

National Security and the Rehnquist Court

John Yoo*

Scholars of the future may associate the Rehnquist Court most closely with a reinvigoration of federalism or a retrenchment in criminal procedure,¹ but its most significant impact may have arrived in the area of national security.² The Rehnquist Court's more active role in national security matters paralleled the Court's activities in other areas, in particular its general unwillingness to defer to other branches of government or to restrain the exercise of judicial review. Because the Court refused to recognize the limits of its own capabilities, it sparked a confrontation with the political branches in an area where the stakes are much higher than the areas of federalism or criminal procedure. Part I of this Essay describes the background of the Court's intervention, while Part II discusses the Court's active approach to the 2004 enemy combatant cases. Part III discusses the congressional response to the enemy combatant cases and discusses how the interaction between the coordinate branches can be modeled as a noncooperative strategic game. This analysis suggests that in the enemy combatant cases the Court finally overstepped its bounds, provoking a dramatic congressional response.

I.

It is surprising that the Rehnquist Court chose to adopt a more interventionist attitude than its predecessors in the area of national security. One might surmise that, left to his own devices, William Rehnquist would not have sought to expand the judicial role in reviewing the national security decisions of the President or Congress. In his 1998 book, *All the Laws but One: Civil Liberties in Wartime*, Rehnquist recognized that "[i]n any civilized society the most important task is achieving a proper balance between freedom and order," but that "[i]n wartime, reason and history both suggest that

* Professor of Law, University of California at Berkeley School of Law (Boalt Hall); Visiting Scholar, American Enterprise Institute. I would like to thank Patrick Hein for excellent research work and the Boalt Hall Fund for financial support.

¹ See, e.g., Jesse H. Choper & John C. Yoo, *Who's Afraid of the Eleventh Amendment? The Limited Impact of the Court's Sovereign Immunity Rulings*, 106 COLUM. L. REV. 213, 220–24 (2006) (discussing the Rehnquist Court's revival of state sovereign immunity as one aspect of the Court's resurrection of federalism); Peter J. Smith, *Federalism, Instrumentalism, and the Legacy of the Rehnquist Court*, 74 GEO. WASH. L. REV. 906, 907 (2006) (explaining that federalism is widely viewed as Chief Justice Rehnquist's signature issue); cf. Rachel E. Barkow, *Originalists, Politics, and Criminal Law in the Rehnquist Court*, 74 GEO. WASH. L. REV. 1043, 1044 (2006) (noting that the conventional wisdom is to view as the Rehnquist Court's dominant mission to cut back on criminal procedure protections, but maintaining that the Rehnquist Court was in fact one of the most vigorous protectors of the jury guarantee).

² See *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Rumsfeld v. Padilla*, 542 U.S. 426 (2004); *Rasul v. Bush*, 542 U.S. 466 (2004). This Essay went to press before the Court issued its decision in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006).

this balance shifts to some degree in favor of order—in favor of the government's ability to deal with conditions that threaten the national well-being.”³ Rehnquist took his title from the famous answer given by President Lincoln to claims that he had violated the Constitution in responding to Southern secession:

The whole of the laws which were required to be faithfully executed were being resisted . . . in nearly one third of the states. Must they be allowed to finally fail of execution . . . ? [A]re all the laws but one to go unexecuted, and the government itself go to pieces, lest that one be violated?⁴

Rehnquist did not advocate complete judicial abdication in wartime, but observed from a review of the Civil War and World War II civil liberties cases that “[t]he laws will thus not be silent in times of war, but they will speak with a somewhat different voice.”⁵

Rehnquist's early opinions also reflect a reluctance to expand the judicial role in the areas of national security and foreign affairs. As an Associate Justice of the Burger Court, Rehnquist authored opinions that provided the executive branch with significant discretion in the management of foreign affairs. In *Dames & Moore v. Regan*,⁶ Rehnquist wrote the majority opinion for a unanimous Court upholding the agreement that ended the Iranian hostage crisis.⁷ The Algiers Accords required the United States to terminate all legal proceedings in American courts against Iran and its state enterprises, to nullify any attachments and judgments obtained in U.S. courts against them, and to require claims by U.S. individuals and companies against Iran to be brought to the Iran–United States Claims Tribunal to be established in the Hague.⁸ In an executive order implementing the accords, President Carter ordered the nullification of attachments, the transfer of frozen assets to the control of the tribunal, and the suspension of any claims pending in American courts.⁹ The Court found that Congress had delegated sufficient power for the nullification of attachments and transfer of assets under the International Emergency Economic Powers Act (“IEEPA”).¹⁰

The Court, however, admitted that IEEPA did not delegate any power to the President to “suspend” claims pending in court.¹¹ Normally, this would have placed the President in what has come to be known as Category II of Justice Jackson's concurrence in *Youngstown Sheet & Tube Co. v. Saw-*

³ WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* 222 (1998).

⁴ Abraham Lincoln, Message to Congress in Special Session (July 4, 1861), in 6 *COMPLETE WORKS OF ABRAHAM LINCOLN* 297, 309 (John G. Nicolay & John Hay eds., 1906).

⁵ REHNQUIST, *supra* note 3, at 225.

⁶ *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

⁷ *Id.* at 674, 688.

⁸ *Id.* at 664–65.

⁹ *Id.* at 665–66.

¹⁰ *Id.* at 675; International Emergency Economic Powers Act of 1977, 50 U.S.C. §§ 1701–1706 (2000).

¹¹ *Dames & Moore*, 453 U.S. at 675.

yer¹² (a framework much beloved by functionalists). Described by Justice Jackson as the "zone of twilight," Category II would ordinarily raise doubts about the legality of the action because the President acted in the absence of a congressional grant of authority and must rely on his own independent powers.¹³ But Justice Rehnquist subtly changed the category's scope. Quoting from Jackson's concurrence, Rehnquist wrote for the Court that "the enactment of legislation closely related to the question of the President's authority in a particular case which evinces legislative intent to accord the President broad discretion may be considered to 'invite' measures on independent presidential responsibility."¹⁴ Rehnquist argued that IEEPA and other statutes evidenced congressional intent to delegate broad powers to the President in foreign affairs, and he pointed to a long practice of unilateral presidential actions to settle international claims.¹⁵ Rehnquist inferred congressional acquiescence in President Carter's order despite the lack of any affirmative legislative act specifically approving the suspension of claims.¹⁶ Although Rehnquist's opinion limited the scope of the holding,¹⁷ the young Associate Justice had essentially converted *Youngstown* Category II into an area of presidential authority.

Two years earlier, then-Justice Rehnquist would have gone further to recognize significant foreign affairs disputes between the President and Congress as nonjusticiable. In *Goldwater v. Carter*,¹⁸ Senator Goldwater challenged the constitutionality of President Carter's unilateral decision to terminate the United States' mutual defense treaty with Taiwan.¹⁹ While the Court of Appeals for the D.C. Circuit held that the President possessed the power under the Constitution to unilaterally terminate treaties,²⁰ the Supreme Court, without a majority opinion, vacated the D.C. Circuit opinion and ordered the complaint dismissed.²¹ Justice Powell argued that the case was unripe because Congress as a whole had not taken any action in opposition to President Carter,²² an approach that presaged *Raines v. Byrd*.²³ Justice Brennan would have reached the merits and upheld the President's unilateral authority to terminate treaties.²⁴ Justice Rehnquist, however,

12 *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring).

13 *Id.* at 637.

14 *Dames & Moore*, 453 U.S. at 678 (quoting *Youngstown*, 343 U.S. at 637).

15 *See id.* at 686.

16 *Id.* at 687-88.

17 *See id.* at 688 ("We do not decide that the President possesses plenary power to settle claims But where, as here, the settlement of claims has been determined to be a necessary incident to the resolution of a major foreign policy dispute . . . and where, as here, we can conclude that Congress acquiesced in the President's action, we are not prepared to say that the President lacks the power to settle such claims.").

18 *Goldwater v. Carter*, 444 U.S. 996 (1979).

19 *Id.* at 997-98.

20 *See Goldwater v. Carter*, 617 F.2d 697, 709 (D.C. Cir.), vacated, 444 U.S. 996 (1979).

21 *See Goldwater*, 444 U.S. at 996.

22 *Id.* at 697-98 (Powell, J., concurring).

23 *Raines v. Byrd*, 521 U.S. 811, 829-30 (1997) (holding that individual members of Congress had no standing to challenge the line-item veto).

24 *Goldwater*, 444 U.S. at 1006 (Brennan, J., dissenting).

wrote for a four-Justice plurality that the struggle between the President and the Senate raised a political question that was unfit for judicial resolution.²⁵

Here, while the Constitution is express as to the manner in which the Senate shall participate in the ratification of a treaty, it is silent as to that body's participation in the abrogation of a treaty. . . . In light of the absence of any constitutional provision governing the termination of a treaty, and the fact that different termination procedures may be appropriate for different treaties, the instant case in my view also must surely be controlled by political standards.²⁶

Rehnquist found the political question doctrine especially appropriate for cases involving foreign affairs: "I think the justifications for concluding that the question here is political in nature are even more compelling than in *Coleman* [a case involving a domestic issue] because it involves foreign relations—specifically a treaty commitment to use military force in the defense of a foreign government if attacked."²⁷

Based on this track record, the Bush administration could have believed that Chief Justice Rehnquist would be sympathetic to the administration's claims in the enemy combatant cases. Three cases in the 2003 October Term brought sharp disputes to the Court over the Bush administration's policy of detaining alleged members of al Qaeda without criminal charge.²⁸ In the wake of the terrorist attacks on September 11, 2001, the Bush administration claimed that the nation was at war and that its wartime authority permitted the detention of terrorists as enemy combatants.²⁹ The administration claimed that its authority to detain members of the enemy applied equally to citizens and noncitizens alike.³⁰ It further argued that noncitizen detainees could not file suit for a writ of habeas corpus because their location at the U.S. Naval Station at Guantánamo Bay, Cuba, lay outside the territorial jurisdiction of the federal courts.³¹

In general, Rehnquist was favorable to the national security claims of the executive branch. In *Hamdi v. Rumsfeld*,³² he joined the plurality opinion that upheld the administration's wartime authority to detain enemy combatants without criminal charge.³³ In *Rumsfeld v. Padilla*,³⁴ he wrote the majority opinion agreeing with the government that the detainee had brought his case in the wrong forum, thus precluding any decision on whether

²⁵ *Id.* at 1002 (Rehnquist, J., concurring in the judgment).

