

2015

Liberty, Security, and Judicial Review in the War on Terror: An Analysis of Supreme Court Approaches to Deference in a Post-9/11 Context

Jacob Oppler

The College of Wooster, jacob.oppler@gmail.com

Follow this and additional works at: <https://openworks.wooster.edu/independentstudy>

 Part of the [Constitutional Law Commons](#), [Military, War, and Peace Commons](#), and the [National Security Law Commons](#)

Recommended Citation

Oppler, Jacob, "Liberty, Security, and Judicial Review in the War on Terror: An Analysis of Supreme Court Approaches to Deference in a Post-9/11 Context" (2015). *Senior Independent Study Theses*. Paper 6908.

<https://openworks.wooster.edu/independentstudy/6908>

This Senior Independent Study Thesis Exemplar is brought to you by Open Works, a service of The College of Wooster Libraries. It has been accepted for inclusion in Senior Independent Study Theses by an authorized administrator of Open Works. For more information, please contact openworks@wooster.edu.

LIBERTY, SECURITY, AND JUDICIAL REVIEW IN THE WAR ON TERROR: AN
ANALYSIS OF SUPREME COURT APPROACHES TO DEFERENCE IN A POST-9/11
CONTEXT

By Jacob E. Oppler

An Independent Study Thesis
submitted to the Department of Political Science
at the College of Wooster
March, 2015
in partial fulfillment of the requirements of I.S. Thesis

Advisor: Dr. Mark Weaver

Second Reader: Dr. Kevin Marsh

Acknowledgments

There are many people to whom I owe an enormous amount of gratitude.

To my professor, advisor, coach, and mentor, Mark Weaver, thank you for everything you have done for me in my time at Wooster. Thank you for challenging me to think critically and supporting my academic pursuits in Political Science and Moot Court. I appreciate everything you have done to help me mature as a student and as an individual.

To my parents, thank you for every opportunity you have given me. Thank you for your constant support, guidance, and love. I will always be grateful for the sacrifices you have made for me, and the education you have given me. I love you.

To all of my wonderful friends and peers, thank you for your encouragement, companionship, and the experiences you have shared with me.

Abstract

In times of war, the government acts to suppress threats to national security, often curtailing or restricting American civil liberties. Over the course of American history, the Supreme Court has reviewed this legal conflict between civil liberties and national security policies during war. Scholars generally observe the Court's judicial review as deferential to the government. The War on Terror presents new and different challenges to American civil liberties. While this legal conflict has emerged again under the conditions of a war against terrorism, the war itself is markedly unlike past wars in American history. This research seeks to explain how the Supreme Court approaches deference in the Post-9/11 context. Using previous wartime contexts as a reference for Court behavior, this study examines the Court's deliberative review process in three Post-9/11 cases involving national security policies and civil liberties.

Table of Contents

Chapter One: Introduction	1
Chapter Two: Theory	6
<i>Inter Arma Silent Leges</i>	7
The “Old Judicial Deference” Model:	9
Alternative Theories:	11
Nuanced Deference	16
Chapter Three: Literature Review	17
History of American Civil Liberties vs. National Security	17
An Institutional Approach?	20
The Civil War, <i>Ex Parte Merryman</i> and <i>Ex Parte Milligan</i> :	23
World War I and Speech Rights:	27
World War II and the Detention of Japanese-American Citizens:	30
A New Wartime Context: the emerging Post-9/11 legal conflict	33
Notable Security Policies:	36
Guantanamo Bay	38
The early legal approach:	40
Chapter Four: Research Design and Methodology	42
Case Selection:	43
Decision Rules:	47
#1. Expertise:	47
#2. Prudence:	50
#3. Textual/Institutional Legitimacy:	53
#4. Precedent Legitimacy:	56
Chapter Five: Analysis	61
<i>Hamdi v. Rumsfeld</i> , 542 U.S. 507 (2004)	61
Background of the Case:	61
Analysis of the Court’s Opinion in <i>Hamdi v. Rumsfeld</i> :	63
First Question:	64
Second Question:	68
Third Question:	72
Appendix I	78
<i>Rasul v. Bush</i> , 542 U.S. 466 (2004)	81
Background of the Case:	81
Analysis of the Court’s Opinion in <i>Rasul v. Bush</i> :	83
Constitutional Question:	84
Appendix II	93
<i>Rumsfeld v. Padilla</i> 542 U.S. 426 (2004)	95
Background of the Case:	95
Analysis of the Court’s Opinion in <i>Rumsfeld v. Padilla</i> :	97
First Question:	99
Second Question:	105
Appendix III	112
Chapter Six: Conclusion	114
Overview of Results	114

<i>Hamdi</i>	115
<i>Rasul</i>	117
<i>Padilla</i>	117
Collective Summary	118
Bibliography	122
Supreme Court Cases Referenced	125

Chapter One: Introduction

Of the several constitutional issues presented before the United States Supreme Court, perhaps no struggle is more significant than the task of balancing the government's national security policies with the preservation of American civil liberties. Historically, the United States government has maintained an interest in defending the nation's population from security threats. The American public has likewise maintained an interest in retaining its most fundamental rights protected by the Constitution. Although this legal struggle has persisted throughout much of the history of the United States, its review before the U.S. judiciary has varied over time. My research investigates the ways in which the United States Supreme Court rules on Executive Branch security policies that conflict with American civil liberties in the Post-9/11 context. Specifically, my research explores the legal and theoretical frameworks that Supreme Court justices use to make decisions in cases that pit the citizenry's civil liberties against the government's interest in safeguarding the nation. This research will present a comprehensive analysis of the legal rationale behind the Supreme Court's approach to balancing these interests during times of national crisis or war.

My research topic stems from one of the most momentous events in American history. The attacks of September 11, 2001 represent a crisis that challenged the United States government in ways the nation had not been challenged before – yet certain government responses to the 9/11 attacks invoke a recurring legal issue throughout U.S. history. In times of national crisis, the United States responds to security threats, but often at the cost of neglecting or restricting American civil liberties. This political phenomenon surfaced during the U.S. government's response to the September 11 crisis, but also during several other conflicts in American history. National security policies have regularly shown themselves to clash with our

most valued civil liberties during these national crises, but the context of 9/11 is distinct. Nonetheless, in times of war and uncertainty, again and again, the issue surfaces: are these civil liberty principles absolute? Or does the State, from which these principles guard, have the legal authority to ignore or restrict these rights?

The legal authority to curtail certain civil liberties during war is unclear. On one hand, the government must realistically respond to threats against its citizens and national interests. On the other hand, those very citizens must retain their constitutional rights and protections. These are certainly issues of political and legal concern. In the United States, when legal conflicts arise, these issues navigate their way through the complicated U.S. judicial system. To understand how the legal issues resulting from the 9/11 attacks are settled, a review of specific legal cases can provide some insight. The following research will examine how a single institution – the United States Supreme Court – balances these two vital interests of security and individual liberty in the context of a War on Terror.

A critical examination of the Supreme Court's decision-making process is necessary to understand not only the judiciary as an institution, but also the legal and political implications of its judgments. The nation's Supreme Court serves as the principal authority on constitutional issues. In essence, the Court's decision in balancing these legal tensions indicates how the Constitution protects American civil liberties during war or national crisis. Although the American judicial system is vast and complicated, the decisions of the Supreme Court are considered paramount over all other legal decisions. The Court's decision on an issue informs the population of its rights and instructs the Executive Branch whether and how to implement, rectify, or terminate a policy. An understanding of the Supreme Court's review process is an

understanding of how the U.S. Constitution functions, and moreover, how it observes fundamental principles of civil liberty— especially during the Post-9/11 era.

In his book *All the Laws but One: Civil Liberties in Wartime*, Former Supreme Court Chief Justice, William Rehnquist, stated:

It is neither desirable nor is it remotely likely that civil liberty will occupy as favored a position in wartime as it does in peacetime. But it is both desirable and likely that more careful attention will be paid by the courts to the basis for the government's claims of necessity as a basis for curtailing civil liberty (Rehnquist 1998, 224-225).

Rehnquist's book was published just three years before September 11, 2001. In the time since Rehnquist made this prediction, the courts *have* been tasked with making decisions on issues related to national security and civil liberties. My research question asks: how does the Supreme Court balance national security policies with civil liberties in the Post-9/11 context with respect to deference to the government? To fully observe and understand the review process of these Post-9/11 Supreme Court decisions, I will describe the Court's process in other past wartime contexts. Therefore, my research will express how the Post-9/11 Court's legal process specifically compares to the balancing process of past wartime Courts. I hypothesize that the Supreme Court's balancing process will result in a continued pattern of deference to government policies in Post-9/11 cases, but the Court's deliberative process itself will be far more nuanced and complex than in past Supreme Court cases.

In the following chapters I will describe the historical context of the Supreme Court's approach to civil liberties and national security during war. This review will draw from literature that describes: the nature of the historical war or crisis, the government's policies, laws, or actions in response to the conflict, and how the Court approached the resulting legal issues. Next, I will develop a theoretical context to more precisely describe the dominant interpretations of the Court's approach to balancing liberty and security during war. As part of this review of the

established theories related to my research, I will draw from a collection of emerging theories that help illustrate the way in which I predict the Court will approach this legal issue in the context of Post-9/11. My collective review of history and theory will conclude with a brief review of the literature that focuses on Post-9/11 security policy and relevant commentary on the emerging legal conflicts.

After I have more clearly defined the historical contexts of the Supreme Court's approach to this legal conflict, the relevant theories (both conventional and contemporary), and described the security policies and legal conflict in the Post-9/11 period, I will describe the composition of my own research design. My research seeks to assess and explain the Court's deliberative process of balancing liberties and security by examining the Court's approach to deference. Based on the theoretical models described by the literature, I seek to explain whether and how the Post-9/11 Court's balancing process fits one of these models. While much research has been done to explain how the Supreme Court balances liberties with security, my research explores a somewhat unobserved area of the Court's approach. I will analyze the language of the Court's opinion as it pertains to the Court's consideration for deference to explain how the Court approaches this legal conflict. My analysis will build from a framework developed by Robert M. Chesney, professor at the University of Texas School of Law (Chesney 2009). Because my research seeks to understand the Court's balancing approach through its language, I will analyze the Court's opinion based on this framework, with specified criteria defined in my Research Design and Methodology chapter.

I will analyze each of the case studies, and express whether and how my analysis of the Court's decision-making process supports one of the theoretical models described in my Theory chapter. I will preface each case with a brief explanation of the legal facts, and the constitutional

questions presented for review. I will then analyze each case individually and record my findings. Lastly, I will describe what my analysis produced, how my analysis supports or rejects my hypothesis, and briefly discuss the implications of my research. While the study of the Supreme Court's constitutional interpretation is immense, my research specifically aims to explain how the Post-9/11 Supreme Court balances liberty and security by focusing on how the Court approaches deference to the government.

Chapter Two: Theory

The literature covering theories of constitutionalism during war is extensive. In this chapter, I will present some of the theoretical models that help describe how the Supreme Court approaches issues of civil liberties and national security. The theories that I will assess are specifically related to the Court's application of deference during war, with regard to issues of liberty and security. I will illustrate theories related to self-preservation and constitutional exceptionalism during war. I will then apply this broader theory to the Court's historical approaches to deference during war. This theory helps exhibit the traditional nature of the Court's approach to deference. Finally, I will explain alternative contemporary theories to help understand a different judicial approach to deference in more recent contexts.

The first set of theories demonstrates the conventional notion that the judiciary makes exceptions to protected civil liberties protections during war. I will consolidate these general theories into a single description of the Court's historical approach to deference. I call this approach "Old Judicial Deference," borrowing from the expression used by Kim Lane Scheppelle (2012). The prevailing theories about the Court's interpretation of the Constitution during war might be incomplete. The Post-9/11 era, and the ensuing War on Terror, presents a new space for constitutional theory on the Court's approach to deference. The last part of this section will attempt to illustrate some of these emerging theories. Again, I will draw from these theories to suggest an alternative approach to the Court's conventional use of deference. I call this approach "Nuanced Deference." I suggest that the prevalent theory of Old Judicial Deference can be supplemented by analyzing the Court's process to deference in the Post-9/11 era. While the traditional theories indicate the Court's continued approach of Old Judicial Deference during

war, I suggest that the emerging theories supporting the Nuanced Deference approach will be more appropriate to characterize the Post-9/11 Supreme Court.

Posner and Vermeule (2007) and Epstein et al. (2005) distinguish two theories, which I suggest best describe the two relevant constitutional approaches assumed by the Court during war. The first theory is that the Court assumes a “deferential view” whereby the Court’s review process is characterized as “relaxed or suspended” (Posner and Vermeule 2007, 15). This is also referred to as the “crisis jurisprudence” of the Court or the “crisis thesis” to describe the deferential treatment offered by the Court during war (Epstein et al. 2005, 6). Collectively, this theory suggests that the Court reviews the government’s wartime policies less stringently, or perhaps not at all, and defers to the government so that the Executive can properly address security threats (Posner and Vermeule 2007; see also Scheppele 2012, Matheson Jr. 2009). The literature references this theory as the courts’ dominant approach judicial review in war. This deferential theory has been empirically supported by American history; this approach represents the way in which the Court treats civil liberties and government policies “in our courts” (Posner and Vermeule 2007, 16). Summarized simply, when the United States is faced with a national security crisis, “the executive acts . . . and courts defer” (Posner and Vermeule 2007, 3).

Inter Arma Silent Leges

A common theoretical model of the Supreme Court’s balancing process during war can be described as broad deference to the federal government. However, there exists a wider theoretical principle that recognizes exceptions to constitutional standards during war or national emergency. Scholars, politicians, and theorists have often recalled the Latin proverb *Inter arma silent leges* to describe the function of the Constitution during war. This maxim translates to: “during war, law is silent” (Tushnet 2003; Lobel 2002; Turner 2003). Where a nation’s very

existence is threatened, it may be necessary to neglect or even violate constitutional principles. Rehnquist (1998) affirms that the phrase has some “validity” in observing judicial tendencies during war (224). Government policies have long substantiated this idea that times of crisis require the restrictions or neglect of constitutional norms for the preservation of the State. Turner (2003) counsels that it is important to consider this Latin phrase in light of the United States’ history of Executive power during war (333).

Scholars and theorists observe war and crisis as affecting, and moreover challenging, our conceptions of law, liberties, and constitutional protections. Sotirios Barber, professor government at the University of Notre Dame, and James Fleming, professor of law at Fordham University School of Law, suggest that our perception of war “exposes our view of human nature, the nature of the Constitution and of constitutional obligation . . .” (2005, 232). This precept might help explain why other theorists make exceptions to our most valued constitutional principles during war. Though the sentiment seems contradictory, the concept of self-preservation has resonated with even the most influential legal minds. Thomas Jefferson once suggested that the preservation of the nation bears greater importance than the laws for which the country stands. In a letter written in 1810, Jefferson noted that:

A strict observance of the written laws is doubtless one of the high duties of a good citizen, but it is not the highest. The laws of necessity, of self-preservation, of saving our country when in danger, are of higher obligation. To lose our country by a scrupulous adherence to written law, would be to lose the law itself, with life, liberty, property and all those who are enjoying them with us; thus absurdly sacrificing the end to the means (Baker 2002, 24).

Jefferson identified an obligation to preserve the State at the cost of violating the law. Political philosopher John Locke also affirmed that the “power to act according to discretion, for the publick [sic] good, without the prescription of the Law, and sometimes against it” is necessary above all for the preservation of the State (Scheppelle 2012, 97). Political Scientist and Cornell

professor, Clinton Rossiter once explained that the “constitutional state . . . is essentially designed to function under normal, peaceful conditions” and that without this environment, democratic values cannot survive (Brandon 2005, 13). Removed from the specific national security vs. civil liberty debate, a broader consideration for constitutional exceptionalism may be necessary to understand why the Court readily accepts the State’s interests as exigent during war.

However, the very meaning of the Latin phrase “*inter arma silent leges*,” suggests the Court’s review process is devoid of constitutional judgement altogether. The self-preservation theory seems to overstate the Court’s deference to the Executive during war. Mary Dudziak, Professor of Law at Emory University, and Richard Grimmett, international security specialist and author, note that perhaps law is “not *silent* during wartime, but it is generally assumed that law is *different* during wartime” (2010, 1679). The broader notion of self-preservation or constitutional exceptionalism helps understand the more specific theory of the Court’s deference.

The “Old Judicial Deference” Model:

Kim Lane Scheppelle, Princeton University Director of the Program in Law and Public Affairs, posits that the judiciary does not become entirely silent on issues during war, but it certainly tends to “at least hold [its] constitutional fire until the country is out of danger” (2012, 98). Scheppelle distinguishes this type of hands-off Court deference as “Old Judicial Deference” (2012). To more clearly define the conventional approach to deference, I too will describe this general theory as “Old Judicial Deference.” This approach is similar to the “deferential view” described by Posner and Vermeule (2007, 15). When this legal conflict is confronted in the courts, the judiciary tends to defer to the executive during war by ruling in favor of a government policy, or by evading the issue presented for review (Scheppelle 2012). The Court “tends to review potential infringements of civil liberties with extreme deference” (Wells 2004, 903). The

State “need merely raise the specter of national security” to receive the Court’s endorsement. (Wells 2004, 903). This is a broad characterization of the Court’s behavior, but it seems to be a common perception among scholars.

This theory encompasses both the self-preservation theory and an argument made by William Rehnquist in his book, *All the Laws but One* (1998). (William Rehnquist, it should be noted, served as Chief Justice of the Supreme Court from 1986 until his death in 2005.) Like Scheppele, Rehnquist (1998) contends that, over the course of history, few Supreme Court decisions during war have favored civil liberties. This is partially because of a “hierarchical system of courts,” according to Rehnquist, but also because of a general “reluctance” to rule against national security policy during a crisis (1998, 221). The courts tend to rule in favor of the government policy that restricts civil liberties when the courts “would not have done so” during peace (1998, 222). Scott Matheson Jr., professor of law at the University of Utah, discusses this theory too. He points out that the Court “generally has acquiesced in violations of civil liberties during times of crisis, at least until the crisis has ended . . .” (2009, 24). This would suggest that the timeframe during which the Court considers security policies and civil liberties bears significance. This theory suggests that the Court will favor security policies when it reviews a case *during* the crisis, but will more likely favor liberty protections *after* the course of war (Rehnquist 1998).

Rehnquist views this Court approach as a balancing process between liberty and security. In war, the balance leans in favor of the government because of perceived wartime exigencies (1998, 222). But judicial decisions favoring security interests are not, themselves, the only form of “deference” shown by the Court. Rehnquist, like Scheppele (2012), notes that federal courts “may simply avoid deciding an important constitutional question in the midst of a war” and leave

difficult questions unanswered (1998, 221). He maintains that there is a historical pattern of federal courts avoiding constitutional issues, effectively leaving State policies intact (1998, 221). Thus, a contested government action or policy might go un-reviewed entirely. This approach does not suggest that the Supreme Court is dormant or failing to engage in its duties as a branch of government. While the Supreme Court is not necessarily *silent* during times of conflict, its judicial approach will often frame national security policies as “substantial and exigent” compared to individual rights (Brandon 2005, 18).

Examples of this unrefined and rather one-dimensional standard of deference are found throughout history. One of the most commonly cited examples of this theoretical approach by the Court comes from its decision in *Korematsu v. United States*, 323 U.S. 214 (1944). Several scholars have cited this World War II-era case as a textbook example of a decision that largely ignored fundamental liberty interests. Christina E. Wells, professor of law at the University of Missouri, explains that the Court hardly considered “the government’s evidence (or lack thereof)” of any necessity to suppress individual rights (2004, 904). The Court’s deference to the State in *Korematsu* appears to be neither rare in its application, nor in its general reasoning. In cases from both World Wars the Court granted this broad, static model of Old Judicial Deference to the government (Rehnquist 1998; Wells 2004; Scheppele 2012).

Rehnquist mitigates this theory to some degree towards the end of his book, noting “it is both desirable and likely that more careful attention will be paid by the courts to the basis for the government’s claims of necessity as a basis for curtailing civil liberty” (1998, 224-225). This model of judicial deference has prevailed over time as a conventional theory of the Supreme Court’s approach to judicial deference.

Alternative Theories:

Some scholars have expressed doubts that the Court's approach to deference is standard and one-dimensional during war. There are emerging alternative positions on the Court's approach to liberty and security issues during war. Although they refute the general theory that the Court approaches deference broadly and uniformly, I will develop my own theory based on some of these alternative observations.

The first alternative theory alludes to Mark Tushnet (2003). What Tushnet refers to as "Social Learning theory," is that which I use to support a new potential theoretical approach. To unpack this version of social learning, it is important to note that Tushnet addresses a phenomenon of bureaucratic decision-makers and government policies related to national security. Described as a "general pattern of retrospective adjustment of our understanding of civil liberties," social learning theory suggests that an institution perceives the policies of the past with an understanding of their faults or legal deficiencies. (Tushnet 2003, 292). Tushnet suggests that the government has reduced the rights-restrictive nature of its wartime policies with each successive war (2003, 295). For example, he points to recent policy changes within the Bush administration in the War on Terror; the administration's early and "problematic" policies have slowly transformed and have been supplanted by "less troubling" policies (2003, 296).

This theory "does identify a real process in which government policy in response to emergencies has a decreasingly small range . . ." (Tushnet 2003, 298). Theoretically, State policies that once limited civil liberties are acknowledged (publically or internally within agencies), and remedied in future circumstances. This approach describes the government as responsive to past policy deficiencies. While government officials might have carried out actions, detrimental to citizens' constitutional rights, a retrospective assessment of the old policies should inform policy-making with greater respect for the public's civil liberty interests.

Using Tushnet's theoretical model of governmental social learning, I suggest that the social learning theory applies to the judiciary. Whereas Tushnet (2003) suggests that administration officials will be more cognizant of their decisions based on past policies, I suggest that the Court will examine the specific contexts of each case as they relate to past circumstances, and ultimately past decisions. For the purposes of my Supreme Court case studies, I am only concerned with this theory as it relates to the judicial branch of government. Aziz Huq, professor of law at the University of Chicago Law School, suggests that the judiciary as an institution could assume an approach to balancing liberty and security in a manner that resembles the social learning theory. Huq notes:

Courts . . . will generally accord deference to claims of necessity but resist claims of government power that track or echo historically discredited models. Taking social learning seriously, courts after 9/11 would resist measures that resembled past discredited security efforts, while accepting innovations. Dissents from today's decisions that endorse novel security responses would one day be celebrated as prescient when new information emerges about the flaws in current security problems (2010, 20).

Under my model, social learning theory posits that the Court's application of deference to the State will be predicated upon a very nuanced, detailed scrutiny of a government's policy. The approach requires the Court to carefully review security cases with consideration of past security policies *and* past Court decisions based on those policies.

There are some empirical examples of this theoretical model in the Court's own history. Shira Scheindlin, a U.S. District Court Judge, and Matthew Schwartz, law clerk to Hon. Scheindlin, explore the World War I decisions of Justice Oliver Wendell Holmes. In *Schenck v. United States*, 249 U.S. 47 (1919), where the Court deferred to the State at the cost of restricting First Amendment protections, Justice Holmes concluded:

The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. . . . The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and

present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right (Scheidlin and Schwartz 2004, 1617) (emphasis omitted).

In these remarks, Justice Holmes provides a clear example of judicial deference to the government, implicating First Amendment protections. However, Scheindlin and Schwartz note that Justice Holmes' views changed dramatically in his dissenting opinion in *Abrams* during the same World War I period. Justice Holmes wrote in his dissent:

Congress certainly cannot forbid all effort to change the mind of the country. Now nobody can suppose that the surreptitious publishing of a silly leaflet by an unknown man, without more, would present any immediate danger that its opinions would hinder the success of the government arms or have any appreciable tendency to do so (Scheidlin and Schwartz 2004, 1618).

Justice Holmes' deference to the government was quickly replaced by a defense of civil liberties during the same war period. This specific example is not entirely emblematic of the social learning theory but it does reveal some form of social learning. Stone (2003) affirms that the Supreme Court eventually "overruled every one of its World War I decisions," and held that "every one of the individuals who had been [convicted in those cases] . . . had been punished for speech that should have been protected by the First Amendment" (228). While the admission of erroneous decision-making hardly reconciles the past neglect of individual freedoms, the gesture has important implications. This is indicative of social learning patterns in the Court. Former Supreme Court Justice Wiley Rutledge once admitted the "anguish" he felt in retrospect as part of the Court's majority opinion in *Korematsu* (Stone 2003, 233). This progressive consideration *is* indicative of the social learning theory that I describe. Epstein et al. describe this view as the "learning effects" of the Court, whereby "with each passing war, the Court becomes less likely to

suppress rights because the government – perhaps because it has learned from the Court and its own past mistakes – becomes less bent on curtailing them” (2005, 29).

