



# Minimalism at War

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2004

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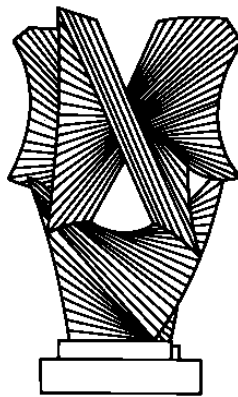
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## Minimalism at War

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THE LAW SCHOOL  
THE UNIVERSITY OF CHICAGO

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## Minimalism at War

Cass R. Sunstein\*

“The Founders intended that the President have primary responsibility—along with the necessary power—to protect the national security and to conduct the Nation’s foreign relations. . . . This Court has . . . held that the President has *constitutional* authority to protect the national security and that this authority carries with it broad discretion. . . . [I]t is crucial to recognize that *judicial* interference in these domains destroys the purpose of vesting primary responsibility in a unitary Executive.”<sup>1</sup>

“The Constitution has never greatly bothered any wartime President.”<sup>2</sup>

“More importantly, the search for alternatives helps avoid two extreme positions. The first says that, insofar as war is concerned, the Constitution does not really matter. That is wrong. The Constitution always matters, perhaps particularly so in times of emergency. The second says that, insofar as the Constitution is concerned, war or security emergencies do not really matter. That is wrong too. Security needs may well matter, playing a major role in determining just where the proper constitutional balance lies.”<sup>3</sup>

### I. Introduction

Many judges are minimalists; they want to say and do no more than necessary to resolve cases.<sup>4</sup> Judicial minimalism leads in two different directions. First, minimalists favor shallowness over depth, in the sense they seek to avoid taking stands on the most deeply contested questions of constitutional law. They attempt to reach incompletely theorized agreements, in which the most fundamental questions are left undecided. They prefer outcomes and opinions that can attract support from people with a wide range of theoretical positions, or with uncertainty about which theoretical positions are best. In these ways, minimalist judges avoid the largest questions about the meaning of the free

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<sup>1</sup> Hamdi v Rumsfeld, 124 S Ct 2633, 2675-76 (2004) (Thomas dissenting)

<sup>2</sup> Francis Biddle, In Brief Authority 219 (Doubleday 1962).

<sup>3</sup> Stephen Breyer, Liberty, Security, and the Courts (April 14, 2003), online at [http://www.supremecourtus.gov/publicinfo/speeches/sp\\_04-15-03.html](http://www.supremecourtus.gov/publicinfo/speeches/sp_04-15-03.html) (visited Dec 1, 2004)

<sup>4</sup> Minimalism is discussed in general terms in Cass R. Sunstein, One Case at a Time: Judicial Minimalism on the Supreme Court (Harvard 1999).

speech guarantee, or the extent of the Constitution's protection of "liberty," or the precise scope of the President's authority as Commander in Chief of the Armed Forces.

Second, minimalists favor narrowness over width. Proceeding one case at a time, they seek decisions that resolve the problem at hand without also resolving a series of other problems that might have relevant differences. In the fashion of common law courts, minimalist judges prefer to focus on the particular question at issue, refusing to venture broader judgments that might turn out, on reflection, to be unwarranted.<sup>5</sup> With their emphasis on shallowness and narrowness, some minimalists have a particular preference for democracy-promoting decisions, certainly as compared to decisions that simply invalidate what government proposes to do. Democracy-promoting decisions are those that lead to explicit judgments by democratically accountable actors, above all Congress.<sup>6</sup>

Many judges distrust minimalism and prefer maximalism.<sup>7</sup> Maximalists reject shallowness in favor of depth. They are committed to a large-scale theory about the foundations of constitutional law. They might believe that "originalism" is the best theory of constitutional meaning, or they might think that the document should be interpreted to ensure the appropriate operation of democracy itself.<sup>8</sup> Typically they believe that their own theory is correct and that it reflects the right kind of judicial modesty (or, as the case may be, aggressiveness). What matters is that maximalists want to adopt a foundational account of one or another kind.

In the same vein, maximalists reject narrowness in favor of width. They believe that narrow rulings leave a great deal of unpredictability and also promote judicial discretion.<sup>9</sup> They think that firm, clear rules, laid down in advance, are the best way of

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<sup>5</sup> See Richard A. Posner, Law, Pragmatism, and Democracy 80 (Harvard 2003): "The pragmatic judge tends to favor narrow over broad grounds of decision in the early stages in the development of a legal doctrine. . . . What the judge has before him is the facts of the particular case, not the facts of future cases. He can try to imagine what those cases will be like, but the likelihood of error in such an imaginative projection is great. Working outward, in stages, from the facts before him to future cases with new facts that may suggest the desirability of altering the contours of the applicable rules, the judge avoids premature generalization."

<sup>6</sup> This point is elaborated in Sunstein at pp. 26-39 (cited in note 4).

<sup>7</sup> See Antonin Scalia, A Matter of Interpretation (Princeton 1997).

<sup>8</sup> See John Hart Ely, Democracy and Distrust (Harvard 1983).

<sup>9</sup> For an argument in favor of width, see Antonin Scalia, The Rule of Law is a Law of Rules, 56 U Chi L Rev 115 (1989); the best general treatment is Adrian Vermeule, Interpretive Choice, 75 NYU L Rev 74 (2000)

ensuring clarity for the future—and also of simultaneously constraining and emboldening judges, encouraging them to protect liberty when the stakes are highest.<sup>10</sup> They add that such rules provide a highly visible background against which other branches of government can do their work.<sup>11</sup>

The terrorist attacks of September 11, 2001 have raised fresh questions about the places of minimalism and maximalism in American constitutional law. Those questions are especially pressing in the face of conflicts between national security and claimed violations of constitutional rights. Perhaps a form of minimalism makes particular sense for the resolution of such conflicts; perhaps some kind of maximalism is much better. In fact we can readily imagine two stylized positions: National Security Maximalism and Liberty Maximalism.<sup>12</sup> National Security Maximalists understand the Constitution to call for a highly deferential role for the judiciary, above all on the ground that when national security is threatened, the President must be permitted to do what needs to be done to protect the country. If he cannot provide that protection, who will? By contrast, Liberty Maximalists insist that in times of war, at least as much as in times of peace, federal judges must protect constitutional liberty.<sup>13</sup> Indeed, Liberty Maximalists believe that under circumstances of war, it is all the more important that federal judges take a strong stand on behalf of liberty.<sup>14</sup> If they do not, who will?

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<sup>10</sup> Scalia, at 119 (cited in note 9).

<sup>11</sup> See *id.*

<sup>12</sup> For excellent and related discussions from which I have learned a great deal, see Eric A. Posner and Adrian Vermeule, Accommodating Emergencies, 56 *Stan L Rev* 605 (2003); Richard Pildes and Samuel Issacharoff, Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Right During Wartime, 5 *Theoretical Inquiries in Law (Online Edition)* No 1, Article 1 (Jan 2004), online at

<http://www.bepress.com/til/default/vol5/iss1/art1> (visited Dec 1, 2004). National Security Maximalism is an extreme version of what Posner and Vermeule call the accommodationist view; Liberty Maximalism is akin to what they deem the strict enforcement view. Their target is the civil libertarian concern that accommodationist rulings will weaken liberty during peacetime and that during emergencies, the government will respond to unjustified public panic. Like Posner and Vermeule, I reject the strict enforcement view, and for reasons that overlap with theirs. National Security Maximalists are what Pildes and Issacharoff call Executive Unilateralists; Liberty Maximalists are what Pildes and Issacharoff call Civil Libertarians. Like Pildes and Issacharoff, and borrowing from their discussion, I stress the use of clear statement principles.

<sup>13</sup> See generally David Cole, Enemy Aliens: Double Standards and Constitutional Freedoms in the War on Terrorism (WW Norton 2003).

<sup>14</sup> This is one reading of Geoffrey R. Stone, Perilous Times: Free Speech in Wartime from the Sedition Act of 1798 to the War on Terrorism (WW Norton 2004).

Of course some people reject both maximalism and minimalism in favor of an intermediate approach. They might, for example, err in the direction of presidential power without accepting National Security Maximalism, or err in the direction of freedom without accepting Liberty Maximalism. But an emphasis on the two forms of maximalism is helpful for analytic purposes; by exploring the poles, we can have a clearer sense of what might be wrong with more cautious versions as well. In addition, the poles have considerable appeal—National Security Maximalism to many federal judges as well as to the executive branch, Liberty Maximalism to many academic commentators as well as mission-oriented organizations focussed on the protection of freedom. As we shall see, unmistakable forms of National Security Maximalism, rather than an intermediate approach, can be found in several places in recent years.

This Article has two central purposes. The first is to reject both forms of maximalism and to specify and support a minimalist approach to intrusions on freedom amidst war. The second is to suggest that to a remarkable degree, an identifiable form of minimalism captures the practices of the American courts when national security is threatened.<sup>15</sup> Prominent uses of minimalism can be found during the Civil War, World War I, World War II, the Cold War, and the contemporary war on terrorism. In general, the Supreme Court has adopted a form of minimalism having three central components: a requirement of clear congressional authorization for executive action intruding on interests with a claim to constitutional protection<sup>16</sup>; an insistence on fair hearings, including access to courts, for those deprived of liberty; and judicial decisions that are themselves shallow and narrow and that therefore impose modest constraints on the future. The minimalist pattern unifies an extraordinary number of seemingly disparate decisions, including those in the recent past.<sup>17</sup> Indeed, the Court's notorious decisions involving the exclusion and detention of Japanese-Americans during World War II should be seen not as blind deference to executive power, but as a tribute to

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<sup>15</sup> An important aspect of minimalism, requiring congressional authorization, is traced in some detail in Pildes and Issacharoff, Civil Libertarianism (cited in note xx).

<sup>16</sup> The notion of authorization raises a number of complexities, on which see Curtis Bradley and Jack Goldsmith, Congressional Authorization and the War on Terrorism, Harv L Rev (forthcoming 2005); I deal with some of those complexities below, see TAN *infra*.

