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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.”¹ “Until we have penetrating studies of the influence of these [judges],” he wrote, “we shall not have an adequate history of the Supreme Court, and, therefore, of the United States.”² Frankfurter’s call has been answered for many jurists,³ yet even fifty years after Wiley Rutledge died, there was no adequate

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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). And Frankfurter himself 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). For other important examples, see 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).

account of Frankfurter's colleague, leaving modern readers with little to no impression of Justice Rutledge or his work.⁴

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.⁵ Part I of this Article offers a brief biographical sketch aimed to show 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 sheds light on broader national issues, including FDR's transformative judicial appointments, early twentieth-century legal education, and the New Deal's influence on both. Any students of history, and especially any students of the Court, will appreciate Ferren's introduction to this unknown, yet important Justice.

Part II shifts from the historical to the modern, analyzing the significance of Rutledge's judicial work for today's cases concerning executive detention. In a series of recent cases, 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.⁶ Such issues might seem novel to modern minds, but they would not to Rutledge.

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 full 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), 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 a set of 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 contact 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*, 415 F.3d 33, 35 (D.C. Cir. 2005), cert. granted, 126 S. Ct. 1606 (2006) (No. 05-184) (addressing military commissions); *Hamdi v. Rumsfeld*, 546 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).

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 that affect the rule of law in wartime.

This Article uses three pairs of “old” and “new” cases to illustrate Rutledge’s modern relevance. *First*, a 1948 Rutledge opinion about habeas jurisdiction demonstrates the force of a certain style of legal reasoning.⁷ The calm, technical, value-laden analysis of Rutledge’s opinion did not persuade his colleagues at the time, but the Court adopted Rutledge’s approach many years later in the wartime detention context that had concerned him most.⁸ *Second*, Rutledge was the decisive fifth conference vote to support the government in *Korematsu v. United States*.⁹ *Korematsu*, and its precursor *Hirabayashi v. United States*,¹⁰ show the immense dangers of “small” judicial errors regarding executive power. My thesis is that close analysis of Rutledge’s role not only reshapes those landmark cases’ meaning; it also offers a crucial benchmark for modern efforts to avoid “another *Korematsu*” in *Hamdi v. Rumsfeld*.¹¹ *Third*, Rutledge wrote a dissent about military commission procedures that parallels the currently pending case, *Hamdan v. Rumsfeld*.¹² Rutledge identifies *Hamdan*’s main issue with vivid clarity, namely, whether any judicially enforceable limits constrain a President’s ability to punish war crimes. Given the coincidence of legal issues between Rutledge’s time and ours, lessons from his dramatic successes and failures are more valuable than ever. With respect to *Hamdan*, I suggest that modern Justices who are influenced by Rutledge’s experience have various useful options with which to manage broad assertions of presidential detention authority.

Part III briefly 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

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

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).

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. As a legal culture, biography is a popular 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 have served the Court for decades and who have radically reformulated 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 “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 as new Justices join the Court; they will soon define their own approach to the nation’s great legal work.

In the final analysis, I suggest that judicial biography—when it is done well, at the right time—can focus much-needed attention on deep questions of judicial role. And although the character and talents of judges are always important, they are distinctively critical under the pressures applied by our modern War on Terror. It may be mere 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.¹³ 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,

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).

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 not a successful 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 months could have been extremely 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 family saved to complete Rutledge's education, which he compared to "a house, built to the roof, the rafters laid . . . but there's *no top*."¹⁴

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 Hadley's 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.¹⁵ And although Rutledge's expertise was in corporations and business law,

14. *Id.* at 34.

15. *Id.* at 52.

his early years were spent “teaching around the curriculum,” as was common practice in those days.¹⁶

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.¹⁷ 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-seven—became dean, and eighty percent of the graduating class petitioned the board of directors to support that choice.¹⁸

Rutledge’s deanship from 1930 to 1935 was impressive. He restructured law review admissions to improve student writing and access. He organized lectureships analyzing connections between law and social science.¹⁹ 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.²⁰ Still, Dean Rutledge led the law school many steps forward, and in doing so he attracted attention among academics and beyond.

16. *Id.* at 51-52.

17. *Id.* at 52.

18. *Id.* at 66.

19. 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).

20. 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

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.²¹

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 congressional efforts to regulate child labor,²² and many lawyers, including the American Bar Association's President, opposed efforts to override such rulings by constitutional amendment.²³ 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 freedom from national restraint in order to establish monopoly; the shield behind which vast power combinations seek similar freedom today; 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.²⁴

because the donor demanded a color-blind admissions policy. *Id.* at 72.

21. A significant social activity for Rutledge was the "Public Question Club," a professional group 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).

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

23. FERREN, *supra* note 5, at 74-76.

24. *Id.* at 75.

Missouri never did ratify the Child Labor Amendment, but Rutledge's speeches showed 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, if perhaps less openness to internal reform.²⁵ 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 the inadequacy of legal services for unemployed persons, and the bar's "almost appalling apathy and indifference" to effective legal aid; the report concluded that "[n]o legal system can survive . . . [when] so large a proportion of the general population" is ignored.²⁶ At a 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 at this time was supporting FDR's "court-packing plan," which would have added fifty judges to the federal bench, including six Supreme Court Justices, wherever existing judges were seventy years old with ten years of service.²⁷ Rutledge shared other intellectuals' concerns about overbearing the Judiciary, but he viewed the Court as unbearably resistant to necessary legislation addressing underconsumption, employment displacement, land planning, conservation, social security, and other urgent issues.²⁸ Expressing a flexible view of constitutional structure, Rutledge characterized the Court's cases as threatening "basic principles of national democracy," possibly risking "another Dred Scott

25 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.

26. *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").

27. 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).

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

situation.”²⁹ Thus, Rutledge thought that if States like Missouri would not correct the Court’s errors by ratifying constitutional provisions like the Child Labor Amendment, a change in judicial personnel was the only feasible option.³⁰

Rutledge vociferously supported the court-packing plan, and he even agreed to testify before Congress.³¹ The Court, however, 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.³² Given such profound jurisprudential shifts, Congress was ultimately content to offer septuagenarian Justices with ten years’ service *the option* of full-salary retirement.³³

Although Roosevelt failed to change the Supreme Court’s institutional structure, he did influence that organ by appointing eight Justices.³⁴ Rutledge was considered several times among FDR’s nominees, first as a successor to Justice Cardozo in 1938.³⁵ Irving Brant, a Democratic writer from St. Louis,³⁶ brought Rutledge to Roosevelt’s attention partly due to Rutledge’s positions on child labor and legal reform. Brant saw in Rutledge a young, liberal

29. *Id.*

30. *See FERREN, supra note 5, at 76-77* (describing the amendment movement’s failure). 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 a legislative act, or granting Congress general constitutional authority to reenact statutes that the Court struck down. *Id.* at 127.

31. Rutledge’s willingness to support the court-packing proposal set him 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 controversial, pro-Roosevelt views. *Id.* at 127–28.

32. *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).

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

34. 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.*

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

36. Notable among Brant’s writings is a significant six volume biography of James Madison.

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 himself 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.³⁷ Brant therefore promoted 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.”³⁸ 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.”³⁹

Brant and other Rutledge supporters, including faculty and luminaries from the St. Louis and Iowa bar, sustained Rutledge as an alternative to Frankfurter throughout the nomination process. When Frankfurter was finally chosen, Rutledge advocates looked forward to other vacancies, and they did not wait long, because 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.

In 1939, Rutledge began a decade of judicial service with “perhaps the most strenuous year” of his life.⁴⁰ The many causes of Rutledge’s stress included his penchant for long writing,

1 IRVING BRANT, JAMES MADISON (1941). The later volumes were published in 1948, 1950, 1953, 1956, and 1961.

37. 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.

38. *Id.* at 143.

39. *Id.*

40. *Id.* at 181.

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 across the country about legal services for indigent populations. Rutledge also helped a young Herbert Wechsler restructure the federal government's 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 penchant for 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 the federal district court, review petitions concerning federal agencies, and appeals from municipal courts regarding contracts, torts, criminal law, family law, and the like.⁴¹ 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.⁴²

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.⁴³ Three factors pushed the other way. First,

41. 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).

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

43. 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 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.")

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].”⁴⁴

Second, Biddle asked his assistant, Herbert Wechsler, to evaluate candidates’ judicial work. Wechsler’s memorandum noted his earlier experience with Rutledge, but more importantly, the report offers a rare appraisal of judicial product without flattery or exaggeration.⁴⁵ 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—especially after the first year—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.”⁴⁶ 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.”⁴⁷ 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.”⁴⁸ 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.”⁴⁹

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 still pressured to appoint a Justice from west of the

44. 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.