Scheppele posits a different approach of the Supreme Court. This model is described as “New Judicial Theory” (2012). Scheppele uses the Court’s Post-9/11 decisions to describe New Judicial Deference as a theoretical model. She suggests that, although the Court has taken an approach that looks as if it has supported a decision in favor of detainees, its continue to defer to the government in practice (2012). The Court avoids answering questions that would specify constitutional remedies to the questions at issue, and simply leaves “many questions open” (Scheppele 2012, 161). This theory can be summarized as an approach whereby “a single judicial opinion pulls in both directions at once” (Scheppele 2012, 157). Although many lauded the Court’s decisions for ruling against *certain* government actions in its holding, the decision did not really offer substantial support for civil liberties. Scheppele suggests *Roe v. Wade*, 410 U.S. 133 (1973) provides an example of the New Judicial Deference approach: “the Court created what appeared to be an expansive right,” but the procedural difficulty of receiving an abortion in practice did not truly favor this right in reality (Scheppele 2012, 157). This theory suggests that even though the Court’s approach does not appear to favor the government – and might even explicitly rule in favor of civil liberties – the outcome is still unfavorable individual liberties because the Court does not offer a practical remedy to the issues. Scheppele explained of the Post-9/11 Court cases:

The suspected terrorists were told by the Court that they had rights, and the president, Congress, and the lower courts were told to act accordingly. The petitioners could not realize these rights, however, not because the Court ultimately ruled against them . . . but instead because the Court gave them rights that were all dressed up but had nowhere to go (2012, 164).

This approach defined by Scheppelle provides a strong foundation for my research. Because of the modernity of this theory, and specific relation to the Post-9/11 Court, I suggest that this alternative theory about the Court's review of liberty and security is most applicable. Taking Tushnet's social learning model and Scheppelle's New Judicial Deference model, I suggest that the Court's review of these Post-9/11 cases will be mindful and cautious in considering deference, perhaps relying on its past decisions as guidance. This approach, relying on both Tushnet (2003) and Scheppelle (2012) is what I describe as "Nuanced Deference."

Nuanced Deference

The American judicial process is complex and takes significant time to render effective and tangible interpretations of the law. I suggest that this process plays a role in a possible emerging approach of the Court. Scheppelle (2012) suggests the Court's review of Post-9/11 cases favors the executive even though the Court's decision provides "inspiring rhetoric" (157). I suggest this rhetoric is, itself, an indication of a different approach to deference. Scheppelle is generally critical of the gap between what the Court's opinions appear to offer, and how the Court's decisions realistically affect individual rights. But again, changes in the complicated and slow-moving judicial system do not appear immediately. Where Old Judicial Deference represents the traditional approach of the Court during war, the changing rhetoric and general reflection of civil liberties suggests the Court may adopt an intricate and nuanced approach to deference. Perhaps, as Scheppelle (2012) posits, the Court does not tackle the truly contentious issues. But as part of the gradual development of the judiciary as an institution, Nuanced Deference represents a different approach to judicial review during war. Nuanced Deference suggests that the rhetoric – the Court's language – provides evidence of a more reflective and conscious consideration of individual rights in its approach to deference.

Chapter Three: Literature Review

History of American Civil Liberties vs. National Security

The first part of this chapter will establish a broader historical background of the legal struggle between civil liberties and national security. I will describe several wartime contexts to illustrate this conflict, and review how scholars view the judiciary's approach to the legal struggle between these two important interests. The particular legal conflict between liberties and security is not a new development in American history, but it is a relevant one. The collective literature has identified the legal struggle for a balance between the government's interest in national security, and the public's interest in retaining civil liberties dating back to the 19th century (Stone 2003; Rehnquist 1998; Lobel 2002). The Supreme Court has reviewed this issue several times before under varying circumstances. The continuity of this conflict over time may be indicative of its legal complexity and its unresolved nature. The literature reveals that this phenomenon draws from a longstanding pattern of policies specific to war or crisis responses over the course of American history (Baker 2003; Cole 2003; Scheppele 2012).

When a national crisis or war tests government officials, the policy responses to national security threats tend to reduce the scope of civil liberties. David Cole, professor of law at Georgetown University, notes that the government's policy officials tend to view national security as of vital importance and treat civil liberties as "mere obstacles to effective protection of the national interest" (2003, 2567). Cole (2003) more specifically identifies three significant moments in American wartime history to support this view; the events of The Civil War, World War I and World War II have all presented challenges to the country's civil liberties (see also Tushnet 2003). Furthermore, these moments of national crisis exposed the deferential nature of the Supreme Court during war (Cole 2003). Christina Wells, professor of law at the University of

Missouri, describes the common scenario in which “government actors can err by misperceiving that certain groups pose a danger,” or by applying restrictive policies that seem to violate protected liberties (2004, 908). This appears to be a recurring pattern in light of *habeas* suspension during the Civil War, speech restrictions during World War I, and detention policies during WWII. United States security policies have often diminished constitutional protections in an effort to enhance national defense. In the following section, I will review the nature of these three wartime conflicts, and describe how the Court addressed cases resulting from these crises.

How – if government wartime policies do adversely affect civil liberties – does the Court’s judicial authority check these State policies? When charged with balancing these conflicting interests, the United States Supreme Court conforms to a typical decision. The literature tends to agree that, where the judiciary reviews the constitutionality of government policies, the U.S. court system has generally offered great leniency to the government during war (Chesney 2009; Tushnet 2003; Posner and Vermeule 2005) (but see Issacharoff and Pildes 2005).¹ Eric A. Posner and Adrian Vermeule, professors of law at the University of Chicago and Harvard Law School, respectively, offer a concise summary of the literature’s understanding of the Court’s tendencies: “Conventional wisdom among constitutional lawyers . . . holds that courts defer heavily to government in times of emergency, either by upholding government’s action on its merits, or by ducking hard cases that might require ruling against the government” (2007, 16).

Cole (2003) classifies the American court system as largely “ineffective” at protecting civil liberty when the nation perceives serious threats to security (2568). According to Jules Lobel, professor of law at the University of Pittsburgh School of Law, the Court has been

¹ Issacharoff and Pildes (2005) explain that, “courts have also been reluctant to find that the executive has unfettered discretion to make trade-offs between liberty and security” (162).

historically complaisant of the government's actions during crisis (2002, 768). Lobel explains that the Court has "generally acquiesced in these violations of civil liberties during war . . . at least until after the war or perceived emergency was over" (2002, 768). There is agreement among scholars that the judiciary simply conforms to the policies of the wartime State, often at the cost of individual liberties. This is reflective of the broader theoretical model of the Court. According to Political Scientist, Clinton Rossiter, the courts may not have the capacity to control the policies of the Executive even in rendering a decision. Rossiter contends that:

[T]he courts of the United States, from the highest to the lowest, can do nothing to restrain and next to nothing to mitigate an arbitrary presidential military program suspending the liberties of some part of the civilian population. . . . Whatever relief is afforded, and however ringing the defense of liberty that goes with it, will be precious little and far too late (Cole 2003, 2568).

Regardless of their judicial authority, the American courts seem to do very little in practice to adequately balance the government's power with the public's freedoms during war. The literature generally concludes that the Court accommodates the government when it reviews this legal conflict. In very plain terms, the notion "that the Court acts to suppress rights and liberties under conditions of threat . . . has been so widely accepted since the World War I period, that most observers no longer debate whether the Court, in fact, behaves in this way" (Epstein et al. 2005, 5-6).

Most scholars seem to adopt this understanding of the Court's approach, but there are a few counter-examples to provoke further debate. Some arguments initially try to rebut the common narrative, but only a few seem to gain any traction. For example, Mark A. Graber, adjunct professor of law at the University of Maryland, suggests that the "canonical narratives [describing this conflict]" neglect to describe certain "instances in which military conflict inspired some government officials to increase protections for civil rights and liberties" (2005,

96). However, Graber's examples, by his own admission, offer very little substance to refute the general findings of the collective literature. He points out that the U.S. government made efforts to promote racial equality during the Civil War, World War II and the Cold War. He also adds that the Supreme Court even ruled that "the government could not compel students to salute the flag" in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943) (2005, 96). Ultimately, Graber concedes that these contrary examples do not represent "a comprehensive account of freedom when the United States is at war . . ." (2005, 114). These occasions described by Graber do seem inconsequential. There are not many evident counter-arguments to the broad collection of literature that converges on the issue. However, there are two distinct studies that do present a compelling alternative to the literature's discussion.

An Institutional Approach?

Perhaps the most compelling example of research that contradicts the literature's common theme is the work done by Lee Epstein, Daniel Ho, Gary King, and Jeffrey Segal (2005) and Issacharoff and Pildes (2005). Both Epstein et al. (2005) and Issacharoff and Pildes (2005) note that the literature tends to view the Court's wartime constitutional interpretation as a duality – two competing approaches. The common approach simply addresses two sides of a dichotomy, each advocating for different approaches to constitutional balance. Issacharoff and Pildes identify, on one end, the "executive unilateralists," who tend to favor complete and decisive Executive "discretion" during war "not subject to oversight . . ." (2005, 162). On the other end, is the "civil libertarian" faction, who rejects an approach that requires "trade-offs between liberty and security" during war (2005, 162). Epstein et al. theorize that:

[T]he Supreme Court decides cases most related to war from an *institutional-process* perspective rather than from a first-order *balancing* of security and liberty rights. Because the institutional-process dimension is mostly unrelated to conventional rights-oriented conceptions, the presence of war does not necessarily tilt the Court in favor of security

for war-related cases. Conversely, in cases unrelated to war, the Court seeks to balance security and liberty interests, as scholars have commonly conjectured, and the presence of war does tilt the Court in favor of security (2005, 9) (emphasis added).

In a comprehensive quantitative analysis of the Court's approach to civil liberties spanning over several years, Epstein et al. note that "none of the cases [observed] presented clear-cut victories for executive unilateralists or civil libertarians" (2005, 110). They maintain that the Court does not really *balance* liberty with security in cases related to the war itself. Instead, the Court "seeks to shift responsibility towards Congress and the Executive" when it reviews a case directly related to a war (Epstein et al. 2005, 74). Moreover, they point out that the literature tends to emphasize certain cases that take place during crises; this makes it much more difficult to understand the Court's behavior "in the absence of a war since [this emphasis] relies on large invariance assumptions about how the justices would have decided similar cases in a time of peace" (Epstein et al. 2005, 40-41). While their quantitative approach examines the broader behaviors of the Court, and accounts for both war-related and non-related cases, my own analysis of the Court's Post-9/11 decisions can build off of this research's findings. My own research relates to that of Epstein et al. (2005): it analyzes the Court's deliberative review process – something that Epstein et al. contend falls beyond executive unilateralism and civil libertarianism.

The research question that I seek to answer is not: *whether* the Court defer to the government's wartime decisions (much of the existing literature confirms that it does) – or *should* the Court defer to the government's wartime decisions (this would prompt a normative approach) – but *how* the Court goes about such a complicated process of review. Because there seem to be some conflicting interpretations of the Court's approach to liberty and security during war, it is worth expound upon these foundations in the literature. Because it *is* generally

understood that the Court *does* defer to the government, my research will specifically focus on this deferential process. Epstein et al. (2005) and Issacharoff and Pildes (2005) identify gaps or omissions in the dominant literature. They do not necessarily refute claims that the Court defers to the Executive in practice, but they do seem to dispute and challenge the way in which the broader literature understands the Court's behavior. They explain that the Court's review process during war might not be entirely focused on a process balancing liberty and security, but rather a process that is determined by institutional conditions. In sum, the contentions forwarded by Epstein et al. (2005) and Issacharoff and Pildes (2005) raise alternative questions about the decision-making process of the Court.

I have mentioned the term "deference" several times now to describe the nature of the Court's judicial review during war. It is necessary to clarify this term in order to understand how I use it, and to understand how the literature describes the Supreme Court. Jonathan Justl, Yale Law School J.D., provides an apposite definition for judicial deference that clarifies the term. Justl wrote in 2010:

Deference requires two elements. The first is freedom to reach an independent conclusion disagreeing with the decisionmaker [sic] in question. The second is an affirmative choice to accept another decisionmaker's [sic] conclusion without reaching an independent conclusion (285).

This definition of judicial deference, thus, encompasses either the Court's decision to explicitly and directly rule that the government's actions are constitutional, or the Court's decision to implicitly approve of the government's actions, without expressly ruling that they are constitutional.

The historical description of the Court covered in the literature also presents a common theme. While the literature tends to agree that the Court has historically assessed this conflict with great deference to the State, there is some evidence that this has not always been the case.

Lobel (2007) suggests that the Supreme Court's early decisions in the years following the Constitution were unlike those of the Court in more recent times. The literature conforms to a common understanding of judicial deference to the State. But there are gaps in these general claims. Lobel (2007) offers an important alternative point that seems to be unobserved in much of the literature. The Supreme Court in the early 19th century *was* willing to review the government's wartime policies and their "lawfulness" (Lobel 2007, 56). It is, therefore, important to narrow the scope of the literature that characterizes the U.S. court system during war. Unlike the institution described by much of the literature, the pre-Civil War Supreme Court resembled a judicial arbitrator that *was* willing to address the legal conflict between security and liberty. Lobel explains that:

These early [Supreme Court] decisions reflect three broad principles. First, the judiciary upheld congressional power to regulate not only the decision to go to war but the scope and methods by which warfare would be conducted. Second, the courts took a very narrow view of the executive's inherent powers in time of war in the absence of congressional authorization. Third, the courts were willing to scrutinize executive claims of military necessity, *even on the battlefield*, to determine whether executive officials had acted lawfully (2007, 53).

Based on the institutional differences between the Court during the early 19th century, and during the later part of the 19th century, it is crucial to review the literature's historical account, as it describes the Court after the Civil War, to accurately describe the institution.

The Civil War, *Ex Parte Merryman* and *Ex Parte Milligan*:

The American Civil War presents a historical example unlike any other in the history of U.S. national security. It is largely considered the United States' most threatening security crisis (Stone 2003, 219; Rossiter 1948, 223). This domestic crisis, which geographically divided the Union North from the Southern states, also marks one of the judiciary's earliest challenges of wartime decision-making.

From its outbreak, the war tested the country militarily, but also civilly and in the courts. In April 1861, several hundred Union troops from Massachusetts arrived in Baltimore, Maryland, prepared to move south to defend Washington, D.C. in the early stages of the war (Rehnquist 1998). The militia was stopped in Baltimore by a mob of “twenty thousand Confederate sympathizers” who clashed violently with the Union soldiers, resulting in the deaths of two troops and four citizens (Rehnquist 1998, 20-21). In all, the clash led to widespread riots in Maryland, to which President Lincoln responded by declaring “martial law” in the state and suspending *habeas corpus* (Stone 2003, 220).

This term, *habeas corpus*, is Latin for “You may have the body.” The *Legal Information Institute* at Cornell University Law School describes the writ of habeas corpus as a mechanism of the U.S. court system, which ensures that no citizen is imprisoned without reason and, above all, without judicial review. Essentially, the writ of habeas corpus is an injunction that is filed on behalf of a prisoner to determine the status of imprisonment as lawful or unlawful (Cornell University Law School n.d.). The concept of habeas corpus can be traced back to English common law, and its implementation in U.S. law can be found in Article I, Section 9, Clause 2 of the Constitution: “The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it [sic]” (Cornell University Law School n.d.; Constitution of the United States).

As part of the civil unrest and executive takeover in the state of Maryland, the arrest of John Merryman led to an important example of the judiciary’s intervention during war (Stone 2003, 220). In *Ex Parte Merryman* 17 F. Cas. 144 (1861), Chief Justice Roger Taney ruled that President Lincoln had unconstitutionally suspended the writ of habeas corpus, holding that Congress was the only government institution with the power to suspend the writ (Baker 2002,

24; Cole 2003, 2571; Rehnquist 1998, 36). This decision marks an important judicial rejection of executive authority during war. Although it is a case of severe liberty restrictions, during an extraordinary security crisis, Chief Justice Taney's denial of executive power during such an intense and dangerous national crisis presents a unique case of judicial intervention. Nonetheless, President Lincoln refused to adhere to the ruling in the case. Cole (2003) mitigates the judiciary's forceful stance against the government, noting that President Lincoln "simply ignored Justice Taney's decision altogether" (2571).

Clinton Rossiter (1948) maintains that Lincoln asserted new wartime authority, never before adopted by the Executive nor vested in Congress by the Constitution (233-234). Lincoln's encroachment of constitutional authority has raised questions about the exigency of federal power during war. Clearly, the President acted beyond the limits of his legal authority, and American civil liberties were curtailed to a great degree. But Rehnquist (1998) poses: "Should [President Lincoln] have carefully weighed the pros and cons as to whether he was authorized by the Constitution to do this before acting? . . . Cast in these terms, it is difficult to quarrel with his decision" (223).

Merryman was not the only Civil War litigation to reach the federal courts. In fact, the Supreme Court offered perhaps the most powerful decision in favor of individual liberties in *Ex Parte Milligan*, 71 U.S. 2 (1866). In the wake of Confederate rebellion, the Court was tasked with a decision about the U.S. military's constitutional power to try a U.S. citizen with espionage or conspiracy against the State.² Lambdin Milligan, the convicted defendant in the case, was tried and sentenced to death by a military commission (Stone 2003, 222). The Court emphasized

² It is worth mentioning that, while Milligan's alleged offenses against the State and his preliminary proceedings transpired during the actual course of hostilities of the Civil War, the Supreme Court reached its decision after the war ended.

the State's violation of the Separation of Powers clause, ruling that the military is not constitutionally authorized to conduct judicial review of U.S. citizens for crimes against the government. Justice Davis, delivering the Court's opinion, determined that military tribunals are not a legal substitute for civil or criminal courts when such court systems are open and functioning (Rehnquist 1998, 129; Cole 2003, 2572). Justice Davis continued to assert two other important standards. First, that the right to a writ of habeas corpus could be suspended only under the provisions of Article I, Section 9 of the United States Constitution. But even if habeas corpus is suspended pursuant to this constitutional clause, such a suspension does not allow the government to conduct its own trials (Rehnquist 1998, 131). Second, Justice Davis determined that government power under martial law has legitimacy only when security threats are tangible and present, not simply asserted by conjectural claims (Rehnquist 1998, 131). This wartime ruling – among the first to address security and liberty conflicts during war – laid a foundation for very basic rights to a writ of habeas corpus.

The ruling in *Milligan* is unique. The case stands out as a bastion for American civil liberties during times of military conflict. There are very few, if any, cases in the Court's history that offer such wartime protection from the Executive branch. However, the *Milligan* decision is an outlier in a broader history of Court. Cole (2003) suggests that *Milligan* appears to be an exceptional decision in support of liberty, but notes that the ruling came after the Civil War had already ended (2576). As precedent, the case has been repeatedly circumscribed, restricted, and disregarded during other wartime cases before the Court. Scheindlin and Schwartz assert that “most scholars” realize the minimal impact the *Milligan* decision had on future issues between liberty and security (2004, 1616). The circumstances of the Civil War and the illegal military trial in *Milligan* are undoubtedly unique events, but the Court's broad ruling favoring of civil

liberties in this case *is* an exception to an otherwise deferential history of Court decisions in favor of the government and military.

World War I and Speech Rights:

The United States' involvement in Europe's Great War resulted in the first large-scale restrictions of speech rights in the 20th century. In response to the breadth of anti-war sentiment from groups of "German-Americans, Irish-Americans, socialists, pacifists, and anarchists," who were "sharply critical of the Wilson Administration," the United States entered into an era of speech-restricting wartime policy. Wells suggests that the government manufactured "an internal threat" as part of its "national security agenda" to inflame the public and garner support for the war (2004, 910). The Wilson Administration sought popular support for its policies by adopting fierce pro-war rhetoric. Wells points to President Wilson's 1915 State of the Union address in which he declared: "The gravest threats against our national peace and safety have been uttered within our own borders" (2004, 910).

The legislative branch also challenged civil liberties during World War I. With its passage of the Espionage Act of 1917, Congress "made it a crime for any person willfully to 'cause or attempt to cause insubordination, disloyalty, or refusal of duty in the military . . .'" (Stone 2003, 223). Stone explains that the legislative intentions of Congress were tailored to confront "very specific concerns" in terms of military operation, but the administration interpreted the law with far more rigidity (2003, 223). The next year, Congress passed the Sedition Act of 1918, which aimed to eliminate speech that might incite seditious acts. Scheindlin and Schwartz (2004) maintain that the government proceeded "in a widespread and systematic way, to imprison those Americans that opposed the war effort in word, rather than in deed" (1617). This law criminalized "any disloyal, profane, scurrilous, or abusive language about

the form of government of the United States, or the Constitution of the United States, or the flag of the United States, or the uniform of the Army or Navy . . . ” (Scheidlin and Schwartz 2004, 1617).

Congressional legislation and executive policies developed under the Wilson Administration embody some of the more restrictive government policies against speech during this period of war. By the standards of the legislation that had actually been passed into law, President Wilson had “advocated [for] a more repressive version” of the law and his Administration interpreted the law “with little prosecutorial restraint” (Matheson Jr. 2009, 54-55). Nearly 2,200 citizens were prosecuted by the Department of Justice for offenses that included charges for “disloyal, seditious, or incendiary speech” (Matheson Jr. 2009, 55). The implementation of these reactionary laws became corrosive to some Americans’ free speech and press rights throughout much of the war, but the literature seems to characterize the severity of these policies to varying degrees. Although Matheson Jr. (2009) and Scheindlin and Schwartz (2004) characterize the government’s policies as noticeably detrimental to American civil liberties, Rossiter (1948) refutes the broadness of this claim. In fact, Rossiter contends that American civil liberties were “neither actually nor potentially . . . abridged to any serious degree in the course of the first World War” (1948, 250). Curiously, Rossiter (1948) does identify “outright limitations on American liberty” in the form of speech and press restrictions (251), but he notes that most ordinary citizens and press organizations were unaffected by the laws and administrative policies during World War I (253). Despite some of the literature’s conflicting claims about the severity of these security policies, many observers agree that the courts displayed little sympathy for individual liberties during World War I.

For the most part, lower courts “and ultimately the Supreme Court” granted broad deference in favor of the government policies, upholding convictions of many citizens and “punishing violators severely” (Matheson Jr. 2009, 57) (but see Stone 2003).³ The Supreme Court heard several cases related to the World War I domestic government policies. In *Schenck v. United States*, 249 U.S. 47 (1919), the Court demonstrated its deferential nature, denying First Amendment protections (Scheindlin and Schwartz 2004, 1617). The Court also ruled in favor of the government in *Abrams v. United States*, 250 U.S. 616 (1919), upholding the conviction of war protesters who distributed anti-war pamphlets (Dudziak and Grimmett 2010, 1680). Several other salient cases, similar to these speech-related issues, were brought before the Court with similar results (Stone 2003; Rehnquist 1998). The literature tends to focus on these consistent rulings in favor of the government.

The series of decisions handed down by the Court in response to these World War I laws is distinguishable from the direction of the *Milligan* decision. While the administration acted to draw back civil liberties, the judiciary proved ineffective in limiting these “aggressive prosecutions” (Matheson Jr. 2009, 61). As Rehnquist concludes in his book – and as is demonstrated by the World War I courts – where a “decision is made after hostilities have ceased, it is more likely to favor civil liberties,” such as in *Milligan* (1998, 224). But during the continuation of hostilities, the Court appears less inclined to grant liberties such protection. Rehnquist’s latter conclusion applies fittingly to the Court rulings during the course of the Great

³ Stone (2003) concurs that very “few” judges came to the aid of the First Amendment rights, but pulls some rare exceptions from district court judges who “stood fast against the tide [of government policy]” (226). Although my research will not analyze the judgments of lower federal courts, the existence of lower-level federal rulings in favor of civil liberties during a period of such pervasive liberty drawbacks, suggests at least some legal resistance to sweeping security measures. These few district court exceptions are certainly contrary to the general pattern of judicial deference during World War I.

War. The World War I cases present issues exclusively related to speech and press liberties. Moreover, although the Wilson Administration sought to extinguish anti-war sentiment at an administrative level, Congress also imposed statutory limitations on liberty.