²⁶ *Id.* at 1003 (citation omitted) (quotation omitted).

²⁷ *Id.* at 1003–04 (citing *Coleman v. Miller*, 307 U.S. 433 (1939) (treating a challenge to the validity of Kansas's ratification of the Child Labor Amendment as a nonjusticiable political question)). Rehnquist cited *United States v. Curtiss-Wright Corp.*, 299 U.S. 304 (1936), as an example of judicial noninterference with foreign affairs issues. *Goldwater*, 444 U.S. at 1004 (Rehnquist, J., concurring in the judgment).

²⁸ See *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Rumsfeld v. Padilla*, 542 U.S. 426 (2004); *Rasul v. Bush*, 542 U.S. 466 (2004).

²⁹ See *Hamdi*, 542 U.S. at 516–17.

³⁰ *Id.*; see also *Padilla*, 542 U.S. at 430–32.

³¹ See *Rasul*, 542 U.S. at 472–73.

³² *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

³³ *Id.* at 509.

³⁴ *Rumsfeld v. Padilla*, 542 U.S. 426 (2004).

his military detention was unconstitutional.³⁵ In *Rasul v. Bush*,³⁶ Rehnquist joined the dissent, which argued that the federal courts could not exercise habeas jurisdiction over alien enemy combatants held outside the territorial United States.³⁷ If Chief Justice Rehnquist's votes had dictated the results, the resulting legal framework would not have looked much different than the one developed by the Bush administration. Both alien and American enemy combatants could be held in military detention without criminal charge; federal courts would not hear habeas claims brought by aliens captured and held outside the United States; and the Court would provide deferential review in habeas cases for American enemy combatants.³⁸

It is important to remember, however, that the Rehnquist Court did not always follow its Chief Justice. Supreme Court Justices are a notoriously independent bunch. A Chief Justice cannot order the others how to vote; he cannot hire them, fire them, or change their salaries. His only real power consists of speaking first at the Justices-only conference where they vote on cases and assigning writing duties when he is in the majority. As a result, the Court functions more like nine little law firms where, as Justice Felix Frankfurter once said, each Justice "is his own sovereign."³⁹ Or, perhaps more accurately, in the words of Justice Oliver Wendell Holmes, the Court resembles "nine scorpions in a bottle."⁴⁰

Yet, some Chief Justices have managed to exercise leadership. Our nation's greatest Chief Justice, John Marshall, convinced his colleagues to unify behind common opinions establishing judicial review,⁴¹ the supremacy of federal law over the states,⁴² and the creation of national institutions such as the federal bank.⁴³ Chief Justice Earl Warren, former California governor, brought the Court together to unanimously strike down segregation⁴⁴ and to expand the protections for criminal defendants.⁴⁵ Rehnquist too may be

35 *Id.* at 430. Padilla then brought his habeas petition in the District Court for the District of South Carolina, which granted the petition and commanded his release. *See Padilla v. Hanft*, 389 F. Supp. 2d 678, 692 (D.S.C. 2005). The district court was reversed on appeal by the Fourth Circuit. *See Padilla v. Hanft*, 423 F.3d 386, 390, 397 (4th Cir. 2005). His petition for certiorari from that decision was denied as moot after he was indicted with criminal charges and transferred from military to criminal custody. *See Padilla v. Hanft*, 126 S. Ct. 1649 (2006).

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

37 *Id.* at 488 (Scalia, J., dissenting).

38 *See id.*; *Hamdi*, 542 U.S. at 509, 527 (plurality opinion) (authorizing military detention of enemy combatants but requiring some "meaningful opportunity" to challenge basis of detention).

39 Felix Frankfurter, *Chief Justices I Have Known*, 39 VA. L. REV. 883, 901 (1953).

40 MAX LERNER, *NINE SCORPIONS IN A BOTTLE: GREAT JUDGES AND CASES OF THE SUPREME COURT* (1994).

41 *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

42 *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816).

43 *McCulloch*, 17 U.S. (4 Wheat.) 316. *See generally* G. EDWARD WHITE, *THE MARSHALL COURT AND CULTURAL CHANGE, 1815-1835*, at 181-200, 367-83 (1988) (describing the organization of the Marshall Court and Chief Justice Marshall's profound influence over the Court's jurisprudence).

44 *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

45 *Miranda v. Arizona*, 384 U.S. 436 (1966).

remembered as one of the most important Chief Justices because he successfully moved the Court over the years in the direction he preferred.

As a young Justice, he was known as the “Lone Ranger” for his solitary dissents. After almost two decades as Chief Justice, however, Rehnquist saw many of those views become law. In criminal law, he successfully expanded the flexibility of police to search and question suspects,⁴⁶ and he made it more difficult for defendants to stretch out their trials with frivolous appeals or to attack the death penalty.⁴⁷ With religion, Rehnquist convinced his colleagues to allow religious groups to compete on an equal footing with secular groups for government funds, which allows parents to use vouchers at religious schools.⁴⁸ He demanded that judges return to an interpretation of the Constitution that focused on its text and the original understanding of those who ratified it, rather than the evolving meanings of present-day society.⁴⁹ He was a Scalia or a Thomas before it was fashionable.

Rehnquist’s judicial philosophy sought to return the country to its Tocquevillian roots, with a central place for civil society—churches, clubs, private organizations—and less government control and regulation of enterprise.⁵⁰ He advanced this theme of decentralization by bolstering the states as a counterweight to the national government and requiring compensation to property owners who suffer from regulation.⁵¹ Although Rehnquist

46 See, e.g., *United States v. Ramirez*, 523 U.S. 65, 69–72 (1998) (holding that officers executing a search warrant did not violate the Fourth Amendment when they broke a garage window during course of a “no-knock” entry into defendant’s residence); *Muehler v. Mena*, 544 U.S. 93, 100–01 (2005) (holding that officers needed no independent reasonable suspicion to question occupant about her immigration status); see also Richard W. Garnett, *Right On*, *Legal Aff.*, Mar.–Apr. 2005, at 34, 34 (“Time and again—for example, in cases involving the Fourth Amendment’s ban on unreasonable searches and seizures, or the appropriate balance between local control and federal power—seeds that Rehnquist planted decades ago in solitary and provocative dissents have taken root and flowered.”).

47 See, e.g., *Smith v. Robbins*, 528 U.S. 259, 271–73 (2000) (holding that the final section of the *Anders* opinion, which recites an acceptable procedure for treating frivolous appeals, is not obligatory upon the states, and states are free to adopt different procedures, so long as those procedures adequately safeguard a defendant’s right to appellate counsel); *Blystone v. Pennsylvania*, 494 U.S. 299, 305 (1990) (holding that the Pennsylvania death penalty statute satisfied “the requirement that a capital sentencing jury be allowed to consider and give effect to all relevant mitigating evidence”).

48 See *Zelman v. Simmons-Harris*, 536 U.S. 639, 662–63 (2002) (holding that an Ohio school voucher program did not violate the Establishment Clause because it was neutral to religion and permitted private choice among secular and religious options for schools).

49 See William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 697, 706 (1976), reprinted in 29 HARV. J.L. & PUB. POL’Y 401 (2006) (explaining how the notion that a “living Constitution” permits unelected judges “to impose on other individuals a rule of conduct that the popularly elected branches of government would not have enacted and the voters have not and would not have embodied in the Constitution” is fundamentally at odds with the Constitution’s origins as a product of the democratic process).

50 See John O. McGinnis, *Reviving Tocqueville’s America: The Rehnquist Court’s Jurisprudence of Social Discovery*, 90 CAL. L. REV. 485, 487 (2002).

51 See, e.g., *United States v. Lopez*, 514 U.S. 549, 564, 567 (1995) (invalidating the Gun-Free School Zones Act of 1990 as beyond the reach of the Commerce Clause and thereby limiting Congress’s power to intrude on “areas such as criminal law enforcement or education where the States historically have been sovereign”); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1030–31 (1992) (requiring compensation under the Takings Clause when a regulation deprives a

never succeeded in overturning *Roe v. Wade*,⁵² his Court permitted states to place restrictions on the right to abortion,⁵³ and although he did not eliminate affirmative action in school admissions, the Rehnquist Court made the use of race by government generally more difficult to justify than before.⁵⁴

Rehnquist's views, however, often did not prevail, and even in those areas most dear to him his colleagues limited the reach of his revolution. In *Gonzales v. Raich*,⁵⁵ for example, the Court allowed federal drug laws to trump California's medical marijuana initiative.⁵⁶ This outcome ran counter to recent Commerce Clause decisions striking down federal laws that prohibited gender-based violence⁵⁷ and banned handguns in school zones.⁵⁸ Rehnquist voted with the dissent in *Raich*.⁵⁹ In *Kelo v. City of New London*,⁶⁰ the Court held that cities may take private property and transfer it to private developers in the interests of economic improvement.⁶¹ Again, Rehnquist voted with the dissent.⁶² Justice John Paul Stevens, a Republican appointee who has emerged as the leader of the Court's liberal wing, wrote the majority opinion in both the medical marijuana and the takings cases.⁶³

Even Rehnquist's efforts to allow more space for religion in public life appear to have faded. In *McCreary County v. ACLU of Kentucky*,⁶⁴ five Justices affirmed an order requiring Kentucky authorities to remove the Ten Commandments from a county courthouse.⁶⁵ Rehnquist dissented for a third time.⁶⁶ He did write an opinion in a separate case announced the same day, *Van Orden v. Perry*,⁶⁷ which allowed a six-foot high monolith with the Ten Commandments to remain on the Texas Capitol lawn as a ceremonial recognition of religion.⁶⁸ He was unable to get a fifth vote to make his opinion one

land owner of "all economically productive or beneficial uses" unless the state can identify "background principles of nuisance or property law that prohibit the uses" forbidden by the regulation).

⁵² *Roe v. Wade*, 410 U.S. 113 (1973).

