, e.g., Kate Zernike and Sheryl Gay Stolberg, *Detainee Rights Create a Divide on Capitol Hill*, N.Y. TIMES, July 10, 2006, at A1.

330. See, e.g., *Hamdan*, 126 S. Ct. at 2798 (“[I]n undertaking to try Hamdan and subject him to criminal punishment, the Executive is bound to comply with the Rule of Law that prevails in this jurisdiction.”); *Hamdi v. Rumsfeld*, 542 U.S. 507, 535–36 (2004) (plurality) (“[The government’s] approach serves only to condense power into a single branch of government. . . . [A] state of war is not a blank check for the President when it comes to the rights of the Nation’s citizens. . . . [The Constitution] most assuredly envisions a role for all three of the branches when individual liberties are at stake.”); *Rasul v. Bush*, 542 U.S. 466, 474 (2004) (“Executive imprisonment has been considered oppressive and lawless since John, at Runnymede, pledged that no free man should be imprisoned . . . save by . . . the law of the land.” (quoting *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 218–19 (1953) (Jackson, J., dissenting))).

such rights apply in military commissions. *Rasul* offers a plausible framework for analyzing such problems, as the following footnote explains in detail,<sup>331</sup> but it is unclear whether such reasoning (which Kennedy did not join) would draw five votes from the current Court.

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331. The key is to apply both elements of *Rasul*'s analysis, which (as we discussed) not only embraced Rutledge's *Ahrens* dissent but also offered a Guantanamo-specific argument rebutting the presumption against extraterritoriality. See *Rasul v. Bush*, 542 U.S. 466, 480–85 (2004); see *supra* notes 103–10 and accompanying text. The government's most recent argument against applying constitutional rights to Guantanamo detainees was that "aliens outside the United States [do not] have due process rights under the Federal Constitution." Brief for the Respondents in Opposition at 19 n.11, *Hamdan v. Rumsfeld* (Sept. 7, 2005) (No. 05-184) 2005 WL 2214766. Yet *Rasul* held that Guantanamo Bay is "within the territorial jurisdiction of the United States" for habeas purposes. *Rasul*, 542 U.S. at 480–81 (internal quotation marks omitted). That same basis for applying habeas statutes to Guantanamo Bay detainees also supports recognizing their substantive constitutional rights. Simply put, the presumption against extraterritoriality should apply in both contexts or in neither. Cf., e.g., Kermit Roosevelt III, *Guantanamo and the Conflict of Laws: Rasul and Beyond*, 153 U. PA. L. REV. 2017, 2017–18, 2026–29, 2059–71 (2005); Gerald L. Neuman, *Extraterritorial Rights and Constitutional after Rasul v. Bush*, 153 U. PA. L. REV. 2073, 2073–83 (2005).

This argument does not rely on *Rasul*'s well-known "footnote 15," which implied without analysis that United States standards for legal custody reach Guantanamo Bay. *Rasul*, 542 U.S. at 484 n.15 ("Petitioners' allegations—that, although they have engaged neither in combat nor in acts of terrorism against the United States, they have been held in Executive detention for more than two years in territory subject to the long term, exclusive jurisdiction and control of the United States, without access to counsel and without being charged with any wrongdoing—unquestionably describe 'custody in violation of the Constitution or laws or treaties of the United States.'"). *Rasul*'s fifteenth footnote received close attention in two district court opinions. In *Khalid v. Bush*, 355 F. Supp. 2d 311 (D.D.C. 2005), Judge Richard Leon rejected petitioners' view that that footnote "intended to overrule, sub silentio, *Eisenstrager* and its progeny." *Id.* at 323. Judge Joyce Green reached an opposite conclusion in *In re Guantanamo Detainees Cases*, 355 F. Supp. 2d 443, 453–64 (D.D.C. 2005). Judge Green cited footnote 15 as "perhaps the strongest basis" for applying constitutional rights to Guantanamo detainees; she also cited *Rasul*'s holding that Guantanamo Bay lies within the territorial jurisdiction of the United States and Kennedy's opinion concurring in the judgment. *Id.* at 462–63. See also *supra* note 104.