World War II and the Detention of Japanese-American Citizens:

The government's wartime policies during World War II exhibited strict limitations on the physical freedom for many American citizens in the western United States. Following the attack on Pearl Harbor in December 1941, President Franklin Roosevelt issued Executive Order 9066, establishing what became a program "of internment of Japanese-Americans on the West Coast" (Stone 2005, 228-229; Baker 2002, 25). While the military fought abroad in both the Pacific and European theaters, domestic policies in the Western U.S. states during this period reflect a clear reduction of civil liberties. As many as 110,000 Americans of Japanese descent were imprisoned during the Second World War, without criminal charges (Friedman 2005, 294; Lobel 2002, 768). Some of these military policies in the western states were challenged in the courts, and the literature asserts that the decisions handed down by the Supreme Court represent some of the most deferential approaches of the Court during war (Wells 2004, 904).

The government's internment policies and military ordinances were those that most directly challenged domestic civil liberties during the war. Much of the literature describes these federal policies as regrettable in retrospect. Issacharoff and Pildes affirm that the "unjustifiable" nature of the government's internment policies is not a "disputed" topic (2005, 174). Shortly after the war, many reassessed the government's approach to detention as lamentable (Stone 2003, 233).

In *Hirabayashi v. United States*, 320 U.S. 81 (1943), The Court reviewed the constitutionality of a military-imposed curfew on Japanese-Americans, "residing in military

areas” (Justl 2009, 282). In that case, Hirabayashi was convicted of violating a military curfew imposed on Japanese-American citizens. The Court upheld the legality of his conviction based on two considerations: first, the Court ruled that Congress and the Executive were acting in accord, providing institutional authority for the military action (Justl 2009, 282). The second consideration was whether the government had violated Hirabayashi’s Fifth Amendment rights. The Court recognized the government’s treatment of certain citizens “based solely on ethnic ancestry” but found the government’s curfew policy necessary under the circumstances of war with Japan, thus denying individual rights protections (Justl 2009, 282-283). Justice Stone, writing for the Court in *Hirabayashi*, explained that it was “not for any court to sit in review of the wisdom of the [war power] actions of the Executive or of Congress, or to substitute its judgment for theirs” (Rehnquist 1998, 199).

The Court reviewed a similar constitutional question the following year. As part of the military’s domestic internment policies, Fred Korematsu was convicted for violating a military “exclusion” order of Japanese-Americans from certain areas designated by the government (Kmiec 2003, 276). In *Korematsu v. United States*, 323 U.S. 214 (1944), the Court reviewed a case in which the government argued for the necessity of its internment program of Japanese-Americans as a measure to defend “against espionage and sabotage” (Wells 2004, 903-904). The Court ruled in a 6-3 decision that it “cannot reject as unfounded the judgment of the military authorities and of Congress,” deferring to the government and legitimizing Korematsu’s conviction (Wells 2004, 904). Justice Hugo Black, writing the opinion of the Court, stated:

We are not unmindful of the hardships imposed . . . upon a large group of American citizens. But hardships are part of war, and war is an aggregation of hardships. All citizens alike, both in and out of uniform, feel the impact of war in greater or lesser measure. Citizenship has its responsibilities as well as its privileges, and in time of war the burden is always heavier. Compulsory exclusion of large groups of citizens from their homes, except under circumstances of dire emergency and peril, is inconsistent with our

basic governmental institutions. But when under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger. . . (Stone 2003, 233).

The Court acknowledged the unpleasant conditions imposed by the government on certain citizens, but justified its decision based on what appeared to be the exigency of war and military necessity.

There are, in the literature, different understandings of the Court during World War II. The Court's approach has been criticized as improper judicial review. Mark Tushnet (2003) notes that the *Korematsu* case is "regarded almost universally as wrongly decided" (296). A large faction of the literature depicts the Court's approach as accommodating of discriminatory government laws. To this end, Scheindlin and Schwartz explain that the Court's deliberation in *Korematsu* appeared to entirely disregard issues of racial discrimination (2004, 1621). Cole also explains that the Court's deference to the government during World War II essentially upheld the State's detention policies "based on race" (2003, 2565). These areas of the scholarship tend to view the Court's decision based solely on the outcome of the case. Although the literature refers to the language of the Court's justices, it seems to classify the Court's approach to judicial review as a textbook example of its proclivity to defer to the State. Wells explains that the Court's review process in *Korematsu* "best exemplifies this approach [of broad deference]" (2004, 903). Darren Wheeler, a Political Science professor at Ball State University, bluntly describes the Court as putting "its stamp of approval on the World War II internment of more than 100,000 Japanese Americans," calling the Court's decision-making pattern "one of judicial deference" (2009, 679).

The literature covering the Supreme Court's review of security and liberty during war is vast. There is a general consensus that the Court behaves differently in times of war than in times

of peace. Much of the literature's analysis confirms that the Court resolves this legal conflict by simply granting deference to the government in an accommodating manner. However, there are varying conclusions about the Court's review process within the literature. Certain scholars deviate from the conventional findings and dispute the notion that the Court's use of deference is broad and static in nature. I hope to incorporate both of these approaches in my research. Considering both the conventional understanding of the Court's wartime decisions, and the alternative scholarship, my research aims to describe the way in which the Court reviews wartime cases by examining how it chooses to exercise deference.

A New Wartime Context: the emerging Post-9/11 legal conflict

To preface this section, I reiterate that my research aims to describe the deliberative review process of the Supreme Court regarding liberty and security issues in the Post-9/11 context. While there exists a breadth of literature covering the circumstances of the War on Terror, the government's security policies, and the exceptional qualities of both, my research specifically focuses on *how* the Court considers the use of deference. Therefore, the following review of the Post-9/11 context will not describe every feature of this vast political and legal landscape. In the following section, I will briefly outline government policies germane to my research, and describe how the literature presents these policies as antagonistic to civil liberties.

As I have mentioned, the struggle for balance between civil liberties and security is a fundamental issue of the War on Terror. The literature cites increasing executive power and broad security measures that pressure civil liberties in the Post-9/11 era (Lobel 2002). However, the current conflict is unique in some ways.

The U.S. has enjoyed a relatively stable government throughout its history. Fortunately, the country has not had to operate under conditions of disorder for most of its existence. There

have undoubtedly been periods of crisis and war that threatened the State – the Civil War, World War I, and World War II present three obvious examples. But those conflicts eventually subsided. That is why we consider those moments “crises” in our history. Not by coincidence, once a national crisis has receded, the struggle between security and liberties tends to ease as well, and the civil liberties that were suspended in war are often restored (Baker 2003, 548). Once freedoms are reinstated to their former status, government officials sometimes even “chid[e] themselves for their earlier restrictions” of individual rights (Baker 2003, 548). In the previous crises facing the United States, there existed more clearly defined parameters of the conflict itself. Each war identified an enemy and each conflict ended definitively. But the cessation of a war against terrorism is unclear, and thus the conventional restoration of civil liberties is also uncertain.

Today’s U.S. security policies are predominantly guided by responses to the events of September 11, 2001. In the aftermath of the terrorist attacks on 9/11, the United States government amplified its national defense strategies. The State acted swiftly to augment security policies and procedures, ushering in a so-called “War on Terror.” Three days after the U.S. was attacked, President George W. Bush maintained that a “national emergency exists by reason of the terrorist attacks on September 11 and the continuing and immediate threat of further attacks on the United States” (Matheson Jr. 2009, 86) (internal parentheses omitted). However, this ongoing event – whether described as a national emergency, crisis, or war – is difficult to define and evaluate. Curtis Bradley, professor at the University of Virginia School of Law, and Jack Goldsmith, professor at Harvard Law School assert that it is “unclear how to conceptualize the defeat of terrorist organizations, and thus how to conceptualize the end of this conflict” (2005,

2049). This new type of warfare “has no clear end or scope . . . it is bound neither by time, geography, nor specific adversaries” (Baker 2003, 548).

The conflict is ongoing, but also changing. While certain security policies implemented by the Executive are still effective to some degree, they can also change with the direction of the war. The timeframe of the conflict is unknown, the government’s security objectives are changing, and its legal boundaries are still vague. Dudziak and Grimmatt explain that the 21st century fight against an “ism” (as in terrorism) presents challenges for the United States:

The new threat of terrorism seemed an amoeba-like mass that could pop up anywhere. Traditionally, when nations fought each other, wars were thought to be bounded in space by their territory, and in time by one nation’s defeat. Once the enemy was not a nation-state or even an identifiable social group, but an ideology, war was no longer confined in space or time, but seeped into the global spaces where evil ideas appeared to reside. As the immediacy of September 11 receded, the nation seemed to enter an ambiguous era that was neither wartime nor peacetime (2010, 1697).

This has profound implications for the relationship between national security and civil liberties. Perhaps Scott Matheson Jr. best illustrates the uncertainty of this warfare when he notes, “new threats to security can bring new threats to liberty” (Matheson Jr. 2009, 85).

The literature characterizes the War on Terror’s impact on civil liberties in different ways. In some areas of the literature, the United States’ responses to the attacks on 9/11 have been somewhat sympathetic to individual rights. Peter J. Spiro, professor of International Law at the University of Georgia Law School, concedes that features of the government’s Post-9/11 policies “have been rights-restrictive,” but the general protection of civil liberties during this period has been prominent (2005, 198). Spiro explains that the “damage” done to civil liberties “has been mitigated, and may ultimately prove minimal” (2005, 199). This does not seem to be the dominant position among scholars, but it does support a common claim that liberty protections during national crises have increased since the end of World War II (Matheson Jr.

2009, 85). Stone (2003) also notes that civil liberties protections have become more prevalent during times of both peace and war (244). While he suggests that the security policies in the War on Terror are certainly more liberal than in past wars, Stone still criticizes some of these policies as “deeply troubling” (2003, 244). In a similar explanation, Matheson Jr. (2009) suggests that the Executive’s policies have certainly assumed expansive authority, but that the specific government responses to war are different from those of past wars (85). Nonetheless, much of the literature describes the government’s Post-9/11 policies as restrictive of civil liberties. Lobel (2002) characterizes the Post-9/11 policy responses as an “[a]ssault on civil liberties” that are “reminiscent of the Cold War” (778).

Notable Security Policies:

In a series of Acts passed by Congress, Executive orders, and military operations, the collective force of the United States government coordinated extensive anti-terrorism efforts after 9/11. Devised at the discretion of executive and legislative authority, new and fortified security policies took form, aimed at dismantling a network of terrorism around the world. The government’s policy response was immediate. The literature converges on a discussion of a key legislative document passed in the immediate aftermath of September 11: The the Authorization for Use of Military Force (AUMF).

In September 2001, Congress passed the AUMF, which granted authority to the President as Commander-in-Chief to take action against those responsible for the attacks on 9/11 (Matheson Jr. 2009, 86; Wheeler 2009, 693). The provisions of this law are general, and scholars agree that the President has interpreted the language of the law broadly (Bradley and Goldsmith 2005; Lobel 2007). Bradley and Goldsmith (2005) provide a compelling explanation of the AUMF’s importance in the War on Terror. With regard to questions about the law’s authority,

they dispel two “misconceptions” about the law. First, they note that a congressional declaration of war “is not required” for the President to obtain complete authority in commanding a war, and second, that the irregular nature of a war against terrorism does not necessarily limit the President’s authority under the AUMF (2005, 56-57). This suggests that the President does enjoy broad statutory authority from the legislature to carry out executive policies at his own discretion. Just as the language used in the law is broad, so too is the President’s implementation of the statute. Although the administration’s application of the AUMF is not the focus of my research, the executive’s interpretation of this law presents a challenge to civil liberties that illustrate the ensuing legal conflict.

Bradley and Goldsmith argue that too little scholarly focus has been placed on Congress’ role in the War on Terror, and that the literature neglects to address the implications of Congress’ role in the war (2005, 2049). They argue that the AUMF, in particular, is worthy of more thorough analysis for three related reasons: First, this legislation seems to supply legislative approval for the President’s broad policy-making, providing inter-institutional accord; second, the AUMF suggests there is greater constitutional validity of the President’s actions based on past Supreme Court decisions; and third, the federal courts often decide constitutional questions based on the perceived authority shared between Congress and the President (Bradley and Goldsmith 2005, 2050-2052). The literature suggests that legislation – especially with broad provisions – might play an important role in the Court’s review of the Executive’s actions. The legal considerations discussed by Bradley and Goldsmith help introduce the relevant Post-9/11 struggle between liberty and security in the courts.

Among the actions taken by the Executive under the AUMF, the President has interpreted this congressional legislation as authority to conduct an extensive detention program of terrorist

suspects. Wheeler notes that the law actually provides no explicit language that authorizes the President to detain individuals considered to be terrorist suspects (2009, 693). However, as Lobel (2007) points out, that the Bush administration has interpreted this legislation as authority “to detain American citizens or other individuals indefinitely as enemy combatants . . .” (50). This program represents one of the most prominent struggles between civil liberties and national security in the Post-9/11 context.

Guantanamo Bay

Shortly after the Spanish-American war in 1898, the United States and newly-liberated Cuba signed the Platt Agreement in 1903 (Poppowell 2009). The terms of this agreement specified that the United States would be allowed to lease the area known as Guantanamo Bay from Cuba for 2,000 gold coins (Atkins 2011). The lease agreement was renegotiated under President Franklin Roosevelt in 1934, and since then the U.S. has paid \$4,085 each year to the Cuban government to lease the land upon which the United States operates its naval base (Poppowell 2009; Atkins 2011). Although the U.S.-owned naval base at Guantanamo has been operational for decades, it has recently become a focus of scholars as a model for the U.S. detention policies in the War on Terror.

Soon after the U.S. invaded Afghanistan in 2001, the military was faced with a challenge: how and where to imprison Taliban and al Qaeda militants captured on the battlefield during war (Atkins 2011). The administration, along with the Justice Department and the Defense Department, concluded that those militants captured in Afghanistan were not subject to the Prisoner of War status under the Geneva Conventions, but were instead considered “enemy combatants” (Atkins 2011, para. 2). The government decided to construct a detention center at Guantanamo Bay to hold the captured militants, and by January 2002 as many as 110 enemy

combatants were imprisoned at the naval base (Atkins 2011, para. 2). Scholars suggest the location of the naval base bears an important legal function for the government. Because the base is technically outside of territorial United States, the detainees enjoy very limited legal access (Atkins 2011). These circumstances have invoked claims of severe rights restrictions of those imprisoned at Guantanamo.

The United States' detention of foreign combatants at Guantanamo presents a prime example of the early legal conflicts emerging from the War on Terror. Assistant professor at the University of Pennsylvania Law School, Kermit Roosevelt III, describes this security policy as "perhaps the *starkest* conflict between individual liberty and executive authority" (2005, 2017) (emphasis added). The literature discusses several criticisms of the government's detention policies at Guantanamo. Kim Scheppele maintains that Guantanamo prisoners have been given "virtually no due process" of law and are made to live in "appalling conditions under an interrogation regime that the International Committee of the Red Cross (ICRC) said was 'tantamount to torture'" (2012, 125). Lord Johan Steyn, a judge of the British high court, refers to the detention center at Guantanamo as a "legal black hole" (Scheppele 2012, 125). Lord Steyn describes what he feels is the necessary judicial response to the U.S. detention policies:

The theory that courts must always defer to elected representatives on matters of security is seductive. But there is a different view, namely that while courts must take into account the relative constitutional competence of branches of government to decide particular issues, they must never, on constitutional grounds, surrender the constitutional duties placed on them. . . . And judges do have the duty, even in times of crisis, to guard against an unprincipled and exorbitant executive response (Scheppele 2012, 125-126).

In addition to the detention policy itself, the Bush administration also instituted its own system of military tribunals to review the cases of detainees (Wheeler 2009, 682). In November 2001, President Bush issued an executive order that authorized not only the "indefinite detention" of foreign terrorist suspects, but also the "trial of such defendants by a military

tribunal” (Lobel 2002, 784). The lack of legal protections and judicial processes at the naval base defy American civil liberties and trial rights. The location of the naval base also seems to trouble the line between what is legal and what is illegal. The scholarship is generally critical of the apparent rights violations of the detention program. This understanding of the government’s policies provides a clear understanding of the legal conflict that my research observes through the Court.

The early legal approach:

The literature’s review of the legal struggle between security and liberty is not uniform, and is certainly not complete. Although the literature does discuss some of the early legal cases of the Post-9/11 context, there is still much to be observed and analyzed. Some scholars predict a continued pattern of the Court’s conventional approaches. Others describe the emergence of a modified approach. Legal scholar and former U.S. Ambassador, Douglas Kmiec, describes the judiciary’s initial approach to policies in the War on Terror as “highly deferential” to the executive, as it has been during other past crises (2003, 281). There are several explanations for this approach, as Wheeler (2009) describes, using four main reasons: First, the time it takes for the Court to deliberate favors the Executive’s ability to conduct policy; second, the Court frequently addresses only specific, limited questions, rather than the larger constitutional merits of a federal policy; third, the judicial decisions about the legality of a policy are implemented by other institutional bodies, such as the Executive Branch, which will likely “minimize the impact” of a judicial decision; and lastly, Wheeler suggests that the traditional model of judicial deference is likely to resurface in cases related to the War on Terror, as it has in past conflicts (Wheeler 2009, 681).

The literature addresses some of the Supreme Court's specific decisions in the War on Terror to date. While the existing research describes some of the Court's Post-9/11 approaches, my own research helps to further understand the Court's use of deference as part of its review. There are similar descriptions of the Court's review in cases such as: *Hamdi v. Rumsfeld*, *Hamdan v. Rumsfeld*, *Rasul v. Bush*, and *Boumediene v. Bush*. The literature tends to view the Court decisions as generally favorable to the government.

Scheppele posits that the Court's review of the recent Post-9/11 cases might “*appear* to be saving the rule of law from a lawless executive,” but in practice, the Court's decisions really favor “what the executive branch wanted” (2012, 124-125). Darren Wheeler (2009) notes that the judiciary “may not be playing the role some presidential critics would like,” but its role is limited by the greater institutional factors of democracy and separation of powers (696). Epstein et al. (2005) describe the Court's rulings as closely related to the “congressional authorization” granted to the President (101). Epstein et al. (2005) describe the *Hamdi* decision as specifically demonstrative of the Court's approach to a review of institutional authority, rather than an approach of balancing interests. These interpretations of the Court's approach to the Post-9/11 legal conflict are significant to my research. Wheeler (2009), Scheppele (2012), and Epstein et al. (2005) suggest that the Court's decisions in these cases ultimately favor the government in some form. They also all describe processes that are slightly unlike past wartime approaches. Building off of this common perception of the Court's approach in the Post-9/11 context, I join my theoretical prediction that the Court will both defer in practice as it has in the past, but in a more calculated and precise approach that first a description of Nuanced Deference.

Chapter Four: Research Design and Methodology

My research attempts to explain how the Supreme Court reviews national security and civil liberties in times of crisis by focusing on how the Court approaches the use of deference. As I have outlined in the Theory chapter, deference can be understood through a focus of two dominant theories, which I have categorized as: **Old Judicial Deference** and **Nuanced Deference**. I suggest that, while the Supreme Court has traditionally granted deference with an Old Judicial approach, the Post-9/11 government policies will exhibit a more refined and nuanced review by the Court. I expect the Court to review civil liberties and security policies with more thorough and detailed analysis. Although the outcome of these cases dealing with civil liberties in the 21st century might resemble the same outcomes of past Court decisions, I create a detailed and standardized criteria to inspect the Court's decisions, and examine the Court's process of granting deference. Ultimately, this research will investigate the procedural approach – the underlying process – of Supreme Court decision-making. Rather than focusing on the outcome of the Court's decision, my research will focus on how the Court analyzes constitutional issues.

I suggest that the Supreme Court will continue to defer to the government in Post-9/11 cases, but in a manner that supports a more nuanced and complex approach to balancing State policies with individual rights. That is to say, even though the history of the Court seems to support an approach of Old Judicial Deference, the balancing process of the Post-9/11 Court will resemble a more pensive and careful process expressed in the language of the Court opinion. In order to empirically determine how the Supreme Court addresses issues of deference to the State, I will look at particular language utilized by the Court with consideration for the two approaches to deference.

Case Selection:

To examine (“test”) this hypothesis, I select three (3) legal cases that have been reviewed, heard, and decided by the Supreme Court of the United States. Using a **comparative case study** method, I select each case sample based on the following provisions:

1. The case is heard by the Supreme Court of the United States, as granted by a *writ of Certiorari* from a lower court.
2. The case is reviewed and decided by the Court during the period following September 11, 2001. (So as to easily control for a government security policy in response to the events of that day).
3. The case is before the Court as the result of a challenge to or petition of the prohibition, regulation, neglect, or otherwise unfavorable Executive treatment of “civil liberties.”

Based on these general criteria, I turn to more specific sources for consideration of my cases.

First, it is important to note that the Supreme Court has reviewed only a select number of cases during this period, many of which were decided several years ago. To contextualize the cases relevant to my research, I turn to the online periodical publication of Benjamin Wittes, a Senior Fellow of Governance Studies at the Brookings Institution. Along with Jack Goldsmith, professor of law at Harvard University Law School,⁴ and Robert Chesney, Wittes launched the periodical website, *Lawfare: Hard National Security Choices*, in September 2010. *Lawfare*, which is published in cooperation with The Brookings Institution, is devoted to covering contemporary issues of “cybersecurity, Guantánamo habeas litigation, targeted killing, biosecurity, universal jurisdiction, the Alien Tort Statute, [and] the state secrets privilege . . .” (Wittes, Chesney, and Goldsmith n.d.). In 2012, Wittes catalogued a series of “post-9/11 judicial materials,” which chronologically detail Post-9/11 Supreme Court cases related to the War on Terror (Wittes 2012). The limited number of Supreme Court cases relevant to my research

⁴ Prior to his work at Harvard Law School, Jack Goldsmith was the Assistant Attorney General for the Office of Legal Counsel between 2003 and 2004, and served as Special Counsel to the Department of Defense between 2002 and 2003 (Wittes, Chesney, and Goldsmith n.d.).

controls the scope of constitutional issues that I can observe. Most cases identified by Wittes, and further described in the literature, deal with issues related to indefinite detention, habeas corpus, and jurisdiction of the federal courts. Although my examination of the Court does not specifically seek to explain only these issues, the limited number of cases does circumscribe my selection of cases related to these issues. Drawing from the cases documented by Wittes, I chose to observe three cases at random. I analyzed one case at a time and recorded my observations for one case before selecting another case, so as not to make generalizations about the Court's Post-9/11 approach. I also selected cases individually to ensure that my methodology process would first function to support the content analysis process itself.

The "data" that I will examine are qualitative in nature. I will examine the language (textual wording) of the Court's official written majority opinion, as collected from the LexisNexis® Academic database. Although most Court opinions are authored by a single Justice, the opinion represents the majority of Justices presiding over a case. Supreme Court decisions are not always limited to the official opinion (binding authority) of the Court. Justices who do not write the Court opinion often write what is known as a concurring opinion or concurrence, and a dissenting opinion or dissent. However, for the purposes of my research, I will not analyze the content and language of these supplemental opinions. I am only interested in the binding decisions of the Court. These concurring and dissenting opinions do not pertain to my research and declarative analysis of the Court as an institution.

As mentioned, the case studies I have selected will examine how the Court reviews national security with civil liberties in terms of the nature and extent of deference granted to the Executive. The Court's analysis observes two conflicting interests: those of the State and those of the individual. These two interests are defined, generally, as: **Post-9/11 United States**

national security policies and **American civil liberties**. I conceptualize these two terms with several considerations. For absolute clarity: the term **United States** refers specifically to the “government,” the “State,” the “Executive,” the “President,” the “administration,” the “military,” or any other official actor of the United States government exercising authority over a civilian population. The term **Post-9/11 national security policies** refers specifically to any regulation (by law or executive order), implementation of law, interpretation of law, or any official action undertaken by any of the aforementioned actors for the purposes of defending, protecting, advancing, securing, or otherwise concerning the safety and protection of the United States, its interests, and its civilian population during the period of time following September 11, 2001. The second general term, **American civil liberties**, is conceptualized as any right, freedom, or privilege granted by the U.S. Constitution or as interpreted by the Supreme Court.

The way in which I will examine the opinion of the Court is specific to the research question I have addressed. I do not implement a regimented, codified measurement for the particular *words* or *vocabulary* in the manuscript of the Court opinion. In order to remain systematic and rigorous in my analysis of the Court opinions, I will employ four categories that I identify as important considerations for discretion that the Court uses when balancing security policies and civil liberties. These categories help recognize whether and in what way the Court has decided to defer to the government.