⁵³ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 881–87 (1991) (upholding Pennsylvania laws requiring informed consent and a twenty-four-hour waiting period prior to having an abortion).

⁵⁴ See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003) (upholding University of Michigan Law School race-based admissions policy as narrowly tailored to further a compelling state interest); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 235–37 (1995) (holding that federal racial classifications must be narrowly tailored to serve a compelling governmental interest); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 508 (1989) (invalidating race-based set-asides in city construction contracts as not narrowly tailored to remedy past discrimination).

⁵⁵ *Gonzales v. Raich*, 125 S. Ct. 2195 (2005).

⁵⁶ *Id.* at 2201, 2209.

⁵⁷ *United States v. Morrison*, 529 U.S. 598, 617–19 (2000).

⁵⁸ *United States v. Lopez*, 514 U.S. 549, 567 (1995).

⁵⁹ See *Raich*, 125 S. Ct. at 2220 (O'Connor, J., dissenting).

⁶⁰ *Kelo v. City of New London*, 125 S. Ct. 2655 (2005).

⁶¹ *Id.* at 2665, 2668.

⁶² See *id.* at 2671 (O'Connor, J., dissenting).

⁶³ See *Raich*, 125 S. Ct. at 2198; *Kelo*, 125 S. Ct. at 2658.

⁶⁴ *McCreary County v. ACLU of Kentucky*, 125 S. Ct. 2722 (2005).

⁶⁵ *Id.* at 2730–32.

⁶⁶ See *id.* at 2748 (Scalia, J., dissenting).

⁶⁷ *Van Orden v. Perry*, 125 S. Ct. 2854, 2858 (2005).

⁶⁸ *Id.*

for the Court as a whole; the deciding vote was cast by Justice Stephen Breyer, no fellow traveler of Rehnquist's, who was moved less by legal arguments and more by the fact that the tablets had sat there for forty years.⁶⁹

Yet, one issue that seemed to unite the members of the Rehnquist Court was the supremacy of the federal courts in interpreting the Constitution. "Judicial supremacy" is a well-worn phrase that encompasses different meanings.⁷⁰ One such meaning, best demonstrated by *Cooper v. Aaron*,⁷¹ is that the entire nation must accept the judiciary's reading of the Constitution.⁷² Once the Supreme Court concluded that the Constitution prohibited segregated schools, other officials had to take measures to end segregation in schools; to do otherwise would violate their oath to the Constitution.⁷³ Under this extreme version of judicial supremacy, which Sai Prakash and I have called "interpretational supremacy,"⁷⁴ it is emphatically the judiciary's duty to say what the Constitution means for everyone in the nation.⁷⁵ A somewhat narrower version, "judgment supremacy," holds that the Court's interpretations of the Constitution bind the President and Congress.⁷⁶

In various contexts, Chief Justice Rehnquist and his colleagues agreed that the Court's decisions interpreting the Constitution ought to govern the other branches. In *City of Boerne v. Flores*,⁷⁷ the Court held that its interpretations of the Fourteenth Amendment prevailed over those expressed by Congress, and, as a result, it struck down the Religious Freedom Restoration Act for enforcing an understanding of the Free Exercise Clause which was at odds with the decisions of the Court.⁷⁸ While several Justices have objected to the expansion of this doctrine in the federalism context,⁷⁹ they have not opposed its use to preserve the Court's reading of the rights to counsel and against self-incrimination protected by *Miranda v. Arizona*.⁸⁰ One might say that the Court's confidence in its own supremacy is one of the few things upon which an otherwise polarized Court can agree. It might also be fair to say that Chief Justice Rehnquist is one of the few Justices who has consistently led the movement on the Court in favor of its own institutional supremacy, regardless of the subject matter. Indeed, Rehnquist himself wrote the majority opinion in *United States v. Dickerson*,⁸¹ upholding *Miranda* in the face of a federal statute that apparently sought to overrule it.⁸²

⁶⁹ *Id.* at 2870 (Breyer, J., concurring in the judgment).

⁷⁰ See Saikrishna Prakash & John Yoo, *Against Interpretational Supremacy*, 103 MICH. L. REV. 1539, 1550 (2005) (book review).

⁷¹ *Cooper v. Aaron*, 358 U.S. 1 (1958).

⁷² *Id.* at 18.

⁷³ *Id.* at 17.

⁷⁴ Prakash & Yoo, *supra* note 70, at 1550.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *City of Boerne v. Flores*, 521 U.S. 507 (1997).

⁷⁸ *Id.* at 536.

⁷⁹ See *United States v. Morrison*, 529 U.S. 598, 637–40 (2000) (Souter, J., dissenting).

⁸⁰ *Miranda v. Arizona*, 384 U.S. 436, 467–70 (1966); *United States v. Dickerson*, 530 U.S. 428, 432 (2000) (holding that Congress cannot overrule a constitutional decision of the Supreme Court).

⁸¹ *United States v. Dickerson*, 530 U.S. 428 (2000).

⁸² *Id.* at 432.

A second feature of the Rehnquist Court's jurisprudence, much remarked on, was its unwillingness to defer to Congress. In the federalism context, for example, the Court refused to give Congress the benefit of the doubt when reviewing a federal law banning handguns in school zones.⁸³ In invalidating a law as beyond the reach of the Commerce Clause for the first time since the Great Depression,⁸⁴ the Court did not assume that Congress had a rational basis for concluding that handguns in school zones would "substantially affect" interstate commerce.⁸⁵ In *United States v. Morrison*,⁸⁶ the Court went even further and rejected congressional findings of a link between violence against women and the national economy.⁸⁷ It has also paid little deference to legislative history or other sources of congressional deliberation in reviewing statutes seeking to enforce Fourteenth Amendment rights.⁸⁸ Justices opposed to limits on the federal government's authority have criticized this approach, but they have at times shared the Rehnquist Court's confidence in its own capabilities. While scholars have disagreed about the virtues of the Court's interpretive supremacy and its attitude toward its institutional capabilities,⁸⁹ they have been a signature legacy of Chief Justice Rehnquist. Part II discusses how these themes expressed themselves in the terrorism cases.

II.

The Rehnquist Court's decisions in the war on terrorism illustrate these themes: even though there were sharp disagreements over the meaning of substantive constitutional provisions, the Court remained confident in its supremacy in interpreting the Constitution and in reviewing the actions of the other branches. Multiple opinions and a failure to reach a majority in the most important case of the terrorism trilogy revealed how fractured the Court had become by the end of the Chief Justice's tenure.⁹⁰ And while the Court was generally deferential to the political branches on matters of war and national security, the Court was also quite willing to intervene in the cases challenging the detention of enemy combatants.⁹¹

Strikingly, the Court declared its intention to review the actions of the military in detaining members of the enemy.⁹² Unlike its Civil War and World War II counterparts,⁹³ the Rehnquist Court would not consider mili-

83 See *United States v. Lopez*, 514 U.S. 549, 567–68 (1995).

84 *Id.*

85 *Id.* at 564.

86 *United States v. Morrison*, 529 U.S. 598 (2000).

87 *Id.* at 614–17.

88 *Id.* at 625–27.

89 See Prakash & Yoo, *supra* note 70, at 1553–54.

90 See *Hamdi v. Rumsfeld*, 542 U.S. 507, 509 (2004) (O'Connor, J., plurality opinion); *id.* at 539 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment); *id.* at 554 (Scalia, J., dissenting); *id.* at 579 (Thomas, J., dissenting).

91 The discussion of the enemy combatant cases contained in this Part substantially relies upon other recent work. See John Yoo, *Courts at War*, 91 CORNELL L. REV. 573 (2006).

92 See *Rasul v. Bush*, 542 U.S. 466, 484 (2004).

93 *Johnson v. Eisentrager*, 339 U.S. 763, 789 (1950) ("Certainly it is not the function of the Judiciary to entertain private litigation . . . which challenges the legality, wisdom, or propriety of

tary decisions in wartime to be outside the competence of the federal courts.⁹⁴ Expansion of judicial review into military decisions represents an unprecedented intrusion by the federal courts.⁹⁵ It is unprecedented on both formal and functional grounds. Formally, it required the Court to effectively overrule a precedent that was exactly on point at the end of World War II.⁹⁶ Functionally, it requires factual and legal judgments in the midst of war that press the courts far beyond their normal areas of expertise and risks conflict with the other branches in the management of wartime measures.⁹⁷

At the same time, critics of the Bush administration have surely overstated the cases as a defeat for its strategy on the war on terrorism.⁹⁸ While the Court intervened into military matters in an unprecedented manner, it also affirmed the administration's fundamental legal approach to the war on terrorism and left it with sufficient flexibility to effectively prevail in the future. The Rehnquist Court agreed that the United States is at war against the al Qaeda terrorist network and the Taliban militia that supports them.⁹⁹ It agreed that Congress authorized that war.¹⁰⁰ It recognized that the United States may use all of the "fundamental incident[s] of waging war" to fight a new kind of enemy that has no territory, no population, and no desire to spare innocent civilian life.¹⁰¹

While Rehnquist, the individual Justice, may have wanted to side with the government in all three cases, the Court did not.¹⁰² Rehnquist himself may have voted with the plurality in *Hamdi*, in particular, so as to lend sup-

the Commander-in-Chief in sending our armed forces abroad or to any particular region."); The Prize Cases, 67 U.S. (2 Black) 635, 670 (1863) (holding that the Court must defer to the President's determination of the proper response to insurrection).

⁹⁴ See Yoo, *supra* note 91, at 574.

⁹⁵ *Id.*

⁹⁶ *Eisentrager*, 339 U.S. at 781 (holding that no right of habeas corpus is available for nonresident enemy aliens).

⁹⁷ See Yoo, *supra* note 91, at 574–75.