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

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

47. *Id.*

48. *Id.*

49. *Id.*

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 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.”⁵⁰

When Rutledge reached the Supreme Court in February 1943, his colleagues suffered serious interpersonal frictions, and matters soon worsened. Seven of nine Justices were FDR appointees, but Jackson and Frankfurter were conservatives with whom Roberts and Reed combined to oppose the Court’s liberal wing (Murphy, Douglas, Black, Rutledge, and occasionally Stone).⁵¹ Ideological divisions, however, paled beside the conflicts over propriety and ethics that surfaced during the Court’s next few years.⁵² Such controversies are remarkable

50. *Id.* at 219.

51. 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 Congress’s 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. . . . In general summary, . . . Stone’s lone dissent in the first *Flag Salute* case, . . . plus Stone’s very important intellectual contribution in the *Carolene Products* case, has 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).

52. A few examples may be useful. 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 but 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 chronically irritating, as was his penchant for taking summer recess before others’ opinions had circulated. Many at the Court were unhappy that Jackson agreed to prosecute at the Nuremberg Trials without advising even Chief Justice Stone, especially as the departure shifted heavy burdens to others on the Court. Black and Jackson had a terrible feud 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, with the result that no letter of any kind was issued. *Id.* at 279-83.

Ferren summarized the Court’s inner workings 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. The media wrote that two Justices (Black and Douglas) would resign if Jackson became Chief, and similarly that Jackson would resign if Black were promoted. 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).

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.⁵³

In terms of legal opinions, a full accounting of Rutledge’s contributions in such varied fields as federalism, religion, 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.

* * * * *

The foregoing sketch aims to reinforce the significance of full-length judicial 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 judicial career caps President Roosevelt’s successful efforts at “court-picking,” and it highlights

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 51, at 628 (noting that Stone “got on very happily 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)).

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

the legal issues that preoccupied the Court between *Lochner*'s death and *Brown*'s birth. Thus, although Ferren's contribution to Supreme Court history is set in personal terms, I would suggest that his book is a valuable resource for all students of the Court's enduring significance.

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 may 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 personality and his success. As Rutledge wrote after being nominated 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.⁵⁴

A second personal dimension of the story concerns Rutledge's law clerks. In the late nineteenth century, Supreme Court Justices began hiring recent law graduates to research legal issues, manage certiorari requests, and sometimes draft opinions.⁵⁵ Although American legal education once relied entirely on apprenticeship, clerkships—at the Supreme Court and elsewhere—are the last great example of institutionalized mentoring. Obviously, clerkships vary with the personalities involved, but the experience, in propelling lawyers toward their newfound profession, often leaves indelible impressions of what counts as law and good judgment.

For most of Rutledge's tenure, Supreme Court Justices hired one law clerk per year; in 1948 and 1949, they hired two. Rutledge thus had nine clerks at the Court. One is now a Harvard

54. FERREN, *supra* note 5, at 219. Ferren also suggests that Rutledge's humility and compassion helped to spur Rutledge's 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.

55. *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) (offering a more extended analysis).

law professor, a few are accomplished private counsel, 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,⁵⁶ and several Rutledge clerks name their former employer as permanently influencing their view of life and law.⁵⁷ 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 of us seek books about just any Justice. Especially in today's biography-rich landscape, it is Rutledge's tie to modern circumstances that commands particular attention, and the most important such link concerns executive detention.⁵⁸ After decades of jurisprudential quiet, the President's authority to detain individuals without criminal process is again critically important. Rutledge's career manifests how executive detention cases test 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 charging and trying detainees in military tribunals. With respect to each of these stages, Rutledge played a critical role in World War II's landmark decisions, and those decisions, in turn, intimately affect pending or recently decided cases in today's Supreme Court. By comparing three pairs of "old" and "new" cases, I suggest that the World War II precedents

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

57. 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.").

58. For other doctrinal parallels, compare, e.g., *Everson v. Board of Educ.*, 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, e.g., *Gonzales v. Raich*, 125 S. Ct. 2195 (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).

demonstrate how well and badly courts behave in addressing executive detention issues; such cases thus offer vital standards for evaluating modern judicial performance in this sensitive area of the law.

The first pair of cases is Rutledge’s dissent in *Ahrens v. Clark*, which addressed the territorial limits of habeas jurisdiction, and *Rasul v. Bush*, concerning detentions at Guantanamo Bay.⁵⁹ 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 showcases the author’s commitment to judicial craft and constitutional value. And in the modern context, that opinion remains a peerless lens for exposing 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 the relocation of Japanese-Americans in World War II, with *Hamdi v. Rumsfeld*, concerning the detention of “enemy combatants” in Guantanamo Bay.⁶⁰ Rutledge was the decisive fifth vote at conference in *Korematsu*, and a fractured majority of the *Hamdi Court* crafted its legal analysis 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 seriously flawed. Judicial support for civil liberties was even weaker, and less principled, than *Korematsu*’s six to three vote indicates. For modern readers, understanding the full scope of Rutledge’s mistake provides unique insights about whether today’s courts are doomed to repeat it.

Third, on the issue of detainees charged in military commissions, the best known Rutledge opinion is his dissent in *In re Yamashita*, concerning the military commission trial of a Japanese general.⁶¹ *Hamdan v. Rumsfeld* raises similar issues with respect to a military commission trial of Osama bin Laden’s driver.⁶² Modern courts will decide whether there are

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

60. *Hamdi v. Rumsfeld*, 546 U.S. 507 (2004); *Korematsu v. United States*, 323 U.S. 214, 223 (1944); *see infra* Section II.B.

61. *In re Yamashita*, 327 U.S. 1, 46-47 (1946) (Rutledge, J., dissenting).

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

limits on the executive's choice of procedures in military commissions, and here again, Rutledge's example sets a crucial standard measure for analyzing presidential authority during national crisis. Thus, with respect to every stage of executive detention 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*,⁶³ the Attorney General deported a hundred German nationals under the Alien Enemy Act of 1798, which grants broad power to remove citizens of nations at war with the United States.⁶⁴ 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 federal 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.⁶⁵

Voting six to three, the Supreme Court found jurisdiction improper. 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.*”⁶⁶ In *Ahrens*, the respondent Attorney General was undeniably “within” the district court's jurisdiction, but Douglas wrote for the Court that habeas jurisdiction was lacking because the *detainees* were not “within” the District of Columbia.⁶⁷ 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.⁶⁸ Accordingly, the Court held that Congress had allowed habeas jurisdiction only for detainees within a deciding court's territorial boundaries.

63. 335 U.S. 188 (1948)

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

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

66. *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”).

67. *Ahrens*, 335 U.S. at 190–92.

68. *Id.* at 190-93.

Rutledge’s dissent in *Ahrens* has been described as “sufficiently representative to provide . . . an introduction to its author’s judicial career.”⁶⁹ Meeting the majority’s five-page opinion with eighteen in response, Rutledge carefully surveyed statutory language, legislative history, and prior precedents, showing that none compelled the majority’s result.⁷⁰ He also explained that concerns over travel and convenience 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 might require district courts to hear from detainees located outside their 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.”⁷¹ 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.⁷² Although the majority was preoccupied with 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.⁷³ 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.⁷⁴

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

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. The introduction of these points by once-Professor Rutledge reads much like a classroom transcript, where the instructor poses hypothetical questions not directly at issue but possible as extensions of the principle at stake.

For Rutledge, the *Ahrens* majority might allow illegal detention with no chance of relief, especially with respect to 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.”⁷⁵ Such events could arise from “military detention,” from “mass evacuation of groups . . . in time of emergency,” or “possibly . . . even from wilful misconduct by arbitrary executive officials overreaching their constitutional or statutory authority.”⁷⁶

Although such particular scenarios did not materialize after World War II, Rutledge’s broad concerns about wartime detention marked the *Ahrens* dissent as a work of its time; it also explains the opinion’s reemergence during today’s new war and confinements. Rutledge’s dissent is just the kind of opinion that many 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 imprisoned in Germany by the United States Army.⁷⁷ The detainees had been convicted by a military commission for hostile military activities after Germany’s surrender. The Supreme Court cited historical examples denying judicial access 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.⁷⁸ *Eisentrager* thus reversed the court of appeals, which had countered *Ahrens*’s statutory place-of-the-body rule by invoking constitutional norms and “fundamentals,”⁷⁹ and affirmed the district court, which had embraced *Ahrens*’s view of territorial jurisdiction.

In contrast, *Braden v. 30th Judicial Circuit Court*⁸⁰ signaled dissatisfaction with *Ahrens*. Braden was an Alabama prisoner who argued that his conviction on a stale Kentucky indictment

75. *Id.* at 210.