<sup>17</sup> See Rasul v Bush, 124 S Ct 2686 (2004); Hamdi v Rumsfeld, 124 S Ct 2633 (2004).

minimalism—requiring clear congressional support for deprivations of liberty by the executive, and permitting those deprivations only if that support can be found.<sup>18</sup>

The Court’s own practices help to identify serious problems with both forms of maximalism. If the nation is genuinely threatened, Liberty Maximalism runs into two difficulties. First, it is unrealistic, certainly in its most ambitious forms; judges simply will not protect liberty with the same aggressiveness when a country faces a serious threat to its survival.<sup>19</sup> By itself this is a large objection to Liberty Maximalism. “Ought implies can,” and it is unhelpful to urge courts to adopt a role that they will predictably refuse to assume.<sup>20</sup> Second, Liberty Maximalism is undesirable. The government’s power to intrude on liberty depends on the strength of the justifications it can muster on behalf of the intrusion.<sup>21</sup> When security is at risk, government has greater justifications than when it is not. Hence it is correct to say, with Chief Justice Rehnquist, that 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.”<sup>22</sup>

None of this means that in times of war, the government may proceed however it wishes or act in blatant violation of constitutional commands. Interferences with freedom of speech, for example, should be regarded with great skepticism, simply because they eliminate the principal method by which democracies correct themselves.<sup>23</sup> As we shall see, courts do, and should, take steps to ensure against arbitrary detentions. In American

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<sup>18</sup> See below.

<sup>19</sup> See Lee Epstein et al., The Supreme Silence During War (unpublished manuscript 2003) (offering quantitative study of judicial deference during war); William Rehnquist, All the Laws But One (Knopf 1998).

<sup>20</sup> Of course I am using the term “can” to suggest willingness, rather than feasibility. There is nothing in the structure of the universe that would prevent courts from adopting Liberty Maximalism, and hence “can” operates, in this context, in a relatively weak sense. There is no point in asking courts to assume a posture that they will predictably refuse.

<sup>21</sup> See Breyer, Liberty at 3 (cited in note xx): “The value does not change; the circumstances change, thereby shifting the point at which a proper balance is struck. That is what happens in wartime when more severe restrictions may be required.”

<sup>22</sup> *Id.* at 224-25.

<sup>23</sup> See Stone, Perilous Times, (cited in note 14); see also Aharon Barak, A Judge on Judging: The Role of a Supreme Court in a Democracy, 116 Harv L Rev 16, 149 (2002): “[M]atters of daily life constantly test judges’ ability to protect democracy, but judges meet their supreme test in situations of war and terrorism. The protection of every individual’s human rights is a much more formidable duty in times of war and terrorism than in times of peace and security. . . . As a Justice of the Israeli Supreme Court, how should I view my role in protecting human rights given this situation? I must take human rights seriously during times of both peace and conflict.”



law, it cannot be said that “inter arma silent leges” (amidst war laws are silent).<sup>24</sup> But as a general approach for courts in wartime, Liberty Maximalism is a nonstarter. It is too broad, and too neglectful of legitimate government interests, to have a serious claim to our attention.

But its principal competitor, National Security Maximalism, runs into serious problems as well. First, its reading of the Constitution, typically emphasizing the President’s role as Commander in Chief, is tendentious; some of the document’s provisions can be taken to support National Security Maximalism, but they need not be read in that fashion. In fact they are more plausibly seen to ensure a shared division of authority between the President and Congress, above all because they retain the role of Congress as the nation’s lawmaker. Second, National Security Maximalism neglects the fact that under many circumstances, the executive branch is most unlikely to strike the right balance between security and liberty.<sup>25</sup> A primary task of the President is to keep the citizenry safe, and any error on that count is likely to produce extremely high political sanctions. For this reason, the President has a strong incentive to take precautions even if they are excessive and even unconstitutional. Internal deliberations within the executive branch are more likely than not to aggravate the problem, leading not to sensible checks and balances, but to a tendency toward a degree of extremism.

Of course unjustified intrusions on liberty can and do produce political retribution as well. But whether they do so depends on their incidence; and here is a further problem for National Security Maximalism. Political safeguards are most reliable if the intrusions severely burden many people at once. Such general intrusions are unlikely to be tolerated unless citizens can be convinced that they are necessary. But if the intrusions are faced by an identifiable few, political checks will not ensure that they are justified. On the contrary, political pressures might well favor them even if they are not.

In some circumstances, then, the executive is likely to adopt steps that sacrifice liberty for no adequate reason.<sup>26</sup> But judicial intervention is no panacea, for courts have institutional weaknesses of their own. Worst of all, they lack relevant information and

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<sup>24</sup> Cicero, *Oratio Pro Annio Milone IV*; see Rehnquist, *All the Laws* at 224 (cited in note xx).

<sup>25</sup> For countless examples, see Stone, *Perilous Times* (cited in note 14).

<sup>26</sup> See id.; Epstein et al., *Supreme Silence* (cited in note xx); and Rehnquist, *All the Laws* (cited in note xx), for many illustrations.

hence they may not know whether an interference with liberty is actually justified. Because their historic mission is to protect individual liberty, they may give insufficient attention to the variables on the other side.<sup>27</sup> But none of this means that courts cannot play a productive role. I investigate here three ingredients of a minimalist approach that seems to me to have significant promise, and to represent a distillation of much of the practice of American courts over the last century and more:

1. *Clear congressional authorization.* Courts should require clear congressional authorization before the executive intrudes on interests that have a strong claim to constitutional protection.<sup>28</sup> As a general rule, the executive should not be permitted to act on its own.<sup>29</sup> The underlying ideas here are twofold: a requirement of congressional authorization provides a check on unjustified intrusions on liberty, and such authorization is likely to be forthcoming when there is a good argument for it. A requirement of clear authorization therefore promotes liberty without compromising legitimate security interests.<sup>30</sup>

2. *Hearing rights.* Courts should insist, whenever possible, on the core principle of the due process clause: Before anyone is deprived of liberty, some kind of procedure must be put in place to ensure against erroneous deprivations. This requirement protects

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<sup>27</sup> Notably, however, there appears to be no evidence of judicial overprotection of civil liberties in the nation's long history. See Stone, Perilous Times (cited in note 14). Compare the use of the Precautionary Principle in environmental regulation, which calls for margins of safety to protect against harmful outcomes. See Cass R. Sunstein, Laws of Fear: Beyond the Precautionary Principle (forthcoming 2005), for general discussion. When national security is in danger, governments officials are engaging in a form of risk management, and it should not be surprising to find that they often adopt a kind of Precautionary Principle. Stone, Perilous Times (cited in note xx), may be seen as a catalogue of instances in which something akin to that principle was employed to produce many unjustifiable intrusions on liberty; in this sense, it is a cousin to Aaron Wildavsky, But Is It True: A Citizen's Guide to Environmental, Health, and Safety Issues (Harvard 1995), which catalogues a number of cases in which unjustifiable steps were taken in response to imagined environmental concerns.

<sup>28</sup> An early version of this idea can be found in Masses Publishing Co v Patten, 244 F 535 (SDNY 1917), discussed below.

<sup>29</sup> Complexities emerge when the President's inherent authority is plausibly involved. See Loving v United States, 517 US 748 (1996).

<sup>30</sup> I discuss below the complex question whether clear authorization is sufficient as well as necessary; the short version is that outside of the egregious cases, courts should ordinarily respect the shared views of Congress and the President.

against unjustified imprisonment, which counts as the most serious infringement of civil liberty.<sup>31</sup>

3. *Judicial self-discipline.* Courts should discipline themselves through narrow, incompletely theorized decisions. Such decisions tend to ensure against dual risks: judicial overreaching, in the form of limits on executive power that will ultimately prove unjustified; and excessive judicial modesty, in the form of decisions that, in the heat of the moment, lead to large-scale intrusions on liberty.<sup>32</sup> When vindicating minimalist principle (2), for example, judges can refuse to specify the precise procedure that must be used, allowing the executive (for example) to use military tribunals or otherwise to depart from ordinary adjudicative procedures, so long as the rudiments of due process are observed.

These three ideas can be unified under the general rubric of Due Process Writ Large. The requirement of congressional authorization provides a degree of procedural protection at the structural level. By mandating action from an institution that is both diverse and deliberative, that requirement offers a procedural safeguard against ill-considered intrusions into the domain of liberty. The requirement of a minimal hearing reflects the most familiar aspect of the due process guarantee. The requirement of narrow and shallow rulings from the courts applies due process principles to judges themselves, by ensuring that those not before the court will be provided with an opportunity to be heard.

All of these principles make sense not only for courts, but also for constitutional judgments within the executive branch and Congress in times of war. Judges are hardly the only people involved in constitutional interpretation. The executive branch, for example, would do well to seek congressional authorization for intrusions on constitutionally sensitive interests, to ensure hearings for those deprived of liberty, and to rely on narrow and incompletely theorized judgments about issues at the frontiers of constitutional law.

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<sup>31</sup> The hearing right is a modest one, because as I am understanding it here, it requires a proceeding only to determine whether the executive has deprived someone of liberty on the basis of facts that under relevant as a matter of existing law.

<sup>32</sup> See Epstein et al., Supreme Silence (cited in note xx), for details.

Of course minimalism is not always the appropriate course for federal judges or for anyone else.<sup>33</sup> Predictability can be extremely important, and in some contexts minimalism cannot be tolerated, simply because it sacrifices rule of law values for no sufficient reason. And of course general principles cannot resolve concrete cases; everything turns on the particular intrusion and its underlying justification. Sometimes the President is constitutionally permitted to act on his own<sup>34</sup>; sometimes hearings need not be held<sup>35</sup>; sometimes judges should rule broadly. A committed minimalist will insist on these very points, contending that it is too ambitious to insist, all of the time, on congressional authorization, hearings, and narrow and incompletely theorized rulings. But when national security and liberty are in tension, the three principles provide the best general orientation.

This remainder of this Article comes in three parts. Part II sketches the role of National Security Maximalism in the war on terror. It shows that in recent years, this way of proceeding has had a prominent place in the Department of Justice, the Supreme Court, and federal courts of appeals. Part III outlines the problems with National Security Maximalism, including its tendentious reading of the Constitution and its failure to appreciate the relevant incentives on the part of the executive branch. Part IV sketches the minimalist alternative, with its emphasis on clear statement principles, hearing rights, and narrow, shallow judicial judgments.