⁹⁸ See, e.g., Andrew Buncombe, *Court Defies White House with Camp Delta Ruling*, IN-DEP. (U.K.), June 29, 2004, at 24 ("In what represented President Bush's most damaging legal defeat since he assumed office, the [C]ourt ruled 6-3 that . . . prisoner[s] [taken] as part of the so-called 'war on terror' could not be held indefinitely without access to lawyers or the courts."); Stephen Henderson, *Detainees Win Access to Courts: Supreme Court Rulings Deliver a Legal Blow to the Administration's Antiterrorism Policy*, PHILA. INQUIRER, June 29, 2004, at A1 ("The U.S. Supreme Court repudiated a central legal doctrine of the Bush administration's antiterrorism efforts yesterday . . ."); Steve Lash, *Court Clarifies Issues of Individual Rights: Bush Administration Rebuffed as Justices Say Detainees Must be Afforded Due Process*, ATLANTA J.-CONST., July 4, 2004, at B5 ("The [C]ourt handed the Bush administration several stinging setbacks.").

⁹⁹ See *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004) (plurality opinion).

¹⁰⁰ See *id.*

¹⁰¹ *Id.* at 519 ("Because detention to prevent a combatant's return to the battlefield is a fundamental incident of waging war, in permitting the use of 'necessary and appropriate force,' Congress has clearly and unmistakably authorized detention in the narrow circumstances considered here." (quoting Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001))).

¹⁰² Compare *id.* at 509 (O'Connor, J., plurality opinion, joined by Rehnquist, C.J.) (upholding detention of U.S. citizen enemy combatant but requiring a "meaningful opportunity" to challenge detention), with *Rasul v. Bush*, 542 U.S. 466, 488 (2004) (Scalia, J., dissenting, joined by Rehnquist, C.J.) (disputing availability of habeas corpus for noncitizen enemy combatants captured and held overseas), and *Rumsfeld v. Padilla*, 542 U.S. 426, 450–51 (2004) (Rehnquist, C.J.,

port to the Court's institutional standing, but he accepted a more modest opinion, one that did not provide full deference to the government and which punted on the most difficult questions of procedure for habeas review of enemy combatant detentions.¹⁰³

For the most part, *Hamdi* provided the Bush administration with a substantial victory in the legal campaign in the war on terrorism.¹⁰⁴ Yaser Hamdi had been captured by Northern Alliance troops, a coalition of groups allied to the United States and opposed to the Taliban militia, during the fighting in Afghanistan and handed over to the United States armed forces.¹⁰⁵ Hamdi was first transferred to the naval station at Guantánamo Bay, Cuba, and, upon discovery that he had been born in the United States, was sent to a navy brig in South Carolina.¹⁰⁶ He was not charged with a crime.¹⁰⁷ On behalf of his son, Hamdi's father filed an application for a writ of habeas corpus on the ground that, as an American citizen, Hamdi could not be held without criminal charges, access to a tribunal, or counsel.¹⁰⁸ While the government agreed that Hamdi could seek habeas, it asserted that the laws of war permitted the detention of Hamdi as an enemy combatant.¹⁰⁹ As evidence of Hamdi's status as an enemy combatant, the government provided a declaration from a Department of Defense official stating that Hamdi had traveled to Afghanistan in the summer of 2001, affiliated himself with the Taliban, and surrendered while armed.¹¹⁰

Hamdi's habeas application asked the courts to decide whether the Constitution entitled him, as a U.S. citizen, to some form of process to challenge the government's detention and characterization of Hamdi as an enemy combatant.¹¹¹ Implicitly, the case raised broader issues: Had the September 11, 2001 terrorist attacks on New York City and the Pentagon started a war? Could Congress and/or the President decide whether war had begun? And what war powers could the President exercise after September 11? If the September 11 attacks merely violated federal and state criminal laws, then Hamdi's detention was inconsistent with the Bill of Rights because the government had not charged him, provided him with a lawyer, or made him available for a trial.¹¹²

majority opinion) (remanding case for lack of district court jurisdiction, thereby avoiding the merits of Padilla's challenge to his classification as an enemy combatant).

¹⁰³ *Hamdi*, 542 U.S. at 509 (plurality opinion).

¹⁰⁴ *Id.* at 518–21 (upholding government's right to detain enemy combatants without charge for the duration of hostilities).

¹⁰⁵ *Id.* at 510.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 511. Hamdi based his argument on 18 U.S.C. § 4001(a), which declares that “[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.” *Id.* at 515 (quoting 18 U.S.C. § 4001(a) (2000)).

¹⁰⁹ *Id.* at 525. Throughout the proceedings, the government refused to allow Hamdi access to a lawyer or to appear in person in court. *Id.* at 540 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment).

¹¹⁰ *Id.* at 512–13 (plurality opinion).

¹¹¹ *Id.* at 511, 524.

¹¹² The Fifth Amendment requires indictment or presentment and provides criminal defendants with the right to remain silent. U.S. CONST. amend. V. The Sixth Amendment provides

A four-Justice plurality recognized the exceptional nature of the war on terrorism.¹¹³ It acknowledged that the September 11 attacks had created a state of war, that the Afghanistan conflict was part of that war, and that enemy combatants could be detained without criminal charge as a fundamental incident of war.¹¹⁴ In the opinion written by Justice O'Connor, joined by Chief Justice Rehnquist and Justices Kennedy and Breyer, the plurality recognized that Congress had enacted a statute on September 18, 2001, authorizing the President to use "‘all necessary and appropriate force’ against ‘nations, organizations, or persons’" he determines are responsible for the September 11 attacks.¹¹⁵ Deference to the political branches was called for because the President and Congress agreed that a state of war existed.¹¹⁶ The Court stated that "[t]here can be no doubt that individuals who fought against the United States in Afghanistan as part of the Taliban, an organization known to have supported the al Qaeda terrorist network responsible for those attacks, are individuals Congress sought to target in passing" the authorization to use force.¹¹⁷ The Court did not review whether the basic facts satisfied the statute, or whether the statute satisfied the Constitution. For example, the plurality did not ask whether the terrorist attacks constituted an act of war under the Constitution, whether sufficient evidence linked al Qaeda to the attacks, or whether the use of force against the Taliban came within the September 18 authorization.¹¹⁸

Justice O'Connor's plurality opinion also accepted the second leg of the administration's approach to the war on terrorism.¹¹⁹ Under the laws of war, the right to use force against an enemy includes the lesser power to capture and detain its soldiers.¹²⁰ The purpose of detention in the military context is not punitive, but preventive.¹²¹ Detention prevents enemy combatants from returning to fight another day.¹²² Following a World War II case, *Ex parte Quirin*,¹²³ the plurality agreed with the Bush administration that the power to detain extends even to U.S. citizens who join the enemy.¹²⁴ "A citizen, no

the right to a speedy trial and the right to assistance of counsel. *Id.* amend. VI. Hamdi's detention also would have violated 18 U.S.C. § 4001(a) because no act of Congress had overridden the rights of criminal defendants to be free of detention without criminal charge. See 18 U.S.C. § 4001(a) (2000).

¹¹³ See *Hamdi*, 542 U.S. at 518 (plurality opinion).

¹¹⁴ *Id.* at 518–19.

¹¹⁵ *Id.* at 518 (quoting Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001)).

¹¹⁶ See *id.*

¹¹⁷ *Id.*

¹¹⁸ Because the plurality opinion found that the President and Congress agreed that the September 11 attacks had initiated a state of war, it did not address the Bush administration's argument that the President had unilateral constitutional authority to respond to the attacks with force. See *id.* at 516–17 (declining to address the President's assertion of "plenary authority to detain [enemy combatants] pursuant to Article II of the Constitution").

¹¹⁹ *Id.* at 518–19.

¹²⁰ See, e.g., *Ex parte Quirin*, 317 U.S. 1, 28 (1942).

¹²¹ *Hamdi*, 542 U.S. at 518 (plurality opinion).

¹²² *Id.*

¹²³ *Ex parte Quirin*, 317 U.S. 1 (1942).

¹²⁴ *Hamdi*, 542 U.S. at 519 (plurality opinion). The *Quirin* Court upheld the detention and

less than an alien, can be 'part of or supporting forces hostile to the United States or coalition partners' and 'engaged in an armed conflict against the United States.'"¹²⁵ Beyond the authorization to use force, the plurality concluded, no further word from Congress was needed. "Because detention to prevent a combatant's return to the battlefield is a fundamental incident of waging war," the plurality observed, "in permitting the use of necessary and appropriate force," Congress authorized wartime detention of enemy combatants.¹²⁶

Upholding the third element of the administration's argument, the O'Connor plurality opinion rejected Hamdi's claim that his detention was illegal because it was indefinite.¹²⁷ Instead, the Court followed the laws of war in holding that the government can detain enemy prisoners until the end of the conflict.¹²⁸ "The United States may detain, for the duration of these hostilities, individuals legitimately determined to be Taliban combatants who engaged in an armed conflict against the United States."¹²⁹ So long as "the record establishes that United States troops are still involved in active combat in Afghanistan," Hamdi's detention without criminal trial could continue.¹³⁰ The plurality agreed that it was premature to identify when the conflict *might* end while combat operations in Afghanistan continued.¹³¹ But it did acknowledge that if hostilities continued for "two generations," Hamdi's detention might fall outside the government's war powers, without providing any reason why thirty-six years was the relevant time frame.¹³²

For the most part, these conclusions are consistent with the Court's war-time precedents. In *The Prize Cases*,¹³³ for example, the Court found that "the President in fulfilling his duties, as Commander-in-chief," was justified in treating the Southern states as belligerents and that instituting a blockade was a question "to be decided by him."¹³⁴ The Court did not second-guess whether a state of war existed when the rebellion broke out, but deferred to the decision of "the political department of the Government to which this power was entrusted."¹³⁵ In the World War II case *Ludecke v. Watkins*,¹³⁶ the

trial by military commission of Nazi saboteurs, one of whom was allegedly a U.S. citizen. *Quirin*, 317 U.S. at 37–38, 48.

¹²⁵ *Hamdi*, 542 U.S. at 519 (plurality opinion) (quoting Brief for the Respondents at 3, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (No. 03-6696)).

¹²⁶ *Id.* (quotation omitted).

¹²⁷ *Id.* at 519–21.

¹²⁸ *Id.* at 520 (citing Geneva Convention Relative to the Treatment of Prisoners of War art. 118, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Hague Convention Respecting the Laws and Customs of War on Land art. 20, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631; Hague Convention with Respect to the Laws and Customs of War on Land art. 20, July 29, 1899, 32 Stat. 1803, 1 Bevans 247).