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).

violated his speedy trial rights.⁸¹ Because Braden sought habeas relief from Kentucky’s district court, despite his being held in Alabama, the question was whether his case lay “within” the district court’s “respective jurisdiction[.]”⁸² The Court held that jurisdiction in Kentucky was proper, because (as Rutledge had 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.”⁸³ The *Braden* Court viewed statutory and doctrinal developments as having “a profound effect on [*Ahrens*’s] continuing vitality,” and held that *Ahrens* no longer stood as “an inflexible jurisdictional rule,” but only as a decision applying “traditional principles of venue.”⁸⁴

Then 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.”⁸⁵ 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 . . . the ultimate sovereignty of the Republic of Cuba over [Guantanamo Bay],” but that “the Republic of Cuba consents that during the period of the occupation by the United States . . . the United States shall exercise complete jurisdiction and control over and within said areas.”⁸⁶ The United States

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.

84. *Id.* at 493, 497, 500. Notwithstanding *Braden*’s attempted revision, it is absolutely clear that *Ahrens*’s holding cannot be explained using venue principles. The government waived any defenses to hearing *Ahrens* in the District of Columbia, thereby rendering irrelevant all waivable defenses—such as venue, but unlike 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).

and Cuba later made the lease indefinite, lasting as long as the United States does not abandon the naval base.⁸⁷

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.⁸⁸ In response, the government cited *Eisentrager*, arguing that federal courts could not review Guantanamo detentions because those detainees were not “within [any district court’s] respective jurisdiction[.]”⁸⁹

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 fifty years earlier.⁹⁰ Like his mentor, Stevens declared the 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.”⁹¹ Rebutting the government’s reliance on *Eisentrager*, Stevens held that *Braden* had unsettled *Ahrens* as precedent, thereby making *Eisentrager*’s constitutional and quasi-constitutional analysis unnecessary.⁹² The *Eisentrager* detainees had urged a constitutional or quasi-constitutional basis

87. *Id.*

88. *Id.* at 471-72 & n.4.

89. *Id.* at 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 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.”).

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 concerning habeas relief’s availability to 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 *Eisentrager*’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 *Eisentrager*’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 had denied committing any aggression against the United States. *Id.* at 475-76.

for habeas jurisdiction *only because* they accepted the *Ahrens* majority’s “place-of-the-body” rule as authoritative. Thus, insofar as *Braden* repudiated that analysis, Stevens viewed *Ahrens*’s holding as relevant “only to the question of the appropriate forum, not to whether the claim can be heard at all.”⁹³

Some observers have expressed great difficulty understanding *Rasul*’s reasoning.⁹⁴ Part of that confusion owes to the limited attention paid to Rutledge and his dissent.⁹⁵ 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.⁹⁶ Thus, they thought *Eisentrager* should control on its factual similarity to *Rasul*, if nothing else.⁹⁷ That argument overlooks a crucial detail. *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.⁹⁸ The risk that legal technicalities might block

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 DRAKEL. 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 *Eisentrager*, without acknowledging the importance of *Ahrens*, and without rebutting the analysis of Rutledge’s dissent).

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. *Rumsfeld v. Padilla*, 542 U.S. 426 (2004), which was decided the same day as *Rasul*, also 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); *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.

review of wartime detention is what led Rutledge to support habeas jurisdiction over Ellis Island detainees whose jurisdictional arguments were otherwise unsympathetic.⁹⁹ Although *Eisenrager* extended *Ahrens* and denied habeas jurisdiction for detainees overseas,¹⁰⁰ it was Rutledge's principled discussion in dissent that led the Court, in its recent detention jurisprudence, to a result that was hard to anticipate and is difficult otherwise to explain. The coincidence that Justice Stevens wrote the opinion producing the result is stunning, but also appropriate.

Before leaving this discussion, strong substantive echoes between Stevens's *Rasul* opinion and Rutledge's *Ahrens* dissent cannot obscure the two opinion's very different judicial styles. Rutledge systematically disassembled the *Ahrens* majority, confronting each point with counterpoints and filling footnotes with legal research. By contrast, the *Rasul* opinion contains just three elements: (i) a general celebration of the writ,¹⁰¹ (ii) a rebuttal of *Eisenrager*,¹⁰² and (iii) a rebuttal of the presumption against extraterritoriality.¹⁰³ 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.¹⁰⁴

99. To see why the *Ahrens* petitioners were unsympathetic, imagine this question from Douglas and the *Ahrens* Court: "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 legal problem with such a question is that it blurs the line between venue and jurisdictional rules that anchors the Rutledge position. See *supra* note 71 and accompanying text. Questions of venue, convenience, and similar issues may be waived and are exclusively in the parties' hands. The government in *Ahrens* did waive such defenses. Thus, the Supreme Court was to consider only issues 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).

101. *Rasul*, 542 U.S. at 473-76.

102. *Id.* at 474-79.

103. *Id.* at 480-85.

104. *Id.* at 481 (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.* 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, not less than American citizens, are entitled to invoke the federal courts' authority under [28 U.S.C. § 2241]."

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).

As *Rasul*'s responsive structure suggests, its affirmative argument for habeas jurisdiction is spare; indeed, even reliance on Rutledge is underemphasized.¹⁰⁵ 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 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.¹⁰⁶

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?¹⁰⁷ On the other hand, 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 this 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 *Eisentrager*, and to add language about Guantanamo Bay, in the hope of attracting Kennedy's vote or in fear of losing O'Connor's.¹⁰⁸

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).

106. *Id.* at 500 (Scalia, J., dissenting).

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 duality. 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,

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 applicable to a broad range of unforeseen circumstances. That very characteristic, which marks the *Ahrens* dissent's greatness and long shelf-life, may have blocked the *Rasul* majority from fully accepting it. Despite some cost to clarity, 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 "War On Terror" more clearly emerge. The general merits of writing "broad" versus "narrow" decisions in wartime are canvassed elsewhere.¹⁰⁹ My reasons to differentiate Rutledge's opinion from Stevens's is to illustrate Rutledge's dominant judicial traits and to flag the Court's extraterritoriality analysis, which creates interesting doctrinal possibilities (discussed herein) for another executive detention case.¹¹⁰

B. Uncharged Detainees: Comparing Hirabayashi, Korematsu and Hamdi

If *Rasul* vindicated Rutledge's dissent in *Ahrens*, *Hamdi* condemned his vote in *Korematsu*.¹¹¹ Many details of the Japanese-American cases are well known, but some are not.¹¹²

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 wrong as a statutory matter, petitioners would lose if the habeas statutes were not to apply to Guantanamo. To give meaning to both of *Rasul*'s parts has underanalyzed consequences, as I suggest *infra*, Section II.C.4. At this point, however, *Rasul*'s critics may simply note that, despite Scalia's charge of inconsistency, Stevens's opinion does not contain any explanation like the one in this footnote.

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* Section II.C.4 (discussing *Hamdan v. Rumsfeld*, 415 F.3d 33, 35 (D.C. Cir. 2005), *cert. granted*, 126 S. Ct. 1606 (2006) (No. 05-184)).

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*, 546 U.S. 507, 521-23 (2004) (plurality); *cf. id.* at 563-73 (Scalia, J., dissenting); *infra* text accompanying notes 188-203. 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. See *infra* Section II.C. 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* Section II.B.2.

112. For example, the four "internment cases" are discussed extensively in IRONS, *supra* note 52, at viii-ix:

Attention to Rutledge’s unrecognized role in those decisions, for example, 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 the possible repetition of wartime abuses.

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.”¹¹³

Implementing that order, Lieutenant General DeWitt divided the Pacific Coast into “military areas” that were deemed particularly vulnerable to attack, sabotage, and espionage.¹¹⁴ In March 1942, Congress criminalized any violation of military-area regulations, authorizing penalties up to a \$5000 fine and one year in prison.¹¹⁵

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,” this 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

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 effort to contribute to this well-traveled field of legal history lies in my revisionist approach to the link between *Hirabayashi* and *Korematsu*, and the consequences thereof.

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 52, at 18. See generally *Ahrens v. Clark*, 335 U.S. 188 (1948) (applying the Enemy Alien Act to German nationals); *supra* Section II.A.

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

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

two, or five miles from their residence.¹¹⁶ 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.¹¹⁷ This “anti-migration order” was odd because it blocked innocent persons, who might wish to avoid even *appearing dangerous*, from leaving areas that seemed militarily vulnerable.¹¹⁸

Beginning in May 1942, DeWitt ordered all persons of Japanese ancestry to “evacuate” designated military zones.¹¹⁹ 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.”¹²⁰ 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.”¹²¹ In due course, federal judges would call the government’s various

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 52, 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.”).

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 52, 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

confinement facilities “internment camps,” “detention camps,” “prisons,” and “concentration camps.”¹²² 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.¹²³ Relocation and detention were deemed necessary to investigate the detainees’ loyalty in ways that were presumptively impossible if Japanese-Americans were unsupervised at home.¹²⁴ 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.¹²⁵ 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

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 52, 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).