## II. National Security Maximalism

“We are now confronted by a profoundly disturbing trend in our national political life: the growing tendency of the judicial branch to inject itself into areas of executive action originally assigned to the discretion of the president. These encroachments include some of the most fundamental aspects of the president’s conduct of the war on terrorism.”<sup>36</sup>

“But the ‘law’ which this prisoner is convicted of disregarding is not found in an act of Congress, but in a military order. Neither the Act of Congress nor the Executive Order, nor both together, would afford a basis for this conviction. It rests on the orders of General Dewitt.”<sup>37</sup>

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<sup>33</sup> See Vermeule, 75 NYU L Rev 74 (cited in note xx).

<sup>34</sup> See, for example, Johnson v Eisentrager, 339 US 763 (1950).

<sup>35</sup> See *id.*

<sup>36</sup> Attorney General John Ashcroft, quoted in Terry Frieden, Ashcroft: “Activist” Judges Can Put Nation’s Security At Risk (Nov 12, 2004), available at <http://www.cnn.com/2004/ALLPOLITICS/11/12/ashcroft.judges/index.html> (visited Dec 1, 2004).

<sup>37</sup> Korematsu v United States, 323 US 214, 243 (1944) (Jackson dissenting).

It should be unsurprising to find that in the aftermath of the attacks of 9/11, National Security Maximalism has obtained a great deal of support. To be sure, the Supreme Court has refused to accept it, at least thus far.<sup>38</sup> But the basic approach can be found in many places.

#### A. The Department of Justice

In recent years, the most visible moment for National Security Maximalism came from the Office of Legal Counsel of the Department of Justice, with its 2002 memorandum on the legality of coerced interrogation.<sup>39</sup> The most remarkable aspect of the memorandum is its suggestion that as Commander in Chief of the Armed Forces, the President of the United States has the inherent authority to torture suspected terrorists, so as to make it constitutionally unacceptable for Congress to ban the practice of torture.<sup>40</sup> The Office of Legal Counsel emphasized that “the President enjoys complete discretion in the exercise of his Commander-in-Chief authority and in conducting operations against hostile forces.”<sup>41</sup> In addition, the Office of Legal Counsel insisted that a core function of the Commander in Chief includes interrogation of the enemy.<sup>42</sup> Because of “the President’s inherent constitutional authority to manage a military campaign against al Qaeda and its allies,” congressional enactments “must be construed as not applying to” interrogations undertaken as part of the President’s Commander in Chief authority.<sup>43</sup> “Any effort by Congress to regulate the interrogation of battlefield combatants would violate the Constitution’s sole vesting of the Commander in Chief authority in the

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<sup>38</sup> See, for example, Hamdi v Rumsfeld, 124 S Ct 2633, 2674 (2004); Rasul v Bush, 124 S Ct 2686 (2004).

<sup>39</sup> See Office of Legal Counsel, Memorandum for Alberto Gonzales, Counsel to the President, Re: Standards of Conduct for Interrogation under 18 USC 2340-2340A (August 1, 2002) (copy on file with author). This was the most visible moment for National Security Maximalism, but perhaps not the most extreme one. In the Padilla case, the President claimed that, as Commander in Chief, he had the inherent power to order military authorities to seize an American citizen in the United States without any judicial approval and to hold him indefinitely, incommunicado, with no access to a lawyer, a court, family, or friends, and without even informing his family or friends what they had done with him. I discuss Padilla below.

<sup>40</sup> Id at 31.

<sup>41</sup> Id at 33.

<sup>42</sup> Id at 38.

<sup>43</sup> Id at 34. To be sure, the position of the Department of Justice was stated with a degree of tentativeness, with the suggestion that the congressional ban on torture “might” be unconstitutional in the context of battlefield interrogations. So phrased, the suggestion is a form of minimalism, asking for avoidance of the constitutional issue by reading the statute so as not to intrude on the President’s authority as Commander in Chief. But the general impression is that the ban probably should be regarded as unconstitutional.

President.”<sup>44</sup> Hence coercive interrogation, including torture, must be permitted if the President wants to engage in it.

The Office of Legal Counsel is part of the executive branch, and one of its major functions is to protect the constitutional prerogatives of the President, especially those prerogatives that are associated with the Commander in Chief power. Generous interpretations of the President’s prerogatives should be expected from any office within the Department of Justice, above all when national security is at risk. But in its endorsement of presidential power, the memorandum on coerced interrogation went well beyond ordinary practice. To be sure, the President has inherent authority to oversee battlefield operations, and Congress has limited power to control such operations. The President also has the inherent authority to conduct interrogations amidst war. But to say the least, it is unusual to say that this authority includes the power to torture people when Congress has expressly said otherwise. The power to command the armed forces is not easily taken to include “inherent” power to torture enemy combatants. Even if it does include that power, it is hard to contend that Congress cannot provide protection against torture.<sup>45</sup>

Whatever one’s ultimate judgment on the merits, the memorandum of the Office of Legal Counsel provides a dramatic example of National Security Maximalism—one that may be taken to presage future understandings if that approach ultimately prevails.

#### B. Justice Clarence Thomas in Hamdi

In recent Supreme Court decisions involving the war on terrorism, National Security Maximalism failed to attract a majority opinion.<sup>46</sup> But it made a conspicuous appearance in a remarkable dissenting opinion by Justice Clarence Thomas in the Hamdi case.<sup>47</sup> I will turn to the particular facts of the case in due course. For the moment, note

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<sup>44</sup> Id at 39.

<sup>45</sup> See the discussion of Justice Jackson’s views in Youngstown Sheet and Tube Co v Sawyer, 343 US 579 (1952) (“The Steel Seizure Case”), explored below. Note that in some applications, the Commander in Chief power is more plausibly read to include the power to torture – when, for example, torture is deemed necessary to prevent an imminent attack on American troops. But even here, Congress almost certainly has the authority to forbid the practice of torture.

<sup>46</sup> See Rasul, 124 S Ct 2686 (2004); Rumsfeld v Padilla, 124 S Ct 2711 (2004); Hamdi, 124 S Ct 2633 (2004).

<sup>47</sup> Hamdi, 124 S Ct 2633, 2674 (2004).

that Justice Thomas emphasized, very broadly, that any constitutional judgment in this domain should consider “basic principles of the constitutional structure as it relates to national security and foreign affairs.”<sup>48</sup> In his view, the Constitution accords to the President the “primary responsibility . . . to protect the national security and to conduct the nation’s foreign relations.”<sup>49</sup> Hence judicial judgments should be made against the backdrop set by the President’s inherent and broadly discretionary power to protect national security.<sup>50</sup>

With respect to the courts, Justice Thomas contended, “it is crucial to recognize that *judicial* interference in these domains destroys the purpose of vesting primary responsibility in a unitary Executive.”<sup>51</sup> Judges “lack the relevant information and expertise to second-guess determinations made by the President . . . .”<sup>52</sup> In fact congressional grants of power should be construed generously on the President’s behalf, rather than narrowly, so as to fit with institutional limits on the power of the judiciary.<sup>53</sup> Because the executive branch of the federal government “has an overriding interest in protecting the Nation,” it can invoke that interest to justify depriving people of liberty.<sup>54</sup> In fact Justice Thomas argued in favor of broad constructions of congressional grants of authority partly to avoid constitutional difficulties: “Although the President very well may have inherent authority to detain those arrayed against our troops, I agree with the plurality that we need not decide that question because Congress has authorized the President to do so.”<sup>55</sup>

Justice Thomas’ opinion is a form of National Security Maximalism because of its breadth and ambition. There is no effort here to offer a cautious ruling tailored to the facts of the particular case. On the contrary, Justice Thomas speaks generally about the “primary responsibility” of the President in the domain of “national security.” In addition, he adopts a kind of clear statement principle in favor of presidential authority, suggesting,

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<sup>48</sup> Id at 2675.

<sup>49</sup> Id.

<sup>50</sup> Id.

<sup>51</sup> Id at 2676.

<sup>52</sup> Id.

<sup>53</sup> Id at 2677.

<sup>54</sup> Id at 2685.

<sup>55</sup> Id at 2679.

at least implicitly, that statutes should be read in a way that does not conflict with the President’s inherent authority. But from a reading of the Constitution alone, it would not be entirely clear whether the President or the Congress has primary responsibility in the domain of national security—an issue to which I will return. The important point is that Justice Thomas offers a distinctive vision of the constitutional structure, one that accords principal authority to the President and thus exemplifies National Security Maximalism.

### C. National Security Maximalism on the United States Court of Appeals: The President and “The War Power”

In the years since the September 11 attacks, National Security Maximalism has played a large role on the lower federal courts.<sup>56</sup> Two circuits have decided most of the cases involving a conflict between national security and individual liberty: the United States Courts of Appeals for the District of Columbia and for the Fourth Circuit. Both have shown a remarkable tendency toward National Security Maximalism. In nearly every case in which a serious challenge was mounted to the power of the President, the President has prevailed in the courts of appeals.<sup>57</sup> Let us investigate the details.

1. *The D.C. Circuit.* One of the most strikingly maximalist decisions by the D.C. Circuit is Al Odah v United States,<sup>58</sup> reversed by the Supreme Court.<sup>59</sup> In its exceedingly ambitious ruling, the court held that aliens captured outside of the United States have no rights under the due process clause. The Court said that the Guantanamo Bay detainees were, in law, analogous to German prisoners captured on the battlefield in World War II. The court acknowledged that Guantanamo Bay is controlled by the United States military, but it insisted on the irrelevance of this fact because Cuba has sovereignty over

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<sup>56</sup> The principal exception is Padilla v Rumsfeld, 352 F3d 695 (2d Cir 2003), in which the Court held that the President could not detain Padilla because he lacked the inherent authority to do so and because Congress had not authorized the detention of American citizens on American soil. Id at 712-18, 722-23. This is an example of minimalism in action, as discussed below.

<sup>57</sup> The only significant exception is *id.* The evident influence of National Security Maximalism on the lower courts may attest to the reluctance of judges on those courts to reject security-related decisions by the President of the United States; perhaps the Supreme Court, by virtue of its unique position, is bound to be more cautious about embracing National Security Maximalism.