Instead, the approach presented here relies on the structure of *Rasul*'s majority opinion as a whole. In Part III, the Court construed the habeas statutes to allow jurisdiction in cases where the prisoner is held outside the issuing court's territory. See *Rasul*, 542 U.S. at 475–79. In Part IV, the Court held that the habeas statutes (independent of their content) apply to Guantanamo Bay just as they would to any State or the District of Columbia. See *id.* at 480–83. Phrased this way, it is hard to see how the presumption against extraterritorial application of United States law could bar a detainee's constitutional rights when it did not limit the habeas statutes' application in *Rasul*.

Of course, a *Rasul*-based response might not require applying every constitutional right to military commissions, or to Guantanamo detainees generally. Much less would it require Scalia's caricature of allowing detainee damage suits under *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). See *Rasul*, 542 U.S. at 500 (Scalia, J., dissenting). Under current precedents, *Bivens* has proved to be a rather delicate flower, and the Supreme Court has been entirely willing to recognize "special factors counseling hesitation" in various contexts. See, e.g., *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 68–70 (2001). Without examining details, one presumes that the Court could find such factors with respect to Guantanamo detainees held as enemy combatants. Scalia's attempted analogy between *Bivens*'s fragile damage remedies and the robust right to challenge illegal detention suggests a mistaken view of both judicial mechanisms.

Furthermore, some procedural rights (the easiest example is grand jury indictment) might not apply to military commissions at any location. Nor would the Court have to resolve all such questions

In structure, though not in impact, a legislative authorization of military commission procedures could pose questions more similar to *Hirabayashi* and *Korematsu* than to other War on Terror cases. What should courts do when Congress and the President jointly authorize oppressive activity? What should our Court do if military commissions are (again) marked off as a realm of unchained power, where Presidents may blend engineered results with ostensible fairness to suit dominant political tastes?

Fortunately, we may never confront these questions in their pure, most dangerous form. Even before *Hamdan*, President Bush did not construct military commissions as “kangaroo” or “drum-head” courts. Indeed, despite their shortcomings, the procedures for Hamdan’s trial would have compared well to those used to convict Yamashita. For example, Hamdan’s commissioners were legally trained, his lawyers were not rushed, and any conviction would, en route to the President’s desk, have been reviewed by a panel of exceptionally talented lawyers.<sup>332</sup> Other protections included Hamdan’s receipt of charges, his presumed innocence, his ability to confront witnesses if available, his attorney’s right to see classified inculpatory materials, and the requirement of proof beyond reasonable doubt. On the other hand, Hamdan’s commission permitted unsworn statements as evidence, gave no right to a speedy trial, allowed his exclusion from the trial, and stated that the presumption of innocence and the right to silence were not “enforceable” rights, arguably allowing their abridgment at any time.<sup>333</sup>

Even if Congress simply approved these pre-*Hamdan* procedures wholesale, it seems preponderantly likely that Kennedy (*Hamdan*’s fifth vote) would uphold them as constitutionally valid.<sup>334</sup> Yet lessons from the

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at once. Military commissions in this respect may present a relatively “easy” case. An important, realistic first step would be to hold that detainees tried before a military commission deserve the same constitutional and statutory rights in Guantanamo Bay as would obtain in a military commission for United States citizens in Miami. *Cf.* Cole, *supra* note 208, at 978–79. Regardless of the precise constitutional standards applied to military commissions in either locale, such a ruling would at least serve Rutledge’s goal of ensuring that military commissions beyond immediate hostilities remain consistent with fundamental procedural justice, and that such proceedings remain subject to some form of Article III oversight. Related questions may (or may not) prove more difficult concerning whether suspected terrorists held in Chicago and Guantanamo Bay deserve equal statutory and constitutional rights with respect to their indefinite detention.

332. *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152, 167 & n.13 (D.D.C. 2004).

333. See Brief for Appellee at 3–4, *Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir. 2005) (No. 04-5393) (citing 32 C.F.R. §§ 9.6(d)(3), 9.10-11 (2004)).