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 52, 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).

three months, which ran concurrently.¹²⁶ Hirabayashi challenged both the curfew order and the exclusion order as unconstitutionally delegating power to the military and unconstitutionally discriminating against Japanese-Americans.¹²⁷ However, because lawful conviction of either count could support Hirabayashi's three-month sentence, the Supreme Court chose to rule only on Hirabayashi's 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 precisely and quickly ascertained," were a "menace to the national defense and safety, which demanded that prompt and adequate measures be taken."¹²⁸ Second, the Court accepted that innocent Japanese and Japanese-American persons "could not readily be isolated" from dangerous ones.¹²⁹ Third, the Court denied that a curfew must be imposed on "all

126. *Id.* at 85. 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 describing various curfew violations. Based on that diary and Hirabayashi's corroborative confession, the government charged him with violating the curfew order. IRONS, *supra* note 52, at 92.

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 stay required for 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 random 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.

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

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.”¹³⁰

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,”¹³¹ it ultimately held that:

The adoption by the Government, in the crisis of war and . . . threatened invasion,

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 similarly 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 52, at 55 (quoting memorandum). That argument aimed to explain 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 brief in *Yasui*: “[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 139-140 (quoting another 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 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.’”).

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 such 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.”).

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.¹³²

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

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

131. *Id.* at 100.

132. *Id.* at 101.

133. See FERREN, *supra* note 5, at 244 (describing Murphy's change); IRONS, *supra* note 52, 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 such decisions' "wisdom or expediency" 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 52, 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. 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 52, 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.

DeWitt's exclusion order took effect;¹³⁴ 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.¹³⁵ Stone, Black, Frankfurter, and Reed voted to affirm Korematsu's conviction; Roberts, Murphy, Jackson, and Douglas voted to reverse. Because Justices speak at conference in order of seniority—and the rest of the Court was evenly divided—the final decision fell to Wiley Rutledge. 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.”¹³⁶ Stone had prodded Rutledge toward that result just moments before his vote: “If you can do it for curfew you can do it for exclusion.”¹³⁷ Thus, Rutledge voted to affirm, Douglas later switched to join the majority, leaving as the only dissenters the very liberal Murphy and two moderate conservatives, Roberts and Jackson.

Modern lawyers can imagine few cases more wrongly decided than *Korematsu*, but of course that view is informed by hindsight.¹³⁸ When Roosevelt and DeWitt issued their orders in 1942, the United States had suffered an unthinkable surprise attack, 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.¹³⁹ There was certainly reason to doubt

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

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

136. *Id.*

137. IRONS, *supra* note 52, at 322.

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 52, 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.”).

the military's threat assessments even in 1942¹⁴⁰—and the government concealed information from the Supreme Court that would have raised more doubts.¹⁴¹ But few commentators (and fewer judges) would have staked national survival on such doubts until quite late in the war.¹⁴²

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 52, 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.*

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 aerial incursion turned out to be false. “[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.

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’”

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

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.¹⁴³ The Court in 1943 and 1944 had only partial knowledge of such exaggerations.¹⁴⁴

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.¹⁴⁵ 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 neither easy nor satisfactory. First, Rutledge trusted FDR in ways that modern readers might struggle to grasp. Roosevelt had led the country through a Great Depression, using “fireside chats” to support

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 52, 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.”).

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. *See also* 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 such an 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.

policies and to build his personal image.¹⁴⁶ When *Korematsu* was decided in 1944, Roosevelt was en route to winning his country's largest foreign war and had just won 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.

In a sense, the government also 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.¹⁴⁷ Rutledge's conversations with his first law clerk, Victor Brudney, confirm the effectiveness in *Hirabayashi* of the government's arguments for deference. When Brudney suggested that the Court should request an FBI report that had cast 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

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 52, 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 180-181 (“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.”).

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 52, 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”; obvious parallels to modern rhetoric and circumstances need no elaboration.

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.¹⁴⁸

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.¹⁴⁹ Modern jurists study *Korematsu* as indefensibly embracing Japanese-American internment, and *Hirabayashi* (if at all) as a curfew case of marginal significance.¹⁵⁰ 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

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 the 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 could survive 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).

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 52, at 342.

Whatever one thinks of *Endo*, however, an incalculably greater oversight is most lawyers' unfamiliarity with *Hirabayashi*, the case that set forth the complete doctrinal groundwork that supports the now-infamous *Korematsu* decision.

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.¹⁵¹

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.¹⁵²

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 even that line between *Korematsu* and *Hirabayashi* blurs upon a 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, yet 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*—concerned the failure to report to a Civil Control Station in violation of DeWitt's exclusion order.¹⁵³

151. *Korematsu v. United States*, 323 U.S. 214, 225-26 (1944).

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.'")

153. *Korematsu*, 323 at 215.

Analysis of disputed legal issues confirms further similarities. The military pursued, 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.¹⁵⁴ 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.¹⁵⁵ The others quietly renounced their year-old votes.¹⁵⁶ And Roberts’s arguments are unpersuasive. Roberts tried to distinguish *Korematsu* from *Hirabayashi* because the government’s exclusion order was “part of an over-all plan for forceable detention.”¹⁵⁷ But 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.”¹⁵⁸ Was any part of that program *for* “forceable detention”? Or was every part of the program *for* security against perceived

154. See *supra* text accompanying notes 128-130.

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 such 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 logical expansion as an example of the 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.

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).

threats?¹⁵⁹ 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. Again, it was clear to the Court, and was dispositive for Rutledge, that the practical effects of *Korematsu* and *Hirabayashi* differed; but their legal principles were similar indeed. The *Korematsu* majority clearly stated this view: "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."¹⁶⁰

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.¹⁶¹ 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, seeking to bomb factories or shipping docks, it is hard to see why skin color or ancestry should matter much.¹⁶² Moreover, there was no evidence of post-Pearl

159 For a detailed analysis of many complexities entailed by trying to identify what a racially discriminatory government program is "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.

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 52, 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 obviously most security-oriented policy would be to apply such restrictions to all civilians. (Let us overlook, for present purposes, the fact that Lippman actually used the word "nobody" 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." *Hirabayasi*, 320 U.S. at 95 (emphasis added). For discussion of such arguments, see *supra* note 129.

Harbor sabotage or espionage by persons of Japanese descent, even though such activities had been undertaken by non-Japanese persons during the war in Europe.¹⁶³

The irrationality of the curfew and exclusion orders not only gives lie to asserted military necessity, it also reveals the most obvious source of modern revulsion at *Korematsu*, namely, its racism. *Korematsu* once more is more similar to *Hirabayashi* 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.¹⁶⁴ Similarly, under an anti-subordination model, to exclude a racial group from home and community might be more offensive than a curfew or house arrest because it creates a class of “domestic exiles,”¹⁶⁵ but race-based curfews and travel restrictions also produce a class of “outsiders” within society’s gates, which 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 protection, none of which had emerged in World War II.¹⁶⁶ 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.¹⁶⁷ Nor were the Justices

163. Compare, e.g., *YAMAMOTO*, *supra* note 123, at 364, and *IRONS*, *supra* note 52, 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 *A COMMUNITY OF EQUALS: THE CONSTITUTIONAL PROTECTION OF NEW AMERICANS* (1999).

166. The earliest academic hallmark of modern equal protection law 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

ignorant of links between United States racism and the Japanese-American cases. Indeed, the United States' brief in *Hirabayashi* (which was incorporated by reference in *Korematsu*) cited *Plessy v. Ferguson* as ordinary precedent, not as the constitutional pariah it would later become.¹⁶⁸

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.¹⁶⁹ 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.¹⁷⁰ 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 describe the United States, with no mention of legalized racism, as having “institutions founded upon the doctrine of equality.”¹⁷¹ The Court's opinion upholding military racial classification and evacuation was a predictably difficult occasion to proclaim (for the first time) that “all legal restrictions which curtail the civil rights of a single racial group are immediately suspect.”¹⁷² At best, such phrases voice dreams that the civil rights movement would struggle to realize. At worst, the Court's claim that racial

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. Board 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 52, at 364 (“During the evacuation debate in 1942, [Secretary of War Henry J. Stimson] defended the Army's segregation of black soldiers . . . [H]e nonetheless 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 polluted by the warped psychology of race hatred,” but characterized such circumstance less as domestic problems than as “a reflection of the witch's brew that has lately been served up abroad.” IRONS, *supra* note 52, at 337.

172. *Korematsu*, 323 U.S. at 216. See generally IRONS, *supra* note 52, 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”).

restrictions need “the most rigid scrutiny” bordered insincerity.¹⁷³ Thus, although legal principle did not support Rutledge’s vote with the unanimous Court in *Hirabayashi*,¹⁷⁴ Rutledge did not see, and the dissents did not state, a satisfying basis for changing course in *Korematsu*.¹⁷⁵

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, however. First, to understand the true relationship between *Hirabayashi* and *Korematsu* is to illuminate the dangers in executive detention cases of arguably “small” jurisprudential errors. As Chief Justice Stone encouragingly suggested: “If you can do it for curfew you can do it for exclusion.”¹⁷⁶ From Rutledge’s perspective, as the decisive fifth vote, the mistake in *Korematsu* was slipping on an exceedingly treacherous slope. To overlook that aspect of the internment cases is to miss something important.

