February 24, 2006

Layers of the Past: The Enemy Combatant Cases

by Peter E. Quint

I. Introduction

Cases involving the separation of powers between Congress and the executive, and questions of presidential power in general, were relatively rare in the Supreme Court before the 1970s. Occasionally a case would come along -- and sometimes it would be a spectacular case such as Youngstown Sheet & Tube v. Sawyer -- but these decisions were relative rarities, hardly grist for the judicial mill. This situation changed significantly in the 1970s, when under the indirect impetus of executive adventurism in the Vietnam War, and particularly in response to extended claims of executive power advanced by the Nixon administration, litigants and courts seemed to find it increasingly appropriate to bring these cases to judicial decision.

It seems a fair bet that the importance and frequency of cases of this nature will only increase in the twenty-first century. War, terrorism, and environmental disaster seem to be high on the agenda in our new millennium, and issues of this kind are likely to evoke broad claims of executive power in response. Accordingly, the proper role and limits of the powers of the President are likely to move to the forefront of constitutional issues, in a manner not seen since the Nixon period (and perhaps not even then).

With the recent appointments of Chief Justice Roberts and Justice Alito, we may now be at a turning point in the history of the court's doctrines on the separation of powers. But on this sort of question, particularly, it is of course perilous to try to predict the future.

Yet, according to the ideology of the common law at least, the past to some extent determines the present and the future. Of course there are multiple layers of the past and, with a jurisprudence that now extends back over more than two centuries, the Supreme Court has a certain

ability to choose the particular layer of the past that it wishes to adopt for the present.

The Court's most recent pronouncements on executive power were handed down in cases decided in 2004 on the President's authority to hold individuals in military custody, as "enemy combatants". These decisions represent one layer of the -- quite recent -- past. But the opinions in these cases, in turn, rely on doctrines suggested by a range of earlier cases, including decisions that extend back to the middle of the nineteenth century, or earlier. As a kind of curtain raiser, therefore, to what seem likely to be some of the most important and difficult constitutional problems of the near future, it might be useful to try to take a synoptic view of these 2004 cases, as recent history, as well as the cases representing layers of earlier history on which these decisions may rely.

II. Four types of arguments.

When some form of Presidential action is challenged before a court, the Executive typically has a number of arguments that may be deployed in response. The first argument is that the courts have no business adjudicating the question at all, because the plaintiffs have raised a "political" question or because the matter is not justiciable for some other reason. According to the second argument, even if the case is justiciable, the President may claim authority that proceeds directly from the Constitution itself -- whether that authority is "inherent" or expressly stated in the constitutional text. The third argument is that, even though the President may not have direct constitutional authority, some statute of Congress (or perhaps a treaty) should be interpreted to grant the President the authority that he is asserting. In addition to these arguments, implicating aspects of the separation of powers, the President may also have to confront claims that individual rights prevent the President's action, even if it is authorized by Congress.

In the enemy combatant cases, the President made arguments in all of these categories. In these categories, cases from various layers of the past furnished principles that could be used on each side of the respective issues. The Court's response was decidedly mixed.

III. The 2004 Cases.

After the attacks on September 11, 2001, Congress enacted a Joint Resolution authorizing the President to respond with the use of "all necessary and appropriate force". Thereafter, alleged hostile fighters -- "enemy combatants" -- were captured on the "battlefield" in Afghanistan or arrested elsewhere in the world. Among these detainees were sixteen individuals, allegedly adherents of Al Qaeda, the Taliban or similar groups, whose petitions for habeas corpus were ultimately considered by the Supreme Court in the 2004 cases. These were: Yaser Hamdi, an American citizen who was apparently seized during a battle in Afghanistan; Jose Padilla, also a citizen of the United States, who was arrested in an airport in Chicago after flights from Pakistan and Switzerland; and fourteen citizens of Australia and Kuwait who were being held with many other noncitizens at the American base in Guantanamo Bay, Cuba. The habeas corpus petitions claimed that military detention by the United States, or the circumstances of that detention, were unlawful.

In Hamdi's case, a majority of the Supreme Court found that the military detention of a citizen in Hamdi's position was lawful, if he was indeed an "enemy combatant". But the Court also found that Hamdi was constitutionally entitled to a hearing before a "neutral decisionmaker" on the question of his status as an "enemy combatant".[1] Rather than proceed to such a hearing, the Government entered into an agreement with Hamdi, by which he renounced his American citizenship and was allowed to return to Saudi Arabia.