¹²⁹ *Id.* at 521 (quotation omitted).

¹³⁰ *Id.*

¹³¹ *See id.* at 520–21.

¹³² *See id.* The Court also left open the possibility that the war paradigm for detention might "unravel" if "the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war." *Id.* at 521.

¹³³ *The Prize Cases*, 67 U.S. (2 Black) 635, 670 (1862).

¹³⁴ *Id.* at 670.

¹³⁵ *Id.*

Court found that determining the end of a state of war also rested within the hands of the political branches.¹³⁷ In *Ex parte Quirin*, as noted earlier, the Court recognized the government's authority to detain enemy combatants without criminal charge, even when the enemy combatants are U.S. citizens.¹³⁸ Consistent with these precedents, the *Hamdi* plurality showed no appetite to challenge the political branches in their area of greatest competence: deciding whether an attack has occurred, whether war has broken out, and whether force ought to be used in response.¹³⁹

It was at this point, however, that the Court took a wrong turn. *Ex parte Milligan*,¹⁴⁰ decided shortly after the Civil War, held that the writ of habeas corpus could extend to a detained American citizen who had plotted to attack military installations while "the courts are open and their process unobstructed."¹⁴¹ But neither *Milligan* nor *Quirin* addressed how federal courts hearing habeas applications brought by American enemy combatants should take into account the government's national security interests and the preventive purpose of detention, and how to balance them against the need to test the government's proof. From a functional perspective, process in the wartime habeas context represents the balance struck between the value of the information that will flow to the courts—information that may allow them to prevent erroneous detentions—and the costs of producing that information. While the chances of erroneous detention in wartime might be higher, the costs of providing the information in wartime are certainly higher than in the garden-variety criminal case. Revealing information regarding captured enemy combatants could reveal intelligence sources and methods and interfere with ongoing military operations.¹⁴²

Such considerations led the Court, in 1950, to refuse to permit alien enemy combatants to resort to habeas at all. In *Johnson v. Eisentrager*,¹⁴³ the Court held that German POWs convicted by military commission for war crimes could not seek review of their sentences in a federal court through a writ of habeas corpus.¹⁴⁴ According to the *Eisentrager* Court:

The writ, since it is held to be a matter of right, would be equally available to enemies during active hostilities as in the present twilight between war and peace. Such trials would hamper the war effort and bring aid and comfort to the enemy. They would diminish the prestige of our commanders, not only with enemies but with wavering neutrals. It would be difficult to devise more effective fet-

¹³⁶ *Ludecke v. Watkins*, 335 U.S. 160 (1948).

¹³⁷ *Id.* at 168–69.

¹³⁸ *Ex parte Quirin*, 317 U.S. 1, 37–38, 48 (1942).

¹³⁹ *Hamdi v. Rumsfeld*, 542 U.S. 507, 516–19 (2004) (plurality opinion). It is important to note that while Justice O'Connor's opinion drew only a plurality of the Court—Chief Justice Rehnquist and Justices Kennedy and Breyer joined her opinion—Justice Thomas's dissent agreed with the plurality on these essential points. *Id.* at 587 (Thomas, J., dissenting).

¹⁴⁰ *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 121 (1866).

¹⁴¹ *Id.* *Milligan* had been captured well away from the front, had never associated with the enemy, and at best was merely a sympathizer with the Confederate cause. *Id.* at 131.

¹⁴² See Yoo, *supra* note 91, at 587.

¹⁴³ *Johnson v. Eisentrager*, 339 U.S. 763 (1950).

¹⁴⁴ *Id.* at 780–81.

tering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home. Nor is it unlikely that the result of such enemy litigiousness would be a conflict between judicial and military opinion highly comforting to enemies of the United States.¹⁴⁵

The unconventional nature of the war on terrorism makes these national security interests only more acute.¹⁴⁶ Al Qaeda is a stateless network, not a nation-state. It has no regular armed forces in the field, no territory, no cities, and no population. Its members violate the laws of war by deliberately concealing themselves within the civilian population and attacking civilian targets with the aim of causing massive casualties. There is no defined battlefield or front separate from home or the rear. The war is not won by seeking a climactic battle between the massed armies of the opponents, but rather by using military, law enforcement, and intelligence officers to prevent terror attacks *before* they occur. Information is the primary weapon in the conflict against this enemy.¹⁴⁷ Intelligence gathered from captured operatives can be the most effective means of preventing future attacks upon U.S. territory.

A purely *de novo* standard of review, which the plurality rejected, would have interfered with operations against al Qaeda.¹⁴⁸ As the Court observed in *Johnson v. Eisentrager*,¹⁴⁹ a judicial proceeding involving enemy combatants could require the recall of military and intelligence personnel from the field, disrupt their operations, reveal tactics and strategies, and force the military to shape its operations to the demands of the very different judicial process.¹⁵⁰ Such considerations supported adoption of the “some evidence” standard, which would have limited review to the facts known to the government.¹⁵¹ Justice Thomas, who dissented from the judgment, agreed with this approach because courts “lack the relevant information and expertise to second-guess” the battlefield decisions made by the military and ultimately the President.¹⁵²

Joined by Justices Souter and Ginsburg, however, the plurality ordered lower courts to adopt a vague framework for review of the legality of military detention.¹⁵³ It announced a rule that an enemy combatant must receive a lawyer and “a fair opportunity to rebut the Government’s factual assertions

¹⁴⁵ *Id.* at 779.

¹⁴⁶ See Yoo, *supra* note 91, at 586–87.

¹⁴⁷ *Id.*

¹⁴⁸ *Hamdi v. Rumsfeld*, 542 U.S. 507, 527–28, 531–33 (2004) (plurality opinion).

¹⁴⁹ See *Eisentrager*, 339 U.S. at 779.

¹⁵⁰ *Hamdi*, 542 U.S. at 531–32 (plurality opinion).

¹⁵¹ *Id.*

¹⁵² *Id.* at 583 (Thomas, J., dissenting).

¹⁵³ See *id.* at 533 (plurality opinion) (“[W]e weigh the opposing governmental interests against the curtailment of liberty that such confinement entails.”). Justices Souter and Ginsburg would have held the detention forbidden by 18 U.S.C. § 4001(a), but joined in the judgment of the plurality to maximize the number of Justices rejecting the government’s position of detention without review. *Id.* at 553 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment).

before a neutral decisionmaker.”¹⁵⁴ Beyond that, nothing is certain. Borrowing *Mathews v. Eldridge*’s balancing test to determine whether a procedure meets the requirements of the Due Process Clause,¹⁵⁵ the plurality ordered lower courts to develop procedures for detainee habeas proceedings by balancing the private interest affected by government action against the government’s interests and the costs of providing greater process—all measured in the context of deciding whether more process would reduce government error.¹⁵⁶ The fact that the Court modeled its approach on a case analyzing the due process rights of welfare beneficiaries highlights the improvisational nature of the result in *Hamdi*.¹⁵⁷

Eldridge seems particularly inappropriate because of its lack of coherence or predictability.¹⁵⁸ How are courts to measure values such as “the private interest” or “the government interest” in any systematic manner? *Hamdi* itself bears this out. According to the plurality, a citizen has a fundamental interest “to be free from involuntary confinement by his own government.”¹⁵⁹ But the government also has a “weighty and sensitive” interest in preventing enemy combatants from fighting again.¹⁶⁰ And the plurality could have defined the government’s interest as prevailing in war, the most compelling government interest in American constitutional law: “It is obvious and unarguable that no governmental interest is more compelling than the security of the Nation.”¹⁶¹ The Court does not indicate how the “values” of these variables are to be measured. Should we measure the government’s interest by accounting for the lives potentially saved times the reduction in the probability of an attack? Do we use as the value of a life the amount applied by the Environmental Protection Agency in reviewing domestic regulations?¹⁶² How are the courts to place a value on individual liberty against mistaken or pretextual executive detention? Is it the money that a citizen would pay to avoid detention? If there is a systematic, rational way to balance these competing values, the Court gave no hint of it—leaving all of these values, and the procedures they are to shape, up to the lower courts.¹⁶³

¹⁵⁴ *Id.* at 533 (plurality opinion).

¹⁵⁵ *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (“[D]ue process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest . . . and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the . . . burdens that the additional . . . requirement would entail.”).

¹⁵⁶ *Hamdi*, 542 U.S. at 529 (plurality opinion).

¹⁵⁷ *See id.*

¹⁵⁸ *See Yoo, supra* note 91, at 588.

¹⁵⁹ *Hamdi*, 542 U.S. at 531 (plurality opinion).

¹⁶⁰ *Id.*

¹⁶¹ *Haig v. Agee*, 453 U.S. 280, 307 (1981) (citation omitted) (affirming the President’s authority to revoke a citizen’s passport when his actions seriously threaten national security).

¹⁶² *See Eric A. Posner & Cass R. Sunstein, Dollars and Death*, 72 U. CHI. L. REV. 537, 549–50 (2005) (listing the values placed on a statistical life in various regulatory schemes and concluding that “most regulatory agencies have now converged on a fairly narrow range for the valuation of life: \$5 million to \$6.5 million”).

¹⁶³ *See Hamdi*, 542 U.S. at 533 (plurality opinion) (“[T]he exigencies of the circumstances

Hamdi's significance extends beyond the habeas procedures that courts will apply in reviewing the cases of U.S. citizens detained as enemy combatants.¹⁶⁴ In *Rasul v. Bush*, a 6-3 majority of the Court found that the federal courts had jurisdiction over the claims of alien enemy combatants, detained at Guantanamo Bay, challenging their detention.¹⁶⁵ *Rasul* essentially overruled *Johnson v. Eisentrager*,¹⁶⁶ but left open what substantive claims, if any, a detainee could bring and what procedures would apply.¹⁶⁷ *Rasul* provided no guidance on where and when the military must provide hearings to enemy combatants, who can participate, how classified intelligence might be treated, and what level of review will be exercised by the federal courts.¹⁶⁸ Despite an extended discussion of Guantanamo Bay, *Rasul* failed to limit its holding geographically.¹⁶⁹ The Court's lack of restrictions on the reach of federal jurisdiction suggests that even Saddam Hussein in Iraq or Osama bin Laden in Afghanistan—should he ever be captured—could challenge the legality of their detention in federal court.