In attempting to operationalize the complex idea of deference, I borrow from the research of Robert Chesney. Chesney reminds readers that, “At a minimum . . . a judge cannot avoid adopting some standard of proof in the course of determining whether the constituent elements of a legal rule have been satisfied or violated” (2009, 1364). Thus, while there is no quantifiable measure of the Court’s language (at least not for the purposes of my research), there does exist

some method to validate the Court's balancing process and its ultimate holding. Chesney cites Professor Richard Fallon, who explained in 2001:

[J]udicially prescribed tests do not (and should not) always reflect the Court's direct assessment of constitutional meaning, but sometimes embody the Court's judgment about an appropriate standard of judicial review, indicating the circumstances in which other officials will be held by the courts to have failed to meet their primary duties (Chesney 2009, 1387).

The Court, in essence, must follow criteria – legal standards and rules – in order to make determinations about the constitutionality of a policy in question. That is to say, the Court cannot form opinions based solely on personal or moral judgments; there must be some legal test, logic, framework, standard, or other mechanism that supports a judicial ruling. (This is not to say that Supreme Court Justices completely detach their underlying ideological beliefs from their ultimate decision, but that is another issue.)

Utilizing a framework that Robert Chesney calls a “review of the considerations that might be cited” as criteria for granting deference, I will examine the language of the Court's opinion through a similar framework (Chesney 2009, 1363). Chesney articulates what he calls specific “decision rules” – or rules that serve as an abstract framework through which judges might determine whether or not to provide a deferential ruling to the State (2009). Chesney acknowledges that these criteria “are not direct expressions of constitutional meaning. Rather, they are devices for operationalizing constitutional meaning in the context of a specific institutional setting” (2009, 1389). Each rule represents a different consideration the Court might cite as a reason to defer (or not to defer) to the government's actions.

For the purposes of my research, I will use decision rules to define whether and in what ways the Court grants deference to the Executive Branch's wartime policies. The way in which the Court uses one or several of these rules will indicate the Court's process of granting

deference. Within the text of the Court's opinion, I will examine how the Court decides to defer to the government as indicated by these four decision rules. It is the *way in which* the Court employs these standards that will support a claim for one of the two theoretical approaches described in the previous chapter. I operationalize each decision rule below with a brief definition and some examples of how the Court has used these rules in past national security/civil liberties cases. It should be noted that the Court does not necessarily always use these rules to grant deference, and that the Court might – and often does – use more than one of the four rules when it defers to the government.

Decision Rules:

A set of distinct considerations the Court might use as a standard when determining whether to defer to a government law or policy. The framework developed by Chesney (2009) is related to a specific type of deference. He examines “national security fact deference,” which describes whether the Court defers to the Executive on the basis of available factual information provided by the government (Chesney 2009). My research examines a broader range of deferential judgments, but Chesney's general framework serves as an effective means of observing the Court's approach. Chesney's own decision rules are headlined as “Core Accuracy,” “Weighted Accuracy,” “Prudence,” and “Legitimacy” (2009). I have borrowed from some of his categories, but have also operationalized the rules with my own standards. Below, I define four (4) different criteria the Court might use.

#1. Expertise:

The way in which the Court considers the appropriate arbitrator in a case.

The Court considers which institution can most accurately and dependably resolve a balance between rights and security. The Court considers Expertise to defer to the government

where the Court indicates that it does not have the proper facts, pertinent information, or necessary context of a case to properly review the case. Considering the Supreme Court is not privy to the extensive resources and expertise of the many executive administration officials, bureaucracies and the military, the Court is not necessarily situated to make decisions where it simply does not have significant knowledge of a particular security issue. For example, if a government policy in question involves top-secret, confidential information, the Court might not have access to all relevant facts of the case. Chesney cites professor Kermit Roosevelt who notes that judges are not often “suited to gauge the necessities of administration in unusual environments” (Chesney 2009, 1393).

Language supporting this rule will indicate the Executive’s superior expertise of security issues. When it exercises its power of judicial review, the Court generally balances the facts of a dispute between the State and the individual. But without the full range of information, the Court might have to trust the policy judgments of the administration because it simply does not have the proper information to evaluate or assess the administration’s claims.

Chesney points to the Court’s opinion in *United States v. Reynolds*, 345 U.S. 1 (1953) as an example of this type of deference decision. In this case, the government argued that it should be exempt from a civilian lawsuit because disclosing all facts related to the case might reveal military secrets, which – the Executive claimed – would harm national security interests. The government argued that only the executive branch was capable of determining whether disclosing sensitive information would inflict harm to national security (Chesney 2009). Ultimately, the Court in *Reynolds* found that the government must demonstrate that disclosing so-called sensitive information would compromise security. However, that Court qualified this requirement by holding that “where necessity is dubious,” the Executive need only make a

“formal claim of privilege,” to receive the Court’s deference (Chesney 2009, 1377). The *Reynolds* decision says, in general parlance: if a government policy is brought before a court for judgment, the State may claim that its disclosure of information to any party (including the courts) could expose the nation to security harms. As such, the Court may consider its own judicial review as an impediment to national security, deferring to the Executive because the executive is the only party with an extensive understanding of the information’s sensitivity.

Expertise deference is invoked by the Court’s language when a) the Court, itself, states that it does not have the ability to make decisions during war or a crisis when the administration is best suited to decide what is required for our national security; or b) relevant information about the case is unavailable for the Court to make a determination.

On the other end of this Decision Rule, the Court might flatly refuse to defer to the government based on a consideration of Expertise. If the Court does not identify the Executive as the appropriate institution for judicial review, or if the Court explicitly identifies the federal courts as the proper arbitrator, such use of Expertise might guide the Court away from deference.

The question that I will ask to assess deference to Expertise is: Does the Court find that it has sufficient factual information in order to make a judgment? If the language of the Court suggests that it does not have enough information, or if the Court identifies the Executive as the more capable arbitrator, such language supports the conclusion that the Court has adopted the approach of Old Judicial Deference. However, if the Court does consider in detail the facts of the case and does not refer to the Executive as the proper decision-maker (or directly rejects such a notion), this use of Expertise indicates an approach of Nuanced Deference.

Old Judicial Deference predicts: the Court will affirm that the Executive Branch of government is best situated to judge the impact of a wartime policy on an individual's civil liberties.

Nuanced Deference predicts: the Court will, at least, question the Executive's sole authority to judge what might be damaging to national security, and review policy with what facts it has; or the Court will explicitly reject the Executive as the institution best-suited to judge its own policies, and will assign judicial review to the Article III courts.

#2. Prudence:

The way in which the Court considers immediate & future implications.

The Court considers deference to the government in circumstances with consideration for potentially harmful national security or civil liberties outcomes. Prudence might be considered the Court's broadest and most utilized decision rule for deferring to government policies during times of crisis or war. This standard of deference describes the Court's consideration for the efficacy of a wartime policy and future implications of a decision.

The Court's opinion in *Schenck v. United States*, 249 U.S. 47 (1919) provides a clear example:

“When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right” (*Schenck*, 52).

In *Schenck*, the Court described certain types of speech as having the potential to “create a clear and present danger” and that such speech “will bring about the substantive evils that Congress has a right to prevent” (*Schenck*, 52). The language here weighs the impact of speech rights against the military's ability to function effectively, citing the speech's menace as a threat to the country's security. The Court establishes somewhat of a pseudo test to place a constitutional

right (in this case, the right to speech) beyond the realm of First Amendment protections. Thus, the Court determines – perhaps artificially – that permitting such speech would be imprudent during times of crisis. When the Court does use this Decision Rule in such a manner, the Court’s approach is that of Old Judicial Deference. That is to say, the Court’s process follows the traditional theory of deferring to executive policies during times of war with less concern for civil liberties.

Another example of this prudential deference rule is identified by a reluctance to interfere with military procedure or efficacy during a national crisis. This example is found in *Korematsu*, where the Court (among a litany of deference considerations) stated that, “hardships are part of war,” and that every citizen is expected to “feel the impact of war” (*Korematsu*, 219). The Court admitted that “Compulsory exclusion of large groups of citizens from their homes” is prima facie “inconsistent with our basic governmental institutions” (*Ibid*, 220). However, because of the impending peril and danger cited by the U.S. military, and because our country faces a serious struggle against a powerful enemy, “the power to protect must be commensurate with the threatened danger” (*Ibid*, 220).

Of course, Prudence as defined by a concern for security implications would be well established in all cases before the Supreme Court. But for the purposes of this study, this criterion will be specifically defined in terms of concern for the immediate and future implications for U.S. national security. This Decision Rule is indicated by language that makes exceptions to fundamental liberties and will explicitly refer to the security policies as exceptional and urgent. The Prudence Decision Rule draws from language expressing exigency or necessity.

However, some Prudence considerations will not automatically result in a gesture of the Court’s deference. The Court considered this standard, with regard to future implications of a

security policy and its impact on civil liberties in *New York Times Co. v. United States*, 403 U.S. 713 (1971). In this Vietnam War-era case, the government was tasked with demonstrating that its interest in national security was enough to prevent newspapers from exercising their free press rights to publish military documents regarding the Vietnam War. The Court questioned this prior restraint regulation, and the Court responded with language indicating the implications of this security policy:

“The word ‘security’ is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment. The guarding of military and diplomatic secrets at the expense of informed representative government provides no real security for our Republic” (*New York Times*, 719).

It should be noted that the above citation does not quite represent the opinion of the Court itself, as these words were written in a concurring opinion by Justice Black, with whom Justice Douglass joined. However, the language is representative of the Court’s ultimate decision because the Court opinion in this case was decided *per curiam*. This means that no single Justice wrote the Court’s official opinion. Instead, six Justices of the majority each wrote a concurring opinion. The language of Justice Black indicates that deferring to the Executive would be imprudent because the government regulation in that case harms fundamental liberties, and hardly secures national security.

The Court’s use of Prudence will often rely on presuppositions about the future. While it does not seem based on a definitive legal test or doctrine, a concern for Prudence is often what past wartime Court used to, at least in part, defer to the Executive. In certain cases, the Court might see that a security policy is actually imprudent, or unnecessarily restrictive in comparison to the individual’s civil liberties interest. In most cases, the Court will use Prudence to express the urgency or necessity of a security policy and acknowledge that one’s liberty interests do not supersede the government’s interests. This use of Prudence follows the traditional convention of

Old Judicial Deference. However, if the Court finds that a security policy or action is unnecessarily burdensome of one's civil liberties, a use of this Decision Rule indicating the imprudence of such a policy will indicate the Court's approach to Nuanced Deference.

Old Judicial Deference predicts: The Court will continue to make exceptions to liberties because of the impending dangers and impact of war or crisis.

Nuanced Deference predicts: The Court either rejects the government's arguments regarding immediate or future national security threats, or holds that the potential harms to civil liberties outweigh the security concerns based on the circumstances of the case.

#3. Textual/Institutional Legitimacy:

The way in which the Court considers the language of the Constitution as authority for policy implementation.

The Court sometimes defers to the government based on an interpretation of the Constitution's text itself. In citing language found within the Constitution, the Court might expand or narrow its acceptance of security policies. The Court's use of this Decision Rule will be supported by language that identifies the legality of an action *based on* the provisions enumerated in the Constitution. Much of this consideration for Textual Legitimacy can be found in language that compares the institutions of the Presidency and the Legislature – as found in Articles I and II of the Constitution – and how the language of the Constitution guides these institutions' actions.

The language of the Court in *Ex Parte Quirin*, 317 U.S. 1 (1942) considering petitioners' contention of a right to trial by jury provides some useful examples:

1. "The Fifth and Sixth Amendments, while guaranteeing the continuance of certain incidents of trial by jury which Article III, § 2 had left unmentioned, did not enlarge the right to jury as it had been established by that Article" (*Quirin*, 39).

2. “. . . [W]e must conclude that § 2 of Article III [of the Constitution] and the Fifth and Sixth Amendments cannot be taken to have extended the right to demand a jury to trials by military commission, or to have required that offenses against the law of war not triable [sic] by jury at common law be tried only in the civil courts” (*Quirin*, 42).
3. “We cannot say that Congress in preparing the Fifth and Sixth Amendments intended to extend trial by jury to the cases of alien or citizen offenders against the law of war otherwise triable [sic] by military commission, while withholding it from members of our own armed forces charged with infractions of the Articles of War punishable by death. It is equally inadmissible to construe the Amendments . . . as either abolishing all trials by military tribunals . . . or . . . as imposing on all such tribunals the necessity of proceeding against unlawful enemy belligerents only on presentment and trial by jury” (*Quirin*, 44-45).

In the *Quirin* opinion, Chief Justice Stone interprets Article III of the Constitution (enumerating the powers vested in the U.S. judiciary) and the Fifth and Sixth Amendments to the Bill of Rights, as textual evidence preserving the government’s power to try German saboteurs under a military trial. Chief Justice Stone qualifies the constitutional protections of these Amendments and Article III by limiting their meaning and application to the specific case against enemy belligerents. This detailed interpretation of the Constitution’s text, and of Congress’ intentions, exemplifies the Court’s use of Textual/Institutional Legitimacy to defer to the Executive’s military tribunal policies.

Another type of Institutional Legitimacy deference addresses institutional powers, without explicitly mentioning where the authority is found in the Constitution. Consider the example of deference from the opinion in *Dennis et al. v. United States*, 341 U.S. 494 (1951): “That it is within the power of the Congress to protect the Government of the United States from armed rebellion is a proposition which requires little discussion” (*Dennis*, 501). The Court legitimizes what has been constitutionally assigned to Congress in general terms. The language in *United States v. Curtiss-Wright Corporation et al.*, 299 U.S. 304 (1936) offers another example of an Institutional Legitimacy, this time based on legislative authority:

“A legislative practice such as we have here, evidenced not by only occasional instances, but marked by the movement of a steady stream for a century and a half of time, goes a long way in the direction of proving the presence of unassailable ground for the constitutionality of the practice, to be found in the origin and history of the power involved, or in its nature, or in both combined” (*Curtiss-Wright Corporation*, 327-328).

The Institutional Legitimacy standard will be found in language that observes an Executive action based not necessarily on the balance of liberties and security, but by the constitutionality of the institutional authority. Under this standard of deference, The Court’s language will observe the way in which the different branches of government operate together (as substantiated by the Constitution). For example, if Congress passes legislation that authorizes the President to implement a certain policy, the Court might use Institutional Legitimacy to substantiate its deference to the government in that case. However, the Court might also use Institutional Legitimacy to emphasize a lack of authority or a denial of authority from Congress. In such a consideration for Institutional Legitimacy, the Court might refuse to defer to the Executive based on its interpretation of discord between the two government branches.

In what is perhaps the strongest example of Institutional/Textual Legitimacy for granting deference to a wartime government action, Justice Black, delivering the opinion of the Court in *Youngstown Sheet & Tube Co. et al. v. Sawyer*, 343 U.S. 579 (1952), asserted plainly: “It is clear that if the President had authority to issue the order he did, it must be found in some provision of the Constitution” (*Youngstown*, 587). This language serves as an example of the Court’s reliance on Institutional Legitimacy to deny or refuse deference. Here, the Court uses Institutional Legitimacy to narrow the Executive’s power by interpreting his limited authority granted by the Constitution. Language indicating the use of this decision rule will describe the duties and powers of the President as Commander in Chief, the authority granted by Congress, and more

abstractly, the way in which both branches cooperate, interact, disagree, or engage with the other.

Old Judicial Deference predicts: the Court will interpret the text of the Constitution or the intentions of Congress broadly to legitimize government actions, particularly by the Executive.

Nuanced Deference predicts: the Court will interpret the text of the Constitution more narrowly, requiring that both the executive and legislative branches approve of the action or policy in order for it to be legitimate; or the Court will invalidate the Executive's policy or action based on discord between the Executive and Congress.

#4. Precedent Legitimacy:

The way in which the Court interprets and refers to previous cases decided by the Supreme Court to establish a standard of deference.

The Court cites the decisions of precedent cases and describes the legal precedent to either distinguish or compare the past decision or logic with the context of case at bar. A consideration for deference under this Decision Rule is indicated by language that narrows or broadens the meaning of precedent case law. That is to say, the way in which precedent is cited (discussed, observed, scrutinized) indicates the Court's considerations for deference. Where the Court dismisses previous rulings or logic regarding deference to the government, it will generally narrow its deferential proclivity. Where the Court uses language that strongly relies on preceding cases, especially when it cites the same case(s) for logic, the Court broadens its standard of deference.

The Precedent Legitimacy rule is one of the more difficult considerations to identify because almost every Supreme Court opinion cites legal precedent in its opinion. In order to test

for language specific to my research, I am not looking for the mere existence of citations to authority themselves. Instead, I consider: does the Court read the facts and/or the logic of this precedent case to *directly* advance its own answer to a national security challenge presented before the Court? There are, I suggest, two ways in which the Court reads precedent to supplement its response to a constitutional question. Similarly to the way in which the Court reads the Constitution under Textual Legitimacy, the decision rule is established by the expansion or restriction of a precedent's interpretation.

Does the Court cite legal precedent, previously appearing in national security cases, to make clear distinctions, both in the facts of the case and in the applicability of a legal test? If so, such language limits or narrows the reading of deference. Even if the Court ultimately decides to defer to the State, the language considering alternatives to the precedent and closely studying its relation to the present case emphasizes a process that is more *narrowly* drawn in its conclusions. Does the Court read legal precedent to make general, broad, and general analogies, both in the case facts and in applicability of a legal test or standard? If so, the language supports the Court's commitment to the precedent's logic for deference. In any application of Precedent Legitimacy the Court's language will refer to a previous legal case – that is a given tenet of the Precedent Legitimacy decision rule.

Several clauses from *Korematsu* rely on legal precedent for deference:

1. "In *Hirabayashi v. United States*, 320 U.S. 81, we sustained a conviction obtained for violation of the curfew order. The *Hirabayashi* conviction and this one thus rest on the same 1942 Congressional Act and the same basic executive and military orders . . ." (*Korematsu*, 217).
2. "The 1942 Act was attacked in the *Hirabayashi* case as an unconstitutional delegation of power; it was contended that the curfew order and other orders on which it rested were beyond the war powers of the Congress, the military authorities and of the President, as Commander in Chief of the Army . . . We upheld the curfew order as an exercise of the power of the government . . . In light of the principles we announced in the *Hirabayashi*

case, we are unable to conclude that it was beyond the war power of Congress and the Executive to exclude those of Japanese ancestry from the West Coast war area at the time they did” (*Korematsu*, 217-218).

3. “In this case the petitioner challenges the assumptions upon which we rested our conclusions in the *Hirabayashi* case . . . After careful consideration of these contentions we are compelled to reject them” (*Korematsu*, 217).

The passages cited throughout *Korematsu* rely heavily on both the logic and facts found in *Hirabayashi*. The reading of *Hirabayashi* directly supports the Court’s decision to defer to the government’s actions. This is an example of the Court relying on Precedent Legitimacy as a Decision Rule to expand or compare the logic of a previous Court decision.

Similarly, the Court may defer to the government by narrowing an earlier decision in which the Court refused to defer to the government. In *Ex Parte Quirin*, the Court addressed petitioners’ claim that the decision in *Ex Parte Milligan* established a right to trial before a civil court under the laws of war, and that they were not subject to a military trial. *Quirin* presents an example of Court language that relies on a Precedent Legitimacy consideration, but in a manner constricting the precedent’s meaning:

“The Court’s opinion [in *Milligan*] is inapplicable to the case presented by the present record,” the Court opined, in distinguishing the applicable jurisdiction of the courts based on the facts of each case (*Quirin*, 45).

Both the Court’s broad reading of precedent in *Korematsu*, and its provisional, narrow reading in *Quirin* are examples of Precedent Legitimacy language to defer to the government. Both Courts produced a similar outcome with deferential treatment of the government policy in question, but the process by which each Court considered deference was different. If the Court were to use Precedent Legitimacy in a manner that rejects the logic for deference in a previous case, such a consideration for this Decision Rule would indicate a deviation from the traditional Old Judicial Deference. Though the customary use of Precedent Legitimacy seems to support

deference to the Executive, any use of this Decision Rule that narrows or expands legal precedent in a manner that favors civil liberties, would indicate an approach of Nuanced Deference.

Old Judicial Deference predicts: the Court will broadly interpret precedent case law that defers to the State broadly to compare previously legitimized government actions; or the Court will narrow or restrict precedent case law that favors civil liberties to distinguish the relevant facts or logic in that case.

Nuanced Deference predicts: the Court will broadly interpret precedent case law that favors civil liberties to rely on logic or standards previously established; or the Court will carefully differentiate precedent case law that supports deference to the Executive with greater consideration for distinguishing logic and fact patterns.

-[end Decision Rules]-

With a framework established by these four decision rules, I will analyze the way in which the Supreme Court deliberates in Post-9/11 cases. Each case study will be analyzed closely and meticulously, using a content analysis of the Court's language. Based on this analysis of the language in the Court opinion, I will determine *how* the Court approaches deference in its review of national security and civil liberties. My own content analysis will determine if the Post-9/11 Court's process follows an approach of continued Old Judicial Deference, or if the Court's process supports an approach of Nuanced Deference. My analysis might reveal that the Court's approach does not fit either Old Judicial Deference or Nuanced Deference. I am not concerned primarily with the specific outcome of each Supreme Court ruling; my analysis will not focus on the Court's ruling or decision alone. Instead, I will analyze the deliberative *process* of the Court – the way in which the Court uses these Decision Rules to decide whether and how

much to defer to government security policies. I have asserted as part of my hypothesis that the Court *will* maintain its inclination to defer to the Executive in times of war or conflict, including the Post-9/11 period. However, as suggested under the Decision Rules criteria, I also hypothesize that the Court's deferential treatment of these government policies will take on a nuanced approach in the period following September 11, 2001.

Chapter Five: Analysis

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

Background of the Case:

Shortly after the attacks of 9/11, Congress passed into law the Authorization for Use of Military Force (the “AUMF”), authorizing the President to exert “all necessary and appropriate force” against those “nations, organizations or persons” responsible for, or in connection with, the terrorist attacks on the U.S. In 2001, the United States launched military operations in Afghanistan. Yaser Esam Hamdi, a United States citizen, born in the U.S. (Louisiana), was found in Afghanistan fighting with Taliban insurgents, a group deemed to have supported those who perpetrated the 9/11 attacks. American allied forces captured Hamdi in Afghanistan, and turned the citizen-detainee over to the United States military. Hamdi was detained in Afghanistan until the government learned that he was a U.S. citizen and transferred him to the United States, where he was detained at a naval facility in Virginia in 2002.

Pursuant to provisions in the AUMF, the government classified Hamdi as an enemy belligerent, and subjected the citizen-detainee to indefinite detention. In June 2002, Hamdi’s father (Esam Fouad Hamdi) filed a petition for a writ of habeas corpus on behalf of his son. The suit brought by Hamdi’s father alleged that the government had no legal authorization to detain his son, and that the government had infringed upon the younger Hamdi’s Fifth and Fourteenth Amendment rights of the Constitution of the United States.

Esam Fouad Hamdi’s petition against the federal government was brought before the Eastern District Court of Virginia. The petition requested the Court to (1) “appoint counsel for Hamdi; (2) order respondents [the government] to cease interrogating [Hamdi]; (3) declare that he is being held in violation of the Fifth and Fourteenth Amendments”; (4) “schedule an

evidentiary hearing, at which Petitioners may adduce proof in support of their allegations”; (5) “order that Hamdi be released from his ‘unlawful’ custody” (*Hamdi v. Rumsfeld* 542 U.S. 507, 511 (2004)). The District Court granted Hamdi access to a public defender. The United States Court of Appeals for the Fourth Circuit reversed the lower court’s order that Hamdi be provided legal counsel, maintaining that the District Court did not “extend appropriate deference to the Government’s security and intelligence interests” (*Hamdi*, 512).

On remand, the government motioned to vacate Hamdi’s petition, citing the declaration of Michael Mobbs, an individual identified as a “Special Advisor to the Under Secretary of Defense for Policy” (*Ibid*, 512). The Mobbs Declaration provided the government with its evidentiary basis for Hamdi’s detention. The Court of Appeals required the District Court to rehear the petition, with consideration for the Mobbs Declaration. The District Court again found that the government did not provide sufficient evidence to legally detain Hamdi indefinitely, without due process under the Constitution.