<sup>58</sup> 321 F3d 1134 (DC Cir 2003).

<sup>59</sup> Rasul, 124 S Ct 2686 (2004).



the area.<sup>60</sup> Broadly reading Supreme Court precedents, the Court ruled in favor of executive discretion.<sup>61</sup>

A concurring opinion by Judge Randolph (who wrote the majority opinion as well) went further still, resolving several issues that it was not necessary for him to discuss. Consider his confessedly maximalist opening sentence: “I write separately to add two other grounds for rejecting the detainee’s non-habeas claims.”<sup>62</sup> The fundamental motivation for his separate opinion seemed to be captured by his final sentence: “The level of threat a detainee poses to United States interests, the amount of intelligence a detainee might be able to provide, the conditions under which the detainee may be willing to cooperate, the disruption visits from family members and lawyers might cause—these types of judgments have traditionally been left to the exclusive discretion of the Executive Branch, and there they should remain.”<sup>63</sup> Here is an explicit endorsement of National Security Maximalism.

Other rulings within the D.C. Circuit fall in the same category. In Center for National Security Studies v Department of Justice,<sup>64</sup> a divided court of appeals permitted an extraordinary level of secrecy from the executive branch. A number of public interest groups invoked the Freedom of Information Act (FOIA), the common law, and the First Amendment to require the government to release information about those who had been detained in the aftermath of the September 11 attacks. The requested information included names, dates of arrest and release, and reasons for detention. The disclosure request had a strong democratic justification: Evaluation of the executive’s behavior could not easily come from a public not provided with this information. In ruling that disclosure was not required, the court relied on a broad interpretation of exemption 7(A) of FOIA, which exempts “records or information compiled for law enforcement purposes . . . to the extent that the production could reasonably be expected to interfere with enforcement proceedings.”<sup>65</sup>

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<sup>60</sup> 321 F3d at 1143.

<sup>61</sup> Id.

<sup>62</sup> Id at 1145.

<sup>63</sup> Id at 1150.

<sup>64</sup> 331 F3d 918 (DC Cir 2003).

<sup>65</sup> 5 USC § 552 (2000).

As Judge Tatel emphasized in dissent, the court’s interpretation of this exemption was exceptionally deferential to the government’s vague statements about potential harms.<sup>66</sup> The court was entirely aware of this point. In language that is closely linked to Justice Thomas’ dissenting opinion in Hamdi, the court emphasized that “the judiciary owes some measure of deference to the executive in cases implicating national security, a uniquely executive purview. . . . We have consistently reiterated the principle of deference to the executive in the FOIA context when national security concerns are implicated. . . . [W]e have consistently deferred to executive affidavits predicting harm to the national security, and have found it unwise to undertake searching judicial review.”<sup>67</sup> Indeed, the court went so far as to comment on the distinctive nature of the current threat: “America faces an enemy just as real as its former Cold War foes, with capabilities far beyond the capacity of the judiciary to explore.”<sup>68</sup> In fact the court insisted that deference was “mandated by the separation of powers,”<sup>69</sup> suggesting that disclosure under FOIA would raise constitutional problems. The court left no doubt about the motivation for its action: “We are in accord with several federal courts that have wisely respected the executive’s judgment in prosecuting the national response to terrorism.”<sup>70</sup> What is most noteworthy about the decision, then, is not the outcome, but the broad pronouncements about the need to defer to the executive.

Within the District of Columbia, the district courts have shown a similar tendency to National Security Maximalism. Consider, for example, ACLU v Department of Justice,<sup>71</sup> in which organizations sought information involving the government’s use of § 215 of the Patriot Act. Section 215 gives the FBI broad power to “make an application for an order requiring production of any tangible things . . . for an investigation to obtain foreign intelligence information . . . or to protect against international terrorism.”<sup>72</sup> In particular, the plaintiffs sought to use FOIA to find out (1) the total number of § 215 requests received by the National Security Law Unit of the FBI and (2) any and all records relating to § 215. Notwithstanding the fact that the Department of Justice had

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<sup>66</sup> 331 F3d at 924.

<sup>67</sup> Id at 926.

<sup>68</sup> Id.

<sup>69</sup> Id.

<sup>70</sup> Id at 932.

<sup>71</sup> 321 F Supp 2d 24 (DDC 2004).

<sup>72</sup> 50 USC § 1681 (2000).

previously made several disclosures of its behavior under the Patriot Act, the court ruled broadly that the national security exemption of FOIA justified the failure to disclose the information. It acknowledged that the “issue is hardly free from doubt,” but ruled for the government “because it [was] mindful of the ‘long-recognized deference to the executive on national security issues.’”<sup>73</sup> Thus the court deferred, not to specific explanations by the executive, but to the vague claims that release of the number of § 215 field requests “poses the continuing potential to harm our national security by enabling our adversaries to conduct their intelligence or international terrorist activities more securely.”<sup>74</sup> The court’s willingness to embrace National Security Maximalism is best understood in light of a background principle in favor of executive power in the domain of national security.

A similar approach can be found in Edmonds v Department of Justice.<sup>75</sup> There the court gave an exceedingly broad reading to the “state secrets privilege” so as to dismiss a Privacy Act claim brought by a self-styled whistleblower at the Federal Bureau of Investigation. One of the most striking parts of the court’s opinion came in a footnote, in which it addressed the possibility of staying the case rather than dismissing it: “This is due not only to the nature of the information, but also because the imminent threat of terrorism will not be eliminated anytime in the foreseeable future, but is an endeavor that will consume our nation’s attention indefinitely.”<sup>76</sup> Under FOIA, then, National Security Maximalism has been explicitly endorsed within the D.C. Circuit, in holdings that fit well with the general approach in Al Odah.

2. *The Fourth Circuit.* Broad rulings in favor of executive authority have also come from the Fourth Circuit.<sup>77</sup> The most prominent of these is Hamdi v Rumsfeld.<sup>78</sup> There the Court held that enemy combatants, captured on the battlefield, could be detained indefinitely and without trial, even if they were American citizens. In so ruling, the Court relied largely on the President’s power as Commander in Chief, contending that this power includes “the authority to detain those captured in armed struggle” and also

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<sup>73</sup> 321 F Supp 2d at 26.

<sup>74</sup> *Id.*

<sup>75</sup> 323 F Supp 2d 65 (DDC 2004).

<sup>76</sup> *Id.* at 82 n 7.

<sup>77</sup> See, for example, United States v Moussaoui, 382 F3d 453 (4th Cir 2004).

<sup>78</sup> 316 F3d 450 (4th Cir 2003), *revd.*, Hamdi v Rumsfeld, 124 US 2633 (2004).

“to deport or detain alien enemies during the duration of hostilities” and “to confiscate or destroy enemy property.”<sup>79</sup>

The central question in the case involved the procedural protection, if any, that would accompany the exercise of the Commander in Chief power. The Court emphasized the need to defer to the President: “The Constitution’s allocation of the warmaking powers reflects not only the expertise and experience lodged within the executive, but also the more fundamental truth that those branches most accountable to the people should be the ones to undertake the ultimate protection and to ask the ultimate sacrifice from them.”<sup>80</sup> Hence deference to the executive would be the basic rule.<sup>81</sup> The court was aware that in denying fair procedure, the President was doing something unusual. But changed circumstances justified this step. “As the nature of threats to America evolves, along with the means of carrying those threats out, the nature of enemy combatants may change also. In the face of such change, separation of powers does not deny the executive branch the essential tool of adaptability.”<sup>82</sup>

Indeed the Court said that the source of the detention was not a statute, but “Article II, Section 2, of the Constitution, wherein the President is given the war power.”<sup>83</sup> (I will return to this important statement in due course.) Deference to the President stems from this explicit grant of authority. So long as a detention “is one legitimately made pursuant to the war powers,” it must be respected.<sup>84</sup> A general statement on the part of the executive, supporting the claim that a citizen was detained in the course of war and qualified as an enemy combatant, would be sufficient.<sup>85</sup> The court left no doubt that this conclusion stemmed from National Security Maximalism: “The constitutional allocation of war powers affords the President extraordinarily broad authority as Commander in Chief and compels courts to assume a deferential posture.”<sup>86</sup>

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<sup>79</sup> Id at 463.

<sup>80</sup> Id.

<sup>81</sup> Id at 464. Notably, however, the court was careful to limit the reach of its ruling, in a way that suggest a form of minimalism described below. See id at 465.

<sup>82</sup> Id at 466.

<sup>83</sup> Id at 471.

<sup>84</sup> Id.

<sup>85</sup> Id at 472-73.

<sup>86</sup> Id at 474.

That deference required the conclusion that Hamdi could be held indefinitely, even after the end of the relevant hostilities.<sup>87</sup> In reaching this conclusion, the court referred to the judgments of the executive branch, without even pausing to consider what kind of authorization Congress had given it.<sup>88</sup>

### III. Three Problems with National Security Maximalism

“In a government of separated powers, deciding finally on what is a reasonable degree of guaranteed liberty whether in peace or war (or some condition in between) is not well entrusted to the Executive Branch of Government, whose particular responsibility is to maintain security. For reasons of inescapable human nature, the branch of Government asked to counter a serious threat is not the branch on which to rests the Nation’s entire reliance in striking the balance between the will to win and the cost in liberty on the way to victory. . . . A reasonable balance is more likely to be reached on the judgment of a different branch. . . . Hence the need for an assessment by Congress before citizens are subject to lockup, likewise the need for a clearly expressed congressional resolution of the competing claims.”<sup>89</sup>

“Judges are sometimes called upon to be courageous, because they must sometimes stand up to what is generally supreme in a democracy: the popular will. Their most significant roles in our system are to protect the individual criminal defendant against the occasional excesses of that popular will, and to preserve the checks and balances within our constitutional system that are precisely designed to inhibit swift and complete accomplishment of that popular will.”<sup>90</sup>

In the abstract, National Security Maximalism has a great deal of appeal. Far more than Congress, the President is in a position to act quickly and decisively to protect the citizenry. He is also likely to be able to acquire relevant information about what must be done and about when to do it. Because the President is Commander in Chief of the Armed Forces, Congress cannot override the President’s judgments about how to carry out a lawful war. Justice Thomas correctly emphasizes that Alexander Hamilton defended the creation of a “unitary executive” as a means of ensuring energy, coordination, and dispatch in the presidency.<sup>91</sup> These qualities are relevant above all in time of war. By contrast, courts lack good tools for assessing the President’s claims of military necessity.