In Padilla's case, the Court found that the habeas corpus petition had been improperly filed in New York and therefore must be dismissed.[2] The petition was then properly refiled in South Carolina, and the case began to work its way again up the appellate ladder. Questions with respect to Padilla's military detention may be heard by the Supreme Court this year.

In the case of the noncitizens (Rasul), the Supreme Court found that noncitizen detainees in Guantanamo Bay are entitled to file petitions for habeas corpus -- but what

[1] Hamdi v. Rumsfeld, 542 U.S. 507 (2004).

[2] Rumsfeld v. Padilla, 542 U.S. 426 (2004).

rights these detainees may have (if any) were deferred for future decision.[3] Subsequently, Congress has enacted a statute purporting to deny federal jurisdiction to consider habeas corpus and other petitions of noncitizen detainees at Guantanamo Bay in most circumstances. Whether this statute should be interpreted to deny habeas corpus remedies to detainees already at Guantanamo Bay (instead of future detainees only), and questions relating to the constitutionality of the statute, remain undecided.

As noted, the Court, in the 2004 cases, considered a range of arguments on the question of Presidential authority, and the various opinions of justices wound their way through several layers of decisions of the past in order to reach their conclusions on this important contemporary problem.

IV. Layers of the Past

A. Marbury v. Marbury. Arguably, the case that played the most important role in the three "enemy combatant" decisions was a case that was hardly cited at all in any of the opinions -- Marbury v. Madison. In addition to its famous holding on judicial review of legislation, Chief Justice Marshall's opinion in Marbury also declared -- in strong dictum -- that the judges are authorized to order executive officials to comply with their legal duty. The extent of judicial authority over the power of the executive lies at the heart of the enemy combatant cases, and therefore a principle advanced in Marbury must certainly play a role.

But there is also a competing principle in the Marbury opinion itself that can take us in the opposite direction. Chief Justice Marshall was anxious to make clear that he was not claiming a general supervisory role over President Jefferson and his cabinet. Accordingly, he disclaims judicial authority over "political" subjects, which are confided to "executive discretion."

Within Marshall's opinion in Marbury, therefore, we find two opposing principles. In appropriate circumstances, the courts must review legislative and

[3] Rasul v. Bush, 542 U.S. 466 (2004).

executive action, but, if the "subject" in issue is "political", judicial review must stop. The question, of course, is where and how this line should be drawn.

The line sketched by Marshall is by no means entirely clear, and it may not precisely foreshadow the contours of the modern "political question" doctrine. Yet Marshall seems to rely here -- as elsewhere in the opinion -- on the concept of "law", as known to courts. If the law imposes an obligation on the executive in favor of an individual -- such as Madison's legal obligation to deliver the commission to Marbury -- the court should order the executive to comply with the law. But if the law or the Constitution leaves a subject within the executive's discretion -- as it does, for example, on the question of whom to appoint as Justice of the Peace for the District of Columbia or whether or not to negotiate a treaty with France -- there is no legal obligation imposed on the executive and accordingly, there is no opportunity for the Court to intervene. Of course the joker is that the Court decides in each case whether the "subject" falls into one category or the other.

In Marbury it was a statute (the District of Columbia Organic Act of 1801, as interpreted by Marshall) that gave the claimant a right to his commission. In the enemy combatant cases, in contrast, it is the Constitution that may impose limitations on the executive in favor of individuals. Since both a statute and the Constitution are forms of "law", this should not make any real difference on the question of judicial power. Yet the executive could argue that the open texture of the Constitution, in a time of "war on terrorism", is much more likely to yield "subjects" of executive discretion than the narrowly-focused statutory provision litigated in Marbury in a time of domestic peace.

Yet in the enemy combatant cases, at the outset at least, the Court clearly comes down on the side of judicial review and gives the rhetorical back of its hand to the claim that the "subject" is political and the courts should not intervene. Therefore the overarching principle of judicial review prevails -- at several crucial points -- over the "political question doctrine" (or a facsimile thereof) in these enemy combatant cases.