Because these questions are left unanswered in *Rasul*, it seems safe to assume that procedures consistent with *Hamdi* will apply to the detention hearings of both U.S. citizens and alien enemy combatants.¹⁷⁰ If a procedure meets due process standards for citizens detained within the United States, it should also satisfy any due process rights held by alien enemies outside the country. But such procedures also threaten the same level of interference with ongoing military operations as in the *Hamdi* context. On the other hand, the individual liberty interest might be reduced, as the Court has recognized in *United States v. Verdugo-Urquidez*¹⁷¹ that aliens outside the territorial United States do not have Fourth Amendment rights protected by the U.S. Constitution.¹⁷² In fact, the Court reached this conclusion because it found illogical that the military would need to acquire a warrant to attack or detain enemy aliens at war with the United States.¹⁷³

Stepping back from their positive attributes and their faults, *Hamdi* and *Rasul* illustrate broader trends in the Rehnquist Court's jurisprudence. First, the Court displayed deference to the political branches in important respects, particularly the existence of a state of war and the ancillary powers that flow from the right to use force against foreign enemies. The Court, however, signaled a desire to interfere with the decisions that Presidents and Con-

may demand that . . . enemy combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict.”).

¹⁶⁴ See Yoo, *supra* note 91, at 589.

¹⁶⁵ *Rasul v. Bush*, 542 U.S. 466, 484–85 (2004).

¹⁶⁶ See *id.* at 479 (“Because *Braden* overruled the statutory predicate to *Eisentrager's* holding, *Eisentrager* plainly does not preclude the exercise of [28 U.S.C.] § 2241 jurisdiction over petitioner's claims.”).

¹⁶⁷ *Id.* at 485.

¹⁶⁸ See *id.* (“Whether and what further proceedings may become necessary after respondents make their response to the merits of petitioners' claims are matters that we need not address now.”).

¹⁶⁹ See *id.* at 480.

¹⁷⁰ See Yoo, *supra* note 91, at 590.

¹⁷¹ *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990).

¹⁷² *Id.* at 273–75.

¹⁷³ *Id.*

gresses reach in the detention of enemy combatants. To the extent that previous Courts had reviewed the legality of such detention, they usually waited until after hostilities had ended, as in *Ex parte Milligan*,¹⁷⁴ and even then the Courts were not always open to the claims of enemy prisoners.¹⁷⁵ *Rasul*, however, demonstrated that the Rehnquist Court's confidence in the supremacy of judicial review would extend not just to questions of federalism or the Enforcement Clause of the Fourteenth Amendment, but also to issues of wartime.¹⁷⁶ To expand its jurisdiction, the Court ignored the lessons learned from the last great conflict, when the judiciary remained far more conscious of the need for restraint in order to give the political branches the flexibility to wage war effectively. In its exercise of judicial review in other areas, such as the federalism context, the Rehnquist Court seemed to strike down federal laws that were not critical for the nation's security and prosperity. For all of the hue and cry over the invalidation of the Gun-Free School Zones Act of 1990,¹⁷⁷ or the restriction on federal intellectual property remedies,¹⁷⁸ the Court never found unconstitutional a significant law involving the environment, labor, or even education. War is a different matter altogether, where the costs of judicial review may be far greater than these other, less significant contexts.

A second theme of the Rehnquist Court that found expression in the trilogy of terrorism cases was its confidence in the institutional capabilities of the federal courts. This was nowhere clearer on display than the *Hamdi* plurality's application of the *Mathews v. Eldridge* test to the review of the legality of the detention of enemy combatants.¹⁷⁹ Under this approach, the federal courts will decide whether to allow an enemy combatant direct access to all (or some) of the information about him held by the government by measuring the value of the private individual's interest in the information, the government's national security interest in protecting that information from release, and the costs of information production and protection.¹⁸⁰ *Hamdi* does not suggest that the courts should defer to the political branches in the measurement or balancing of these values, even though they involve national security.¹⁸¹

I have argued previously that the judiciary's design and operation give it a weak institutional vantage point from which to play an effective role in

¹⁷⁴ *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2, 121 (1866).

¹⁷⁵ See *Johnson v. Eisentrager*, 339 U.S. 763, 780–81 (1950).

¹⁷⁶ *Rasul v. Bush*, 542 U.S. 466, 479 (2004).

¹⁷⁷ Gun-Free School Zones Act of 1990, 18 U.S.C. § 922(q)(1)(A), *invalidated by* United States v. Lopez, 514 U.S. 549, 567 (1995).

¹⁷⁸ Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 630 (1999) (holding that Florida's sovereign immunity was not abrogated under the Fourteenth Amendment by the Patent and Plant Variety Protection Remedy Clarification Act); Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 672–75 (1999) (holding that Florida's sovereign immunity was not abrogated under the Fourteenth Amendment by the Trademark Remedy Clarification Act).

¹⁷⁹ See *Hamdi v. Rumsfeld*, 542 U.S. 507, 529 (2004) (plurality opinion).

¹⁸⁰ See *id.* at 529–35.

¹⁸¹ *Id.* at 535–37.

foreign affairs and national security.¹⁸² Its insulation from politics, its role as a passive decision maker, the party-driven nature of litigation, and the limits on its ability to acquire information make it, from a comparative institutional perspective, less effective in achieving national security goals than the other branches of the federal government.¹⁸³ The federal judiciary is decentralized, acts slowly (although with greater deliberation), and does not rapidly correct its own errors in light of new information or circumstances.¹⁸⁴ These limitations, perhaps more apparent to the political branches than the courts themselves, prompted the unprecedented response that I discuss in Part III.

III.

Judging from the response it generated, the Rehnquist Court's expansion of its jurisdiction in the war on terrorism may have proven to be more intolerable than its federalism or Fourteenth Amendment decisions.¹⁸⁵ In these latter areas, the political branches did not respond to the Court's declaration of supremacy by pursuing the several avenues left open for the promotion of national policy.¹⁸⁶ The Court's national security decisions, however, did not meet with similar silence. In December 2005, Congress took the remarkable step of specifically overruling *Rasul*, although it added some substantive review provisions for enemy combatants that had not previously existed.¹⁸⁷ Congress's response suggests that the Rehnquist Court had gone too far in expanding the habeas corpus statute, in abandoning *Eisentrager*, and in intruding into the prerogatives of the political branches in waging war.

Even with the Rehnquist Court no more, some of its members continued the judiciary's push into national security matters. In the aftermath of the September 11 attacks, President Bush established military commissions—a traditional form of military justice, used to try enemy combatants for war crimes, that is recognized, but not authorized, by the Uniform Code of Military Justice ("UCMJ")¹⁸⁸—to try captured al Qaeda members.¹⁸⁹ In July 2003, President Bush designated Salim Ahmed Hamdan—alleged to be Osama bin Laden's bodyguard, driver, and co-conspirator—for trial by the commission, and in July 2004, the appointing authority for the military com-

¹⁸² Yoo, *supra* note 91, at 591.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ See, e.g., *United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995); *City of Boerne v. Flores*, 521 U.S. 507 (1997).

¹⁸⁶ See Choper & Yoo, *supra* note 1, at 213, 247–60 (2006) (discussing the spending power, the foreign affairs power, and nonfederal alternatives as tools to circumvent the Eleventh Amendment's grant of state sovereign immunity).

¹⁸⁷ See Detainee Treatment Act of 2005, Pub. L. No. 109-148, §§ 1001–1006, 119 Stat. 2739, 2739–44 (to be codified at 42 U.S.C. § 2000dd). Section 1005 of the Act creates a status review procedure for Guantanamo Bay prisoners and removes federal court habeas jurisdiction over aliens detained at Guantanamo Bay. *Id.* § 1005.

¹⁸⁸ See, e.g., 10 U.S.C. § 821 (2000) (Article 21 of the UCMJ) (recognizing jurisdiction of military commissions); 10 U.S.C. § 836 (2000) (Article 36 of the UCMJ) (recognizing presidential power to prescribe procedural rules for military commissions).

¹⁸⁹ See Military Order of November 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 3 C.F.R. 918 (2002).

missions charged Hamdan with conspiracy to commit attacks on civilians and other charges.¹⁹⁰ Hamdan, who was an alien held at Guantanamo Bay, was also found to be an enemy combatant subject to continuing detention by a Combatant Status Review Tribunal ("CSRT"), an administrative body established pursuant to Defense Department regulations.¹⁹¹ Hamdan's lawyers challenged the legality of the military commission order.¹⁹² Federal jurisdiction was based on *Rasul*, a position that the U.S. Court of Appeals for the D.C. Circuit accepted even as it rejected Hamdan's substantive claims.¹⁹³ On November 7, 2005, the Court granted certiorari.¹⁹⁴

Within two months, Congress enacted a statute eliminating jurisdiction over Hamdan's case and similar cases, of which there were several hundred pending.¹⁹⁵ In the Detainee Treatment Act of 2005 ("Act"), Congress amended the federal habeas corpus statute to read that "no court, justice, or judge shall have jurisdiction to hear or consider" either "an application for a writ of habeas corpus filed by or on behalf of an alien" detained by the Defense Department at Guantanamo Bay, or "any other action against the United States or its agents relating to any aspect of the detention."¹⁹⁶ The Act directly overruled the Court's decision in *Rasul*, an unusual if not remarkable action. In fact, a long list of law professors sent a letter to Congress before the Act's passage arguing that overruling *Rasul* would "harm the Constitution" by stripping federal court jurisdiction over currently pending habeas petitions.¹⁹⁷ The letter raised the claim that reducing the reach of federal habeas corpus jurisdiction would prevent any federal court from implementing the holdings in *Hamdi* and *Rasul* and thereby "consign[] the protection of fundamental human liberties to unilateral executive determination."¹⁹⁸

Conventional academic wisdom, if it were indeed fairly reflected by the letter of the law professors, seems misguided. To be sure, Congress's actions bear close similarities with *Ex parte McCordle*,¹⁹⁹ in which Congress amended the federal habeas statute to prevent the Supreme Court from exercising jurisdiction over the claim of a military detainee in the Reconstruction South after oral arguments before the Court had been completed.²⁰⁰ However, several important differences exist. In *McCordle*, Congress amended a habeas

¹⁹⁰ *Hamdan v. Rumsfeld*, 415 F.3d 33, 35 (D.C. Cir. 2005), *rev'd*, 126 S. Ct. 2749 (2006).