334. Only “preponderantly” because Kennedy’s vote is not always predictable, and because speculation about executive detention cases can be especially unstable. Looking back to the World War II era, three Justices (Roberts, Jackson, and Murphy) changed their votes in the year that

Rutledge era suggest that congressional blessing should not necessarily displace judicial authority to stop serious abuse. One can imagine, for example, commissions with serviceable evidentiary standards where intervention by military command at trial, or on appeal, makes acquittal nonetheless impossible.<sup>335</sup> A “test case” concerning military commission procedures might not present such flagrant unfairness, but regardless of particular objections heard or decided in a particular case (*cf. Hirabayashi*<sup>336</sup>), it is crucial to heed the fullness of history in confronting modern threats. And if nothing else, the historical experience of Rutledge and *Hirabayashi* shows beyond question how “small” mistakes regarding executive detention can grow. If Congress were to decide that military commissions were unconstrained by the Constitution, common law, the Geneva Conventions, and almost all of the Uniform Code of Military Justice, it is hard to see how any procedural safeguards—from notice, to counsel, to confrontation, to an impartial decisionmaker—would be more

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separated *Hirabayashi* to *Korematsu*, perhaps partly because the government’s arguments about wartime necessity had started to wear thin. *See supra* notes 147–79 and accompanying text. Particularly for Roberts and Jackson, their change of heart would have been difficult for outsiders to anticipate, and it is possible, though *not at all certain*, that Kennedy might undergo an analogous shift.

An underlying, recurrent issue that allows such changes concerns presidential credibility. To some extent, executive detention cases inevitably involve a President’s claim that courts should “trust him” to do what is right. After all, the President and military command are situated to assess threats and measure successful responses in ways that courts simply cannot. Presidential credibility is not inexhaustible, however, and the government’s losses in recent War on Terror cases may someday take their toll.

For example, the government once argued that Yaser Hamdi and Jose Padilla were too dangerous for trial in federal court, or for any process to investigate their status as “enemy combatants.” After the Supreme Court ordered the district court to pursue “prudent and incremental” factfinding about Hamdi’s status, *Hamdi v. Rumsfeld*, 542 U.S. 507, 539 (2004) (plurality), the government instead settled the case by releasing Hamdi from prison, rescinding his citizenship, sending him to Saudi Arabia, and having him agree not to sue the United States for wrongful detention or mistreatment. *See supra* Amann, note 197, at 2099. As Padilla’s case approached the Supreme Court for potentially similar treatment, the government changed its collective mind and suddenly decided to try Padilla on criminal charges in federal district court. *See, e.g.,* Jerry Markon, *Court Bars Transfer of Padilla to Face New Terrorism Charges*, WASHINGTON POST, December 22, 2005, at A1.

Likewise, the President prior to *Hamdan* had argued that his system of military commissions was vital to national security. Now that the Court has partially invalidated those commissions, the President might choose to test his claims of military necessity in the political arena, and thereafter in litigation. The problem is that Kennedy in *Hamdan* announced that he did not believe the President’s position that procedurally deviant commissions were necessary. *See, e.g., Hamdan*, 126 S. Ct. at 2808 (Kennedy, J., concurring in part). Perhaps ensuing events will show that Kennedy was wrong. If not, Kennedy might remember the President’s “erroneous” arguments for military deference in *Hamdan* (or *Hamdi* or *Padilla* or *Hirabayashi* or *Korematsu* or *Yamashita*) when he evaluates the government’s claims in future national security cases. How a reduction in governmental credibility might (if it occurs) affect specific cases is too speculative for useful discussion.

335. *Cf. Hamdan*, 126 S. Ct. at 2806–07 (Kennedy, J., concurring in part).

336. 320 U.S. 81 (1943); *see supra* notes 125–79.

than a matter of grace. Whether federal courts could invalidate such a system if Congress authorized it would pose far more difficult questions than appeared in *Hamdan*.