On appeal, the Court of Appeals reversed the lower court’s ruling, ordering that the petition for habeas be dismissed. The Court of Appeals held that the war powers, provided by Articles I and II of the Constitution, precluded the Article III courts from presiding over the case at bar. The Circuit Court found that the government enjoyed jurisdiction over the trial and was suited to oversee the detention hearing. Granting broad deference to the government’s fact-finding claims, the Court of Appeals reversed the ruling of the District Court and denied rehearing. Hamdi’s attorneys filed for a writ of certiorari, which the Supreme Court of the United States granted in 2004. The Court vacated the judgment of the Fourth Circuit Court of Appeals of the United States and remanded the case to the District Court to be heard with consideration of the Supreme Court’s judgment. In its opinion, The Court examined three constitutional questions:

1. Does the Executive have the authority to detain a United States citizen who is defined as an “enemy combatant”;
2. Does the Executive have the authority to detain a United States citizen indefinitely; and
3. Was Petitioner Hamdi afforded Due Process with respect to the writ of habeas corpus with review before the Executive Branch?

Analysis of the Court’s Opinion in *Hamdi v. Rumsfeld*:

There is a lot to unpack in the Court decision. First, it is crucial to note that the Court examined more than one constitutional issue. This is not uncommon for the Court, but it does fracture the Court opinion into different constitutional concerns that are treated separately. It also seems as though the Court considered some constitutional questions are more substantial than others. In particular, the question of whether or not the government can detain a U.S. citizen seems to take less deliberation than the issue what specific type of legal process is due to him.

The procedural history of this case is also significant. The lower courts (The Eastern District Court of Virginia and the United States Court of Appeals for the Fourth District) volley rulings back and forth for a bit, and actually debate the amount of deference owed to the government until the Supreme Court intervenes and issues its decision.

Hamdi v. Rumsfeld, argued and decided in 2004, represents one of the earliest Court decisions in the Post-9/11 era. In the year 2004, the United States military was in the midst of conducting combat missions in two Middle Eastern regions (Iraq and Afghanistan). This is a case in which the Court granted a writ of certiorari and intervened in a conflict during the course of military hostilities. This is significant because, as is the privilege of the Supreme Court, the Court decides which cases to hear. This is a scenario wherein the Court actively *chose* to preside over litigation while the United States was involved in military conflicts abroad. This

development is clearly relevant to William Rehnquist's discussion about the Court's actions during war. During a conflict, as Rehnquist points out, the Court is largely deferential to the military or the executive.

The Court unmistakably acknowledges that "[a]ctive combat operations against Taliban fighters apparently are ongoing in Afghanistan" (*Hamdi*, 521). Thus, even within the context of the case itself, there exists a willingness in the Court's approach to review civil liberty interests of the petitioner against national security actions during the course of ongoing war. The *Hamdi* case was decided by a plurality of four justices, with whom two additional justices concurred in the Court's judgment, giving the ruling a majority of six justices. Justice O'Connor wrote the opinion of the Court. Justice Souter wrote a concurring opinion, with Justice Ginsburg joining the concurrence. Justice Thomas wrote a dissent, and Justice Scalia wrote a dissent, with Justice Stevens joining. In short, six justices favored the Court decision, and three did not. The following analysis will focus on the plurality opinion of the Court, written by Justice O'Connor.

First Question:

Can the Executive branch detain a United States citizen who meets the criteria of an "enemy combatant"?

The Court begins its inquiry by considering the circumstances of Petitioner Hamdi's capture and detention, as he was labeled an "enemy combatant" by the military. The Court acknowledges that the government has never before offered a regimented "criteria" to categorize enemy combatants, but "for the purposes of this case," the definition of such an individual refers to what is outlined by language in the Authorization for Use of Military Force (*Hamdi*, 516). (See also Appendix I). Thus, the Court addresses this question more specifically: does the

Executive have the authority to detain a United States citizen pursuant to the classification of individuals described in the AUMF?

Early in its decision, the Court is willing to defer to the State with regard to this first constitutional question. Before carefully detailing its process of logic, the Court plainly affirms the government's position, "that Congress has in fact authorized Hamdi's detention, through the AUMF" (*Ibid*, 517). Following this affirmation of government action, the Court explains its deference with consideration for Decision Rule #3, Institutional Legitimacy. First, the Court addresses a claim brought up by Hamdi. He contends that his detention is outlawed under a federal law. 18 U.S.C § 4001 states, "No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress" (See Appendix I). Quickly invoking its consideration for Institutional Legitimacy, the Court rebuffs Hamdi. The Court favors the government's position, ruling that "the AUMF is *explicit congressional authorization* for the detention of individuals in the narrow category we describe . . ." (*Ibid*, 517) (emphasis added). The Court explains that the AUMF is an explicit act of Congress and provides sufficient authority to detain a U.S. citizen.

This deference clearly follows Institutional Legitimacy considerations. It is tied closely to the Court's interpretation of the powers shared between Congress and the President. The Court notes that AUMF permits the President to exercise "all necessary and appropriate force" against "nations, organizations, or persons" connected to the acts of terror on September 11, 2001. (See Appendix I). "There can be no doubt," the Court explains, that Congress "sought to target" those individuals fighting with the Taliban in Afghanistan against the United States military (*Ibid*, 518). The Court interprets the language of the AUMF as congressional authority for the President to detain Hamdi, highlighting the significance of inter-government authorization, or

what I have identified as Institutional Legitimacy. For the purposes of Hamdi's particular classification, the Court upholds the government's authority to detain a U.S. citizen, noting that the military, as an arm of the executive branch, served the specific purposes of congressional legislation. Because different branches of the government acted in accord with one another, the Court defers to the Executive's decision. However, the Court makes clear that the AUMF is authority for the detention of those who have been properly defined as enemy combatants. Whether it is determined by concession or another fact-finding process, the AUMF only provides legislative authority for detention once it is made "sufficiently clear that the individual is, in fact, an enemy combatant" (*Ibid*, 523).

Although the Court's main line of reasoning follows Institutional Legitimacy, it further buttresses its decision by utilizing Decision Rule #4 (Precedent Legitimacy) and Decision Rule #2 (Prudence). First, the Court addresses the prudence of arresting and detaining enemy combatants: "The purpose of detention is to prevent captured individuals from returning to the field of battle and taking up arms once again" (*Ibid*, 518). It is widely accepted that captured combatants are detained so they cannot return to fight against their captors. The Court points to the prudence of detaining those individuals who have already committed acts of treason or insurrection (allegedly Hamdi in this case), for the purposes of ensuring greater national security.

Justice O'Connor next explains, "There is no bar to this Nation's holding one of its own citizens as an enemy combatant" (*Ibid*, 519). Expanding the holding in *Ex Parte Quirin*, the Court uses this WWII-era precedent to explain that, "nothing in *Quirin* suggests that [the citizen-detainee's] citizenship would have precluded his mere detention for the duration of the relevant hostilities" (*Ibid*, 519). Combining both considerations (Prudence and Precedent), the Court further supports its decision on this question. Citizens are subject to wartime detention by their

own military if they take up arms against their own country according to precedent; and the release of said citizen-detainee would be imprudent because it risks the citizen would return to the ongoing conflict.

Although the Court extends deference to the military in response to the first constitutional question, the Court's language is careful to place limits on its interpretations of the government's actions. At several junctions, Justice O'Connor cautiously defines the circumstances under which the Court defers to the state. Reframing the issue of detaining a U.S. citizen, the Court notes, "We . . . answer *only* the *narrow question before us*: whether the detention of citizens falling within that definition is authorized" (*Ibid*, 516) (emphasis added). ("[T]hat definition" refers to the specific circumstances of individuals fighting against the United States in Afghanistan). The Court appears to set itself on an intentionally narrow course – addressing only the specific situation of individuals defined by the AUMF, and under the specific circumstances of Hamdi's detention. There is a conscious effort to limit the reach of the Court decision, perhaps for future cases in the War on Terror. Even in defining the AUMF as "explicit" congressional authority, the Court makes this conclusion with regard for only a "narrow category" of individuals. Other language in the opinion shows that the Court defers to the Executive's authority to detain Hamdi, but only as part of the "detention of individuals falling into the *limited category* we are considering . . ." (*Ibid*, 518) (emphasis added). The Court does not flatly state that the U.S. is constitutionally permitted to detain U.S. citizens. Instead, the Court defers to the government's detention of a single U.S. citizen, who fits the definition of an enemy combatant, based on language taken from specific congressional legislation.

There are implications of this careful and precise language. Clearly the Court grants deference to the U.S. government. But this is less important (for the purposes of my research)

than the way in which the Court comes to its decision. Instead of qualifying Hamdi's detention broadly, the Court lays out three of the four Decision Rules in precise and limiting language. The Court relies on Decision Rules #2, #3, and #4. In terms of Prudence, the Court leans in the direction of traditional, Old Judicial Deference. It discusses the dangers of a detainee returning to battle, erring on the side of the government. In terms of Institutional Legitimacy, the Court relies on a more Nuanced Deference, considering the separate branches of government working together as authority for detention. In terms of Precedent Legitimacy, the Court does cite former deference-based decisions and incorporates them broadly as analogous, indicating an approach of Old Judicial Deference. In other words, these three Decision Rules are used somewhat differently. In response to whether or not the Executive can detain a U.S. citizen who is identified as enemy combatant, the Court answers in the affirmative. In this case, the government may detain Hamdi. But the Court limits its ruling to enemy combatants captured on a foreign battlefield during the course of conflict. What is perhaps most indicative of the judgment is the thorough and exact manner in which the Court's decision reads, using specific and precise language to qualify this answer.

Second Question:

Does the United States executive branch have the authority to subject a United States citizen to indefinite detention?

The Court also considers the constitutionality of Hamdi's indefinite detention. The Court first suggests that the "prospect of perpetual detention" in Hamdi's case is "not farfetched," indicating that the parameters of a War on Terror "are broad and malleable" (*Ibid*, 520). The Court asserts that wartime detentions must cease with the cessation of hostilities, and that any indefinite detention for interrogation purposes is illegal. These rulings also reflect the Court's

treatment of deference. It seems as though the Court sets limitations on its decision by qualifying indefinite detention in the context of modern warfare. The Court unmistakably rejects any proposition that the AUMF provides authority for interrogative purposes. Perhaps more importantly, the Court actually sympathizes with civil liberty concerns about the prolonged and unconventional nature of the War on Terror. The Court quite clearly expresses some reservation about the irregular characteristics of post-9/11 warfare.

Nonetheless, the Court recognizes the law of war principles, which permit detention for as long as the course of hostilities. This is a general consideration of Prudence. As the Court points out, direct and continuing combat in Afghanistan would justify detentions as part of the “necessary and appropriate force” clause of the AUMF. Even though indefinite detentions are unconstitutional, the Court views Hamdi’s detention as consistent with the law of war because the United States military continues to engage in hostilities abroad. In accord with the logic of detaining combatants to keep them off the battlefield, the Court again rules in favor of the government in these specific circumstances. For as long as there are hostilities, there is a chance that released detainees will return to fight against the U.S. Although Hamdi’s argument against indefinite detention may have merit, the Court acknowledges the very real presence of United States troops in Afghanistan.⁵ At this point in the opinion, the Court seems to suggest that Hamdi’s detention may be constitutional, without explicitly holding as much. That is to say, the Court reiterates that the U.S. can detain “individuals legitimately determined to be Taliban combatants” who engage in hostilities against the U.S. military until the end of those hostilities (*Ibid*, 521). Again, the Court is careful to qualify its deference to State actions by stipulating

⁵ In observing information about “active combat in Afghanistan,” the Court cites reports published by *The Washington Post* and also media briefings provided by the United States Department of Defense. (*Hamdi*, 521).

specific conditions for such actions. The onus is thus placed on the government to prove that its detainee meets the conditions enumerated by the Court. The Court clearly states that the government does *not* have the authority to subject a citizen to indefinite detention – or anyone for that matter “[b]ut that is not the situation” in this case (*Ibid*, 521).

With regard to for Decision Rule #4 (Precedent Legitimacy), the Court circles back to the issue of detaining a United States citizen. Reinforcing its position based on legal precedent, the Court cites two main cases dealing with citizen detentions. That the Court observes these two cases simultaneously is important. First the Court narrows the reading of the *Ex Parte Milligan*, 71 U.S. 2 (1866) decision, granting deference to detention under the laws of war. *Milligan* represents one of the only, and certainly strongest, Court holdings in favor of civil liberties. Justice O’Connor points out that the holding of the *Milligan* Court was contingent upon “the fact that Milligan was not a prisoner of war, but a resident of Indiana arrested while at home” (*Ibid*, 522). Justice O’Connor distinguishes these facts from the circumstances of Hamdi “carrying a weapon against American troops on a foreign battlefield . . . he was an enemy combatant” (*Ibid*, 522, footnote 1). The Court maintains that Milligan might have been subjected to a different punishment had his classification been that of an enemy combatant, under the laws of war. To be sure, this discussion restricts *Milligan* by discerning between case facts, deferring to the government decision to detain a U.S. citizen. Even though it appears as though the Court is carefully distinguishing the legal precedent in a manner that nuances the case facts and logic, such restriction of *Milligan* serves the Court’s analysis to *expand* another legal precedent. The Court is essentially comparing two different precedent holdings, and favoring one over the other.

The Court continues to contemplate Precedent Legitimacy, now in a manner that expands the reading of a previous case. The Court notes that the *Quirin* Court found the citizen-detainee

guilty of seditious acts against the United States. Justice O'Connor maintains, "his citizenship did not change this result" (*Ibid*, 423). In another consideration for Precedent Legitimacy, the Court explains that the *Quirin* decision was reached unanimously, and that it "both postdates and clarifies" the *Milligan* decision (*Ibid*, 523). This is a noteworthy statement. Legal precedents of unanimous decision are not *technically* any more binding – that is to say, legally persuasive – than a precedent ruling of 5-4. However, by limiting the *Milligan* decision and concurrently favoring the *Quirin* decision, the Court makes a clear choice to use Precedent Legitimacy in favor of the government. Stating that *Quirin* relates to Hamdi's situation more than *Milligan* indicates an Old Judicial Deference approach.

The Court, in addressing Hamdi's detention notes that the government may not subject enemy combatants to detention for any longer than the course of hostilities. The Court, however, explains that (in this case) military operations in Afghanistan are very much active. Although United States citizens cannot be detained beyond the course of hostilities, Hamdi's current detention does not exceed the limitations of the laws of war. The Court further clarifies the legal precedents to which Hamdi's detention relates. Disposing of the *Milligan* precedent, the Court gestures towards *Quirin* as the more appropriate of the Court's history.

The constitutional question here receives an interesting review by the Court. Ultimately, the Court defers to the government – Hamdi's detention does not appear to be indefinite because the United States is still fighting a War on Terror. The Court does seem to grant deference to the government on prudential grounds, implying combatant detentions are necessary security interests. But in deferring to the government in this case, the Court also identifies potential issues with the War on Terror. The Court seems almost apprehensive of the concept of a potentially endless war. The deference itself is very standard in terms of Prudence – releasing Hamdi risks

releasing an enemy back to the war. Even though the Court shows some trepidation about the implications of an endless War on Terror, the Court's consideration for Prudence follows the Old Judicial Deference approach. The marginal, secondary discussion of indefinite detention and the current War on Terror, are however, indicative of a more progressive analysis.

On the use of Precedent Legitimacy, the Court again ultimately defers to the government's detention of a United States citizen in two ways. First, the Court emphasizes the differences of the case at bar with the *Milligan* case, narrowing its authority. At the same time, the Court escalates the importance of *Quirin* to broaden the logic that a citizen may be detained by his own government, under the laws of war. The analysis of Precedent Legitimacy seems to emphasize the Court's original determination with Old Judicial Deference.

Third Question:

Was Petitioner Hamdi afforded Due Process with respect to the writ of Habeas Corpus and proper Judicial Review?

Finally, the Court considers "what process is constitutionally due to a citizen who disputes his enemy-combatant status" (*Ibid*, 524). Essentially, Hamdi's petition against the government seeks to challenge the legal process afforded to him as an enemy combatant, but moreover, as a citizen. The Court addresses Hamdi's concerns, which he articulates as the "extra-judicial detention [that] begins and ends with the submission of an affidavit based on third-hand hearsay" (*Ibid*, 524). This, Hamdi contends, is a violation of his Fifth and Fourteenth Amendment rights.

The Court takes specific measures to resolve this issue with "a careful examination both of the writ of habeas corpus . . . and of the Due Process Clause" (*Ibid*, 525). The Court remarks that both the government and Hamdi agree on certain conditions of the writ of habeas corpus. Of

most importance, the Court recognizes that no suspension of the writ of habeas corpus occurred, and that petitioner Hamdi was rightfully before an Article III (federal) court to dispute his detention. This seems to be a significant inference. The Court suggests that Hamdi must be afforded at least some of the provisions outlined by federal law 28 U.S.C. §2241, §2243, and §2246 (*Ibid*, 525) (See Appendix I). Focusing on these sections of the law, the Court observes that Congress obviously intended to provide defendants with some opportunity “to present and rebut facts . . .” (*Ibid*, 526). The Court points out that the government *knew* about these basic principles of the statute, but instead asked the Court to defer to the detention process that it has provided, suggesting that “no further process is due” (*Ibid*, 526). This request by the government essentially asks the Court to consider Decision Rule #1 (Expertise), and to defer to the military’s own arbitration because only they have the necessary national security information to make this determination.

The Court closely scrutinizes this contention, namely that the federal court system should be excluded from any review of Hamdi’s legal process and that no further fact-finding process is necessary. The government quite directly implies that Expertise deference applies to the “extraordinary constitutional interests at stake” (*Ibid*, 527). Here, the Court airs the two litigants’ arguments, noting, “Both of the these positions highlight legitimate concerns” (*Ibid*, 528). In a sentence that is emblematic of this research’s pursuit, the Court explains that these concerns exemplify “the tension” between the government’s ability to achieve its policy goals and the process a citizen “contends he is due before he is deprived of a constitutional right” (*Ibid*, 528). In other words, the Court acknowledges the tension between the individual’s civil liberty interests and hand the government’s ability to protect national security. At this point, the Court

lays out what is perhaps the clearest example of Nuanced Deference: the Court applies a balancing test, as found in the Court opinion in *Mathews v. Eldridge*, 424 U.S. 319 (1976).

This test weighs “the private interest that will be affected by the official action” versus the state’s “asserted interest, ‘including the function involved’ and the burdens the Government would face in providing greater process” (*Ibid*, 529, citing *Mathews* at 335). The Court addresses the government’s request for deference in terms of Expertise, with this test. The test, of course, requires the *Hamdi* Court to apply its own interpretation. But its use suggests the Court is objectively balancing civil liberties with government policies – a feature of decision-making largely absent from previous wartime decisions.

In what appears to refute the idea of broad deference, the Court explains that Hamdi’s side of the balancing interests “is the most elemental of liberty interests” (*Hamdi*, 529). The Court refuses to diminish the importance of civil liberty interests quite clearly in a motion towards Nuanced Deference. Again, these considerations are contrary to Rehnquist’s theory, which suggests the Court largely reduces or neglects the importance of civil liberties during war. The Court candidly acknowledges the necessity to respect civil liberty interests. This challenges the dominant pattern of the Court; not only does the Court here recognize the liberty interests, but it describes them as essential. Ironically, the Court refers to a standard determined by the *Milligan* Court. O’Connor writes that no detention is appropriate where it functions as an unchecked system. Relying on Precedent Legitimacy (as part of its application of the *Mathews v. Eldridge* test), the Court expands the general understanding of *Milligan* with respect to civil liberties. The Court here “reaffirm[s]” the “fundamental nature of a citizen’s right to be free from involuntary confinement by this own government without due process of law . . .” (*Ibid*, 531).

The Court continues to stress the importance of careful and meticulous balancing between these paramount State and individual interests. Even more importantly, the Court is mindful of the magnitude of national crises: “It is during our most challenging and uncertain moments that our Nation’s commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad” (*Ibid*, 532). This is, again, a clear and conscious statement that exhibits nuanced decision-making. Regardless of the outcome of the test, that the Court highlights these competing wartime interests indicates a rejection of Old Judicial Deference to the government and profound consideration for both security *and* individual liberty interests.

The Court states that neither the government’s proposed solution nor that of the lower District Court⁶ achieves a balance that is appropriate in this case. This declaration by the Court signifies that it is substituting its own review of competing constitutional interests. This is Nuanced Deference. With respect to Expertise, the Court flatly rejects the state’s appeal, but in an even stronger motion, the Supreme Court refuses to adopt lower court rulings, and instead wishes to offer its *own* measure of balance.

In formulating its own balance, the Court relies on the Precedent Legitimacy of several cases. It holds that a citizen-detainee must be given “factual basis for his classification” as well as “a fair opportunity to rebut” the accusations “before a *neutral decisionmaker* [sic]” (*Ibid*, 533) (emphasis added). Citing a combination of *Cleveland Bd. Of Ed. v. Loudermill*, 470 U.S. 532 (1985) and *Concrete Pipe & Products of Cal., Inc. v. Construction Laborers Pension Trust Fund*

⁶ The District Court initially ordered that Hamdi be afforded a public defender. The Court of Appeals reversed and remanded (attaching the Mobbs Declaration for review). On remand, the District Court required the government to provide numerous documents detailing specific names, dates, testimonies, statements, and interviews pertaining to Hamdi’s capture and detention. These government-provided materials, the District Court ruled, were necessary to provide “meaningful judicial review” (*Hamdi*, 514).

for Southern Cal., 508 U.S. 602 (1993), the Court emphasizes that such “constitutional promises may not be eroded” (*Ibid*, 533). But the Court does not completely rebuff the government. Recognizing the exigencies of wartime, the Court suggests, outside of its holding, that once the government presents its factual assertions, the burden might fall onto the petitioner to prove his innocence in light of government accusations.⁷ Essentially, the prisoner would need to more convincingly prove his innocence than the government need prove the detainee’s guilt. Such a “burden-shifting” scheme could satisfy both parties’ interests and would respect constitutional requirements (*Ibid*, 534). Such specific considerations for balancing both liberty and security interests underline this Court’s care and consistency handling this Post-9/11 detention issue.

Summarizing its holding on the issue, the Court rejects deference to the State with regard to Expertise. In very clear language, the Court “necessarily” rejects the government’s “assertion that the separation of powers principles mandate a heavily circumscribed role for the courts . . .” (*Ibid*, 535). The so-called separation of powers claim made by the government would only serve to concentrate power by usurping judicial responsibilities for the executive branch. A court’s own judicial review as a neutral arbitrator would not encumber the wartime government. Broadening the position of the Court in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), the Court considers such Precedent Legitimacy to fortify its position that “war is not a blank check for the President when it comes to the rights of the Nation’s citizens” (*Ibid*, 536).

The Court briefly relies on Decision Rule #3 (Textual and Institutional Legitimacy), indicating that without congressional suspension of the writ of habeas corpus, the standard of

⁷ The Court’s language begins to read in the conditional tense: Legal “proceedings *may* be tailored to alleviate” burdens on the government during war. “Hearsay, for example, *may* need to be accepted as the most reliable available evidence . . .” The Constitution “*would not* be offended by a presumption in favor” of the government’s evidence. The “onus *could* shift to the petitioner to rebut evidence” more persuasively than the government. Such a “burden-shifting scheme . . . *would*” respect a constitutional balance (*Hamdi*, 533-34) (all emphasis added).

judicial review rests with the Judiciary. To “suggest that a citizen” could not access some form of due process described by the Court, “would turn our system of checks and balances on its head . . .” (*Ibid*, 536). The separation of powers clause does not consolidate powers – even during times of conflict – but rather distinguishes the roles of arbitration. The Court uses the standard of Institutional Legitimacy to say that Congress is the only institution that can suspend the writ of habeas corpus, not the Executive. Therefore, the “some evidence” standard used by the government fails constitutional requirements because the defendant is unable to truly challenge the Executive’s claims. Hamdi “unquestionably has the right” to a lawyer, regardless of the government’s assertions (*Ibid*, 539). In holding, the Court asserts that it is not for the Executive, by way of a military tribunal, to determine whether or not a citizen-detainee has been given due process. While a habeas court may accept government assertions as adequate evidence, it must also provide the defendant an opportunity to rebut the government’s accusations.

The *Hamdi* case presents three constitutional questions for review of the Court. In analyzing the language of its plurality opinion, there is clear evidence of the Court’s use of Decision Rules. In general terms, the Court uses *all* four of the Decision Rules that I have defined. With regard to each constitutional question for review, the Court uses each Decision Rule slightly differently. Taken as a whole, considering the Court’s approach to all three constitutional questions, this case study appears to support my hypothesis that while the Court ultimately favored the government’s policies, its approach to deference was careful, precise, and nuanced.

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

Appendix I

115 STAT. 224 Public Law 107–40
(“The Authorization for Use of Military Force”)
 (United States Government Publishing Office 2001).