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<sup>87</sup> Id at 476.

<sup>88</sup> Id. This is a striking contrast with the minimalist approach of the Supreme Court, explored below.

<sup>89</sup> Hamdi v Rumsfeld, 124 US 2633, 2655 (2004) (Souter, joined by Ginsburg, concurring in part, dissenting in part, and concurring in the judgment).

<sup>90</sup> Antonin Scalia, The Rule of Law is a Law of Rules, 56 U Chi L Rev 1175, 1180 (1989).

<sup>91</sup> See Hamdi, 124 S Ct at 2675-2676. For general discussion, see Lawrence Lessig and Cass R. Sunstein, The President and the Administration, 94 Colum L Rev 1 (1994).

At least equally important, judicial errors may turn out to be disastrous rather than merely harmful. To be sure, American practice suggests that judges are most unlikely to err by protecting civil liberties; in our history, it is hard to find even a single case in which judicial protection of freedom seriously damaged national security. But if Liberty Maximalism were accepted, some such errors would become far more probable. In ordinary contexts, even those that involve criminal justice, the stakes are not nearly so high. There is every reason for courts to avoid a decision that leads to freedom for terrorists, or to disclosure of information that helps those who want to kill Americans. Structural concerns, along with simple prudence, argue in favor of considerable judicial deference to presidential choices when national security is at risk. These points provide important cautionary notes; they help to explain why Liberty Maximalism is senseless. But for several reasons, National Security Maximalism should itself be rejected.

#### A. Tendentious Readings of the Constitution

If National Security Maximalism were mandated by the Constitution, judges would be bound to follow it. But far from requiring National Security Maximalism, the Constitution is best read to forbid it.

No one doubts that the President has considerable power in the domain of national security. I have emphasized that under Article II, he is explicitly authorized to be “Commander in Chief of the Army and Navy of the United States.” He is allowed “to make Treaties,” at least when two-thirds of the senators concur. He is authorized to “appoint Ambassadors” and “other public Ministers and Consuls.” He “shall receive Ambassadors and other public Ministers.” But none of this supports Justice Thomas’ suggestion that the President has “primary responsibility—along with the necessary power—to protect the national security and to conduct the Nation’s foreign relations.” Nor does anything in the document support the Fourth Circuit’s suggestion that under Article II, “the President is given the war power.” On the contrary, that view is a tendentious reading of the legal materials. To see why, let us turn to Article I.

Perhaps most notably, Congress, rather than the President, has the power “to declare War.”<sup>92</sup> The Constitution also grants Congress, not the President, the power “to raise and support Armies.” It authorizes Congress “to provide and maintain a Navy.” In a formulation that bears on the President’s supposedly inherent power to torture, and that much complicates any claims about the broad power of the Commander in Chief, the founding document permits Congress to “make Rules for the Government and Regulation of the land and naval Forces.” It is Congress that is authorized to raise funds to “provide for the common Defense and general Welfare of the United States.” Congress, rather than the President, is empowered to “regulate Commerce with foreign nations.” Congress is also authorized to “define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations,” and also to “make Rules concerning Captures on Land and Water.” It is under Article I, not Article II, that the Constitution allows suspension of habeas corpus “when in Cases of Rebellion or Invasion the public Safety may require it.” The fact that the Suspension Clause can be found in Article I tends to suggest that Congress, not the President, is entitled to suspend the writ.<sup>93</sup>

In this light, the Constitution does not repose in the President anything like the general authority “to protect the national security.” On the contrary, the more natural reading of the document is that protection of national security is parceled out between Congress and the President -- and that if either has the dominant role, it is the national lawmaker. To be sure, the Commander in Chief Clause does give the President the authority to direct the armed forces, an expansive authority<sup>94</sup>; but even that authority is subject to legislative constraints, because Congress controls the budget and because Congress can choose not to declare war. And if Congress refuses either to authorize the use of force or to declare war, the President is generally not—on the best reading of the document—entitled to commence hostilities.<sup>95</sup> The Commander in Chief Clause allows

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<sup>92</sup> For treatment of some of the complexities here, with reference to the literature, see Curtis Bradley and Jack Goldsmith, Congressional Authorization and the War on Terrorism, Harv L Rev (forthcoming 2005).

<sup>93</sup> See below.

<sup>94</sup> See Loving v United States, 517 US 748 (1996).

<sup>95</sup> The principal exception is that the President is always permitted to repel sudden attacks – a category that is not self-defining. See John Hart Ely, Suppose Congress Wanted A War Powers Act That Worked, 88 Colum L Rev 1379, 1388 (1988); Note, Congress, the President, and the Power to Commit Forces to Combat, 81 Harv L Rev 1771, 1782 (1968).

the President to manage wars; but it does not give him “the war power.” All of this means that National Security Maximalism cannot claim a strong constitutional pedigree.

Of course, the constitutional text is hardly all there is to our constitutional tradition.<sup>96</sup> In the domain of separation of powers, historical practices and changes over time are highly relevant. As Justice Frankfurter contended, “It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them.”<sup>97</sup> In this context, an understanding of that “gloss” greatly favors the President. There can be no doubt that for questions of national security, the President has assumed authority that the text alone might not sanction. The power to make war is a leading example; the President has long engaged in military actions without the kind of legislative authorization that Article I appears to require.<sup>98</sup>

Historical “glosses” on constitutional text might well be taken to argue in the direction of National Security Maximalism. They make it plausible to contend that the President has more authority, in the domain of national security, than the document alone appears to contemplate. Undoubtedly the increasing power of the President is largely a product of functional considerations having to do with the rise of the United States as an international power and the growing need for energy and dispatch. But even when the document is thus glossed, it remains tendentious to contend that when the nation is at risk, the President must be in charge of the apparatus of government. To say this is to reject a constitutional accommodation that, by text and tradition, unambiguously retains Congress’ role as the nation’s lawmaker.

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<sup>96</sup> The best discussion is David A. Strauss, Common Law Constitutional Interpretation, 63 U Chi L Rev 877 (1996).

<sup>97</sup> See Youngstown Co., 343 US at 610-611. For general discussion, see Curtis Bradley and Jack Goldsmith, Congressional Authorization and the War on Terrorism, Harv L Rev (forthcoming 2005).

<sup>98</sup> For relevant discussion, see Harold Koh, The National Security Constitution: Sharing Power after the Iran-Contra Affair 38-41 (Yale 1990); John Hart Ely, The American War in Indochina, Part I: The (Troubled) Constitutionality of the War They Told Us About, 42 Stan L Rev 877 (1989); Gregory Sidak, To Declare War, 41 Duke L J 29 (1991); Harold Koh, The Coase Theorem and the War Power: A Response, 41 Duke L J 122, 127 (1991).



## B. The Incentives of the Executive Branch

The second problem with National Security Maximalism is that it understates the risks of unlimited presidential authority. The executive branch perceives protection of the nation's security as one of its principal tasks, in part because political retribution will fall swiftly on any President who fails in that task. When the nation is under threat, the executive will naturally take precautionary steps to reduce the risks. So far, so good. But recall here Attorney General Biddle's suggestion: "The Constitution has never greatly bothered any wartime President."<sup>99</sup> The question is whether internal dynamics, or external checks, will help to ensure that the precautionary steps are optimal rather than excessive. For two reasons, National Security Maximalism is far too optimistic on that count.<sup>100</sup>

1. *Internal dynamics, unitariness, and group polarization.* Internal dynamics present a serious problem, precisely because the executive branch is designed so as to be neither diverse nor deliberative, certainly as compared with the national legislature. As Justice Thomas emphasized in Hamdi, the executive branch is "unitary" in principle<sup>101</sup>; it is run by a single person, and he is constitutionally entitled to fill his branch with like-minded people. And here is a real difficulty. One of the most robust findings in modern social science is that after deliberation, like-minded people tend to end up thinking a more extreme version of what they thought before deliberation began.<sup>102</sup> Ordinary processes within the executive branch are all too likely to produce not careful investigation of alternatives, but a heightened version of what executive branch officials believed in advance.<sup>103</sup> As a result, liberty might well be at risk.<sup>104</sup>

Of course a presidential disposition in favor of liberty over security<sup>105</sup> can alter this dynamic. Suppose, for example, that the President and his advisers believe that some

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<sup>99</sup> Francis Biddle, In Brief Authority 219 (Doubleday 1962).

<sup>100</sup> For relevant discussion, see Dominic Johnson, Overconfidence and War: The Havoc and Glory of Positive Illusions (Harvard 2004).

<sup>101</sup> See sources cited in note supra.

<sup>102</sup> See Cass R. Sunstein, Why Societies Need Dissent (Harvard 2003).

<sup>103</sup> See Irving Janis, Groupthink (Houghton Mifflin 1983), for many examples.

<sup>104</sup> Many of the findings in Stone, Perilous Times (cited in note 14), can be explained in part in this way.