The greatest risks of abuse, however, lie outside the military commission context. *Hamdan* confirms that the three separable steps I have used to analyze executive detention cases—jurisdiction, uncharged detention, and military tribunals—are doctrinally interrelated. In *Rasul*, for example, the Court took important steps to maintain jurisdiction over Guantanamo detainees, but that decision indirectly relied on *Hamdi*, which endorsed some level of substantive review over citizens' indefinite, uncharged detention.<sup>337</sup> By similar logic, *Rasul* and *Hamdi* are both landmark cases, but their practical effect would have been less if *Hamdan* had endorsed limitless presidential discretion to establish military commissions, and to handpick the decisionmakers, procedures, and punishments therein.

With *Hamdan*, the wheel turns again. Hamdan was captured in November 2001,<sup>338</sup> and almost five years later, there is no prospect of his being released. Thus, the next "great case" in the War on Terror may concern the government's ability to indefinitely detain non-citizens without trial.<sup>339</sup> If President Bush persists in detaining hundreds of individuals for undefined and lengthy periods, the challenge reserved in *Hamdan* may yet emerge. And the result in such a case, concerning non-citizen uncharged detainees, may once and for all decide whether the President holds a "blank check" to imprison suspects in the War on Terror.<sup>340</sup>

Our country has known several security threats, and each has become famous or infamous for its legal response. The Civil War era witnessed the suspension of habeas corpus and trials by military commission;<sup>341</sup> World War II had racial detentions and martial law.<sup>342</sup> Likewise, today's Court has written, and will yet write, opinions about executive detention that will determine the life or death of many individuals, affect the United States' image regarding rule of law and human rights, and influence history's

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337. See *supra* Parts II.A–II.B.

338. *Hamdan v. Rumsfeld*, 415 F.3d 33, 35 (D.C. Cir. 2005).

339. *Hamdan*, 126 S. Ct. at 2798 ("It bears emphasizing that Hamdan does not challenge, and we do not today address, the Government's power to detain him for the duration of active hostilities in order to prevent such harm.").

340. Cf. *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004); *Hamdan*, 126 S. Ct. at 2799 (Breyer, J., concurring).

341. REHNQUIST, *supra* note 139, at 23–25, 118–37.

342. See, e.g., IRONS, *supra* note 51, at vii; YAMAMOTO, *supra* note 123, at 194.

judgment of whether we have learned from the past in shaping the future. The decisive vote in such cases will likely fall to Justice Kennedy, and the country must hope that all members of the Court will find their own way to honor the high standards that wartime pressures require.

### III. EPILOGUE: YOU ARE WHAT YOU READ

There is one final lesson to be drawn from Rutledge's story; it concerns judicial biography as a genre, and judicial role as its underrecognized topic. This Article has laid out a two-part argument (historical and modern) that Rutledge deserves greater attention than he has received. But some readers may wonder, "If Rutledge really is such a fine jurist, and his work so central to executive detention, why don't we hear of him more often?"<sup>343</sup> In attempting an answer, let us first consider why judicial namedropping is prevalent in United States legal culture. If some language students measure their progress by their working vocabulary, or by the number of Kanji they know, there is a (lesser) sense in which students of United States law are measured by their knowledge (or ignorance) of certain judicial names and personalities. Why?

Part of the tradition simply corresponds to the high status reserved for United States judges and their decisions. This country has an undeniable fetish for our Constitution—with special attachment to free speech, due process, and equal protection. Insofar as American judges are distinctive oracles who give the document voice, they are important people, and we study them accordingly.<sup>344</sup> But there may be more to it than that.

As a methodological matter, debates about judges and judicial role flow through two overlapping channels. First, a declarative mode seeks to state basic principles to define and limit judicial behavior. Ronald Dworkin's work exemplifies such discussion at an abstract level.<sup>345</sup> Alexander Bickel,<sup>346</sup> Owen Fiss,<sup>347</sup> Cass Sunstein,<sup>348</sup> and many others

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343. See, e.g., GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW (5th ed. 2005) lxi–lxxix (listing "Biographical Notes on [Thirty-Eight] Selected U.S. Supreme Court Justices," including Abe Fortas, George Sutherland, and Willis Van Devanter, but not Wiley Rutledge).