Justice O'Connor's plurality opinion in Hamdi contains the most impressive statement of this general position. The Government had argued for extensive deference to the executive's decision that Hamdi was an enemy combatant. But O'Connor responded that we "necessarily reject the Government's assertion that separation of powers principles mandate a heavily circumscribed role for the courts"[4] under the circumstances. The Government's view that the courts should ignore "the individual case and focus exclusively on the legality of the broader detention scheme cannot be mandated by any reasonable view of separation of powers, as this approach serves only to *condense* power into a single branch of government." O'Connor continued:

> 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. *Youngstown...* [The Constitution] most assuredly envisions a role for all three branches when individual liberties are at stake.... Likewise... the Great Writ of habeas corpus allows the Judicial Branch to play a necessary role in maintaining this delicate balance of governance, serving as an important judicial check on the Executive's discretion in the realm of detentions... [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...."[5]

In contrast, Justice Thomas took a substantially different position on this issue, emphasizing "our own institutional inability to weigh competing concerns correctly"[6] and declaring that "we lack the information and expertise to question whether Hamdi is actually an enemy combatant, a question the resolution of which is committed to other branches."[7]

---

[4] 542 U.S. 507, 535 (2004).

[5] Id. at 536-37.

[6] Id. at 579.

[7] Id. at 585-86.

In the companion Rasul case, which considers whether habeas corpus is available to the noncitizens detained at Guantanamo, Justice Kennedy's concurring opinion makes clear that this complex problem also poses the "political" question issue of Marbury -- the question of how authority should be allocated between the judiciary and the executive. Kennedy points out that in the earlier Eisentrager case, involving asserted habeas corpus rights of prisoners abroad[8], the Court rejected the petition because it "was not within the proper realm of the judicial power. It concerned matters within the exclusive province of the Executive, or the Executive and Congress, to determine..."[9]

Indeed, in a passage that accords well with Marshall's distinction in Marbury, Kennedy acknowledges that "military necessity" and other factors create a zone of executive (or executive and congressional) discretion where law enforced by courts does not run; accordingly, "there is a realm of political authority over military affairs where the judicial power may not enter. The existence of this realm acknowledges the power of the President as Commander in Chief, and the joint role of the President and the Congress, in the conduct of military affairs."[10] So the question that the Court must answer in Rasul -- through technical argumentation relating to the proper interpretation of the habeas corpus statute and related constitutional principles -- is where to draw the line between possible judicial power and free executive and (perhaps congressional) discretion.

But, Kennedy concludes, the circumstances indicate that the Rasul case does not fall within that political zone and that there must be "circumstances in which the courts maintain the power and the responsibility to protect persons from unlawful detention even when military affairs are implicated."[11] In this case, the status of Guantanamo

---

[8] Johnson v. Eisentrager, 339 U.S. 763 (1950).

[9] Rasul v. Bush, 542 U.S. 466, 486 (2004).

[10] Id. at 487.

[11] Id. (citing Ex parte Milligan).

Bay as "in every practical respect a United States territory... far removed from any hostilities,"[12] as well as the petitioners' "[i]ndefinite detention without trial or other proceeding", over a long period, "suggests a weaker case of military necessity and much greater alignment with the traditional function of habeas corpus."[13]

In sum, in Kennedy's opinion in Rasul, as in O'Connor's plurality opinion in Hamdi, the judiciary's function as a protector of individual rights prevails over claims of extensive executive discretion.[14] By granting the claimant some rights -- the right to a form of hearing in Hamdi and the right to file habeas corpus in Rasul -- the majority judges agree with this position. In Hamdi and Rasul, therefore, the judicial review principle of Marbury prevails over the "political" question doctrine that is also outlined in Marshall's famous opinion.

B. Youngstown Sheet & Tube v. the Prize Cases.

The writ of habeas corpus -- the writ that was sought in Hamdi, Rasul, and Padilla -- tests whether the executive has followed the steps that are necessary, under relevant principles of law, to justify holding an individual in custody. Accordingly, at the heart of the concept of habeas corpus lies the concept of due process of law.

The procedural aspects of due process of law -- for example, the nature of a required hearing, the opportunity to present a defense, etc. -- are considered at some length in these cases. But first, the Court must examine an even more fundamental question of due process: is there an underlying legal rule that can justify holding the individual? Without such an underlying norm, there can be no detention of an individual. If there is no valid norm

[12] Id. at 487.

[13] Id. at 488.

[14] Suggesting a similar distinction, but reaching a different conclusion, Justice Scalia (dissenting) in effect deplores the result of Rasul which might "have the consequence of bringing the cumbersome machinery of our domestic courts into military affairs." Scalia at 506.

declaring that a particular activity justifies detention, an individual may not be detained no matter how excellent the procedure is for determining that the individual has performed that activity.

Any valid detention of an individual as an enemy combatant must rest ultimately on the adoption of a valid legal rule holding that enemy combatants may be detained under these circumstances. But who has the authority to adopt this legal rule?