<sup>105</sup> Note that such a disposition might be literally dangerous, see Posner and Vermeule, 56 *Stan L Rev* 605 (cited in note xx).

national security risk is trivial while a small group within the administration disagrees. It is predictable that precautionary steps will not be taken even though they are justified.<sup>106</sup> Deliberative processes among like-minded people can produce excessive rather than insufficient concern for liberty.<sup>107</sup> In addition, a system of internal checks and balances can alter the dynamic by which groups end up amplifying their antecedent tendencies.<sup>108</sup> Different agencies and departments often have different agendas and interests; consider the notorious fact that the Department of State and the Department of Defense often disagree on issues of both law and policy. A President can certainly take steps to ensure a diversity of views; it is possible to structure executive branch processes so as to create internal safeguards.<sup>109</sup>

My only suggestion here is that there can be no assurance that the executive branch, consisting of people who work under a single president and usually seeking internal consensus, will consider the relevant factors in a way that produces sensible outcomes. If the outlook of the President and his closest advisers includes a predisposition toward aggressive steps to counteract national security risks, even at the expense of liberty, the executive branch is likely to blunder. History offers countless illustrations.<sup>110</sup>

As an example of a failure of deliberation within the executive branch, consider the account in the 2004 report of the Senate Select Committee on Intelligence, which explicitly accused the Central Intelligence Agency (CIA) of groupthink, in which the agency's predisposition to find a serious threat from Iraq led it to fail to explore alternative possibilities or to obtain and use the information that it actually held.<sup>111</sup> In the Committee's view, the CIA "demonstrated several aspects of group think: examining few alternatives, selective gathering of information, pressure to conform within the group or withhold criticism, and collective rationalization."<sup>112</sup> Thus the agency showed a "tendency to reject information that contradicted the presumption" that Iraq had weapons

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<sup>106</sup> In fact this is one view of the situation in the United States before the attack of September 11.

<sup>107</sup> See Adrian Vermeule, Libertarian Panics (unpublished draft 11/04).

<sup>108</sup> See Sunstein, (cited in note 99).

<sup>109</sup> See Cass R. Sunstein, Group Judgments, NYU L Rev (forthcoming 2005).

<sup>110</sup> For illustrations, see Janis, Groupthink (cited in note xx); Stone, Perilous Times (cited in note 14).

<sup>111</sup> Available at <http://intelligence.senate.gov/> (visited Dec 1, 2004).

<sup>112</sup> Id. Conclusions at 4.

of mass destruction.<sup>113</sup> Because of that presumption, the agency failed to use its own formalized methods “to challenge assumptions and ‘group think,’ such as ‘red teams,’ ‘devil’s advocacy,’ and other types of alternative or competitive analysis.”<sup>114</sup> Above all, the Committee’s conclusions emphasize the CIA’s failure to elicit and aggregate information. Through processes of this sort, it is easy to imagine that liberty could be sacrificed in favor of national security, even if there is no adequate justification for the sacrifice.

The claim of the Senate Select Committee is a remarkable and even uncanny echo of one that followed the 2003 investigation of failures at NASA, stressing that agency’s similar failure to elicit competing views, including those based on information held by agency employees.<sup>115</sup> The Columbia Accident Investigation Board explicitly attributed the accident to NASA’s unfortunate culture, one that does too little to elicit information. In the Board’s words, NASA lacks “checks and balances.”<sup>116</sup> It pressures people to follow a “party line.”<sup>117</sup> At NASA, “it is difficult for minority and dissenting opinions to percolate up through the agency’s hierarchy”<sup>118</sup> -- even though, the Board contended, effective safety programs require the encouragement of minority opinions and bad news. Here too the unitariness of the relevant agency was a central source of the problem.

These examples of executive branch failure reflect the process known as group polarization, through which like-minded people often go to unjustified extremes.<sup>119</sup> If those within an executive agency believe that Iraq has weapons of mass destruction, that very belief is likely to be heightened after members have started to talk. And if those within the executive branch think that some abridgement of civil liberties is necessary and desirable as a precautionary measure, internal deliberations are likely to produce polarization in the direction of the antecedent belief. Of course internal deliberations will not produce a final outcome if external political checks exist; an outraged public is often

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<sup>113</sup> Id at 6.

<sup>114</sup> Id at 8.

<sup>115</sup> NASA, 1 Report of The Columbia Accident Investigation Board, available at [http://www.nasa.gov/columbia/home/CAIB\\_Vol1.html](http://www.nasa.gov/columbia/home/CAIB_Vol1.html) (visited Dec 1, 2004).

<sup>116</sup> Id at 12.

<sup>117</sup> Id at 102.

<sup>118</sup> Id at 183.

<sup>119</sup> See S. Moscovici, and M. Zavalloni, The Group As A Polarizer of Attitudes, 12 *Journal of Personality and Social Psychology* 125 (1969).

able to discipline presidential choices. Sometimes political checks will ensure against unjustified intrusions on liberty. But to understand this point, we have to make a distinction.

2. *Selective denials of liberty.* Some restrictions on liberty apply to all or most -- as in, for example, a general increase in security procedures at airports, or a measure that subjects everyone, citizens and noncitizens alike, to special scrutiny when they are dealing with substances that might be used in bioterrorism. Other restrictions on liberty apply to some or few—as in, for example, restrictions on Japanese-Americans during World War II, racial profiling, or the confinement of enemy aliens at Guantanamo Bay.<sup>120</sup> When restrictions apply to all or most, it is reasonable to think that political safeguards provide a strong check on unjustified government action. If the burden of the restriction is widely shared, it is unlikely to be acceptable unless most people are convinced that there is good reason for it; and for genuinely burdensome restrictions, people will not be easily convinced unless a good reason is apparent or provided. But if the restriction is imposed on an identifiable subgroup, the political check is weakened. Liberty-reducing intrusions can be imposed even if they are difficult to justify. These are the circumstances in which political checks are unlikely to provide an adequate safeguard against unjustified presidential intrusions on liberty.<sup>121</sup>

These claims can be illuminated by a glance at the views of Frederick Hayek about the rule of law. Hayek writes, “how comparatively innocuous, even if irksome, are most such restrictions imposed on literally everybody, as . . . compared with those that are likely to be imposed only on some!”<sup>122</sup> Thus it is “significant that most restrictions on what we regard as private affairs, such as sumptuary legislation, have usually been imposed only on selected groups of people or, as in the case of prohibition, were

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<sup>120</sup> See Cole, Enemy Aliens, (cited in note xx).

<sup>121</sup> Of course we can imagine cases in which it is not easy to tell whether the denial is general or selective. I have suggested that intrusions on those who board airplanes, or use public spaces, are general, simply because such a heterogeneous group of people is burdened. But imagine a law that makes it a crime to advocate terrorism, or to disclose information that compromises national security. Measures of this kind burden everyone, in a sense; they do not affect an antecedently identifiable group such as Japanese-Americans, noncitizens, or Muslims. In practice, however, the burdens imposed by such laws would be faced by a few rather than many. Perhaps the best way to deal with the question, at least for such restrictions, is to insist on strong protection of free speech, at least when there is no imminent risk of serious harm.

<sup>122</sup> Friedrich A. von Hayek, The Constitution of Liberty 155 (Chicago 1960).

practicable only because the government reserved the right to grant exceptions.”<sup>123</sup> Hayek urges, in short, that the risk of unjustified burdens dramatically increases if they are selective and if most people have nothing to worry about. The claim is especially noteworthy in situations in which the executive is imposing restrictions on civil liberties. People are likely to ask, with some seriousness, whether those restrictions are in fact justified if the result is burdensome consequence on them. But if other people face the relevant burdens, then the mere fact of “risk,” and the mere presence of fear, will seem to provide a justification.

The danger of unjustified infringement is amplified when the victims of the infringement can be seen as an identifiable group that is readily separable from “us.” Stereotyping of groups significantly increases when people are in a state of fear; when people are primed to think about their own death, they are more likely to think and act in accordance with group-based stereotypes.<sup>124</sup> Experimental findings of this kind support the intuitive idea that when people are afraid, they are far more likely to tolerate government action that abridges the freedom of members of some “out-group.” And if this is the case, responses to social fear, in the form of infringements on liberties, will not receive the natural political checks that arise when majorities suffer as well as benefit from them. The simple idea here is that liberty-infringing action is most likely to be justified if those who support that action are also burdened by it; in that event, the political process contains a built-in protection against unjustifiable restrictions. In all cases, it follows that free societies need some methods for ensuring against excessive reactions to unjustified intrusions on civil liberties.

Consider in this regard an argument in a famous opinion by Justice Robert Jackson.<sup>125</sup> In that opinion, Justice Jackson made two points. The first is that when the Court rules that some conduct cannot be regulated at all, it is intervening, in a major way, into democratic processes, making that conduct essentially “unregulable.” The second is that when the Court invalidates government action on equality grounds, it requires the government to increase the breadth of its restriction, thus triggering political checks

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<sup>123</sup> Id.

<sup>124</sup> See William von Hippel et al., Attitudinal Process Versus Context: The Role of Information Processing Biases in Social Judgment and Behavior, in Joseph P. Forgas et al., eds Social Judgments 251, 263 (Cambridge 2003).

<sup>125</sup> Railway Express Agency v New York, 336 US 106, 112-13 (1949).

against unjustified burdens. With a modest twist on Jackson's argument, we can see a potential approach for courts faced with claims about unlawful interference with civil liberties. If the executive is imposing a burden on an identifiable subclass of people, a warning flag should go up. The courts should give careful scrutiny to that burden.

Of course these general propositions do not resolve concrete cases; everything turns on the particular nature of the legal challenge. In addition, the incidence of benefits and burdens might result, in theory, in too much liberty rather than too much security. Assume, for example, that government is asked to take steps that would provide security to an identifiable subgroup rather than to the public as a whole, whereas the burden of this step would be faced by everyone; if so, we should expect it to err in the direction of insufficient protection of security, precisely for the reasons that Jackson emphasizes.<sup>126</sup> The existence of selective benefits and burdens does not always show that the executive will unduly sacrifice liberty; the opposite may be true.<sup>127</sup> But an appreciation of the risks of selectivity suggests the problems with National Security Maximalism. Political processes are unlikely to provide an adequate check when government imposes burdens on people who are unable to protect themselves in the political process. The legislature has some advantages over the executive on this count, simply because it is both diverse and deliberative, in a way that ought to ensure a degree of representation for identifiable groups that are at risk.

To summarize: National Security Maximalism cannot claim much support in the Constitution itself; on the contrary, the document does not give the President "the war power." The strongest claim for a maximalist approach emphasizes the Commander in Chief Clause, which does give the President some "inherent" power; but that power must be read in the light of a host of other provisions conferring broad authority on Congress. In addition, National Security Maximalism reposes excessive confidence in the President. Deliberative processes within a unitary branch are likely to lead to an amplification of preexisting tendencies, not toward a system of internal checks and balances. When

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<sup>126</sup> For example, those concerned with the problem of "environmental justice" emphasize the failure to protect identifiable subcommunities against environmental risks. See generally Alan Boyle and Michael Anderson, Human Rights Approach to Environmental Protection (Oxford 1996). This failure might easily be explained in Jacksonian terms.