Second, insofar as even *Korematsu*’s dissenters were hesitant 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* might be a year’s passed time, and the government’s reaction thereto.¹⁷⁷ When *Korematsu* reached the Court in 1944, the United States was far more secure than when *Hirabayashi* was decided. Despite that increased security, however, the government’s arguments and policies concerning race-based confinement were almost completely unchanged. Even years after Pearl Harbor, Japanese-American detainees remained in prison, even when the government had found the particular detainees at issue to be innocent and loyal.¹⁷⁸ For skeptics of Japanese-American internment, it must have seemed clear that the government’s detention

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 Ct. 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 52, at 322.

177. *Cf. supra* note 156 (discussing Murphy’s on new information).

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

program as applied encompassed—at the very least—disturbing excesses and oversimplifications.

From this perspective, *Korematsu*'s dissents might look different from the conventional view. Perhaps such opinions represented frustration dissatisfaction with the government's exhausted, decreasingly credible arguments in its "second round" of detention litigation. It remains unfortunate 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 much clearer that path might have been if even one of *Korematsu*'s dissenters had been methodical, and perhaps even candid, in analyzing the two cases together.

2. "Enemy Combatants"

Hindsight and doctrinal shifts have now discredited *Korematsu* and *Hirabayashi*, but the Court had no occasion to reconsider wartime executive detention of uncharged citizens until the modern case, *Hamdi v. Rumsfeld*.¹⁷⁹ 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 an American citizen by birth, the government transferred Hamdi to Virginia and then to South Carolina.¹⁸⁰

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.¹⁸¹ The government replied that Hamdi could be detained under the Authorization for Use of Military Force¹⁸² because he 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."¹⁸³ As proof, the government offered a declaration from a federal official with second- and third-hand knowledge of the case, but the district court demanded *in camera* production of

179. 542 U.S. 507 (2004).

180. *Id.* at 510.

181. *Id.* at 511.

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

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

numerous documents concerning Hamdi's capture and detention. The Fourth Circuit reversed, allowing detention of any person in a combat zone based on an executive finding of enemy combatant status, without judicial review of the supporting evidence.¹⁸⁴

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.¹⁸⁵ There were, however, obvious differences between *Hamdi* and *Korematsu*. For example, *Hamdi* did not involve 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 especially unsound in a "war" whose uncertain duration might support exceedingly long confinement.¹⁸⁶

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 usefully judged by its doctrinal effectiveness in preventing "another *Korematsu*."¹⁸⁷ O'Connor wrote for four Justices that Congress's Authorization of Military Force allowed the President to detain all "enemy combatants" on the battlefield who supported hostile forces and took up arms against the United States.¹⁸⁸ For detainees who denied committing hostile acts against the United States, however, O'Connor stated that procedures for deciding enemy combatant status must—as

184. *Id.* at 514.

185. 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).

186. Mark Tushnet, *Defending Korematsu?: Reflections on Civil Liberties in Wartime*, 2003 WISC.L. REV. 273, 279 (2003) ("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.").

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

188. *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.

a matter of due process—balance detainees’ interests in liberty and accuracy against military interests in security and convenience.¹⁸⁹ The plurality struck that balance and required that detainees be able to dispute the government’s enemy combatant finding before a neutral decisionmaker; however, the plurality also suggested that the government might sometimes use hearsay evidence, withhold military documents, and use independent military tribunals as decisionmakers.¹⁹⁰ Finally, in its remand instructions, O’Connor’s opinion 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.¹⁹¹

Interspersed with these fairly mild rulings on the merits, O’Connor’s opinion used sharp language to reject *Korematsu*’s legacy.¹⁹² Indeed, O’Connor cited Murphy’s *Korematsu* dissent

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

190. *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.”).

191. *Id.* at 538–39.

192. *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 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.”).

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].”¹⁹³

Such broad, anti-detention rhetoric indicates O’Connor’s understanding that the World War II cases’ failures sounded not only in racism, but also in a misallocation of institutional power and trust. Upon acknowledging that issue, however, O’Connor’s multifactor test leaves 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 shift a detainee’s location to seek a more favorable forum.¹⁹⁴

What made the World War II cases particularly 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 1944.¹⁹⁵ By comparison, Hamdi’s case was more important for politics than national security. Hamdi’s individual detention affected few apparent security interests from the start, and any specific threats requiring his 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 of detention authority in Abu Ghraib and elsewhere.¹⁹⁶ In such a climate, the government’s strict litigating position—which would have

193. *Id.* at 535.

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

195. *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 . . .”).

196. 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 of such information were also

displaced all judicial review of alien terrorists' detention, regardless of that confinement's duration or conditions—risked undermining the government's credibility, which was critical to earning Rutledge's "swing vote."¹⁹⁷ Hamdi's attorney stressed this credibility problem at oral argument, sardonically summarizing the government's overarching position as: "Trust us."¹⁹⁸

In any event, although O'Connor would not accept Hamdi's indefinite, uncharged detention without some form of additional process, her doctrinal test cannot satisfactorily address 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 overcome than the Court's "most rigid scrutiny," which utterly 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 more evident crisis.¹⁹⁹

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,

prevalent during this time.

197. See *supra* notes 146-148 and accompanying text.

198. 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 (2004).

199. 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.").

viewed constitutional due process as barring any detention of citizens without full criminal process, unless Congress suspends habeas corpus.²⁰⁰ Scalia's position was hard to square with a World War II precedent, *Ex Parte Quirin*,²⁰¹ and his broad constitutional pronouncement also risked imposing significant, potentially premature burdens on the government's War on Terror.²⁰² Indeed, if the other branches deemed Scalia's constitutional rule proved unworkable, the only political solution would be for Congress to suspend habeas corpus altogether, thereby allowing even unconstitutional detention to escape judicial remedy.²⁰³

Souter, joined by Ginsburg, crafted 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."²⁰⁴ Souter described the statute's purpose by explicit reference to World War II internment:

[T]he Emergency Detention Act of 1950 [that gave rise to 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*.²⁰⁵

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

201. 317 U.S. 1 (1942) (upholding trial of a United States citizen before a specially composed military commission).

202. *Cf. supra* note and accompanying text (noting some Justices' apparent hesitation to make broad judicial pronouncements in *Rasul* until more details of the new "war" became known).

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

204. 18 U.S.C. § 4001(a) (2000).

205. *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, averse to

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.²⁰⁶ 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.²⁰⁷

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

206. Souter also rested his analysis on a presumption against executive detention that allegedly derived from *Endo*. *Id.* at 2654-55. The inevitable other side of *Endo*, however, is the fact 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). More 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 52, 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). Victims of racist slavery in the antebellum United States were not technically “citizens.” *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 . . .”). The failure even to mention slavery in the national history of racial discrimination illustrates how unsatisfying and misleading citizenship-based legal rules can be.

207. *Hamdi*, 542 U.S. at 545 (Souter, J., concurring in the result). 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.

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.²⁰⁸ Thus, the operative question was how specific a congressional statute must be in order 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.²⁰⁹ The Japanese-American detentions were arguably supported by two congressional authorizations: the declaration of war against Japan and the statute criminalizing the violation of any military exclusion order.²¹⁰

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.²¹¹ Measured by that standard, the Authorization for Use of Military Force is at most a broad, general license to make war. It is not more specific than World War II's declaration of war, and is certainly less specific than the statutes enforcing military-zone regulations. Souter does not explain his use of World War II history as a benchmark as explicitly as could be done, but that core historical comparison is what distinguishes his construction of the Non-Detention Act from other, more malleable "clear statement rules." Indeed, the historical backdrop creates an objective, bright-line standard to measure future assertions of authorized executive detention.²¹²

208. 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).

209. *Id.* at 543, 547 (Souter, J., concurring in the judgment). For reasons disputed, *supra*, note 206, Souter stresses *Endo*, rather than *Korematsu*, as the decisive precedent in interpreting these statutes.

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

211. *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).

212. 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*

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.”²¹³ 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.²¹⁴

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.”²¹⁵ In Souter’s view, however, the government must demonstrate that its actions satisfied the laws of war, and he found that requirement unmet in Hamdi’s case.²¹⁶ 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.”²¹⁷ The President in 2002 proclaimed that al Qaeda and Taliban detainees are not entitled to prisoner of war status under the Geneva Convention.²¹⁸ However, Souter denied that such categorical proclamations could resolve Hamdi’s individual prisoner-of-war 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

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 directly to follow. For a modest defense of Souter’s opinion based on general habeas principles and institutional process theory, see Morrison, *supra* note 200, at 449-50.

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

214. 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.*

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

216. *Id.* at 551.

217. *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).

218. *Id.* at 550.