Unlike the previous question, which implicated the allocation of authority between the judiciary and the "political branches" (particularly the executive), this question involves the allocation of authority between the President and Congress. The Constitution confers authority on Congress to "declare war", to take many other specific steps with respect to armies, navies, and militias, and to make all laws that are "necessary and proper" for carrying out those powers.[15] On the other hand, Article II "vests" the executive power in the President and declares that the President shall be "Commander in Chief of the Army and the Navy". For several decades, moreover, presidents have claimed broad "inherent authority" relating to war.

One strong concept of due process of law requires that fundamental norms must ordinarily be made by legislative decision. This concept was strikingly captured by Justice Jackson in what might be called the peroration of his opinion in the Steel Seizure Case: "With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and the law be made by parliamentary deliberations."[16]. On the other hand, the Bush Administration has followed other recent administrations in claiming direct constitutional authority -- without the necessity of congressional authorization -- to enter United States forces into hostilities and to take foreign and domestic steps related to those hostilities.

Two cases that seem to look in different directions on the scope of presidential and congressional power in war time are the Korean War case of Youngstown Sheet & Tube v.

[15] U.S. Const. art. I §8 cl. 11; cl. 10, 12-17; cl. 18.

[16] 343 U.S. 579, 655 (1952) (emphasis added).

Sawyer, and the Prize Cases, decided during the Civil War. In Youngstown President Truman ordered the seizure of the Nation's steel mills, in order to resolve a labor dispute that threatened war production. Striking down the president's order, Justice Black's majority opinion declared that the seizure order was actually a form of law-making that fell within the power of Congress and was not confided to the Executive. A number of the concurring justices emphasized that Congress had manifested its disapproval of a seizure remedy in these circumstances; therefore the President's authority was at its "lowest ebb". Overall, however, the majority justices seemed to accept the fundamental view that -- even when foreign affairs may be seriously affected -- basic policy-making authority generally falls within the realm of Congress and not within that of the executive.

But the Supreme Court's jurisprudence contains at least one eminent counter-weight to Youngstown. In the Prize Cases of 1863, the Supreme Court upheld the constitutionality of a naval blockade imposed by President Lincoln, without congressional authority, at the outset of the Civil War. (The blockade was later ratified by Congress.) Although Justice Grier's majority opinion places some weight on subsequent congressional ratification, it essentially found that the President's unilateral imposition of the blockade was directly authorized by his constitutional power as commander in chief of the Army and the Navy.[17] Indeed Justice Thomas, dissenting in Hamdi, cites a passage from the Prize Cases for the view "that the President has constitutional authority to protect the national security and that this authority carries with it broad discretion."[18]

Thus, where Youngstown plainly favors congressional power in certain contexts relating to war, the Prize Cases favor unilateral presidential power in the circumstances of that case. Accordingly, one question suggested by the 2004 enemy combatant cases is whether the executive detentions at issue in those cases are closer to the Congressional

[17] See Prize Cases, 2 Black 635, 670.

[18] Hamdi v. Rumsfeld, 542 U.S. 507, 581 (2004).

realm of Youngstown or to the Executive realm of the Prize Cases.

In fact, we do not get a clear answer to this question, as a majority of the Supreme Court finds that congressional authorization is actually present (see section 3 below). In avoiding a statement on "direct" presidential authority, the court was following its practice in Ex parte Quirin, an earlier decision on the related question of military commissions, which also ultimately found that Congress had authorized the presidential action. Even in the realm of foreign affairs, the court in recent years has shown some reluctance to grant direct constitutional power to the President.[19] This may be a continuing legacy of reactions to extended claims of executive power common in the Vietnam era.

In any event, in the "enemy combatant" cases, the Youngstown decision seems to have held its own. As noted, even in finding authorization for the President's detention of enemy combatants, the plurality justices carefully avoid arguments of direct or "inherent" Presidential authority under Article II. Moreover, Justice Souter (joined by Ginsburg) went out of his way to note "the weakness of the Government's mixed claim of inherent, extrastatutory authority under a combination of Article II of the Constitution and the usages of war." Souter added that, "it is instructive to recall Justice Jackson's observation that the President is not Commander in Chief of the country, only of the military."[20] Clarence Thomas, who also found congressional authority, was the only justice who seemed to be willing to find direct presidential authority for holding Hamdi.

The opinions of the Second Circuit in the Padilla case, give us a somewhat fuller exposition of the tension between the Prize Cases and Youngstown in this area.[21] Recall that in Padilla, an American citizen was held as an enemy combatant after having been arrested at an American airport following flights from Pakistan and Switzerland.