<sup>127</sup> See Vermeule, 75 NYU L Rev 74 (cited in note xx). I am abstracting here from obvious complexities, including the possibility that certain groups are especially well-organized, enabling them to obtain measures favorable to their interests or to fend off measures that are unfavorable to those interests.

deprivations of liberty are limited to an identifiable few—as they frequently are—external checks on the executive provide an insufficient safeguard of civil liberties. But Liberty Maximalism is neither feasible nor desirable. Is there anything that courts might do to help? And what does American history say about that question?

#### IV. The Minimalist Alternative

“Even more important than the method of selecting the people’s rulers and their successors is the character of the constraints imposed on the Executive by the rule of law.”<sup>128</sup>

As an alternative to National Security Maximalism, we might imagine a minimalist approach. But what, precisely, is minimalism? It is easy to imagine a range of answers, simply because minimalism is relative, not absolute. Suppose that a court requires congressional authorization for presidential detentions of American citizens on American soil. That ruling is more minimalist than a decision to require congressional authorization for any and all presidential detentions; but it is less minimalist than a ruling that in the particular circumstances of a given case, the President must obtain congressional authorization to detain a particular American citizen on American soil. With respect to minimalism, there is a continuum rather than a set of dichotomies.<sup>129</sup>

- Belonging at the minimalist extreme is a refusal to hear a case at all, as in a denial of certiorari or a jurisdictional ruling. Refusals to adjudicate offer no guidance at all. They leave everything undecided.
- Slightly less minimalist is an authoritative ruling, and therefore a holding, but one that is unaccompanied by much in the way of reasoning -- as in, for example, a judgment without opinion or a ruling whose rationale is so thin and vague that it fail to give a real account of why the court ruled as it did.
- Less minimalist, but firmly within the minimalist camp, is a narrow and shallow decision, tightly tied to the facts of the particular case and avoiding broad statements about the relevant law.
- Still less minimalist, but minimalist still, is a set of established doctrines that embody a self-conscious refusal to rule ambitiously. Consider, for example, the avoidance

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<sup>128</sup> *Rumsfeld v Padilla*, 124 S Ct 2711, 2735 (2004) (Stevens dissenting).

<sup>129</sup> As discussed above, the same is true for maximalism; I use National Security Maximalism and Liberty Maximalism as endpoints on a continuum.

canon -- the notion that statutes should be construed so as to avoid constitutional doubts.<sup>130</sup> This idea is less minimalist than an insistent (stubborn? infuriating?) refusal to specify the circumstances under which statutes will and should be so construed. In its way, the avoidance canon is wide and therefore ambitious. In fact the avoidance canon could well be justified deeply rather than shallowly—by emphasizing, for example, the value of congressional rather than merely executive deliberation on constitutionally sensitive issues.<sup>131</sup> Nonetheless, the avoidance canon is easily taken as part of the minimalist project. The reason is that it leaves the most fundamental issues undecided; it refuses to take a stand on the contested issues of constitutional law.

In the context of war, minimalists want above all to avoid large-scale interventions into democratic processes. They do so because they know how little they know, and because they generally respect the wishes of a threatened nation, at least when Congress and the executive branch agree. Of course sensible people acknowledge that courts should strike down egregious violations of constitutional rights. But outside of the egregious cases, courts should proceed cautiously and narrowly when national security is at risk. As I understand it here, the minimalist project is built on three principles in the context of war. First, Congress should be required to authorize any interference with constitutionally protected interests; as a general rule, the executive should not be allowed to proceed on its own. Second, any deprivation of liberty, at the individual level, should be accompanied by at least minimally fair procedures. Third, judicial decisions should be narrow and incompletely theorized. As we shall see, these three principles, the cornerstones of minimalism at war, do a remarkably good job of explaining the practices of the Supreme Court amidst war. The first principle is the most complex, and it provides the place to begin.<sup>132</sup>

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<sup>130</sup> See, for example, *Yates v United States*, 354 US 298 (1957).

<sup>131</sup> Cass R. Sunstein, *Nondelegation Canons*, 67 U Chi L Rev 315 (2000).

<sup>132</sup> For valuable general discussion, see Pildes and Issacharoff, *Civil Libertarianism* (cited in note xx); for valuable discussion in the context of authorizations to use force, see Bradley and Goldmith, *Harv L Rev* (cited in note xx).



## A. Clear Statement Principles

1. *The basic framework.* For many years, Israel's General Security Service has engaged in certain forms of physical coercion, sometimes described as torture, against suspected terrorists. According to the General Security Service, these practices occurred only in extreme cases and as a last resort, when deemed necessary to prevent terrorist activity and significant loss of life. Nonetheless, practices worthy of the name "torture" did occur, and they were not rare. Those practices were challenged before the Supreme Court of Israel on the ground that they were inconsistent with the nation's fundamental law. The government responded that abstractions about human rights should not be permitted to overcome real-world necessities so as to ban a practice that was, in certain circumstances, essential to prevent massive deaths in an area of the world that was often subject to terrorist activity. According to the government, physical coercion was justified in these circumstances. A judicial decision to the opposite effect would be a form of unjustified activism, even hubris.

In deciding the case, the Supreme Court of Israel refused to resolve the most fundamental questions.<sup>133</sup> It declined to say whether the practices of the security forces would be illegitimate if expressly authorized by a democratic legislature. But the Court nonetheless held those practices unlawful. The Court's principal argument was that if such coercion were to be acceptable, it could not be because the General Security Service, with its narrow agenda, said so. At a minimum, the disputed practices must be endorsed by the national legislature, after a full democratic debate on the precise question. "[T]his is an issue that must be decided by the legislative branch which represents the people. We do not take any stand on this matter at this time. It is there that various considerations must be weighed."<sup>134</sup>

It is worthwhile to pause over the central feature of this decision. The Supreme Court of Israel required clear legislative authorization for this particular intrusion on liberty; it insisted that presidential action, under a vague or ambiguous law, would not be enough. The Court's decision stands for the general principle that even when national

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<sup>133</sup> *Association for Civil Rights in Israel v The General Security Service* (1999). Supreme Court of Israel: Judgment Concerning the Legality of the General Security Service's Interrogation Methods, 38 I.L.M. 1471 (1999).

<sup>134</sup> *Id.*

security is threatened, the legislative branch of government must explicitly authorize disputed infringements on civil liberty. The reason for this safeguard is to ensure against inadequately considered restrictions—and to insist that political safeguards, in the form of agreement from a diverse and deliberative branch of government, are a minimal precondition for intrusions on civil liberties. In these ways, the requirement of clear legislative statement enlists the idea of checks and balances in the service of individual rights—not through flat bans on government action, but through requiring two, rather than one, branches of government to approve.

The Office of Legal Counsel memorandum, sketched above, provides a startling and ironic contrast here. While the Supreme Court of Israel held that clear legislative authorization is required to permit torture, the United States Department of Justice concluded that clear legislative prohibition is insufficient to forbid torture. But it is reasonable to doubt whether the Supreme Court of the United States would accept this reasoning. The reason is that in a large number of cases, many involving national security, the Court has required a clear congressional statement before permitting the executive to intrude on an interest that has a plausible claim to constitutional protection. These decisions can be understood to create “nondelegation canons”—canons of construction ensuring that Congress and the President jointly, rather than the President alone, will make decisions on constitutionally sensitive issues.<sup>135</sup> In the context of threats to national security, nondelegation canons provide a cornerstone of the practice of minimalism at war.

As a leading example, consider Kent v Dulles,<sup>136</sup> decided in the midst of the Cold War. In that case, the Secretary of State, John Foster Dulles, denied a passport to Rockwell Kent, a member of the Communist Party, who sought to attend a meeting of the “World Council of Peace” in Helsinki, Finland. The State Department denied the passport on two grounds, both supported by its own regulations. First, Kent was a Communist; second, Kent had “a consistent and prolonged adherence to the Communist Party line.” Under the governing statute, enacted in 1926, the Secretary of State was authorized “to grant and issue passports . . . under such rules as the President shall designate and

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<sup>135</sup> See Cass R. Sunstein, 67 U Chi L Rev 315 (cited in note xx).

<sup>136</sup> 357 US 116 (1958).

prescribe for, and on behalf of, the United States . . . .”<sup>137</sup> Kent objected that the denial of the passport was unconstitutional.

The Supreme Court could have decided the case on any number of grounds. It could have said that Kent’s first amendment rights had been violated—that it was unconstitutional to deny someone a passport because of his political convictions. It could have said that the decision of the Secretary of State violated Kent’s right to travel—that the due process clause includes a right to leave the country and that the government needs particularly strong grounds for interfering with that right. It could have said that the grant of open-ended discretion to the Secretary of State violated the nondelegation doctrine—that under Article I, § 1, Congress must give the Secretary some guidelines by which to decide whether to grant or to deny passports. Or it could have said that the denial of the passport was lawful—authorized by the language of the relevant statute and, as authorized, within constitutional bounds. All of these routes would have been simple and straightforward.

The Court did none of these things. Instead it held that the denial of the passport was beyond the statutory authority of the Secretary of State. Its analysis began with a bow in the direction of constitutional requirements. In the Court’s view, the “right to travel is a part of the ‘liberty’ of which the citizen cannot be deprived without due process of law under the Fifth Amendment.”<sup>138</sup> The question of statutory authority would be approached in this light. And while the statute was phrased in broad terms, the Secretary had “long exercised” his power “quite narrowly.”<sup>139</sup> In fact passports had been refused in only two categories of cases: those in which the applicant’s citizenship and allegiance to the United States were in doubt; and those in which the applicant was engaged in unlawful conduct. No one claimed that Kent fell in either of these categories. “We, therefore, hesitate to impute to Congress, when in 1952 it made a passport necessary for foreign travel and left its issuance to the discretion of the Secretary of State, a purpose to give him unbridled discretion to grant or withhold a passport from a citizen for any substantive reason he may choose.”<sup>140</sup> The Court was concerned that Congress

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<sup>137</sup> Act of July 3, 1926, ch 772, 44 Stat 887, Part 2, codified as amended at 22 USC § 211a (2000).