344. For descriptions and instantiations of this phenomenon, see, for example, 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 3–31 (1998); DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD (1997); LARRY D. KRAMER, THE PEOPLE THEMSELVES 9–34, 207–48 (2004).

345. RONALD DWORKIN, LAW'S EMPIRE (1986).

346. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1962).

347. OWEN FISS, THE LAW AS IT SHOULD BE (2003).

348. CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999).

strive to explain what judges should do in more particular circumstances. The declarative mode describes judicial role in explicit terms, but such precatory abstractions have drawn strong criticism,<sup>349</sup> and they do not always have the cultural influence that one might expect.

The second mode of discussion is narrative or biographical. Many if not most debates about judges orbit a charted constellation of “heroes” and “villains.” Names like John Marshall, Benjamin Cardozo, William Brennan, Felix Frankfurter, Louis Brandeis, Roger Taney, Hugo Black, Antonin Scalia, Oliver Wendell Holmes, and a dozen more stand out in the popular imagination as different “types” of judges. Their lives and decisions are thought to stand for something. And even though that “something” is not precisely explained, when one name or another is invoked, listeners nod with understanding.

A common step in law students’ acculturation is to identify their most and least favorite Justice, and cycles of debate and education develop such personalities into positive and negative role models. Some Justices’ opinions are read favorably and carefully, others skeptically or dismissively. Students often retain such impressions of “good” and “bad” judges long after their interest in Dworkin or Bickel has faded. And such ex-students fill the ranks of lawyers, judges, and professors, thereby explaining why judicial biography—the narrative mode’s highest form—remains an indispensable element of United States legal culture.

The problem is that academic biographers focus on eye-catching judges, with long (preferably evolving) service to the Court, and with some characteristic that inspires special fascination, whether it be a Holmesian epigram, Marshallian tour de force, or a role in some legal revolution or reform. This quasi-sensational focus is not always bad, but it is incomplete. We have always needed judges with intellectual and personal verve, yet the narrative mode’s distorted examples can obscure that judging, especially when done well, is not a flashy business. By nature, law is a conservative enterprise, where “creative,” “novel” arguments are often suspect and the “unprecedented” is heresy.

Against that backdrop, Rutledge’s story is especially important because it reveals a judge who was profoundly committed to legal craft (perhaps too much in a case like *Korematsu*), but who also manifested compassion and deep awareness of law’s human impact. In one writer’s phrase, “Rutledge was rarely eloquent. The judicial beachheads he took were won,

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349. See, e.g., RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* (1999).

not by sleight-of-words, but on the merits.”<sup>350</sup> What may be most satisfying about the celebration of such a judge is that his intellectual strength stands out despite an absence of pyrotechnic ornament.

When Ferren’s book ends, with Rutledge’s death, the reader must draw her own conclusions about how this judge’s life and career rate. Some observers have implied that, if Rutledge had lived longer, his name and career would be mentioned alongside Frankfurter’s or Black’s.<sup>351</sup> Perhaps so, but Rutledge also marked a very different path from his judicial colleagues. Wechsler stated Rutledge’s distinctive characteristics as modesty, principle, judgment, and “pointing [out] the implications of small things.”<sup>352</sup> Those traits, combined with Rutledge’s anti-dramatic style, might never have attracted such popular attention as Frankfurterian campaigns for *Our Federalism* or Black’s “absolutist” view of free speech. And this is the sense in which Rutledge not only portrays a distinctive type of judge; his story invites us to rethink how judges are valued in legal culture, and how judicial biography affects that process.

It took almost fifty years for Rutledge’s biography to emerge, but today is a uniquely valuable time for Rutledge’s enduring lessons about judicial role and constitutional values. This is true not only for executive detention, but in other contexts also, as two new Justices join the Court and undertake to develop and realize their own models of judging. Today’s judicial selections will be examined by tomorrow’s biographers, and we can only hope that, decades from now, books like Ferren’s may yet be written about judges like Rutledge.

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350. Pollak, *Profile of a Judge*, *supra* note 4, at 191.

351. *Id.* at 177.

352. FERREN, *supra* note 5, at 215.