---

[19] See Dames & Moore v. Regan, 453 U.S. 654 (1981).

[20] 542 U.S. at 552 (citing Youngstown.)

[21] Padilla v. Rumsfeld, 352 F.3d 695 (2nd Cir. 2003).

One member of the three judge panel relied on the Prize Cases in indicating that the President had inherent authority to hold Padilla:

> As I read The Prize Cases, it is clear that common sense and the Constitution allow the Commander-in-Chief to protect the nation when met with belligerency and to determine what degree of responsive force is necessary... The Prize Cases demonstrate that congressional authorization is not necessary for the Executive to exercise his constitutional authority to prosecute armed conflicts when, as on September 11, 2001, the United States is attacked.[22]

The judge rejects the relevance of Youngstown on the grounds that the relationship between the threatened steel strike and the war in Korea "was far too attenuated", in comparison with Padilla in which the President's action is "directly tied to his responsibilities as commander-in-chief."[23]

Rejecting these arguments, the two majority judges found that Padilla's case involved "domestic abridgments of individual liberties" and therefore Youngstown applied.[24] According to these judges, it followed that congressional authorization was necessary under Youngstown before an American citizen could be held under such circumstances, and that any "inherent" powers that the President might have on the battlefield did not extend to these internal actions. The prevailing judges also rejected the application of the Prize Cases, on the ground that the "inherent constitutional authority" established there involved "the capture of enemy property -- not the detention of persons" as in the Padilla case.[25]

---

[22] 352 F.3d at 727-28 (opinion of Wesley, C.J.). Judge Wesley also found congressional authority in this case.

[23] Id. at 727.

[24] Id. at 714 (opinion of Pooler and B.D. Parker, Jr.).

[25] Id. at 717.

C. Dames & Moore v. Endo. The tension between the Steel Seizure Case and the Prize Cases reflects uncertainty in the allocation of "war powers" between Congress and the Executive. But even if a requirement of congressional authorization is assumed, the underlying tension tends to reemerge at the next level of analysis: If there is a congressional statute that may conceivably be interpreted to authorize the executive's actions, the Court must decide whether Congress has authorized the action with adequate specificity. If the Court is wiling to infer broad authorization from general language, such a technique favors extensive policy-making by the executive. On the other hand, a requirement of explicit congressional authorization limits executive discretion and favors closer congressional control of actions related to war.

This was a question of great importance in the Hamdi case because the AUMF -- the statute that was enacted in response to the attacks of September 11 -- authorizes the President to enter into hostilities in very general terms. A question that divided the Justices, therefore, was whether authority for the military detention of citizens could be found in the broad language of the AUMF -- or whether more specific legislative authorization should be required.

What technique of statutory interpretation should be used in a case like Hamdi? In some instances, the Supreme Court has indicated that, in cases of foreign affairs emergencies, the Court should go as far as it can to find a form of congressional authorization -- even to the point of finding "implicit" authorization in statutes that may come close, but do not actually support the executive's action. This technique of authorization by analogy, notably employed by the court in Dames & Moore v. Regan, could also support a court in pushing as far as possible to find actual authorization within general statutory language. Such a view seems to be advanced, for example, by Justice Thomas in his dissenting opinion in Hamdi. Thomas cites Dames & Moore frequently, for the proposition that -- in foreign affairs -- the action of the President is "supported by the strongest of presumptions and the widest latitude of judicial interpretation."[26]

[26] 542 U.S. at 584 (quoting Dames & Moore).

Quite a different position, however, is suggested by the case of Ex parte Endo. This case arose out of the tragic forced removal of thousands of individuals of Japanese ancestry, both citizens and non-citizens, from the West Coast of the United States during World War II. In Hirabayashi and Korematsu, the Court found clear statutory authorization for orders requiring persons of Japanese ancestry to leave the West Coast of the United States.

Ms. Endo was an American citizen who had been required to leave the West Coast pursuant to this program; moreover, notwithstanding a finding that she was "loyal", the Government held her in detention in a "relocation center" in Utah. Granting a writ of habeas corpus, the Supreme Court unanimously ordered that Endo be freed from detention. Because important rights of liberty were involved, the Court imposed a very stringent requirement of explicit authorization; the Court found that because detentions were not specifically mentioned in the relevant statute, there was no Congressional authorization.[27]

In Hamdi, Justice Souter (joined by Justice Ginsburg) relied on Ex parte Endo in arguing that there was no statutory authority for the military detention of American citizens like Hamdi. According to Souter, the "interpretive regime" of Endo required a "clear statement"; Souter quoted language from Endo requiring that, for detention of citizens during wartime, "no greater restraint" should be allowed "than was clearly and unmistakably indicated by the language" of the statute. Moreover, the Non-Detention Act "meant to require a congressional enactment that clearly authorized detention or imprisonment."[28]

In sum, Souter argued that the AUMF did not authorize the detention of a citizen like Hamdi, because

> "like the statute discussed in Endo, [the AUMF] never so much as uses the word detention, and there is no reason to think Congress might have perceived any need to augment Executive power to deal with dangerous

[27] Similarly, a Presidential executive order did not mention detentions and thus also provided no authorization.