Whereas, on September 11, 2001, acts of treacherous violence were committed against the United States and its citizens; and

Whereas, such acts render it both necessary and appropriate that the United States exercise its rights to self-defense and to protect United States citizens both at home and abroad; and

Whereas, in light of the threat to the national security and foreign policy of the United States posed by these grave acts of violence; and

Whereas, such acts continue to pose an unusual and extraordinary threat to the national security and foreign policy of the United States; and

Whereas, the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States: Now, therefore, be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This joint resolution may be cited as the “Authorization for Use of Military Force”.

SEC. 2. AUTHORIZATION FOR USE OF UNITED STATES ARMED FORCES.

(a) **IN GENERAL.**—That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

(b) **WAR POWERS RESOLUTION REQUIREMENTS.**—

(1) **SPECIFIC STATUTORY AUTHORIZATION.**—Consistent with section 8(a)(1) of the War Powers Resolution, the Congress declares that this section is intended to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution.

(2) **APPLICABILITY OF OTHER REQUIREMENTS.**—Nothing in this resolution supercedes any requirement of the War Powers Resolution.

Approved September 18, 2001

United States Code
Title 28 – Judiciary and Judicial Procedure (Chapter 153–Habeas Corpus)
(Government Printing Office 2011).

§2241. Power to grant writ

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless–

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify for trial.

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

(e)(1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

(2) Except as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005 (10 U.S.C. 801 note), no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

§2243. Issuance of writ; return; hearing; decision

A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.

The writ, or order to show cause shall be directed to the person having custody of the person detained. It shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed.

The person to whom the writ or order is directed shall make a return certifying the true cause of the detention.

When the writ or order is returned a day shall be set for hearing, not more than five days after the return unless for good cause additional time is allowed.

Unless the application for the writ and the return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained.

The applicant or the person detained may, under oath, deny any of the facts set forth in return or allege any other material facts.

The return and all suggestions made against it may be amended, by leave of court, before or after being filed.

The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require.

§2246. Evidence; depositions; affidavits

On the hearing of an application for a writ of habeas corpus to inquire into the legality of the detention of a person pursuant to a judgment the certificate of the judge who presided at the trial resulting in the judgment, setting forth the facts occurring at the trial, shall be admissible in evidence. Copies of the certificate shall be filed with the court in which the application is pending and in the court in which the trial took place.

United States Code**Title 18 – CRIMES AND CRIMINAL PROCEDURE (Chapter 301)**

(Cornell University Law School n.d.).

§ 4001

(a) No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.

Rasul v. Bush*, 542 U.S. 466 (2004)*Background of the Case:**

Between 2002 and the decision of the *Rasul* case, the United States detained approximately 640 non-U.S. citizens at the Naval Base at Guantanamo Bay. Those detained at Guantanamo Bay had been captured on foreign soil during the course of hostilities between the United States military and belligerents in the War on Terror. The U.S.-operated Naval Base at Guantanamo Bay is leased by the United States per a 1903 Lease Agreement between the United States and the Cuban government. The agreement recognizes Cuba's sovereignty over the land on which the base sits, while granting consent to the United States executive to "exercise complete jurisdiction and control over" the leased land (*Rasul v. Bush*, 542 U.S. 466, at 471 (2004)).

Among the 640 detainees at Guantanamo Bay, the petitioners in this case include 2 Australian citizens and 12 Kuwaiti citizens. In 2002, when they were made aware of petitioners' detentions, family members of the detainees filed several legal actions against U.S. officials in the United States District Court for the District of Columbia. The suits filed on behalf of the foreign citizen detainees denied any involvement of having engaged in or conspired to carry out acts of terror against the United States. The suits argued that the detainees had been held in custody in violation of United States law, specifically that they had been imprisoned without having been charged for any crime; that they were denied access to legal counsel; and that they were not given a proper trial before any judicial or military court. The suits claimed that the government's indefinite detention of the foreign detainees, without access to counsel, were violations of the Fifth Amendment's Due Process clause. In response, the government argued

that the U.S. federal court system did not have jurisdiction to hear the cases of non-U.S. citizens who were being held on land where the United States did not have sovereign power.

Petitioners sought to invoke the District Court's jurisdiction pursuant to three legal doctrines: the federal-question statute (28 USCS § 1331), the "Alien Tort Statute" (28 USCS § 1350), and a provision of the federal habeas corpus law (28 USCS § 2241(c)(3)). The Australian citizens filed petitions for a writ of habeas corpus. The 12 Kuwaiti prisoners filed suits seeking information about the charges levied against them, to have access to their families and to legal counsel, and to be provided with a legal hearing by a court or other neutral arbitrator. All the detainees argued that the government's denial of those provisions violated the U.S. Constitution, international law and certain treaties of the United States.

The District Court for the District of Columbia heard the several suits as one collective petition for a writ of habeas corpus. The District Court dismissed the appeals for a writ of habeas corpus, ruling in favor of the government. The court ruled that the foreign prisoners were detained outside of sovereign U.S. territory, and they could not seek a petition for a writ of habeas corpus because the federal court system did not have jurisdiction to hear the case.

The United States Court of Appeals for the District of Columbia affirmed the decision of the District Court. The Court of Appeals found that foreign detainees, who were held in custody by the military and where the U.S. government did not have sovereignty, did not enjoy the right to a hearing before a federal court of the United States. In 2003, The Supreme Court granted a writ of certiorari to hear the case. The Supreme Court reversed the decision of the United States Court of Appeals for the District Columbia and remanded the case for the District Court. The Supreme Court reviewed the following constitutional question:

Do the federal courts of the United States have legal jurisdiction to hear the appeals of non-U.S. detainees, held in U.S. military custody at Guantanamo Bay in Cuba?

Analysis of the Court's Opinion in *Rasul v. Bush*:

Rasul v. Bush is another example of a Supreme Court case both argued and decided in the midst of ongoing "war." Like in *Hamdi*, the Court presided over litigation during the course of U.S. military combat in Iraq and Afghanistan. The case deals with alleged Fifth Amendment rights violations, based on the indefinite detention of several non-U.S. citizen detainees. This case presents a particularly interesting question: whether or not foreign prisoners of the U.S. military can even appeal to the U.S. federal court system based on constitutional violations.

In short, the question of deference to the Executive is largely founded on a question of deference on the basis of Expertise. The government asserts that the U.S. judiciary ought to remain uninvolved in the detention process of prisoners, leaving all arbitration to the Executive branch. If the Court ruled in favor of the government's claim regarding federal jurisdiction for writ of habeas petitions, the Court would be effectively granting the government its own power to adjudicate cases dealing with foreign detainees.

To be sure, there exist several similarities in *Rasul* with other cases from this period. The issue of a writ of habeas corpus seems to be of most significance. The issue of federal judicial jurisdiction also appears in recent Post-9/11 cases as they do in *Rasul*. Nonetheless, this case study presents some interesting features that other Post-9/11 cases do not. Of utmost importance is the citizen status of the petitioner detainees. This is important because the case raises fundamental questions about the scope of civil liberties protections. Are the provisions of the Constitution and the corresponding statutory conditions limited to those who are United States citizens? Or do civil liberties more generally apply to any individual subjected to security

policies? This case determines whether citizenship is a prerequisite for constitutional protections against the security policies of the state.

Rasul v. Bush was decided by a 6-3 majority of the Court, with Justice John Paul Stevens writing the opinion of the Court. Justice O'Connor, Justice Kennedy, Justice Souter, Justice Ginsburg, and Justice Breyer voted with the majority of the Court. Justice Scalia wrote a dissenting opinion, with whom Justice Rehnquist and Justice Thomas joined. Once again, my analysis of this case study focuses on the majority opinion written by Justice Stevens.

Constitutional Question:

Does the U.S. federal court system have jurisdiction to hear litigation on behalf of foreign detainees, captured on foreign soil and imprisoned by the United States at Guantanamo Bay?

The Court begins its analysis by briefly outlining the decisions of the lower District and Appeals courts. The ruling of the District Court relied on the Supreme Court case of *Johnson v. Eisentrager*, 339 U.S. 763 (1950). This Court decision denied jurisdiction to a federal district court to hear an appeal for habeas corpus from 21 German citizens, captured in China, and imprisoned in “occupied Germany” (*Rasul*, 475). Justice Stevens summarizes how the District Court cited *Eisentrager* to state that “aliens detained outside the sovereign territory of the United States may not invoke a petition for a writ of habeas corpus” (*Rasul*, 542 U.S., 472-473, citing *Rasul v. Bush*, 215 F. Supp.2d 55, 68 (DC 2002)) (brackets omitted). This brief recount of the district court’s holding later serves as the Court’s starting point for an analysis of Precedent Legitimacy.

The issue can be summarized as this: Can foreign detainees file a suit against the government before a federal court to challenge their detention? The Court initiates its review of

this question by explaining the government's position, which draws on the Court's decision in *Eisentrager*. The *Eisentrager* Court denied U.S. courts the ability to hear petitions for a writ of habeas corpus based on the following crucial facts: the prisoner "(a) is an enemy alien; (b) has never been or resided in the United States; (c) was captured outside of our territory and there held in military custody as a prisoner of war; (d) was tried and convicted by a Military Commission sitting outside the United States; (e) for offenses against laws of war committed outside the United States; (f) and is at all times imprisoned outside the United States" (*Rasul*, 475-476, citing *Johnson v. Eisentrager*, 339 U.S., 763, 777 (1950)). Based on these facts, the Court held that "no right to the writ of *habeas corpus* appears" (*Eisentrager*, 339 U.S., 781, as cited in *Rasul*, at 476). This detailed review of legal precedent sets the *Rasul* Court on a course of consideration of Precedent Legitimacy. In fact, the government's contentions for deference draw exclusively from this former Supreme Court case.

With regard to Decision Rule #4 (Precedent Legitimacy), the Court engages in an analysis to clearly distinguish this case from the *Eisentrager* decision. Stevens notes: the detainees in this case are not citizens of nations at war with the United States; they refute having "engaged in or plotted acts of aggression against the United States"; they have not been given an opportunity before "any tribunal"; they have not been formally charged with or convicted of any crime; and they have been detained for two years by the United States on land exclusively controlled by the United States (*Rasul*, 476). The Court indicates that the facts of *Eisentrager* are not analogous to those of the case at bar. Moreover, the Court emphasizes that the *Eisentrager* Court "made quite clear" that the critical facts enumerated in that case "were relevant only to the question of the prisoners' *constitutional* entitlement to habeas corpus" (*Ibid*, 476). The previous

Court did not address question of any supplemental statutory protections for the non-U.S. detainees.

This point is yet another significant difference emphasized in Justice Stevens' opinion. This direct and detailed distinction between case facts indicates a Nuanced approach by Court. The Court seeks to set out some clear differences in the precedent case, which until this point had served as the principal defense of the government's argument. This approach certainly narrows the impact of the *Eisentrager* decision. By laying out clear differences in the two cases, the Court more closely and consciously considers the circumstances that might caution against deference to the Executive.

In an even more refined consideration of Precedent Legitimacy, the Court goes on to describe the historical contexts surrounding the *Eisentrager* Court's neglect to consider any additional statutory authorization. As part of Justice Steven's opinion in this case, the Court points out that *Eisentrager* denied habeas corpus rights to prisoners based on the ruling of another legal precedent, *Ahrens v. Clark*, 335 U.S. 188 (1948).⁸ Analyzing this legal precedent cited within a legal precedent, Justice Stevens explains that the *Eisentrager* Court had acted pursuant to the *Ahrens* ruling. The *Ahrens* Court held that petitioners must necessarily file a suit in the court that has territorial jurisdiction over the prisoners' detention. This holding, Justice Stevens explains, is not applicable to the case at bar – and would not have been applicable to the *Eisentrager* case. Thus, the Supreme Court altered the authority of the *Ahrens* decision.

⁸ This case concerned 120 German nationals who were detained at Ellis Island in New York, to be deported back to Germany. The German prisoners filed petitions for a writ of habeas corpus in the U.S. District Court for the District of Columbia because they were suing the U.S. Attorney General. The *Ahrens* Court held that because the prisoners were not in fact within the jurisdiction of the District Court for the District of Columbia (where they sought an appeal for a writ), the writ of habeas corpus did not apply (*Ahrens v. Clark*, 335 U.S. 188 (1948)).

The Court continues this deep analysis regarding deference based on Precedent Legitimacy. The Court turns to its ruling in *Braden v. 30th Judicial Circuit Court of Ky.*, 410 U.S. 484 (1973). Justice Stevens holds that the logic in *Ahrens* ought not to have been determinant in *Eisentrager* because the *Braden* Court ruled, in 1973 (a full 25 years after *Ahrens*) that “the writ of habeas corpus does not act upon the *prisoner* who seeks relief, but upon the person who holds him in what is alleged to be unlawful custody” (*Braden*, 410 U.S. at 494-495, as cited in *Rasul*, at 478) (emphasis added). According to Justice Stevens, the *Braden* Court essentially overturned the *Ahrens* ruling that the “prisoner’s presence within the territorial jurisdiction” of the federal court is required to invoke that court’s jurisdiction “under the federal habeas statute” (*Rasul*, 478). The logic in *Braden* draws from other Supreme Court decisions decided in the years following the Post-WWII era *Ahrens* Court.⁹

In the time between the *Ahrens* decision and the case at bar, the Court reversed the holding of the 1948 case. However, *Eisentrager* was heard only two years after the now-invalid ruling in *Ahrens*; this now-voided ruling influenced the ruling in *Eisentrager*. In sum, (1) *Eisentrager* was decided based on the Court’s ruling in *Ahrens*; (2) the premise of *Ahrens* is no longer legally binding; (3) this is because the Court in *Braden* overturned the *Ahrens* judgment; (4) and because the *Braden* decision disposed of the core premise in the *Eisentrager* opinion, “*Eisentrager* plainly does not preclude the exercise of § 2241 jurisdiction over petitioners’ claims” (*Rasul*, 479).

The Court offers an extensive analysis of precedent to explain why the government’s position in the case does not satisfy an appeal for deference. The Court is vigilantly clarifying the

⁹ The *Braden* Court cites *Burns v. Wilson*, 346 U.S., 137 (1953) to show that “petitioners’ absence from the district does not present a jurisdictional obstacle to the consideration of the claim” (*Braden*, 410 U.S. 498, as cited in *Rasul*, at 479).

(inapplicable) logic in *Eisentrager* based on legal developments that had transpired since the 1948 *Ahrens* decision. Such careful consideration clearly indicates a Nuanced approach. Justice Stevens does not just dissect the differences between *Eisentrager* and the case at bar; he completely undercuts the authority and logic behind the *Eisentrager* decision. This is a markedly deep, detailed, and complex process of legal reasoning and use of case authority.

The Court moves away from its examination of legal precedent and turns its attention towards Decision Rule #3 Institutional Legitimacy. Again, the Court starts with the argument presented by the government. The government asks to the Court for deference by contesting the authority of federal habeas statute § 2241 based on a “longstanding principle of American law” (*Rasul*, 480). This principle asserts that congressional legislation does not apply to territories outside of the United States unless Congress otherwise explicitly says otherwise. The Court analyzes this longstanding principle of American law not through an array of possible contexts, but through one specific lens, that of a petition for the writ of habeas corpus. The principle specified by the government “certainly has no application to the operation of the habeas statute with respect to persons detained within the ‘territorial jurisdiction’ of the United States” (*Id*, 480, citing *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949)).

The Court rejects the government’s claim, ruling that the direct terms of the Cuban-American lease agreement of 1903 preclude the government from making this broad appeal for deference. The Court interprets the very language of the bilateral agreement as granting the United States “complete jurisdiction and control” over Guantanamo Bay (*Ibid*, 480). The Court cites the government’s own concession that the federal habeas statute *would* invoke a federal court’s jurisdiction over Guantanamo prisoners who were *American* citizens. The Court interprets the federal habeas statute based on the intentions of Congress, noting, “there is little

reason to think that Congress intended the geographical coverage of the statute to vary depending on the detainee's citizenship" (*Ibid*, 481). In a definitive and unambiguous rejection of the government's argument, the Court holds that foreign prisoners held at Guantanamo, "no less than American citizens, *are* entitled to invoke the federal courts' authority under § 2241" (*Ibid*, 481).

The Court also treats deference in terms of Institutional Legitimacy by evaluating Congress' legislative intentions. First, the Court examines the language of the 1903 federal agreement between the U.S. and Cuba. Because the agreement grants quite clear and absolute control to the United States government, the Court rejects any argument that the government does not enjoy jurisdictional control over Guantanamo Bay. Thus, the statute's authority does apply to prisoners held at the naval base in Cuba. In an interpretation of congressional intent, the Court reasons that a detainee's citizenship has no bearing on the application of the habeas law. Because Congress did not draft the law in a way that "draws . . . distinction[s] between Americans and aliens held in federal custody," the Court reasons that Congress has not restricted the reach of the law to foreign prisoners (*Ibid*, 481).

This is an interesting approach to Institutional Legitimacy. The Court clearly rejects any appeal for deference from the government. The Court holds that there is no reason to construe Congress' statute as limited only to U.S. citizens. The Court analyzes Decision Rule #3 as a gap between what Congress has explicitly authorized of the Executive, and what the Executive has interpreted as authority from Congress. It seems as though the Court rules that the executive has over-stated its authority from congressional legislation and thus rejects the executive's interpretation of what Congress granted. It is difficult to describe this refusal of deference as "Nuanced Deference" simply because the Court fails to use a clear and developed review of the

Separation of Powers. Instead, the Court identifies a gap or an absence of authority, and simply “corrects” the view of the Executive.

The Court holds that section 2241 of the federal habeas law “requires nothing more” than the federal district courts’ jurisdiction over the *custodians* of those imprisoned at Guantanamo Bay. Neither party objects to the federal court’s jurisdiction over the U.S. military, and thus, the statute obliges the U.S. District Court for the District of Columbia “to hear petitioners’ habeas corpus challenges to the legality of their detention at Guantanamo Bay Naval Base” (*Ibid*, 484).

Finally, the Court considers the provisions of 28 U.S.C. § 1331 (the federal-question statute), and § 1350, known as the Alien Tort Statute. (See Appendix II). Once again, Justice Stevens emphasizes that the Court of Appeals rejected petitioners’ appeal for a hearing under federal jurisdiction based primarily on the Court’s holding in *Eisentrager*. Like its ruling on the issue of the habeas statute, the Appeals Court found that the two sections of 28 U.S.C. fall outside of federal court jurisdiction. Once again, Justice Stevens modifies the lower court’s ruling, noting “*Eisentrager* itself erects no bar to the exercise of federal court jurisdiction over the petitioners’ habeas corpus claims” (*Ibid*, 484). The Court turns to a brief consideration of Precedent Legitimacy, noting, “nothing in *Eisentrager* or in any . . . other cases categorically excludes aliens detained in military custody outside the United States from the privilege of litigation in U.S. Courts” (*Ibid*, 484) (internal quotations omitted). Justice Stevens narrows the *Eisentrager* precedent, citing the logic that “[a]lien citizens, by the policy and practice of the courts in this country, are ordinarily permitted to resort to the courts for the redress of wrongs and the protection of their rights” (*Ibid*, 484-485, citing *Disconto Gesellschaft v. Umbreit*, 208 U.S. 570 (1908)). The Court thus recognizes that the two statutes under 28 U.S.C. provide

explicit authority for alien detainees to file suit against the government for violations of U.S. law in a federal court.

The Court concludes its review of *Rasul* by noting: “What is presently at stake is only whether the federal courts have jurisdiction to determine the legality of the Executive’s potentially indefinite detention of individuals who claim to be wholly innocent of wrongdoing” (*Ibid*, 485). The Court answers this question in the affirmative, ruling that federal courts do have jurisdiction. The Court reverses the ruling of the Court of Appeals and remands the cases to the U.S. District Court for the District of Columbia.

Rasul offers a concise ruling, stemming largely from a consideration of Decision Rule #4 Precedent Legitimacy. It is important to note that when the Court narrows *Eisentrager* in a significant way, it is expanding the interpretation of court cases and institutional authorization that permit foreign petitioners access to American courts. Although there is a clear effort throughout the Court’s decision to mitigate the logic and facts in *Eisentrager* in a clearly nuanced manner, the Court seems to rely on fragments of other types of logic that are not specifically identified in the four Decision Rules. For example, the interpretation of congressional intent certainly includes a consideration for Institutional Legitimacy, but the Court does so by examining the meaning of congressional legislation (or lack thereof). While the Court rejects the government’s appeal for a deferential ruling, the Court also relies on a substantial *void* in congressional legislation.

As mentioned, the outcome or ruling of the Court’s opinion is not the focus of my research. That the Court flatly rejected any deference in this case is only secondary to the Court’s review process. The Court’s approach to the government’s broader, most direct appeal for deference is certainly nuanced and calculated. The arduous process of dissecting and

deconstructing *Eisentrager* and its historical and legal contexts indicates an approach of Nuanced Deference. However, the Court's use of Institutional Legitimacy presents a more complex picture. When the Court qualifies congressional authority (or lack of authority), the Court undoubtedly interprets the text of the congressional legislation. But in this instance, the Court identifies a lack of inter-institutional accord. That is to say, the Executive preemptively claims for itself the benefit of a "longstanding American principle" of the legislative tradition of the United States. However, the Court explains that 1) this principle is unfounded with regard to the specific issue of a writ of habeas corpus; and 2) that Congress stated nothing in its statutory language that would otherwise alter the applicability of habeas rights for foreign detainees. Although the Court refuses to grant deference to the Executive, it indirectly points to the relationship between Congress and the Executive in finding a lack of congressional authority.

Lastly, it is of significance that within Court's general parlance there is less specificity than there are broad statements. The Court does little to distinctively tailor its decision to the specific circumstances of the foreign detainees in the case. Instead, the Court uses definitive language to hold, more generally, that the federal court system maintains jurisdiction to hear the appeals of prisoners in extraterritorial detention. This is significant because Court rulings that do not specifically limit the circumstances and contexts in its ruling are frequently used as legal precedent for future constitutional issues in other contexts. In sum, *Rasul v. Bush* is an example of the Court balancing constitutional liberties and State security policies with a Nuanced Deference approach grounded in the use of Precedent Legitimacy. While the Court refuses to defer to the government on the basis of Institutional Legitimacy, the Court does so by rejecting the Executive's claim to congressional authority for its actions.

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

Appendix II

United States Code

Title 28 – JUDICIARY AND JUDICIAL PROCEDURE

(Government Printing Office 2011).

§ 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

§ 1350. Alien's action for tort

The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

§ 2241. Power to grant writ

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and any transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless—

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

(e)(1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

(2) Except as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005 (10 U.S.C. 801 note), no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

Rumsfeld v. Padilla* 542 U.S. 426 (2004)*Background of the Case:**

On May 8, 2002, Jose Padilla, a U.S. citizen, flew from Pakistan to Chicago, Illinois. When his plane landed in the United States, Padilla was arrested by federal law enforcement officers at Chicago's O'Hare International Airport. Padilla was detained as a "material witness," pursuant to a warrant issued by the United States District Court for the Southern District of New York (*Rumsfeld v. Padilla*, 542 U.S., 426, 430 (2004)). The warrant was served as part of a grand jury investigation into the events of September 11, 2001. Padilla was held in federal criminal custody, and motioned on May 22 to vacate the warrant against him. On June 9, while Padilla was still in custody as a material witness, President George W. Bush issued an executive order, commanding Secretary of Defense Donald Rumsfeld to designate Padilla as an "enemy combatant" and detain him in military custody (*Ibid*, 431). The President cited his authority to issue the executive order under the Constitution's "Commander in Chief of the U.S. armed forces" clause, as well as the Authorization for Use of Military Force (AUMF), which was passed into law on September 18, 2001 (*Ibid*, 431).

On June 9, Padilla was handed over to the Department of Defense and transferred to the Consolidated Naval Brig in Charleston, South Carolina. On June 11, counsel for Padilla filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of New York. The suit filed on behalf of Padilla alleged that the government had violated the Fourth, Fifth, and Sixth Amendments and the Habeas Suspension Clause of the United States Constitution. Padilla's suit named President Bush, Secretary of Defense Rumsfeld, and Commander of the Consolidated Naval Brig, Melanie Marr, as respondents. The government argued that Commander Marr was the only direct custodian of Padilla and moved to dismiss the

petition because Commander Marr is not subject to the jurisdiction of the District Court in New York. The government also argued that the President did have the authority to detain Padilla under the Constitution's Commander in Chief clause, the AUMF, and Supreme Court precedent in *Ex Parte Quirin*, 317 U.S. 1 (1942).