¹⁹¹ *Id.* at 36.

¹⁹² *Id.* at 37.

¹⁹³ *Id.* at 39–44.

¹⁹⁴ *Hamdan v. Rumsfeld*, 126 S. Ct. 622 (2005).

¹⁹⁵ Detainee Treatment Act of 2005, Pub. L. No. 109-148, §§ 1001–1006, 119 Stat. 2739, 2739–44 (to be codified at 42 U.S.C. § 2000dd).

¹⁹⁶ *Id.* § 1005(e)(1). The Detainee Treatment Act also contains the "McCain Amendment," which prohibits the cruel, inhumane, or degrading treatment of enemy detainees. *Id.* § 1003. While there are important constitutional and legal issues surrounding the McCain Amendment, I do not address them here because they were not included in the jurisdictional issues raised by *Rasul*.

¹⁹⁷ See Letter from Law Professors to United States Senators (Nov. 14, 2005), http://www.law.yale.edu/outside/html/Public_Affairs/675/profsltr.pdf.

¹⁹⁸ *Id.*

¹⁹⁹ *Ex parte McCordle*, 74 U.S. (7 Wall.) 506 (1869).

²⁰⁰ *Id.* at 508–09.

statute it had passed only one year earlier, and it did so to prevent the Supreme Court from addressing the constitutionality of the measures taken during Reconstruction.²⁰¹ Before *Rasul*, the courts had consistently interpreted the habeas statute—which itself did not speak specifically to the point—not to extend to the cases of aliens held outside the territorial United States in wartime.²⁰² *Rasul* upset that settled understanding; through the Detainee Treatment Act, Congress merely restored *Johnson v. Eisentrager* as the governing rule.²⁰³

The Detainee Treatment Act represents a form of statutory error correction. Congress was not removing jurisdiction in habeas cases that had long been recognized and applied. In fact, courts had interpreted the federal habeas statute to mean the exact opposite of the result in *Rasul* from at least the time of *Eisentrager*, if not before.²⁰⁴ If the critics of the Act's constitutionality are correct, then expansion of the habeas jurisdiction by judicial interpretation would operate as a one-way ratchet: every time the courts expanded habeas jurisdiction, Article III would prevent Congress from reversing the decision. Presumably, this approach would also find unconstitutional the changes to habeas procedure codified by the Antiterrorism and Effective Death Penalty Act of 1996,²⁰⁵ which sought to eliminate multiple and successive habeas petitions by the same convicted criminal.²⁰⁶ The courts have not found the 1996 changes to the habeas statute to violate Article III.²⁰⁷

To be sure, the Detainee Treatment Act also sought to constrain presidential power in the war on terrorism and did so by enlisting the services of the courts. In section 1005(e)(2) of the Act, Congress vested jurisdiction in the U.S. Court of Appeals for the D.C. Circuit to hear appeals of the determinations of the CSRTs, which had been convened by the Defense Department to review the status of enemy combatants at Guantanamo Bay.²⁰⁸ This review, however, would not sweep as broadly as regular habeas jurisdiction. Instead, the D.C. Circuit is to review only whether the CSRT's determination "was consistent with the standards and procedures specified" by the Secretary of Defense for their operation, including the requirement that an enemy

201 *Id.* at 510.

202 *See, e.g., Johnson v. Eisentrager*, 339 U.S. 763, 776–81 (1950) (finding that federal courts do not have jurisdiction over German war criminals held in a U.S.-administered German prison).

203 *Compare id., with Rasul v. Bush*, 542 U.S. 466, 475–79 (2004) (finding that federal courts have jurisdiction to decide whether foreign nationals held at Guantanamo Bay are rightfully imprisoned).

204 *Eisentrager*, 339 U.S. at 776–81.

205 Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104–132, 110 Stat. 1214 (codified in scattered sections of 8, 18, 22, 28, and 42 U.S.C.).

206 28 U.S.C. § 2244(a), (b) (2000).

207 The Detainee Treatment Act also prohibits any other suits other than those permitted by the Act itself relating to any aspect of the conditions of detention. Detainee Treatment Act of 2005, Pub. L. No. 109–148, § 1005(e)(1), 119 Stat. 2739, 2742. This provision essentially codified the D.C. Circuit opinion in *Rasul*, which had held that detainees could not bring other, nonhabeas causes of action such as claims under the Alien Tort Statute, 28 U.S.C. § 1350 (2000). *Al Odah v. United States*, 321 F.3d 1134, 1144 (D.C. Cir. 2003), *rev'd sub nom. Rasul v. Bush*, 452 U.S. 466 (2004).

208 Detainee Treatment Act, § 1005(e)(2).

combatant's status be supported by a preponderance of the evidence and allowing the defendant to rebut a finding of his or her status.²⁰⁹ In other words, the D.C. Circuit's role does not permit de novo review of the legality of an enemy combatant's detention, or even review under a deferential standard. Rather, the D.C. Circuit is to ensure that the CSRTs are faithfully applying their own procedural charter.²¹⁰ The D.C. Circuit may also decide whether these procedures are consistent with the Constitution or federal laws.²¹¹ It does not appear, however, that finding the CRST procedures unconstitutional would require the release of an enemy combatant. Instead, such a finding would send the procedures back to the Defense Department for revision.

The Detainee Treatment Act creates a similar structure for review of military commissions. It vests in the D.C. Circuit appellate review over the decisions of military commissions.²¹² It limits the right to appeal, however, to cases in which an enemy combatant is sentenced to death or receives a sentence of ten years or more; other cases can only be reviewed at the discretion of the court.²¹³ As with the CSRT determinations, the decisions of the military commissions are to be measured against their consistency with the procedures issued by the President and the Defense Department.²¹⁴ And as with the CSRT procedures, the D.C. Circuit may consider whether the military commission's procedures are consistent with the Constitution and federal law.²¹⁵

This outcome provides a broader scope to judicial review than that urged by the Bush administration before the Supreme Court.²¹⁶ It gives courts more of a role than they would have enjoyed under the case law as it existed before the Court's 2004 terrorism decisions. Under that law, as noted earlier, the federal courts had refused to exercise jurisdiction over the cases of enemy combatants held outside the territorial United States, whether tried by military commission or not. *Rasul* expanded the role of the courts beyond the preexisting law, and Congress's response was to change that outcome by eliminating habeas corpus generally over the status of enemy combatants held outside the United States.²¹⁷ Congress also eliminated claims of action under other sources of law, such as the Alien Tort Statute or treaties.²¹⁸ Con-

209 *Id.* § 1005(e)(2)(C)(i).

210 *Id.*

211 *Id.* § 1005(e)(2)(C)(ii).

212 *Id.* § 1005(e)(3).

213 *Id.* § 1005(e)(3)(B)(i)–(ii).

214 *Id.* § 1005(e)(3)(D)(i).

215 *Id.* § 1005(e)(3)(D)(ii).

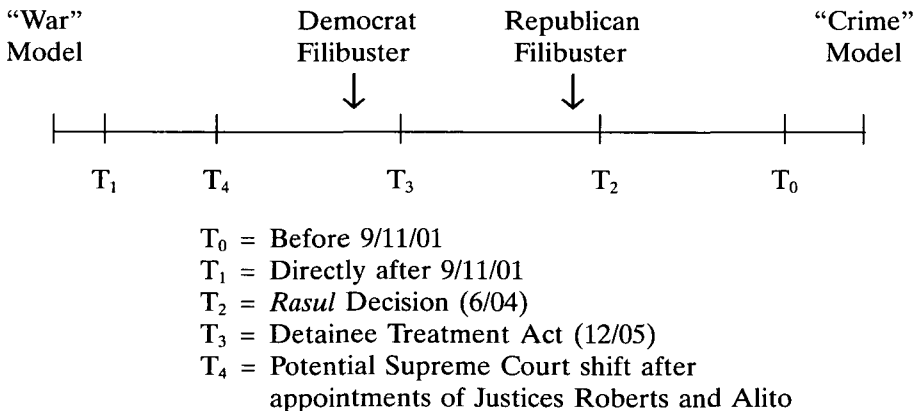
216 In *Rasul*, the administration argued that the federal courts lacked jurisdiction to hear noncitizen enemy combatant habeas petitions under the Constitution and under the habeas statute. *Rasul v. Bush*, 542 U.S. 466, 476–77, 480 (2004). In *Hamdi*, the administration argued that the President had plenary authority to detain enemy combatants without charge or review under Article II, that Congress authorized such detentions, and that the courts should have either no power to review detentions, or alternately, should only have the power to review detentions under an exceptionally deferential “some evidence” standard. *Hamdi v. Rumsfeld*, 542 U.S. 507, 516–17, 526–27 (2004).

217 Detainee Treatment Act, § 1005(e)(1).

218 *See id.*

gress did extend the power of the courts beyond what had existed pre-*Rasul*, permitting the courts to review military determinations of enemy combatant status or guilt for war crimes.²¹⁹ But this is a very narrow review that asks only whether the military tribunals have acted consistently with their own procedures, rather than a *de novo* review of the individual cases.

One way to view the Detainee Treatment Act is as the result of a non-cooperative game between the President, Congress, and the courts.²²⁰ The view of the administration, and its view of the state of the law pre-2004, was against any judicial review at all. Call this the “war” model.²²¹ On the other end of the policy spectrum would be the “crime” model.²²² The labels themselves are not important; they are only meant to summarize different approaches to the war on terrorism. The war model refers to the use of military force, detention without criminal charge, and military courts; the crime model refers to the standard characteristics of the criminal justice system. The war model would make no provision for judicial review; the crime model would have full, *de novo* judicial review. We can think of the spectrum of policy choices between these two polar opposites as a unidimensional continuum, from left to right, with a pure war model on the left and a pure crime model on the right.²²³



Before the September 11 attacks, terrorism was addressed primarily as a criminal justice matter. We can think of the status quo as being fairly close to the right end of the continuum. After September 11, the Bush administration moved policy close to the left end of the continuum by using military force against al Qaeda, detaining enemy combatants without criminal charge, and refusing to provide them with access to the courts for a trial. For three years, this policy remained unchallenged by Congress. We can assume from this that the President’s policy rested within the range of preferences between the

²¹⁹ *Id.* § 1005(e)(3).