[28] Id. at 544.

> citizens within the United States, given the well-stocked statutory arsenal of defined criminal offenses covering the gamut of actions that a citizen sympathetic to terrorists might commit.[29]

In finding that the AUMF provided congressional authorization for the military detention of a citizen like Hamdi, O'Connor's plurality opinion cited neither Dames & Moore, on the one side, nor Ex parte Endo, on the other. Rather, the Court found that

> "the AUMF is explicit congressional authorization for the detention of... individuals who fought against the United States in Afghanistan as part of the Taliban... [D]etention of [those] individuals... for the duration of the particular conflict in which they were captured, is so fundamental and accepted an incident to war as to be an exercise of the 'necessary and appropriate force' Congress has authorized the President to use [in the Force Resolution]."[30]

Moreover, there "is no bar to this Nation's holding one of its own citizens as an enemy combatant", as the Court had in effect previously concluded in Ex parte Quirin.[31] Thus, the plurality ignores the narrowing interpretation suggested by Endo and, necessarily, adopts a somewhat broader view of the appropriate interpretation of congressional authorization to the President. Yet, on the other hand, O'Connor's plurality opinion does cast some doubt on whether the AUMF can be interpreted to allow indefinite military detention of enemy combatants, as the Government claimed. In seeking to sketch out some limitations -- based on the novel circumstances of the present conflict -- O'Connor seems to take a somewhat more restrained view than that suggested by Justice Thomas.[32]

---

[29] Id. at 547. In dissent, Justice Scalia (joined by Stevens) agrees with Souter that the AUMF does not authorize "detention of a citizen... with the clarity necessary to comport with cases such as Ex parte Endo... and Duncan v. Kahanamoku" or with the Non-Detention Act. Id. at 574.

[30] Id. at 517-18.

[31] Id. at 519.

[32] 542 U.S. at 521.

Indeed Thomas seems to draw, from the principles of Dames & Moore, an authority to hold enemy combatants even after active hostilities have concluded.[33]

In the Padilla case, the Court of Appeals for the Second Circuit also invoked Ex parte Endo, and the Non-Detention Act, to impose a requirement of explicit statutory authorization and to find that Padilla's military detention was not authorized by the AUMF. In the view of the Second Circuit, Padilla's case could be distinguished from Hamdi on the grounds that -- although both were citizens of the United States -- Hamdi was captured on the battlefield in Afghanistan, whereas Padilla was arrested in an airport in the United States. The Second Circuit's opinion was vacated by the Supreme Court, which found that Padilla's petition for habeas corpus was improperly filed in New York. But after the petition was properly filed in South Carolina, the District Court also cited Endo in finding that the AUMF did not authorize Padilla's detention -- although that decision was in turn reversed by the Fourth Circuit.

D. Individual Rights: Milligan and Endo v. Quirin, Korematsu & Eisentrager. Cutting across -- and influencing -- the arguments on the separations of powers were issues relating to the constitutional rights (if any) of the detainees, whether citizens or aliens. The parties advanced rather absolute views on this subject. The Government argued (and, indeed, continues to argue) that enemy combatants essentially have no rights under the American Constitution. In contrast, the detainees argued that they are entitled to procedural safeguard resembling those of an ordinary criminal trial.

The few relevant prior decisions of the Supreme Court also propounded fairly definitive views -- on both sides. Favoring an expansive view of rights we find the Civil War case of Ex parte Milligan, as well as the World War II case of Ex parte Endo, discussed above. On the other side, advancing a view of rights as narrow or nonexistent in this context are three other cases arising during World War II:

---

[33] Justice Thomas's opinion did, however, provide the fifth vote for a finding that Hamdi's military detention was authorized by the AUMF. Id. at 587-88.

Ex parte Quirin, Korematsu v. United States, and Johnson v. Eisentrager.