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 Resolution.”²¹⁹ Souter thus found that 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 logically 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 broader empirical and political data, and time for unfolding events to confirm or dispel initial (potentially overdrawn) assessments of military necessity.²²⁰ All of these institutional benefits are of course tailored to ameliorate problems that emerged with a vengeance in *Hirabayashi* and *Korematsu*.²²¹

219. *Id.* at 551.

220. *Cf.* text accompanying notes 176-178 (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.

221. 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 result). By leaving the constitutional issue aside, Souter’s approach also allowed the possibility that the political branches might endorse more presidential power than an Article III judge would have found apt.

By contrast, O'Connor's opinion only partly addressed the perils of governmentally manipulated facts and risk assessments in wartime.²²² Indeed, the plurality seemed not even to recognize the existence of such possibilities. By contrast, Souter called such 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 without charges, and by reminding us 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, most especially in an opinion to correct his own greatest mistake.²²³

C. *Military Commissions: Yamashita and Hamdan*

Our last pair of cases is Rutledge's celebrated dissent in *In re Yamashita*²²⁴ and the Supreme Court's pending case, *Hamdan v. Rumsfeld*,²²⁵ both of which address the President's authority to try detainees in military tribunals. Hamdan's case raises once more the question of law's status during crisis, and Rutledge's work again sheds significant light.

222. 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?

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 still would have left the Fourth Circuit's ruling in place. 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); see John T. Ganoë, *The Yamashita Case and the Constitution*, 25 OR. L. REV. 143, 148 (1946) (calling the opinion "masterful" and "penetrating"); 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).

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

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 famous "return" to the Philippines.²²⁶ 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.²²⁷ 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."²²⁸ 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 was 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 did not mention them in closing arguments.²²⁹ Nonetheless, on December 7, 1945—four years to the day after Pearl Harbor—the

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.

military commission found Yamashita guilty “upon secret written ballot, two-thirds or more of the members concurring,” and sentenced him to death by hanging.²³⁰

Yamashita sought a writ of habeas corpus directly from the Supreme Court,²³¹ his chief objections were that (i) his military commission was illegal because the war with Japan had ceased, (ii) the charges against him 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 (the statutory rules governing military justice).²³² 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.²³³

The Court voted six to two to deny Yamashita’s claims.²³⁴ Stone’s majority opinion listed extensive legal and historical support for convening military commissions to try offenses against the “law of war.”²³⁵ In such cases, the Court held that the only proper judicial review is a habeas corpus proceeding that leaves all reexamination 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.”²³⁶

230. *Id.*

231. *Id.* at 4-6.

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.

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.”²³⁷ Next, the Court upheld the government’s “ineffective command” theory of liability, which punished military leaders like Yamashita for, perhaps even unknowingly, “permitting” subordinates to commit atrocities.²³⁸ The Court supported this command theory by citing international conventions that arguably presupposed effective military command,²³⁹ but the Court’s main argument was that such command responsibility was necessary for the law of war’s “purpose to protect civilian populations and prisoners of war from brutality.”²⁴⁰

Finally, the Court rejected challenges to the military commission’s evidentiary standards.²⁴¹ 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.”²⁴² The Court rejected those arguments because the Articles named only United States Army and similar personnel as “persons . . . subject to these articles”; enemy combatants were not included.²⁴³ The Court found that, despite Congress’s statutory recognition of military

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.

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 (overstating grossly the view 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.

commissions' existence, Congress had left control over procedures "where it had previously been, with the military command."²⁴⁴

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."²⁴⁵ As discussed *supra*, Yamashita's trial violated evidentiary standards required by the Articles of War, which certainly would have governed a trial of United States personnel.²⁴⁶ 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.²⁴⁷

Yamashita objected that the commission's evidentiary standards also violated constitutional rights. The Court summarily dismissed that argument, with only this 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.²⁴⁸

That explanation fails; the Court's technical analysis of statutory and international law was at most tangential to Yamashita's constitutional objection.²⁴⁹ Nevertheless, the Court held without further discussion that Yamashita's trial "did not violate any military, statutory, or constitutional command."²⁵⁰

244. *Id.* at 20.

245. *Id.* at 20-21.

246. *See supra* note 217 (citing Articles of War regulating the use of hearsay and documentary evidence).

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

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 imagined a distinction between a petitioner's contesting the "authority to proceed" and contesting the authority to proceed using certain offensive procedures. The proposed scope or basis for such a distinction, however, has no further explanation.

250. *Id.* at 25.

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.²⁵¹ 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.”²⁵²

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

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.²⁵³

After listing deviations from criminal-law traditions during 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.”²⁵⁴ Given such abundant procedural problems, Rutledge simply stated that “this was no trial in the traditions of the common law and the Constitution.”²⁵⁵

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

252. *Id.* at 40.

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

254. *Id.* at 45.

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

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 such extraordinary deference was plausible in contexts of true "military necessity" or "battlefield" authority, but not 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.²⁵⁶

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 what is most important, as in *Ahrens*, is the normative commitment that underlay Rutledge's technical analysis. Rutledge viewed *Yamashita*'s majority as having identified "no law restrictive upon [Yamashita's capital] proceedings other than whatever rules and regulations may be prescribed . . . by the executive authority or the military."²⁵⁷ Rutledge's forty-page dissent concluded by rejecting this legal vacuum: "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."²⁵⁸ Regardless of whether the basis for limiting executive power be derived from common-law fairness, constitutional due process, the Articles of War, international law, or all of the above, Rutledge's dedication to legal rule and judicial role could not countenance "trial" procedures as shoddy as those that caused Yamashita's death.

2. *Bin Laden's Driver*

Rutledge worried that *Yamashita*'s departure from conventional processes might cause a pervasive decline in all United States criminal procedure, but those broadest worries never materialized.²⁵⁹ Indeed, until recently, the Court's decision to uphold Yamashita's conviction—

256. *Id.* at 47 ("There is a maxim about the law becoming silent in the noise of arms [*Inter armis 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.").

257. *Id.* at 81.

258. *Id.*

259. *See id.* at 79 ("For once [the door against procedural abuse] is ajar, even for enemy

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.”²⁶⁰ But today’s “War on Terror” has returned military commissions to the foreground. On November 13, 2001, citing the Authorization for Use of Military Force, Commander in Chief power, and current embodiments of the Articles of War, Bush ordered that any non-citizen al Qaeda member or other international terrorist should, after presidential designation, be tried in a military commission for violating the law of war.²⁶¹

One person who has been directly affected by military commissions’ resurgence is Salim Ahmed Hamdan. In November 2001, Hamdan was captured by Afghan 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 Hamdan for trial in a military commission.²⁶² 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 (under the government’s view of *Hamdi*) justifying his detention without any further process.²⁶³

Hamdan was later charged before a military commission with conspiring to commit murder, property damage, and terrorism.²⁶⁴ 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, with knowledge that bin Laden and al Qaeda organized the

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, 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) (characterizing negatively the Court’s decision in *Ex parte Quirin*, 317 U.S. 1 (1942), which upheld a military commission’s decision to execute German saboteurs, including one United States citizen).

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. *Id.*

September 11 terrorist attacks.²⁶⁵ Hamdan’s military commission is composed of three U.S. colonels, and its procedures are set by regulation.²⁶⁶

Hamdan sought habeas relief in federal district court, claiming *inter alia* that a 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,²⁶⁷ (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 law,²⁶⁸ and (iii) that the military commission at issue was unlawful because it was not authorized by Congress.²⁶⁹

The district court ordered, under the Geneva Conventions of 1949, that unless a “competent tribunal” found that Hamdan was *not a prisoner of war*, he must be tried before an ordinary court martial, rather than a military commission.²⁷⁰ The D.C. Circuit reversed and held that Congress had authorized the use of military tribunals.²⁷¹ The panel rejected Hamdan’s international law claims for three reasons. First, it held the Geneva Conventions 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 held the Geneva Conventions inapplicable to al Qaeda’s activities.²⁷² The D.C. Circuit also denied

265. *Id.* at 35-36.

266. *Id.* at 36.

267. The basic logic of this argument relies 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 has not been satisfied in Hamdan’s case.

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 be 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*, 11a YALELJ. 1259, 1280-93 (2003).

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

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

272. *Id.* at 38-42.

Hamdan's claims under the Uniform Code of Criminal Justice because it found those statutory restrictions almost entirely inapplicable to military commissions.²⁷³

3. *Rutledge Again?*

As this Article goes to press, the Supreme Court has granted Hamdan's petition for certiorari, and just before oral argument, Congress took the extraordinary step of enacting a habeas-stripping statute, which may or may not affect the Court's willingness to decide the merits of Hamdan's case.²⁷⁴ The new jurisdictional statute raises its own issues concerning the rule of law, but two points even now are unmistakably clear. First, regardless of whether the Court hears the merits of Hamdan's objections or those of another defendant tried by military commission, the basic issue from Rutledge's *Yamashita* dissent seems inescapable, namely, whether there are legal limits that constrain the executive's choice of procedures in military commissions.²⁷⁵

Second, the three separable steps used by this Article 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's practical importance relied on *Hamdi*, where the Court endorsed some level of judicial review over indefinite, uncharged detention.²⁷⁶ By similar logic, *Rasul* and *Hamdi* are both landmark cases, but their practical effectiveness would be substantially lessened if *Hamdan* granted limitless presidential discretion to establish military commissions, and to handpick the decisionmakers, procedures, and punishments used therein.