²²⁰ A recent application of this approach to relations between the President and Congress can be found in WILLIAM G. HOWELL, *POWER WITHOUT PERSUASION: THE POLITICS OF DIRECT PRESIDENTIAL ACTION* 24–54 (2003).

²²¹ See Yoo, *supra* note 91, at 578.

²²² *Id.*

²²³ Cf. HOWELL, *supra* note 220, at 28 (describing a unilateral continuum between liberalism and conservatism).

median member of Congress and the number of Senators necessary to maintain a filibuster.²²⁴ Congress would not overturn unilateral presidential action unless legislation could overcome a filibuster in the Senate.²²⁵ Anticipating Congress's potential moves, a president will enact policies as close as possible to their preferred policy while remaining close enough to the preferences of a filibuster minority to forestall congressional action.²²⁶ President Bush might have reasonably assumed that he could set his unilateral policy relatively far to the left, towards the pure war model, given Congress's sweeping authorization to use all "necessary and appropriate means," including force, against those connected to the September 11 attacks.²²⁷ He may have decided that at least forty-one senators would block any legislation that attempted to override his policies, especially because his party controlled at least forty-nine seats in the Senate in 2001, and rose to a majority after the 2002 midterm elections.

Rasul altered that outcome by shifting the policy point to the other side of the median member of Congress. By laying claim to judicial review over the cases of enemy combatants held both inside and outside the United States, the Court moved the policy back toward the criminal justice model. It is difficult to judge how far past the preferences of the median legislator the courts would set policy because *Rasul* left unstated what procedures and substantive laws would apply.²²⁸ Adapting Howell's approach to unilateral presidential decision making to the judiciary, if the six Justices in the *Rasul* majority were acting rationally, they must have believed that their expansion of judicial review rested closer to the preferences of a filibustering minority on the right side of the continuum than the President's policies did—that is, of forty-one senators who favored policies closer to those of the criminal justice system.²²⁹ After the Court's action, the President would have to convince Congress to enact legislation, rather than simply to block it, in order to return policy toward the war end of the continuum. If forty-one senators preferred the Court's policy to the President's, they could filibuster the legislation. Members of the *Rasul* majority may have believed that this was not politically possible, considering the relatively high transaction costs of legislation, especially when the legislation is controversial.²³⁰ Or perhaps they thought that by only extending judicial review while leaving the important

224 See *id.* at 29, 33 (explaining that the ability to filibuster implies that congressional action to overturn the president's policy will only succeed when the "filibuster pivot" prefers the proposal of the "median legislator" more than they prefer the president's policy).

225 *Id.*

226 *Id.* at 25 ("Presidents do not blindly pronounce any sort of policy initiative—come what may! They monitor politics, anticipating the likely reception that their actions will receive in Congress and the courts. Whether presidents detect organized or ineffectual opposition from the aligning branches of government critically affects their willingness to issue a unilateral directive.").

227 Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

228 See *Rasul v. Bush*, 542 U.S. 466, 485 (2004).

229 Cf. HOWELL, *supra* note 220, at 33, 45–47, 151–69 (analyzing how rational choice theory affects the judiciary's decision to consider its own policy preferences when upholding or reversing unilateral presidential actions).

230 See Robert J. Delahunty & John C. Yoo, *Thinking About Presidents*, 90 CORNELL L. REV. 1153, 1171–72 (2005).

questions of substantive law for the future, their decision would not prompt an override.

Passage of the Detainee Treatment Act, however, shows that the *Rasul* Court miscalculated. It may have believed that its policy lay within the preferences of a filibustering minority who supported a "crime" model for terrorism. But no filibuster appeared against the Graham-Levin-Kyl Amendment that became the Detainee Treatment Act's provisions overturning *Rasul*.²³¹ Instead, the Court's decision was outside the preferences of both the median member of Congress and the forty-one senators most in favor of criminal justice approaches. Policy, however, did not return to the point from which it had moved; in order to bring policy back within the preferences of those forty-one senators, the administration and its congressional supporters vested jurisdiction in the D.C. Circuit to review the decisions of the CSRTs and the military commissions for compliance with the procedures mandated by the Secretary of Defense.²³² This may well have been the outcome that the median member of Congress would have preferred before *Rasul*, but could not enact because of the opposition of a separate group of forty-one senators in favor of the "war" model toward terrorism.²³³ The *Rasul* Court's decision did not achieve the policy preferred by the six Justices in the majority, but it did shift the status quo closer toward the preferences of the median member of Congress.²³⁴ The fact that the Detainee Treatment Act overrode *Rasul* fairly quickly, however, shows that this is yet another area where judicial abilities are quite limited.²³⁵

This positive account of the noncooperative game that led to the overruling of *Rasul* by the Detainee Treatment Act has one more stage. The Detainee Treatment Act moved the policy on enemy combatant detention closer to the President's preferred outcome, but not to the point where it had originally been set after the September 11 attacks. President Bush may believe the war on terrorism is important enough to spend further political capital on moving this policy closer to his preferred outcome. Most analyses of these struggles over policy end with the passage of legislation,²³⁶ but in this case the President was presented with an opportunity to further shift policy toward his preferred outcome. With the retirement of Justice Sandra Day O'Connor and the death of Chief Justice William Rehnquist in the summer of 2005,

²³¹ Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(e)(1), 119 Stat. 2739, 2742 (amending 28 U.S.C. § 2241 with the addition of § 2241(e)).

²³² *Id.* § 1005(e)(2)–(3).

²³³ See HOWELL, *supra* note 220, at 33 (referring to the gridlock interval where any attempted shift of the status quo policy will result in filibuster or veto).

²³⁴ See *id.* (describing how an extreme status quo policy empowers Congress to achieve their ideal median preferences because the status quo is further from the preferences of the minority necessary to filibuster or uphold a veto than the ideal median policy).

²³⁵ See, e.g., Julian Ku & John Yoo, *Beyond Formalism in Foreign Affairs: A Functional Approach to the Alien Tort Statute*, 2004 SUP. CT. REV. 153, 181–93 (analyzing the judiciary's institutional shortcomings in implementing foreign policy generally and applying customary international law in particular).

²³⁶ See HOWELL, *supra* note 220, at 51 (discussing limitations of a one-shot game model).

President Bush had to replace two of the Justices who composed the *Hamdi* plurality and one of the Justices who joined the *Rasul* majority.²³⁷

President Bush responded by nominating two lower court judges with substantial experience defending the prerogatives of the executive branch. John Roberts, first nominated for Justice O'Connor's seat but then elevated to Chief Justice upon Chief Justice Rehnquist's death, had been Deputy Solicitor General under President George H.W. Bush and an Associate Counsel in the White House of President Ronald Reagan.²³⁸ As a judge on the U.S. Court of Appeals for the D.C. Circuit, he had joined the majority opinion in the *Hamdan* case, which exercised jurisdiction over the habeas claims of an alien enemy combatant as required by *Rasul*, but then rejected all of the substantive claims under the Constitution, the Geneva Conventions, and other federal law.²³⁹ While it is not possible to predict with accuracy how Chief Justice Roberts would vote on future terrorism cases, his background suggests that he would be favorable to presidential claims of legal authority. Samuel Alito, a judge on the U.S. Court of Appeals for the Third Circuit, had served as U.S. Attorney for New Jersey under President George H.W. Bush, and as an Assistant to the Solicitor General and Deputy Assistant Attorney General in the Justice Department under President Reagan.²⁴⁰ In 2000, he gave a speech defending the theory of the "unitary executive," which argues that executive powers vested in the federal government, and not specifically allocated to another branch, must rest in the President.²⁴¹ Again, it is impossible to predict with any certainty how Justice Alito would vote on terrorism cases, but his record also suggests that he would be open to arguments in favor of presidential powers in wartime.

What is important for this analysis is not how either Roberts or Alito will vote, but the fact that President Bush selected two judges with substantial experience defending the executive branch. This indicates an effort to move the outcome of the noncooperative game between the three branches over terrorism policy closer to the war model and further from the criminal justice model. If Chief Justice Roberts and Justice Alito do move the Court further towards the war model, it will underscore that the *Rasul* majority misjudged the reaction of the political branches to the Court's effort to expand federal judicial review into the area of war.

²³⁷ As described in Part II above, O'Connor wrote the *Hamdi* plurality opinion and joined the *Rasul* majority, while Rehnquist joined the plurality in *Hamdi* and dissented in *Rasul*. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 509 (2004); *Rasul v. Bush*, 542 U.S. 466, 470, 488 (2004).

²³⁸ See The Justices of the Supreme Court, <http://www.supremecourtus.gov/about/biographiescurrent.pdf>.

²³⁹ *Hamdan v. Rumsfeld*, 415 F.3d 33, 36–43 (D.C. Cir. 2005), *rev'd*, 126 S. Ct. 2749 (2006).

²⁴⁰ See The Justices of the Supreme Court, <http://www.supremecourtus.gov/about/biographiescurrent.pdf>.

²⁴¹ See Jess Bravin, *Judge Alito's View of the Presidency: Expanded Powers*, WALL ST. J., Jan. 5, 2006, at A1 ("The President has not just some executive powers, but the executive power—the whole thing." (quoting a speech by then-Judge Alito at a Federalist Society meeting in November 2000)).

Conclusion

This Essay has discussed Chief Justice Rehnquist's legacy in the area of national security by focusing on the cases involving enemy combatants decided in the summer of 2004. It argues that the decisions, while allowing the government to continue a "war model" in its struggle with the al Qaeda terrorist network, illustrated broader trends in the Rehnquist Court's jurisprudence, in particular its assumption of interpretational supremacy over the President and Congress. This Essay questions whether courts have the functional abilities to play the enlarged role in national security called for by the enemy combatant cases. A noncooperative game model explains subsequent policy developments that have overridden the Rehnquist Court's effort to expand the judicial role in war.