In the post-Civil War case of Ex parte Milligan, the Court granted the habeas corpus petition of an Indiana citizen who had been convicted by a military commission for aiding the Confederate cause. The Court found than an American citizen, who was not a member of the armed forces, could not constitutionally be tried by military tribunal -- even in time of war -- if the individual was not a citizen of a seceding state and resided in an area in which the civil courts were open and operating. Milligan has been considered a bulwark of civil liberty in the United States: a famous German writer, at the time a refugee from Nazi Germany, has written that it is the Milligan case that prevents the American government from erecting a Nazi-type "dual state" -- a state in which a relatively normal jurisdiction of the civil courts is accompanied by a parallel lawless military or Gestapo system.[34]

Milligan was qualified, however, by Ex parte Quirin, which considered the cases of German soldiers who, after being trained as saboteurs, entered the United States from German submarines during World War II. Speedily arrested, they were tried and convicted of war crimes by a military tribunal. The Supreme Court upheld these military convictions, even though one of the German soldiers claimed American citizenship, and even though the saboteurs were tried in an area (Washington, D.C.) in which the civil courts were open and functioning. Milligan was distinguished on the grounds that the saboteurs were "belligerents", actual members of an enemy armed force.

Strictly speaking, neither Milligan nor Quirin was applicable to the problem of the "enemy combatants", because those cases considered the permissibility of trial by a military commission, and not the question of military detention without trial.[35] Yet the government argued that

---

[34] Ernst Fraenkel, The Dual State 156 (1941). According to Fraenkel, when "during the Civil War, a dual state seemed imminent, the Supreme Court halted the development. In Ex parte Milligan, Justice Davis upheld the Rule of Law [and stated]: '... Martial Law can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction.'"

the implications of Quirin push toward recognition of broad military authority to hold "enemy combatants" (whether aliens or citizens), while counsel for the detainees argued that Milligan supported strong rights of due process, at least for citizens held within the United States or territories under its control.

In some ways, the decision in Korematsu[36] seems like a grotesque reverse variation on Ex parte Milligan. During World War II, thousands of individuals of Japanese origin (both citizens and aliens) were removed from the West Coast of the United States by the American military, pursuant to statutory authorization. The Government claimed that these individuals posed a risk of sabotage and espionage. Even though the Supreme Court conceded that classifications based on race or ethnicity are "immediately suspect" and deserve "the most rigid scrutiny", the Court upheld these massive removals on the basis of military necessity. The Court reached this conclusion even though the ordinary civil and criminal courts were open and functioning and were therefore well able to try any individual accused of sabotage, espionage or other criminal offense. Unlike Milligan, this case is, needless to say, not considered a bulwark of American liberty; rather it is now generally acknowledged to have been an inexcusable disaster.[37]

The Court attempted to recover its equilibrium in Ex parte Endo, a companion case decided the same day as Korematsu, in which (as we have seen) the Court found that there was no statutory or presidential authorization for continued detention of loyal citizens removed from the West Coast and held in "relocation centers" in the interior. Finally, in Johnson v. Eisentrager[38], the Supreme Court found that German aliens, who had been convicted of war crimes by an American military commission in China and were serving their sentences in Germany, had no right to file a petition of habeas corpus in an American court.

---

[35] Hamdi, 542 U.S. at 567 (Scalia, J., dissenting).

[36] Korematsu v. United States, 323 U.S. 214 (1944).

[37] See, e.g., Rostow, "The Japanese American Cases -- A Disaster", 54 Yale L.J. 489 (1945).

[38] 339 U.S. 763 (1950).

As noted above, these cases yield rather definite results, on both sides. In Milligan and Endo, the result was the detainee's immediate release from military custody. In Eisentrager, in contrast, the result was continued detention, without any rights to additional process; and the result in Korematsu was that the removal program was upheld, again without any requirement of additional process. (We have seen, however, that the actual military detention of loyal citizens could not be sustained.) Finally, in Ex parte Quirin, the Court sets its face against the arguments of the German saboteurs and was unwilling to grant rights for any additional process.

In Hamdi four judges argued for a form of definitive result along the lines of Milligan or Endo. In an extraordinary dissent, Justice Scalia (joined by Stevens) argued that American citizens, who were not members of the armed forces, could not be tried by military commission and thus must either be released or remitted to the civil authorities for criminal trial[39]; in making this argument, Scalia relied upon Ex parte Milligan, and minimized the force and applicability of Quirin. In Scalia's view, Congress could only change this result by suspending the privilege of the writ of habeas corpus. As we have seen, Justices Souter and Ginsburg reached a similar result by emphasizing the clear statement principle of Ex parte Endo.