Looking briefly back at *Yamashita*, many of the technical arguments supporting that Court's result have changed. For example, unlike the 1929 Geneva Conventions in *Yamashita*,

273. *Id.* at 42-43.

274. *See* Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(e)(1), 119 Stat. 2742. Identical provisions appeared in the National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 109-163, § 1405(e)(1), 119 Stat. 3136.

275. *See generally* Petition for Writ of Certiorari, *Hamdan v. Rumsfeld* (Aug. 8, 2005) (No. 05-184) 2005 WL 1874691; *cf.* Brief of the Office of Chief Defense Counsel et al. as Amicus Curiae in Support of Petitioner at 1 (Sept. 7, 2005) (No. 05-184) 2005 WL 2170063 (“The certiorari petition raises systemic issues that challenge the military commission system’s very existence. These issues will affect every military commission case and will persist regardless of the outcome of petitioner’s particular case.”).

276 *See supra* Sections II.A-II.B.

the Geneva Conventions of 1949 in *Hamdan* regulate trials for misconduct committed before (not just during) detention.²⁷⁷ Similarly, whereas *Yamashita* construed the Articles of War to regulate only trials of United States military personnel, the modern Uniform Code of Military Justice covers all persons in the military's jurisdiction.²⁷⁸ Unpersuaded that such changes compel a different result, the government now offers different technical arguments, including that courts cannot implement *any* of the Geneva Convention's safeguards, and that military commissions are almost wholly exempt from normal military rules.²⁷⁹

This Article will not examine whether some or all of the government's arguments are well placed. What is most important is the renewed vitality of Rutledge's concern that "we shall not forsake in any case . . . the basic standards of trial which . . . the nation fought to keep," that "our system of military justice shall not alone . . . be above or beyond the fundamental law or the control of Congress," and that the Supreme Court "shall not fail in its part under the Constitution to see that these things do not happen."²⁸⁰ In *Hamdan*'s case or another like it, the modern Court will decide whether military commissions are bound by our traditions of criminal adjudication—traditions that can be drawn from the common law, the Geneva Conventions the United States has signed, the Uniform Code of Military Justice, and the Constitution as well. If the Court holds every one of those legal resources inapplicable, based on some contestable set of premises and conclusions, the result will be plain. Military commissions will (again?) represent an area of unchained executive power, where Presidents may blend engineered results and ostensible fairness to suit dominant political tastes.

Given the foregoing conclusion's evident drama, one must add that President Bush has by no means erected today's generation of military commissions as "kangaroo" or "drum-head" courts. Indeed, the procedures for modern military commissions may compare well to those used

277. 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. COURTS L. REV. 4, at *VI.3 (2005).

278. See 10 U.S.C. § 802 (applying the Uniform Code of Military Justice to, among others, all "prisoners of war in custody of the armed forces").

279. Brief for the Respondents in Opposition at 25-29, *Hamdan v. Rumsfeld* (Sept. 7, 2005) (No. 05-184) 2005 WL 2214766.

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

in Yamashita’s trial. For example, Hamdan’s commissioners are all legally trained, his lawyers have not been rushed, and any conviction would, en route to the President’s desk, be reviewed by a panel of exceptionally talented lawyers.²⁸¹ Other protections include Hamdan’s receipt of formal charges, his presumed innocence, his ability to confront the government’s witnesses if they are reasonably available, his attorneys’ right to see even classified inculpatory materials, and the requirement of proof beyond reasonable doubt. On the other hand, regulations for military commissions offer no right to a speedy trial, permit unsworn statements as evidence instead of testimony, and state that the presumption of innocence and the right to silence are not “enforceable” rights, arguably allowing them to be abridged or ignored at any time.²⁸²

Regardless of such details, in both *Yamashita* and *Hamdan* “more is at issue than [the individual defendants’] fate.”²⁸³ It is one thing to say that Presidents have broad discretion to try enemy combatants, or even that procedural objections in *Hamdan* are too minor to require judicial correction.²⁸⁴ However, it is something quite different to grant (as the D.C. Circuit seemed to) the President complete freedom to set military commissions’ procedures as a matter of preference. If nothing else, the historical experience of Rutledge and the *Hirabayashi* court shows beyond question how “small” mistakes regarding executive detention can grow. And if military commissions are unconstrained (as the government claims) 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 than a matter of grace. What is most at stake in *Hamdan* is the power for federal courts to say when particular military commission procedures have gone too far. Unlike combat, strategy, or demonstrable emergencies, concerns about a military

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

282. *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)).

283. *Yamashita*, 327 U.S. at 41 (Rutledge, J., dissenting).

284. Perhaps the insignificance, or potential insignificance, of Hamdan’s procedural grievances implicitly supports the D.C. Circuit’s holding regarding abstention. The court of appeals required Hamdan to raise objections to military commission procedures in the commission’s proceedings themselves, with any possibility of judicial review arising only thereafter. *See Hamdan v. Rumsfeld*, 415 F.3d 33, 42 (D.C. Cir. 2005) (refusing to hear Hamdan’s challenges under the Geneva Conventions on abstention grounds). *But see id.* at 42-43 (rejecting Hamdan’s procedural claims under the Uniform Code of Military Justice on the merits, without any discussion of abstention).

commission's fundamental fairness lie near the heart of judicial experience, and far from any mortal national threat.²⁸⁵

4. "New" Solutions to "Old" Problems

As a final exercise, let us assume that Rutledge's *Yamashita* dissent does identify an abiding legal problem, and that some current Justices are likewise concerned at approving military commissions with little to no procedural constraints. What can be done? One option would be simply to affirm the district court's holding that the Geneva Conventions are "self-executing" and judicially enforceable.²⁸⁶ That issue has occupied a great deal of *Hamdan*'s briefing and academic debate, and its costs and benefits are well known.²⁸⁷

Two less familiar possibilities emerge from this Article's paired cases. First, the Court could cite *Rasul*'s extraterritoriality analysis and rely on constitutional rights. As we discussed, the tentative *Rasul* majority not only embraced Rutledge's *Ahrens* dissent but also offered a Guantanamo-specific discussion to rebut the presumption against extraterritoriality.²⁸⁸ The government's main argument against *Hamdan*'s constitutional claims is that "aliens outside the United States [do not] have due process rights under the Federal Constitution."²⁸⁹ However, *Rasul* held that Guantanamo Bay is "*within the territorial jurisdiction of the United States*" for habeas purposes,²⁹⁰ and that same basis for applying habeas statutes to Guantanamo Bay detainees also supports respect for their substantive constitutional rights. Simply put, the presumption against extraterritoriality should apply in both contexts or in neither one.

285. Although individual detainees may well be dangerous, it seems harder to say that addressing such dangers is incompatible with any type of fundamentally fair adjudication, especially when those procedures may themselves be adjusted to fit exigent circumstances that may arise.

286. *Hamdan*, 344 F. Supp. 2d at 163-65.

287. See, e.g., Derek Jinks & David Sloss, *Is the President Bound by the Geneva Conventions?*, 90 CORNELL L. REV. 97 (2004); Carlos Manuel Vazquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695, 702 n.36, 709 n.63.

288. See *Rasul v. Bush*, 542 U.S. 466, 480-85 (2004); see *supra* notes 103-108.

289. Brief for the Respondents in Opposition at 19 n.11, *Hamdan v. Rumsfeld* (Sept. 7, 2005) (No. 05-184) 2005 WL 2214766 (quoting *United States v. Verdugo-Urquidez*, 494 U.S. 259, 269 (1990) (rejecting "the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States")).

290. *Id.* at 481 (internal quotation marks omitted); see *supra* 104.

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.²⁹¹ Instead, the approach explored 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.²⁹² 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.²⁹³ Phrased this way, it is hard to see how the presumption against extraterritorial application of United States law could bar Hamdan's constitutional rights when it did not limit the habeas statutes' application in *Rasul*.