In December 2002, the District Court for the Southern District of New York ruled that Secretary of Defense Donald Rumsfeld was properly named as respondent in the case, and that the District Court "can assert jurisdiction over" Secretary Rumsfeld (*Ibid*, 432). However, the District Court deferred to the government ruling that the President did have authority to detain Padilla as an enemy combatant.

On appeal, the United States Court of Appeals for the Second Circuit reversed, in part, the ruling of the lower court. First, The Court of Appeals affirmed that Secretary Rumsfeld was properly named as respondent because Rumsfeld "exercises 'the legal reality of control' over Padilla and because he was personally involved in Padilla's military detention" (*Ibid*, 433, citing *Padilla v. Rumsfeld*, 352 F.3d 695 at 707-708 (2003)). The Appeals Court also agreed that the District Court for the Southern District of New York had jurisdiction over Secretary Rumsfeld. However, the Court of Appeals reversed the lower court's decision on the merits of the President's authority to detain Padilla under military custody. The Appeals Court determined that the President did not have legal authority from either the Commander in Chief clause of the Constitution or the AUMF to detain a United States citizen on American soil. Instead, that court noted that both case law and the Non-Detention Act (18 U.S.C. § 4001(a)) preclude the President from detaining citizens without "explicit congressional authorization" (*Ibid*, 434) (see Appendix III). The Appeals Court granted Padilla a writ of habeas corpus and ordered Padilla's release from military custody.

The U.S. government filed for a writ of certiorari, which the Supreme Court granted in 2004. The Court confronted two questions:

1. Was a petition for a writ of habeas corpus properly filed with the proper federal court, and did it identify the proper respondent(s); and
2. Does the President have the legal authority under the AUMF to detain a United States citizen, who is determined to be an enemy combatant?

Analysis of the Court's Opinion in *Rumsfeld v. Padilla*:

The Court's decision in *Padilla* is unique for several reasons. Of greatest importance is that the Court does *not* reach a decision on the constitutional question. Confronted with two questions,¹⁰ the Court acknowledges that it “answer[s] the threshold question in the negative and thus do[es] not reach the second question presented” (*Ibid*, 430). The Court, rules that Padilla's petition was improperly filed because it named the wrong government official as the respondent, and was also filed in a federal district court that did not have the jurisdiction to grant habeas relief. Thus, the Court did not answer the constitutional question because Padilla's challenge against the State could not be substantiated by the District Court for the Southern District of New York. As such, the Court only addresses the first of the two questions presented for review.

The Court uses technicalities in its jurisprudence and in statutory history to simply reject a hearing of the case because the case was improperly filed by Padilla's lawyer. Moreover, this is a case in which the Court opinion constantly responds to contentions made by the Court's dissenting opinion. The Court's response to the dissent provides language that also implies the Court's deferential treatment of the government. *Padilla* is unlike other cases in this Post-9/11

¹⁰ Initially, the Court poses the two questions for review: “First, did Padilla properly file his habeas petition in the Southern District of New York; and second, did the President possess authority to detain Padilla militarily” (*Padilla*, 430).

era because, while the Court does have the opportunity to address an important constitutional issue, it focuses on procedural and technical complications. The Court chooses to acquiesce in favor of the government without directly ruling in favor of the government's security policies. Thus, this case is one in which the Court defers to the government implicitly.

In its inferred deference to the government, the Court relies most heavily on Decision Rule #4 Precedent Legitimacy. The Court frequently analyzes and distinguishes cases used by the Appeals Court, the dissenting opinion, and Padilla's argument. In each case, the Court carefully identifies the legal precedents as dissimilar and inconsequential to the jurisdictional question before the Court. Relying on precedent, the Court rules that the only relevant logic drawn from past cases is that which supports the government's argument. The Court also uses Decision Rule #3 Institutional Legitimacy to reinforce its interpretation of congressional legislation and statutory language. Again, the Court uses these Decision Rules to defer to the government in this case, not by balancing the government's actions against Padilla's civil liberties, but to determine that Padilla's petition does not have legitimacy as it was filed.

Like *Rasul v. Bush*, 542 U.S. 466 (2004) and *Hamdi v. Rumsfeld*, 542 U.S., 507 (2004), the *Padilla* case was both argued and decided in 2004. While *Hamdi* and *Rasul* were both decided on the merits of the cases, the Court seems to evade the core constitutional question in *Padilla*. It might initially appear as though the Court is willing to confront issues related to civil liberties and security policies, however the Court effectively reverts to its traditional pattern of tacit deference.

The *Padilla* case was decided by a five-justice majority. Chief Justice Rehnquist wrote the opinion of the Court. He was joined by Justice O'Connor, Justice Scalia, Justice Kennedy, and Justice Thomas. Justice Kennedy also wrote a concurring opinion, with whom Justice

O'Connor joined. Justice Stevens wrote a dissenting opinion, with whom Justice Souter, Justice Ginsburg, and Justice Breyer joined.

Because the Court addressed *only* the threshold question, without answering the second constitutional question, this analysis will look only at what the Court addressed in its opinion. The Court answered the threshold question in two parts: “First, who is the proper respondent to [Padilla’s habeas] petition? And second, does the Southern District [of New York] have jurisdiction over him or her?” (*Ibid*, 434). Accordingly, the following analysis examines not the two questions presented for review before the Court (see Background of the Case), but the two sub-questions that the Court actually addressed as part of the threshold question: whether the U.S. District Court for the Southern District of New York has jurisdiction over Padilla’s petition for a writ of habeas corpus.

First Question:

Who is the proper respondent to Padilla’s petition for a writ of habeas corpus?

Immediately, the Court asserts that § 2242 of the federal habeas statute identifies the respondent as “the person who has custody over the petitioner” (*Ibid*, 434) (internal parentheses omitted) (see Appendix III). The important language in § 2242 of this statute, as cited by the Court, states: “The writ, or order to show cause shall be directed to the person having custody of the person detained” (*Ibid*, 434). The Court determines that because the federal habeas law uses a “definite article” in reference to a single custodian, “there is generally only one proper respondent” to a petition for a writ of habeas corpus (*Ibid*, 434). With regard to Decision Rule #4 Precedent Legitimacy, the Court cites *Wales v. Whitney*, 114 U.S. 564 (1885) to assert that the longstanding principle of habeas corpus has required a petition to be filed “against some person who has the *immediate custody* of the party detained . . .” (*Ibid*, 435) (emphasis of the Court in

Padilla). (The Court will later refer to this Precedent principle in *Wales* as the “immediate custodian rule.”) Relying on both statutory language in federal habeas law, and Precedent Legitimacy from *Wales*, the Court maintains that “the longstanding practice confirms that in habeas challenges to present physical confinement . . . the *default rule* is that the proper respondent is the *warden of the facility* where the prisoner is being held, not the Attorney General or some other remote supervisory official” (*Ibid*, 435) (emphasis added). Although the Court has made certain exceptions to this habeas principle, none of those Precedent exceptions apply to the facts of the case at bar.¹¹ The Court establishes *Wales* as the decisive Precedent to which *Padilla* relates. The logic from *Wales*, the Court maintains, is the proper logic to apply to *Padilla*’s habeas challenge.

Using Precedent Legitimacy, the Court relies on the immediate custodian rule from *Wales* to determine that Commander Marr “is the proper respondent” in the case, not Secretary Rumsfeld (*Ibid*, 436). Because Commander Marr serves as the *immediate* custodian of the prisoners on the naval brig, it is she who acts as the direct custodian over *Padilla*. The Court uses *Wales* here to directly apply the standard of immediate custodian rule. This is a clear consideration of Precedent Legitimacy that expands the impact of *Wales* because it draws directly from the standard established by that Court.

The Court then addresses the contentions of *Padilla* and Justice Stevens’ dissent. First, the Court notes that neither *Padilla* nor the dissenting opinion “deny the general applicability” of *Wales*’ immediate custodian rule. However, the Court rejects the dissent’s argument that “the

¹¹ The only exceptions that the Court notes are those that have dealt with the “immediate custodian rule” as applied to American citizens detained by the military “outside the territorial jurisdiction of any district court” (*Padilla*, 435, footnote 9). The Court points to specific exceptions found in *Braden v. 30th Judicial Circuit Court of Ky.*, 410 U.S. 484 (1973), *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955), and *Burns v. Wilson*, 346 U.S. (1953). None of these exceptions are applicable to the present case.

rule is flexible” and ought not to apply because of the exceptional circumstances of the case (*Ibid*, 436). It is not uncommon for Court opinions to confront the dissenting opinions in a case. However, the continued reference to Justice Stevens’ dissent indicates that the Court fundamentally rejects the broader argument against the government. By openly referring to and rejecting the dissenting opinion, the Court maintains its narrow approach to the procedural question before the Court, and rejects any deviation from established historical standards.

The Court continues to use Precedent Legitimacy to reject Padilla’s argument and the dissent, which contend that other Court decisions have made exceptions to the immediate custodian rule from *Wales* and have expanded the connotation of the term “custody.”¹² The Court, however, flatly rejects the notion that a broadened definition of “custody” would “undermine the rationale or statutory foundation of *Wales*’ immediate custodian rule where physical custody *is* at issue” (*Ibid*, 437) (emphasis of the Court). The Court notes that its past decisions may have expanded the conditions of custody in certain exceptional cases, which Padilla and the dissent cite, but these exceptions do not obligate the Court to necessarily deviate from the traditional holding in *Wales*. The Court is resolute in its use of Precedent Legitimacy from *Wales*, using the precedent case as a foundation for its decision. Even though Padilla and the dissent point to cases in which exceptions are made to the principle established in *Wales*, the Court distinguishes these cases as irrelevant to the case. The precedent cited by Padilla merely states that the immediate custodian rule “does not apply when a habeas petitioner challenges something *other* than his present physical confinement” (*Ibid*, 438) (emphasis added). In Padilla’s case, however, physical detention *is* the challenge addressed in the habeas petition. The

¹² Padilla argues that the Court in *Hensley v. Municipal Court, San Jose-Milpitas Judicial Dist., Santa Clara Cty.*, 411 U.S. 345 (1973) did not approve of the *Wales* holding – “that a person released on his own recognizance is not ‘in custody’ for habeas purposes . . .” (*Padilla*, 437).

Court explains that case law does not “support a deviation from the immediate custodian rule here” (*Ibid*, 437).

The Court takes *Braden v. 30th Judicial Circuit Court of Ky.*, 410 U.S. 484 (1973) as an example cited by Padilla, considered to be exception to the immediate custodian rule.¹³ The Court uses Precedent Legitimacy to distinguish the facts in that case. Chief Justice Rehnquist notes that *Braden* holds only that a prisoner may name a respondent who “exercises legal control with respect to the challenged ‘custody’” if that petition does *not* specifically challenge the prisoner’s “present physical confinement” (*Ibid*, 438). However, this holding does nothing to undercut the broader *Wales* decision “in the traditional context of challenges to present physical confinement” (*Ibid*, 438). Padilla *is* indeed making a challenge to his physical detention. The Court points out that *Braden* even cited *Wales* to emphasize the established convention “that a prisoner seeking release from confinement must sue his ‘jailer’” (*Ibid*, 438, citing *Braden*, 410 U.S. at 495). The Court uses Precedent Legitimacy to limit the holding in *Braden* by carefully diminishing its relevance to the case.

The Court also takes *Strait v. Laird*, 406 U.S. 341 (1972) as another precedent to demonstrate logical flaws in the exceptions to the immediate custodian rule.¹⁴ Like in *Braden*, the petitioner’s suit against the government did not challenge his present physical detention. In

¹³ In *Braden*, a prisoner in Alabama filed petitioned for a writ of habeas corpus in the Western District of Kentucky because of a “detainer lodged against him in Kentucky state court” (*Padilla*, 438). The petitioner filed for the writ in Kentucky because he was challenging a detention “that would be imposed [in Kentucky] in the future” (*Padilla*, 438, citing *Braden*, 410 U.S. at 488-489). The Court in *Braden* held that the writ was properly filed in Kentucky, and not against the prisoner’s immediate custodian in Alabama, because the “Alabama warden was not” the custodian who was holding the prisoner in what was contested detention (*Ibid*, 438).

¹⁴ In *Strait*, a member of the military reserves, based in California, filed for a petition under federal statute § 2241 to be relieved of his military duties. The petitioner’s official custodian was a commanding officer based in Indiana, in charge of the reservist’s military records. The “immediate custodian rule had no application because petitioner was not challenging any present physical confinement” (*Padilla*, 439).

these two distinguishable cases, the immediate custodian principle was not applicable because “*there was no* immediate physical custodian with respect to the ‘custody’ being challenged” (*Ibid*, 439) (emphasis of the Court in *Padilla*). The Court clearly states that these two precedent exceptions are inapplicable to the case at bar. Again, the Court uses Precedent Legitimacy to moderate the holding in a case, considered to be an exception.

In another use of Precedent Legitimacy, the Court points to a third case, *Ex Parte Endo*, 323 U.S. 283 (1944), to distinguish another exceptional case from the one at bar.¹⁵ Even though the Court in *Endo* dealt with a challenge to the petitioner’s present physical confinement, the Court did not hold in that case that a petition could name “someone other than the immediate physical custodian” as the respondent (*Ibid*, 440). *Endo* is different from the case at bar because the petitioner, though challenging her present physical confinement, filed suit in the proper district court and named her immediate custodian at the time of her detention. Chief Justice Rehnquist notes that in this case, Padilla’s petition was filed *after* he was relocated from New York jurisdiction to South Carolina. This is a clear distinction between the two cases.

Because Padilla challenges his present physical detention, and because “Commander Marr exercises day-to-day control over Padilla’s physical custody” Commander Marr is the proper respondent to be named in a petition challenging physical custody (*Ibid*, 439). With regard to Precedent Legitimacy the Court indicates that it has “*never*” held that “a habeas petitioner could name someone other than his immediate physical custodian as respondent simply because the challenged physical custody does not arise out of a criminal conviction”

¹⁵ In *Endo*, a Japanese-American citizen was detained by the War Relocation Authority (WRA) in California and filed a § 2241 petition in the Northern District of California. The government moved the prisoner to Utah shortly after she filed the petition in California. The Court, however, held that the Northern District of California retained jurisdiction to hear the suit because petitioner named as respondent “the assistant director of the WRA, who resided in the Northern District” at the time of the petition (*Padilla*, 440).

(*Ibid*, 439) (emphasis added). As “statutory language, established practice, and [the Court’s] precedent” exhibit, only the direct custodian of a prisoner can be named as the respondent in a petition for habeas (*Ibid*, 439-440). The Court affirms that the immediate custodian rule from *Wales* is the appropriate standard for a challenge of present physical detention.

The Court notes that Padilla essentially argues that there ought to be an exception “to the immediate custodian rule based upon the ‘unique facts’ of this case” (*Ibid*, 441). The Court explains that even though the conditions of his detention are certainly unique in some ways, Padilla’s petition, at its core, challenges the “physical custody imposed by the Executive” (*Ibid*, 441). Moreover, the government detained Padilla in the same manner it detained other al Qaeda detainees, at the same facility, and informed Padilla’s lawyer of the prisoner’s transfer. Because none of the procedural practices of the government are unique to Padilla’s case, the Court asserts that there is no reason to make an exception to the immediate custodian rule. The Court holds that Commander Marr is the immediate custodian, and thus the proper respondent in this case, not Secretary Rumsfeld.

With regard to the first question, the Court clearly determines that the longstanding principle from *Wales* is the founding standard for challenges against physical confinement. The Court uses Precedent Legitimacy first to rely on the immediate custodian standard established in *Wales*, and then to draw back the exceptions found in other cases. In restricting certain cases, the Court uses Precedent Legitimacy not in a manner that supports Nuanced Deference, but in a manner that shows why *Wales* is the dispositive case and *not* the cases cited by Padilla. Again, the Court takes care to distinguish and differentiate certain legal precedents, but only those presented by Padilla’s counsel and the dissent’s opinion. Here, the Court is largely expanding the *Wales* custodian principle by dismissing the other case law arguments of Padilla. The Court

seems to more broadly favor the government. This deferential approach is not one that considers the government's actual security policies, but one that certainly insulates the Executive from fault or liability by *indirectly* deferring to longtime principles of legal precedent.

Second Question:

Does the Southern District of New York have jurisdiction over the respondent in this case?

Having identified Commander Marr as the appropriate respondent for a petition against the government, the Court examines the jurisdiction of the federal court in which Padilla filed for a writ of habeas corpus. The Court first explains that the statutory language in § 2241(a) of 28 U.S.C. restricts of federal district courts to grant habeas only “within their respective jurisdictions” (*Ibid*, 442) (See Appendix III). The Court explains that the District Court for the Southern District of New York has jurisdiction to hear Padilla's petition for habeas *only* if that court has jurisdiction over Commander Marr.

The Court uses both Decision Rule #3 Institutional Legitimacy and Decision Rule #4 Precedent Legitimacy to rule that the Southern District of New York does not have jurisdiction to hear Padilla's petition for a writ of habeas corpus. The Court interprets congressional legislation to understand the intentions of Congress. The Court holds that when Congress added the clause: “within their respective jurisdictions” to the federal habeas statute in 1867, it did so to “avert the ‘inconvenient and potentially embarrassing’ possibility that ‘every judge anywhere could issue the Great Writ on behalf of applicants far distantly removed from the courts whereon they sat.’” (*Ibid*, 442, citing *Carbo v. United States*, 364 U.S. 611, 617 (1961)) (internal parentheses omitted). Chief Justice Rehnquist notes that Congress put restraints on the judicial system to ensure that the proper cases were heard by the appropriate court. This clear use of Institutional Legitimacy supports deference to the government in this case. The Court reads the

statutory language, specifically the amended clauses, as Congress' intent to limit courts' authority to grant the writ of habeas corpus only within the jurisdiction of the detention.

Using Decision Rule #3, the Court recognizes that Congress provided specific authority under its added statutory provisions. In this case, such legislative restrictions favor the government's argument that the Southern District of New York does not have jurisdiction. Again, this use of Institutional Legitimacy adheres to traditional standards. The Court completely limits its interpretation to established conventions, and rejects any deviation from this interpretation. Such an approach exemplifies the model of Old Judicial Deference.

Continuing with its use of Institutional Legitimacy, the Court notes "Congress has also legislated against the background of the 'district of confinement' rule by fashioning *explicit exceptions* to the rule in certain circumstances" (*Ibid*, 443) (emphasis added). There are, as the Court notes, clear legislative exceptions that Congress has added to the federal habeas statute. But these exceptions only serve to highlight the rigid nature of § 2241, which clearly limits the courts' jurisdiction to their respective districts. In § 2241(d) of federal habeas statute, the Court points to specific congressional language that direct habeas petitions to different courts based on extraordinary circumstances (See Appendix III). The Court also suggests that before Congress added § 2255 to the federal statute – a clause requiring prisoners "to file certain postconviction [sic] petitions in the sentencing courts" – prisoners could only litigate "in the district of confinement" (*Ibid*, 443). Thus, Congress has taken measures to clarify the specific and conditional circumstances of filing for habeas outside of one's jurisdictional district. The Court interprets these two added sections of federal habeas law as emphasizing Congress' intentions to limit prisoners from filing petitions outside of the district of confinement in conventional cases. The Court turns back to the "plain language" of the habeas statute, holding that "for habeas

petitions challenging present confinement, jurisdiction lies in only one district: the district of confinement” (*Ibid*, 443).

The Court then circles back to Precedent Legitimacy to address arguments made by Padilla and discussed in Stevens’ dissent. The Court uses this Decision Rule to distinguish the legal precedent and again defer to the standard statutory interpretation in this case. Chief Justice Rehnquist acknowledges that the *Braden* holding allowed a federal court in Kentucky to hear a petition from an Alabama prisoner. But this is only because “Braden challenged his *future* confinement in Kentucky by suing his Kentucky custodian” (*Ibid*, 444) (emphasis added). The petition did not challenge his present physical custody, and the petition properly identified the custodian of his future contested detention; Braden did not contest his confinement in Alabama, he did contest his to-be detention in Kentucky. Chief Justice Rehnquist explains that, in a challenge “to *present* physical confinement . . . the district of confinement is *synonymous* with the district court that has territorial jurisdiction over the proper respondent” (*Ibid*, 444) (emphasis of the Court).

Nothing in *Braden*, Chief Justice Rehnquist notes, grants federal district courts jurisdiction over “custodians who are outside of their territorial jurisdiction” (*Ibid*, 445). Again, the Court uses Precedent Legitimacy to distance the logic in case law presented by Padilla. Using other legal precedent within legal precedent, the Court further explains that *Braden* cites *Schlanger v. Seamans*, 401 U.S. 487 (1971). This internal precedent expressly held that a “custodians’ absence from the territorial jurisdiction of the district court is fatal to habeas jurisdiction” (*Ibid*, 445).

Similarly, the Court relies on Precedent Legitimacy to narrow the impact of *Strait*. In that case, the Court held that the Northern District of California had jurisdiction over the custodian

located in Indiana. This is because the commanding officer/custodian in Indiana was “present” in California “through the officers in the hierarchy of the command who processed Strait’s application for discharge” (*Ibid*, 445, citing *Strait*, 406 U.S. at 345) (internal parentheses omitted). Even though the dissent contends that Donald Rumsfeld is similarly situated to the commanding officer in *Strait*, the Court rejects this logic. Chief Justice Rehnquist explains that *Strait* relied on the *Ahrens* rule of jurisdiction because the *Strait* decision predated the *Braden* decision. *Ahrens v. Clark*, 335 U.S. 188 (1948) was overturned by the Court in *Braden* in 1973. Therefore, the *Ahrens* rule, requiring the presence of both the prisoner and the custodian for a court to have jurisdiction, was inapplicable after the *Braden* decision. The Court notes that *Strait* is unlike the case at bar because Padilla seeks to challenge his “present physical custody in South Carolina” and has named Secretary Rumsfeld – not Commander Marr – as the respondent in his petition for habeas relief (*Ibid*, 446).

With regard to Institutional Legitimacy, the Court suggests that if it were to accept the logic in *Strait*, granting an exception to “present physical custody” challenges, the Court would “undermine, if not *negate*, the purpose of Congress in amending the habeas statute in 1867” (*Ibid*, 446) (emphasis added). The Court refuses to deviate from the standards established by the legislative branch, which intentionally placed limits on the jurisdiction of courts to hear habeas petitions. This consideration for Decision Rule #3 indicates an approach of Old Judicial Deference. The Court follows both the explicit language of the habeas statute and the implicit intentions of Congress, which amended the statute to clarify the exceptions of present physical custody jurisdiction. Though the dissent contends this case is exceptional, the Court sees no validity in a departure from traditional interpretation of the law’s language and of congressional intent.

The Court holds that whenever a prisoner, seeking to challenge his present physical detention, files a petition for habeas under § 2241 on American soil, he must “name his warden as the respondent and file the petition in the district of confinement” (*Ibid*, 447). Without this statutory stipulation, the Court notes, a prisoner could name any administrative official as respondent in several district court jurisdictions. Such a process would result in what the Court describes as “the very inconvenience, expense, and embarrassment Congress sought to avoid” by amending the jurisdictional provisions in the federal habeas statute (*Ibid*, 447). Chief Justice Rehnquist uses Decision Rule #3 again to emphasize that no exceptions to habeas law, other than that which Congress has explicitly defined in legislation, can be applied in this case.

Next, the Court confronts the dissent’s argument that the government did not adequately inform Padilla’s counsel that Padilla was designated as an enemy combatant and transferred to South Carolina. The dissent hypothesizes that, had Padilla’s counsel been instantly notified of the government’s transfer, counsel would have filed a petition in the New York district court before the transfer. The dissent then suggests that the petition ought to be considered by the Court as if it had been filed earlier in the proper district. However, the Court rejects this argument, noting that the Stevens dissent “cites no authority whatsoever” to legitimize its “extraordinary proposition” that a district court might be granted jurisdiction “based on a series of events that did not occur . . . ” (*Ibid*, 448). The Court flatly rejects the dissent’s argument because it cites no logic or precedent, and is “contrary” to the Court’s own “well-established precedent” (*Ibid*, 448).

Again rejecting the dissent, the Court uses Precedent Legitimacy to invalidate claims that the Court should make an exception to the jurisdictional rules of the habeas statute. The dissent claims that past Courts have made exceptions to the rules of “immediate custodian and district of

confinement” (*Ibid*, 449). In a flat rejection of this argument, the Court explains that the dissent cannot “cite *a single case* in which we have deviated from the longstanding rule” addressed in this case (*Ibid*, 449) (emphasis of the Court). Chief Justice Rehnquist maintains that the dissent’s logic would relegate district courts to a role of arbitrators capable of determining “whether the circumstances of a given case are ‘exceptional,’ ‘special,’ or ‘unusual’ enough to” depart from the established standards of habeas jurisdiction upheld by the Court (*Ibid*, 450). In another brief use of Institutional Legitimacy, the Court states definitively that it does not believe “Congress intended such a result” (*Ibid*, 450).