But the plurality of the Court -- joined by Souter and Ginsberg, for the purposes of making a clear majority[40] -- reached an intermediate position. The plurality rejected the definitive views on both sides -- the government's view that the enemy combatants had very little in the way of due process rights and Scalia's view that civilian citizens cannot be held in military custody without a suspension of the writ of habeas corpus. Instead the plurality found that citizens could constitutionally be held as enemy combatants in military custody, but that constitutional rights of due process require a special form of hearing before a "neutral decisionmaker" to determine the question of whether the individual is indeed an enemy combatant. This hearing also requires adequate notice and opportunity to be heard, although principles of evidence and the burden of persuasion may be relaxed in favor of the Government.

---

[39] Hamdi, 542 U.S. at 554-79.

[40] Id. at 553.

This hearing is a minimum requirement of due process, determined by the plurality through a careful weighing of the contending interests. It is possible that the Court in Rasul implicitly imposes such a requirement for noncitizen detainees as well, although this point is less clear.

IV. Conclusion

Although we cannot predict the future, we can try to make sense of the past. In the 2004 enemy combatant cases, the Court confronted a number of issues on which prior cases, or principles drawn from prior cases, seemed to point in different directions. The Court resolved these tensions, at least provisionally, in the following manner.

1. Marbury v. Marbury. In cases involving the rights of individuals, even in wartime, the Court is unwilling to accord total deference to the decisions of the Executive and Congress. Accordingly, the political question doctrine is not available for the purpose of excluding judicial review of important questions concerning the rights of alleged enemy combatants detained by the United States military; rather, the courts must retain a significant role. Thus, in the 2004 cases, the judicial review strand of Marbury clearly prevails over the political question aspect of that case.

2. Youngstown v. the Prize Cases. On the tension between the congressional primacy of Youngstown and the direct presidential power of the Prize Cases, the Court did not make a clear choice. In the 2004 cases the Court did not find direct presidential authority -- but neither did it state that congressional authorization of detention was constitutionally required. Overall, however, the congressional principle of Youngstown seems at least to be holding its own. In Hamdi, four of the nine justices indicated that congressional authorization for the military detention of citizens was necessary -- and did not find that authorization. Another four justices rested on a finding of congressional authorization, without taking a position on whether direct presidential authority was present. Only one justice seemed to indicate a strong view that -- as the Government argued -- military detention of citizens was directly authorized by the President's power under Article II.

3. Dames & Moore v. Endo. On the question of the second level of tension between executive and congressional power -- the question of the interpretative technique to be applied to statutes possibly authorizing executive action -- the Court seems to tilt a bit in the direction of the President. Certainly the plurality in Hamdi tacitly rejects the clear statement principle of Ex parte Endo, although it does not explicitly adopt the technique of extended authorization propounded in Dames & Moore; and the Court also raises some doubt about authorizing an indefinite detention that could extend far into the future. Yet, in Hamdi, five justices find congressional authorization when (as Souter's opinion shows) there are strong arguments to the contrary.

4. Individual rights: Milligan etc. v. Quirin etc. On the question of individual rights in Hamdi, the Court rejects definitive positions on either side and adopts a nuanced and, indeed, rather modest approach. Instead of deferring to the executive's judgment (as the Government argued) or ordering Hamdi's immediate release from military detention (as Scalia and Stevens would require), the Court balances Hamdi's liberty interests against the Government's security interests and devises a nuanced procedural regime. Detainees challenging their status as enemy combatants may present their case before a "neutral decisionmaker" -- although a "presumption" in favor of the Government's evidence will probably make it difficult for a detainee to prevail in the end. Similarly, the Court in Rasul rejected the Government's argument that habeas corpus could not be filed by noncitizens held at Guantanamo -- thus also rejecting what would certainly have been a clear and definitive result. We do not know what rights the noncitizen detainees ultimately will have (if any). But at least one lower court has found that hearings of the nature of those accorded in the Hamdi case are constitutionally required for noncitizens as well.

A Further Condensation: Whether or not the general principles of the 2004 cases may be applicable to the future, a further condensation of these principles could be stated as follows: On the one hand the Court will strive to stay involved in separations of powers questions relating to individual rights, even in wartime, and it may be reluctant to find direct constitutional authority for significant presidential actions. On the other hand, the Court will probably be generous in finding authority for

executive actions in inexplicit congressional statutes and, when it intervenes to enforce constitutional rights, the Court’s remedies may well be procedural, nuanced, and modest.