Of course, a *Rasul*-based response in *Hamdan* might not require applying every constitutional right to military commissions, or to Guantanamo detainees more generally.²⁹⁴ Some procedural rights (the easiest example is grand jury indictment) might not apply to military commissions at any location. Nor would the *Hamdan* Court have to resolve all questions of this sort at once. An important first step would be to hold that Hamdan deserves the same constitutional and statutory rights in Guantanamo Bay that would obtain if a military commission

291. *Id.* 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.' 28 U.S.C. § 2241(c)(3)."). *Rasul*'s fifteenth footnote received close attention in two conflicting 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*, *Eisentrager* and its progeny." *Id.* at 323. Judge Joyce Green's decision in *In re Guantanamo Detainees Cases*, 355 F. Supp. 2d 443, 453-64 (D.D.C. 2005), reached an opposite conclusion. Judge Green cited footnote 15 as "perhaps the strongest basis" for applying constitutional rights to Guantanamo detainees, *id.* at 463; she also relied on the *Rasul* majority's holding that Guantanamo Bay lies "within the territorial jurisdiction of the United States" and on Kennedy's opinion concurring in the judgment, *id.* at 462. *See also supra* note 104.

292. *See Rasul* 542 U.S. at 475-79; *see also supra* note 133.

293. *See Rasul* 542 U.S. at 480-83.

294. Much less would it require Scalia's caricature of allowing detainee damage suits under *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971). *See Rasul v. Bush*, 542 U.S. 446, 500 (2004) (Scalia, J., dissenting). *Bivens* is a rather delicate flower under current case law, and the Supreme Court has been quite willing to recognize "special factors counseling hesitation" in various contexts. *See Correctional Serv. Corp. v. Malesko*, 534 U.S. 61, 68-70 (2001) (documenting and extending this doctrinal tendency). Without delving into particulars, one presumes that the Court could find such factors with respect to Guantanamo detainees held as enemy combatants. Scalia's attempted parallel between *Bivens*'s fragile damage remedies and the basic right under habeas to challenge illegal detention suggests a mistaken view of both judicial mechanisms.

attempted to try a United States citizen in Miami.²⁹⁵ Regardless of the precise constitutional standards appropriate for military commissions in either locale, such a ruling would at least serve Rutledge’s important goal of ensuring that military commissions beyond immediate hostilities remain consistent with ordinary procedural justice, and that such proceedings remain subject to some form of Article III oversight.

A second common-law solution in *Hamdan* might stem from Souter’s concurrence in *Hamdi*. There, Souter acknowledged an implicit exception to the Non-Detention Act, which would allow Presidents to “deal with enemy belligerents according to the treaties and customs collectively known as the laws of war.”²⁹⁶ Through that technical vehicle, Souter was able to interpret the Geneva Conventions as a limit upon executive power, indisputably subject to judicial review, rather than a source of detainees’ individual rights, which might or might not be legally self-executing.

The critical move in *Hamdi* was to recognize a common-law exception to the Non-Detention Act, which then needed judicial interpretation. A similar role for common-law decisionmaking might work in *Hamdan* as well. For military commissions, the technical analogue is not a common-law exception to a statutory ban, but rather a common-law limit on the power to operate military commissions in the first place.

Hamdan claims that military commissions are invalid absent express congressional authorization, and that commissions must operate under statutory rules. If those arguments fail, it

295. As the text indicates, it is also important that aliens within United States territory normally have the same constitutional rights as United States citizens. As Professor Cole explains:

The Constitution does distinguish in some respects between the rights of citizens and noncitizens. But in fact, relatively little turns on citizenship status. The right to vote and the right to run for federal elective office are restricted to citizens, but all of the other rights are written without such limitation. . . . Specifically, the Court has stated that neither the First nor the Fifth Amendment “acknowledges any distinction between citizens and resident aliens.” For more than a century, the Court has recognized that the Equal Protection Clause is “universal in [its] application to all persons within the territorial jurisdiction, without regard to differences of . . . nationality.” . . . And when noncitizens, no matter what their status, are tried for crimes, they are entitled to all of the rights that attach to the criminal process.

Cole, *supra* note 158, at 978-79 (footnotes omitted)). Exceptions to the parity of citizens and non-citizens include the Enemy Aliens Act and the plenary legislative power to remove aliens.

296. *Hamdi v. Rumsfeld*, 542 U.S. 507, 548 (2004) (Souter, J., concurring in the judgment). This principle could derive from a commonlaw limitation of the Non-Detention Act or of the Authorization of Military Force.

is because the President has some non-statutory authority to establish military commissions. That non-statutory presidential power, if it exists, need not be unlimited or beyond judicial construction. On the contrary, military commissions have long been recognized as creatures of common law, designed to deal with alleged violations of the law of war, applying standards that themselves may be creatures of the common law.²⁹⁷ In such a context, it would make a great deal of sense if the common-law presidential power to operate military commissions, like the common-law “laws-of-war” exception to the Non-Detention Act, were constrained to operate within United States treaty and other international law obligations, or even purely common-law norms of basic fairness. Such analysis would preserve executive power to use military commissions, but would also ensure that such trials adhered at least to “the judicial guarantees which are recognized as indispensable by civilized peoples,” to borrow language from the Geneva Conventions.²⁹⁸

Of course, neither a *Rasul*-based nor a *Hamdi*-based approach to *Hamdan*’s procedural objections is beyond controversy. Yet each does provide a defensible basis for judicial involvement in a case like *Hamdan*’s, and now is the time to collect and evaluate such arguments. Our country has known several eras of significant security threats, and each has become famous or infamous based on its legal response. The Civil War era witnessed the suspension of habeas corpus and trials by military commission;²⁹⁹ World War II had racial detentions and martial law.³⁰⁰ Likewise, today’s Court has written, and will again write, opinions concerning executive detention that could determine the life or death of scores of individuals, affect the United States’ image with respect to the rule of law and human rights, and influence history’s judgment of whether we can learn from the past in shaping the future. With O’Connor’s departure from the bench, the decisive vote in such cases may fall to Justice Samuel Alito, or to

297. See, e.g., *Madsen v. Kinsella*, 343 U.S. 341, 346-347 & 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)).

298. Geneva Convention Relative to the Treatment of Prisoners of War, Art. 3, 6 U.S.T. 3316 (1949). This requirement of “Common Article 3” is applicable to prisoners of war and civilians alike.

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

300. See, e.g., IRONS, *supra* note 52, at vii; YAMAMOTO, *supra* note 123, at 194.

Justice Kennedy, and the country must hope that all members of the Court will find their own way to honor the high juridical standards that wartime pressures require.

III. CONCLUSION: 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 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?"³⁰¹ In attempting an answer, let us first consider why judicial namedropping is so prevalent in United States legal culture. If some language students measure their progress by the number of Kanji they know, or by their working vocabulary, 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. But why?

Much of the tradition owes 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.³⁰²

As a matter of method, discussions of judges and judicial role flow through two overlapping channels. First, a declarative mode states principles designed to define and limit judicial behavior. Ronald Dworkin's work exemplifies such discussion at an abstract level.³⁰³ Alexander Bickel,³⁰⁴ Owen Fiss,³⁰⁵ Cass Sunstein,³⁰⁶ and many others strive to explain what judges should do in more particular circumstances. The declarative mode describes judicial role

301. 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).

302. 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).

303. RONALD DWORKIN, *LAW'S EMPIRE* (1986).

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

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

306. CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME*

in explicit terms, but such precatory abstractions have drawn strong criticism,³⁰⁷ and they do not always have the cultural influence that one might expect.

The second mode of discussion is biographical. Many if not most popular 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 identifying their most and least favorite Justice. Through cycles of debate and education, such personalities develop into positive and negative role models. Some Justices’ opinions are read favorably and carefully, while others are read skeptically or dismissively. Many students retain such impressionistic images of “good” and “bad” judges long after their interest in Dworkin or Bickel has faded. And former students of this type fill the ranks of lawyers, judges, and professors, which itself suffices to explain 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 special fascination, whether it be a Holmesian epigram, Marshallian tour de force, or a role in some legal revolution or reform. Such a quasi-sensational focus is not always bad, but it is incomplete. We have always needed judges with intellectual and personal verve. But the narrative mode’s distorted data set 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 suspect and the “unprecedented” is heresy.

Against that backdrop, Rutledge’s story is especially important because it reveals a judge who is profoundly committed to legal craft (perhaps too much in a case like *Korematsu*), but who also manifests compassion and awareness of law’s human impact. In a commentator’s

COURT (1999).

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

phrase, “Rutledge was rarely eloquent. The judicial beachheads he took were won, not by sleight-of-words, but on the merits.”³⁰⁸ What may be most satisfying about celebrating 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.³⁰⁹ Perhaps that is so, but it is also true that Rutledge’s career 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.”³¹⁰ Those traits, combined with Rutledge’s anti-dramatic style, might never have attracted popular attention to the degree of a Frankfurterian campaign for Our Federalism, much less Black’s “absolutist” view of free speech. This sense in which Rutledge’s story not only portrays a distinctive type of judge; it 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 with respect to executive detention, but in other legal contexts as well, as two new Justices join the Court and undertake to develop and realize their own perspectives on judging. Today’s selections for the Court will be examined by tomorrow’s judicial biographers, and we can only hope that, many decades from now, books like Ferren’s may yet be written about judges like Rutledge.

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

309. *Id.* at 177.

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