There is a struggle here between what the four dissenting justices want the Court to address, and what the Court’s majority wants to address. The dissent attempts several times to shirk the procedural question of jurisdiction, and directly address the balance of Padilla’s civil liberties and the President’s authority to detain a U.S. citizen. The Court majority, however, declines to excuse the technical, procedural issues of jurisdiction. The conflict between the four dissenting justices and the five majority justices relates to whether or not the Court should make an exception to traditional interpretations, and examine the core constitutional issue. That the Court does have an opportunity to address the merits of the case, and instead refuses to do so, clearly indicates an approach of Old Judicial Deference.

Finally, the Court considers one last contention of the Stevens dissent. The dissenting opinion, as the Court notes, advises the Rehnquist Court to make exceptions to the jurisdiction rules in the case because the constitutional issues of the case are of “profound importance” (*Ibid*, 450). The dissenting justices want the Court to address the merits of this case and decide its constitutional question by looking past the traditional rules of jurisdiction. However, the Court uses Decision Rule #3 Institutional Legitimacy to rebut the dissent’s argument. The Court

refuses to address the merits of the larger constitutional question because to do so would ignore the established rules of jurisdiction. Such neglect would exceed judicial authority and the “respective jurisdictions” created by Congress (*Ibid*, 451).

This decision is notable because the dissenting justices are clearly willing to address this issue, regardless of technical and logistical issues. The Court instead chooses to address the procedural question, essentially deferring to the government in a passive, reserved manner. In this case, the Court rules in favor of the government by using Decision Rules #3 and #4, but it does not explicitly rule in favor of a government *policy*. Because the Court refuses to balance American civil liberties with national security policy *altogether*, the Court is effectively suspending any decision based on the merits of the case. This non-decision certainly favors the government because it basically dismisses the Executive of any immediate fault or wrongdoing in this case. That four of the Court’s justices sought to make an exception to the jurisdictional rules of federal habeas statute indicates that there was a possibility that the Court might have addressed the constitutional issue at bar.

The Court’s responses to the dissent are essentially rejections of a Nuanced Deference approach. Justices Stevens, Souter, Ginsburg, and Breyer indicate that this case *is* exceptional and worthy of full judicial review. But the Court’s refusal to consider the larger constitutional issue demonstrates the Court’s tacit deference to the Executive and continued approach of broad, standard Old Judicial Deference.

Rumsfeld v. Padilla 542 U.S. 426 (2004)

Appendix III

United States Code

Title 18 – CRIMES AND CRIMINAL PROCEDURE (Chapter 301)

(Cornell University Law School n.d.).

§ 4001

(a) No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.

United States Code

Title 28 – JUDICIARY AND JUDICIAL PROCEDURE

(Government Printing Office 2011).

§ 2241. Power to grant writ

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and any transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless—

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an

application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

(e)(1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

(2) Except as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005 (10 U.S.C. 801 note), no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

§ 2242. Application

Application for a writ of habeas corpus shall be in writing signed and verified by the person whose relief it is intended or by someone acting in his behalf.

It shall allege the facts concerning the applicant's commitment or detention, the name of the person who has custody over him and by virtue of what claim or authority, if known.

It may be amended or supplemented as provided in the rules of procedure applicable to civil actions.

If addressed to the Supreme Court, a justice thereof or a circuit judge it shall state the reasons for not making application to the district court of the district in which the applicant is held.

Chapter Six: Conclusion

This research attempted to explain how the United States Supreme Court approaches judicial deference in the Post-9/11 context. I hypothesized that the Post-9/11 Court will continue to grant deference to the government's security policies, but that the Court's deliberative review process will resemble a more contemplative and nuanced approach than in previous eras. I expected the Court's ultimate decision to favor the government rather than American civil liberties. But I expected the Court to more carefully and intricately contemplate its deferential treatment of State security policies.

I selected three separate Post-9/11 Supreme Court cases to serve as comparative case studies for my research, and conducted a content analysis of the Court's language in each case. To systematically analyze these case studies and test my hypothesis, I operationalized four distinct criteria, defined as Decision Rules. These criteria provided a framework through which the Court's review process can be observed. My analysis focused on the manner in which the Court used Decision Rules to balance American civil liberties with national security policies. In this chapter I will describe the results of my analysis, explain how these results are significant to my research question and hypothesis, and discuss the implications of these findings.

Overview of Results

The Supreme Court's review of civil liberties and national security policies, in the Post-9/11 context, revealed an apparent change in its approach to the use of deference to the State during war. Based on the literature's assessment of the Court's traditional approach during war, my analysis exhibits at least some evidence of a different approach to deference. My analysis of *Hamdi*, *Rasul*, and *Padilla* partially supported my claim that the Court would consider deference to State policies with extreme care and vigilance. Taken together, the three case studies show

that the Court has modified its deferential treatment of security policies. However, there is clear variance between each of the three case studies. Certain cases support my hypothesis, while others counter or moderate my predictions. Each case presented a different number of constitutional questions for review. In *Hamdi*, the Court reviewed three separate questions; in *Rasul*, the Court reviewed one question; and in *Padilla*, the Court reviewed two questions. I will describe the results of each case, and then describe the impact of all three cases.

Hamdi

The results of this case study mostly support my hypothesis. The Court granted partial deference to the government, and did so in a way that demonstrated Nuanced Deference. With regard to the first constitutional question, the Court granted deference to the government. The Court primarily relied on Decision Rule #3, and used Decision Rules #2 and #4 to reinforce its decision. With its use of Decision Rule #3, the Court approached deference with consideration for this inter-institutional authorization – this approach supports a Nuanced Deference standard. With its brief use of #2 Prudence, the Court’s approach resembled Old Judicial Deference by emphasizing the security threat of releasing a captured enemy combatant like Hamdi. With its equally brief use of Decision Rule #4 Precedent Legitimacy, the Court followed an approach of Old Judicial Deference to assert that past Courts have permitted military detentions of U.S. citizens. Although the Court applied Decision Rules #2 and #4 in a manner that resembles Old Judicial Deference, it’s use of Decision Rule #3 was far more prominent, and thus it’s approach to deference was more nuanced. Furthermore, the Court’s underlying language to specify its exercise of deference illustrated a careful and conscious review. With regard to this first question, the Court grants deference to the State in an approach of Nuanced Deference.

With regard to the second constitutional question, the Court granted deference to the government. The Court used two Decision Rules to address this issue: #2 Prudence and #4 Precedent Legitimacy. The Court relied on both equally in an approach of Old Judicial Deference. However, while its use of these two Decision Rules conforms to an approach of Old Judicial Deference, the Court held that the indefinite detention of a U.S. citizen would be unconstitutional. Thus, while the Court does defer to the State in the case, and uses the Old Judicial Deference approach, the Court notes that this deference is conditional to the facts of this particular case. This qualification is a small indication of some nuanced review. With regard to the second question, the Court grants deference to the State in an approach that mostly describes Old Judicial, but there are traces of the Court's concern about the War on Terror.

With regard to the third constitutional question, the Court does not defer to the government. The Court relied on Decision Rules #3 and #4 to more generally assess a question of Decision Rule #1 Expertise. The Court primarily relies on Decision Rule #4 to articulate a balancing test found in legal precedent. The Court's use of this test emphasizes a Nuanced Deference approach. The Court also relied on Decision Rule #3 to identify a lack of cooperation between government institutions in this case. This consideration demonstrates the Court's approach of Nuanced Deference. With regard to the third question, the Court does not defer to the government in a process that supports clear Nuanced Deference.

The Court approached each question in *Hamdi* slightly differently. Across all questions in this case, the Court used all four Decision Rules. The Court ruled in favor of the government twice, and against the government once. The Court's approach to the first question was mostly reflective of Nuanced Deference, the approach to the second question mostly resembled Old Judicial Deference, and the approach to the third question was clearly one of Nuanced

Deference. In its entirety, *Hamdi* mostly supports my hypothesis because the Court tended to defer to the Executive, but its approach was careful and nuanced.

Rasul

The results of this case study partially support my hypothesis. In this case, the Court rejected deference to the government in a manner that demonstrated a Nuanced Deference approach. The Court used two Decision Rules in this case equally: Institutional Legitimacy and Precedent Legitimacy. The Court relied on Decision Rule #4 Precedent Legitimacy to make detailed distinctions between the argument used by the government, and the facts in the case at bar. The use of this Decision Rule throughout the case very clearly supported an approach of Nuanced Deference. The Court used Institutional Legitimacy to limit the government's claim of authority from Congress. The use of this Decision Rule relied on statutory language and legislative intentions of Congress, both of which reflected an approach of Nuanced Deference.

The Court's approach in *Rasul* partially supports my hypothesis; the Court certainly balanced civil liberties with national security in a careful and nuanced process. However, the Court did not ultimately defer to the government in its decision. This case strongly supports the theoretical approach of Nuanced Deference, but the Court's ruling surpasses my predictions.

Padilla

The results of this case study refute my hypothesis. In this case, the Court refused to review the conflicting interests of civil liberties and national security. This case supports the conventional approach of Old Judicial Deference. The Court was presented with two questions for review, refusing to address the second issue. However, the Court divided the threshold question into two sub-questions.

With regard to the first question addressed by the Court, The Court deferred to the government, relying exclusively on Decision Rule #4 Precedent Legitimacy. The Court determined the proper standard or principle as defined in *Wales*, and used Decision Rule #4 to reject and differentiate exceptions cited by the dissenting opinion. The Court used Precedent Legitimacy as a foundation for its deference to the government in a clear approach of Old Judicial Deference.

With regard to the second question, the Court deferred to the government, relying on Decision Rule #3 and #4 equally. The Court used Decision Rule #3 to emphasize the intentions of Congress and the limits of its legislation. The Court primarily used Decision Rule #4 to defer to the government by again distinguishing the cases mentioned in the dissent's argument. Relying on a combination of both Institutional Legitimacy and Precedent Legitimacy, the Court refused to excuse the procedural and technical issues of jurisdiction, indicating a clear Old Judicial Deference approach.

The Court's approach in *Padilla*, rejects my hypothesis. The Court does defer to the government, but it does so by avoiding any consideration of the constitutional merits of the case. This Old Judicial Deference approach resembles the traditional wartime Courts and entirely contradicts my hypothesis.

Collective Summary

The Post-9/11 Court approached each case somewhat differently. The *Hamdi* analysis mostly supports my hypothesis; the *Rasul* analysis partially supports my hypothesis; and the *Padilla* analysis rejects my hypothesis. Of the six questions reviewed by the Court across all three cases, the Court's holding granted deference to the government on four occasions and refused deference on two occasions. The Court's approach to each question also varied. The

Hamdi Court's approach generally resembled Nuanced Deference; The *Rasul* Court's approach clearly resembled Nuanced Deference; and the *Padilla* Court's approach clearly resembled Old Judicial Deference.

The Court in each case applied Decision Rules differently and used them to varying degrees. In *Hamdi*, the Court relied mostly on #3 to address the first question (also using #2 and #4), it used #2 and #4 equally to address the second question, and mostly used #4 (also using #3) to address the third question (which assessed the issue of Expertise). In *Rasul*, the Court applied Decision Rules #3 and #4 equally. In *Padilla*, the Court used Decision Rules #3 and #4 equally (though mostly #4 to answer the first question).

This analysis of the Court's review process indicates that the Court most frequently relied on Decision Rule #3 Institutional Legitimacy and Decision Rule #4 Precedent Legitimacy. Regardless of its application of deference, the Court relied on these two Decision Rules most often. At times, the Court used Decision Rule #2 Prudence, but did so infrequently. Moreover, the Court hardly applied Decision Rule #1 Expertise to consider deference. Instead, the *issue* of Expertise appeared, and the Court addressed this issue, but its use as a Decision Rule was insignificant.

Based on the limited number of cases I have analyzed, there does seem to be a general trend in the Court's approach to balancing civil liberties with national security. This analysis suggests that the traditionally held theory of the Court during war might be changing. Whereas the Old Judicial Deference approach was the standard theory, Nuanced Deference seems to be emerging. The plurality opinion in *Hamdi* and the majority opinion in *Rasul* generally support this conclusion. On the other hand, the analysis of the Court in *Padilla* detracts from this trend

significantly. While in two of these cases the Court deviates from its conventional process of balancing, the *Padilla* decision mitigates any claim that this trend is definite.

The series of cases seem to support a few specific theories in the literature. Based on the Court's frequent reliance on Decision Rule #3 Institutional Legitimacy, there is evidence to support the inferences of both Epstein et al. (2005) and Issacharoff and Pildes (2005). Both sets of scholars suggest the Supreme Court's approach to the liberty/security conflict is guided by the Court's review of institutional collaboration. My research seems to support this notion because my analysis reveals that the Court mostly relied on Institutional Legitimacy *regardless* of its actual exercise of judicial deference. This is perhaps an important shift in observing the Court in the War on Terror. More research might focus on the Court's view of shared executive and congressional authority, rather than the more imprecise evaluation of *balancing* liberty with security.

It is not clear that the Court's approach resembled the social learning theory. Although the Court relied on Decision Rule #4 quite frequently, the Court's opinion did not mention its own past decisions as flawed. However, it is still possible that the Court's approach to deference used its past decisions to inform its review. The Court was mindful of the circumstances of a war against terrorism, and ruled against detention and due process policies that resembled other policies that received deference by the WWII-era Court. In general, the Court opinion in *Hamdi* and *Rasul* support a theoretical model of Nuanced Deference. Although the *Padilla* opinion clearly rejects this approach, the four dissenting Justices in that case supplement an understanding that the Post-9/11 Supreme Court approaches deference differently in its judicial review than the Court of previous wartime contexts.

This research and its conclusions are certainly limited. There is still much to be observed of the Court's approach to deference in its review of civil liberties and security policies. The War on Terror is not a conventional war, and my research analyzes only a small portion of the possible constitutional issues in need of review. All three cases in my analysis were heard and decided in 2004 by the Rehnquist Court. Chief Justice Rehnquist has since been replaced by Chief Justice John Roberts, and several other associate justices have also been replaced since 2004. Moreover, all three of the case studies dealt with issues related to Guantanamo Bay, indefinite detention under the military, or a writ of habeas corpus. The War on Terror, the government's security policies, and the resulting constitutional issues are all extensive and changing.

David Cole declared in 2003, "It is too early to draw firm conclusions regarding the role of courts in the war on terrorism (2583). Indeed, it is still premature to make a firm conclusion based on three different court cases. While this series of 2004 detainee cases might offer a sample of the Court's approach in the War on Terror, Cole's 2003 assertion remains true. While detention policies were clearly once relevant constitutional issues, new security policies and government actions will continue to challenge civil liberties. It is worth analyzing new constitutional issues to understand how the Court balances these competing interests in the Post-9/11 context. The War on Terror is ongoing, and thus, an explanation of the Court's review process is incomplete. While the Supreme Court remains largely deferential to the government in practice, there is some evidence to suggest that the Court's approach to deference is changing.

Bibliography

- Atkins, Stephen E. 2011. "Guantánamo Bay Detention Camp". In *The 9/11 Encyclopedia*. Santa Barbara: ABC-CLIO. http://0-search.credoreference.com.dewey2.library.denison.edu/content/entry/abcne/guant%C3%A1namo_bay_detention_camp/0 (Accessed March 10, 2015).
- Baker, Nancy V. 2003. "National Security versus Civil Liberties." *Presidential Studies Quarterly* 33 (September): 547-567.
- Baker, Thomas E. 2002 "Civil Rights and Civil Liberties in a Crisis: A Few Pages of History." *Nevada Law Journal* 3(1): 23-28.
- Barber, Sotirios A., and James E. Fleming. 2005. "War, Crisis, and the Constitution." In *The Constitution in Wartime: Beyond Alarmism and Complacency*, ed. Mark Tushnet. Durham: Duke University Press, 232-248.
- Bradley, Curtis A., and Jack L. Goldsmith. 2005. "Congressional Authorization and the War on Terrorism." *Harvard Law Review* 118 (May): 2047-2133.
- Brandon, Mark E. 2005. "War and the American Constitutional Order." In *The Constitution in Wartime: Beyond Alarmism and Complacency*, ed. Mark Tushnet. Durham: Duke University Press, 11-38.
- Chesney, Robert M. 2009. "National Security Fact Deference." *Virginia Law Review* 95 (October): 1361–1435.
- Cole, David. 2003. "Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis." *Michigan Law Review* 101(August): 2565-2595.
- Cornell University Law School. ND. "U.S. Code." *Legal Information Institute*. Web. <https://www.law.cornell.edu/uscode/text/18/4001> (Accessed March 10, 2015).
- Cornell University Law School. ND. "Habeas Corpus." *Legal Information Institute*. Web. http://www.law.cornell.edu/wex/habeas_corpus (Accessed January 23, 2015).
- Dudziak, Mary L., and Richard F. Grimmett. 2010. "Law, War, and the History of Time." *California Law Review* 98 (October): 1669-1709.
- Epstein, Lee, Daniel E. Ho, Gary King, and Jeffrey A. Segal. 2005. "The Supreme Court During Crisis: How War Affects Only Non-War Cases." *New York University Law Review* 80 (April): 1-116.
- Friedman, Max Paul. 2005. "Trading Civil Liberties for National Security: Warnings from a World War II Internment Program." *Journal of Political History* 17 (3): 294-307.

- Graber, Mark A. 2005. "Counter-Stories: Maintaining and Expanding Civil Liberties in Wartime." In *The Constitution in Wartime: Beyond Alarmism and Complacency*, ed. Mark Tushnet. Durham: Duke University Press, 95-123.
- Government Printing Office. 2011. "Title 28 – Judiciary and Judicial Procedure." *United States Code*. Web. <http://www.gpo.gov/fdsys/pkg/USCODE-2011-title28/html/USCODE-2011-title28.htm> (Accessed March 10, 2015).
- Huq, Aziz Z. 2010. "Against National Security Exceptionalism." *University of Chicago Public Law & Legal Theory Working Paper No. 299*. Web. http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1020&context=public_la_w_and_legal_theory (Accessed March 12, 2015).
- Issacharoff, Samuel, and Richard H. Pildes. 2005. "Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime." In *The Constitution in Wartime: Beyond Alarmism and Complacency*, ed. Mark Tushnet. Durham: Duke University Press, 161-197.
- Justl, Jonathan M. 2009. "Disastrously Misunderstood: Judicial Deference in the Japanese-American Cases." *The Yale Law Journal* 119 (November): 270-315.
- Kmiec, Douglas W. 2003. "The Supreme Court in Times of Hot and Cold War: Learning from the Sounds of Silence for a War on Terrorism." *Journal of Supreme Court History* 28 (3): 270-299.
- Lobel, Jules. 2002. "The War on Terrorism and Civil Liberties." *The University of Pittsburgh Law Review* 63 (Summer): 767-790.
- Lobel, Jules. 2007. "The Commander in Chief and the Courts." *Presidential Studies Quarterly*. 37 (March): 49-65.
- Matheson Jr., Scott. 2009. *Presidential Constitutionalism in Perilous Times*. Cambridge, MA: Harvard University Press.
- Popplewell, Brett. 2009. "How the U.S. Got Guantanamo." *Toronto Star*. January 24, 2009. Web. <http://search.proquest.com/docview/439549716?pq-origsite=summon> (Accessed March 14, 2015).
- Posner, Eric A., and Adrian Vermeule. 2005. "Accommodating Emergencies." In *The Constitution in Wartime: Beyond Alarmism and Complacency*, ed. Mark Tushnet. Durham: Duke University Press, 55-92.
- Posner, Eric A., and Adrian Vermeule. 2007. *Terror in the Balance: Security, Liberty, and the Courts*. New York: Oxford University Press.

- Rehnquist, William H. 1998. *All the Laws but One: Civil Liberties in Wartime*. 1st ed. New York: Alfred A. Knopf.
- Roosevelt III, Kermit. 2005. "Application of the Constitution to Guantanamo Bay." *University of Pennsylvania Law Review* 153 (June): 2017-2071.
- Rossiter, Clinton L. 1948. *Constitutional Dictatorship: Crisis Government in the Modern Democracies*. Princeton: Princeton University Press.
- Scheindlin, Hon. Shira A., and Matthew L. Schwartz. 2004. "With All Due Deference: Judicial Responsibility in a Time of Crisis." *Hofstra University Law Review* 32 (Summer): 1605-1662.
- Scheppele, Kim Lane. 2012. "The New Judicial Deference." *Boston University Law Review* 92 (January): 89-170.
- Spiro, Peter J. 2005. "Realizing Constitutional and International Norms in the Wake of September 11." In *The Constitution in Wartime: Beyond Alarmism and Complacency*, ed. Mark Tushnet. Durham: Duke University Press, 198-215.
- Stone, Geoffrey R. 2003. "Civil Liberties in Wartime." *Journal of Supreme Court History* 28 (November): 215-251.
- Turner, Robert F. 2003. "The Supreme Court, Separation of Powers, and the Protection of Individual Rights during Periods of War or National Security Emergency." *Journal of Supreme Court History* 28 (November): 323-338.
- Tushnet, Mark V. 2003. "Defending *Korematsu*?: Reflections on Civil Liberties in Wartime." *Wisconsin Law Review* 273-307.
- United States Government Publishing Office. 2001. "Public Law 107-40-SEPT. 18, 2001." Web. <http://www.gpo.gov/fdsys/pkg/PLAW-107publ40/pdf/PLAW-107publ40.pdf> (Accessed March 10, 2015).
- Wells, Christina E. 2004. "Questioning Deference." *The University of Missouri Law Review* 69 (Fall): 903-949.
- Wheeler, Darren A. 2009. "Checking Presidential Detention Power in the War on Terror: What Should We Expect from the Judiciary?" *Presidential Studies Quarterly* 39 (December): 677-700.
- Wittes, Benjamin. 2012. "The Post-9/11 Era (September 2001 – present): Judicial Materials." *Lawfare: Hard National Security Choices*. November 12. <http://www.lawfareblog.com/wiki/the-lawfare-wiki-document-library/post-911-era-materials/post-911-era-materials-court-cases/> (Accessed November 18, 2014).

Wittes, Benjamin, Robert Chesney, and Jack Goldsmith. *Lawfare: Hard National Security Choices*. Web. <http://www.lawfareblog.com/> (Accessed March 12, 2015).

Supreme Court Cases Referenced

Abrams v. United States, 250 U.S. 616 (1919)

Ahrens v. Clark, 335 U.S. 188 (1948)

Braden v. 30th Judicial Circuit Court of Ky., 410 U.S. 484 (1973)

Burns v. Wilson, 346 U.S. (1953)

Carbo v. United States, 364 U.S. 611 (1961)

Cleveland Bd. Of Ed. v. Loudermill, 470 U.S. 532 (1985)

Concrete Pipe & Products of Cal., Inc. v. Construction Laborers Pension Trust Fund for Southern Cal., 508 U.S. 602 (1993)

Dennis et al. v. United States, 341 U.S. 494 (1951)

Disconto Gesellschaft v. Umbreit, 208 U.S. 570 (1908)

Ex Parte Endo, 323 U.S. 283 (1944)

Ex Parte Milligan, 71 U.S. 2 (1866)

Ex Parte Quirin, 317 U.S. 1 (1942)

Foley Bros., Inc. v. Filardo, 336 U.S. 281 (1949)

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

Hensley v. Municipal Court, San Jose-Milpitas Judicial Dist., Santa Clara Cty., 411 U.S. 345 (1973)

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

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

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

Mathews v. Eldridge, 424 U.S. 319 (1976)

New York Times Co. v. United States, 403 U.S. 713 (1971)

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

Roe v. Wade, 410 U.S. 133 (1973)

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

Schenck v. United States, 249 U.S. 47 (1919)

Schlanger v. Seamans, 401 U.S. 487 (1971)

Strait v. Laird, 406 U.S. 341 (1972)

United States v. Curtiss-Wright Corporation et al., 299 U.S. 304 (1936)

United States v. Reynolds, 345 U.S. 1 (1953)

United States ex rel. Toth v. Quarles, 350 U.S. 11 (1955)

Wales v. Whitney, 114 U.S. 564 (1885)

West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943)

Youngstown Sheet & Tube Co. et al. v. Sawyer, 343 U.S. 579 (1952)