<sup>138</sup> 357 US at 125.

<sup>139</sup> Id at 127.

<sup>140</sup> Id at 128.

had particularly authorized the executive branch to do as it did. “No such showing of extremity, no such showing of joint action by the Chief Executive and the Congress to curtail a constitutional right of the citizen has been made here.”<sup>141</sup>

The Court left no doubt that its decision was constitutionally inspired. It drew attention to the fact that the case involved “an exercise by an American citizen of an activity included in constitutional protection.”<sup>142</sup> For that reason, the Court would “not readily infer that Congress gave the Secretary of State unbridled discretion.”<sup>143</sup> The right of exit had constitutional foundations, and if it is “to be regulated, it must be pursuant to the law-making functions of the Congress.”<sup>144</sup> Hence the Court would “construe narrowly all delegated powers that curtail or dilute” those “activities and enjoyment, natural and often necessary to the well-being of an American citizen.”<sup>145</sup> The Court explicitly linked its narrow construction with the nondelegation principle, citing cases that requires any delegation to be accompanied by intelligible standards.<sup>146</sup> The Court emphasized that it “would be faced with important constitutional questions” if Congress “had given the Secretary authority to withhold passports to citizens because of their beliefs or associations.”<sup>147</sup> But “Congress has made no such provision in explicit terms.”<sup>148</sup> Proceeding in minimalist fashion, the Court left undecided the question whether Congress could constitutionally give that authority to the President. The advantage of the minimalist approach is that it reflects commendable uncertainty about difficult questions, enlisting political safeguards as the first line of defense against unjustified intrusions on freedom.

Was Kent v Dulles decided during war? In a sense, it was not; military forces were not engaged in 1958, and the Court was aware of that fact. The Court explicitly noted that “more restrictive measures were applied in 1918 and in 1941 as war measures,” and it said that it would not “equate this present problem of statutory

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<sup>141</sup> Id.

<sup>142</sup> Id at 129.

<sup>143</sup> Id.

<sup>144</sup> Id.

<sup>145</sup> Id.

<sup>146</sup> Id.

<sup>147</sup> Id at 130.

<sup>148</sup> Id.

construction with problems that may arise under the war power.”<sup>149</sup> But in 1958, the Cold War was at its height, and in the period many people believed that the United States was, in some sense, at war with the Soviet Union.<sup>150</sup>

Did Kent v Dulles involve the Commander in Chief Clause? That clause was not directly mentioned. But the Court’s crucial citation, in Kent v Dulles, involved an explicit reference to a case involving the Commander in Chief power: The Steel Seizure Case.<sup>151</sup> In that case, the Court’s method was exceedingly close to that used in Kent v Dulles. Hence The Steel Seizure Case is highly relevant to the question of presidential power when national security is at risk. That much-discussed decision is illuminatingly seen in minimalist terms.

In 1951, the President directed the Secretary of Commerce to take possession of, and to operate, the majority of steel mills in the United States. The directive was prompted by a threatened strike in the steel industry, one that would apparently jeopardize the continued availability of steel. According to the President, national defense was at risk, because steel was indispensable as a component in nearly all weapons and war materials. The President defended his action as justified by his power as Commander-in-Chief of the Armed Forces. But the Supreme Court firmly rejected the argument. It emphasized that there “is no statute that expressly authorizes the President to take possession of the property as he did here. Nor is there any act of Congress to which our attention has been directed from which such a power can fairly be implied.”<sup>152</sup> It stressed that lawmaking power is vested in Congress, not in the President: “The Founders of this Nation entrusted the lawmaking power to the Congress alone in both good and bad times. It would do no good to recall the historical events, the fears of power and the hopes for freedom that lay behind their choice.”<sup>153</sup> Justice Frankfurter wrote separately, also emphasizing the need for both minimalism and checks and balances.<sup>154</sup> But Justice

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<sup>149</sup> Id at 128.

<sup>150</sup> In the first amendment context, the Supreme Court followed a similar approach in Yates v United States, 354 US 298 (1957), decided only one year before Kent v Dulles. In Yates, the Court narrowly construed the Smith Act so as to protect the abstract advocacy of overthrowing the government. See below for a more detailed discussion.

<sup>151</sup> Youngstown Co, 343 US 579 (1952).

<sup>152</sup> Id at 585.

<sup>153</sup> Id at 589.

<sup>154</sup> Id at 593 (Frankfurter concurring).

Frankfurter’s opinion, and that of the Court itself, have come to be less important than the concurring opinion of Justice Jackson, who explored in some detail the central importance of a grant of authority from Congress.<sup>155</sup>

Jackson famously offered a tripartite division of presidential authority, suggesting that the President’s “authority is at its maximum”<sup>156</sup> when he is acting under an authorization from Congress, and “at its lowest ebb” when the President’s exercise of power is “incompatible with the expressed or implied will of Congress.”<sup>157</sup> Less famously but also significantly, Jackson offered a narrow construction of the Commander in Chief clause, and showed a great deal of skepticism about the idea of “inherent” presidential power. The Commander in Chief clause, he said, “undoubtedly puts the Nation’s armed forces under presidential command.”<sup>158</sup> But it could not be taken “as support for any presidential action, internal or external, involving use of force . . . .”<sup>159</sup> More broadly, Justice Jackson said that “no doctrine that the Court could promulgate would seem to me more sinister and alarming than that a President whose conduct of foreign affairs is so largely uncontrolled, and often even is so unknown, can vastly enlarge his mastery over the internal affairs of the country by his own commitment of the Nation’s armed forces to some foreign venture.”<sup>160</sup> Jackson challenged the “loose and irresponsible use of adjectives” that affected “much legal discussion of presidential powers,” including adjectives like inherent, implied, incidental, war, plenary, and emergency.<sup>161</sup> Jackson expressed skepticism about these adjectives, suggesting that they amounted to an effort to “amend” the work of those who produced the Constitution.

2. *Illustrations.* Jackson’s legislature-centered framework helps to organize a remarkable number of Supreme Court decisions involving civil liberty and war, many of them written before The Steel Seizure Case. Time and again, the Court has emphasized the importance of congressional authorization for presidential action and refused to rule

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<sup>155</sup> Id at 634 (Jackson concurring).

<sup>156</sup> Id at 635.

<sup>157</sup> Id at 637.

<sup>158</sup> Id at 641.

<sup>159</sup> Id at 641.

<sup>160</sup> Id at 642.

<sup>161</sup> Id at 646-47.

that the President has the power to act on his own. In these ways, the Court has acted in good minimalist fashion, leaving many of the most fundamental questions undecided.<sup>162</sup>

Consider, for example, Ex Parte Endo,<sup>163</sup> in which the Court struck down the detention of concededly loyal Japanese-Americans on the West Coast. The case involved a petition for a writ of habeas corpus, sought on behalf of Mitsue Endo, a loyal citizen who had been placed in a relocation center. The Court held that Endo would have to be released. In so holding, it relied on the absence of statutory authorization for her detention. “In reaching that conclusion we do not come to the underlying constitutional issues which have been argued. For we conclude that, whatever power the War Relocation Authority may have to detain other classes of citizens, it has no authority to subject citizens who are concededly loyal to its leave procedure.”<sup>164</sup> The Court emphasized that even in the midst of war, the President would have to identify clear statutory authorization for any such detention: “In interpreting a wartime measure we must assume that their purpose was to allow for the greatest possible accommodation between those liberties and the exigencies of war.”<sup>165</sup> Thus the constitutional issues would be avoided in light of “the silence of the legislative history and of the Act and the Executive Orders on the power to detain.”<sup>166</sup> The Court added that “if there is to be the greatest possible accommodation of the liberties of the citizen with this war measure, any such implied power [of the President] must be narrowly confined to the precise purpose of the evacuation program.”<sup>167</sup>

To be sure, the Court had also held, on the same day, that the forced evacuation of Japanese-Americans was acceptable as a matter of statutory and constitutional law—a holding to which I will turn in due course.<sup>168</sup> But as in Kent v Dulles, the Court

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<sup>162</sup> See Pildes and Issacharoff, Civil Libertarianism (cited in note xx).

<sup>163</sup> 320 US 81 (1943).

<sup>164</sup> *Id.* at 297.

<sup>165</sup> *Id.* at 300.

<sup>166</sup> *Id.* at 300.

<sup>167</sup> *Id.* at 302. Note, however, that the Court refused to decide the case until *after* Roosevelt decided to end the internment; the Court announced its decision the next day. To say the least, this was not a tribute to judicial courage.

<sup>168</sup> See Korematsu v United States, 323 US 214 (1943). The line between Korematsu and Endo was explained in this way by the Court: “The Endo case, post, graphically illustrates the difference between the validity of an order to exclude and the validity of a detention order after exclusion has been effected.” *Id.* at 222. For discussion, see Patrick O. Gudridge, Remember Endo?, 116 Harv L Rev 1933 (2003); Stone, Perilous Times at 302-03 (cited in note 14).

emphasized that for the evacuation, “the Congress and the Chief Executive moved in coordinated action”<sup>169</sup>—a clear signal that the existence of simultaneous and explicit approval by both branches was both necessary and sufficient to produce judicial deference. The clarity of the signal is underlined by a pointed reference to Endo in Kent v Dulles itself, citing Endo to support the proposition that narrow construction of delegated powers is appropriate when “activities or enjoyment, natural and often necessary to the well-being of an American citizen, such as travel, are involved.”<sup>170</sup>

In the same spirit is Duncan v Kahanamoku,<sup>171</sup> involving the imposition of martial law in Hawaii during World War II. Civilians in Hawaii had been imprisoned after a trial in military tribunals; the central question was whether those tribunals had the legal authority to try civilians. In its narrow ruling, the Court held that they did not. The Court concluded that the Hawaii Organic Act did allow the governor of the state to declare martial law, but it refused to agree that as a statutory matter, the governor of the state, even with presidential approval, could “close all the courts and supplant them with military tribunals.”<sup>172</sup> The Court acknowledged that the statutory language and history were unclear and stressed, as relevant to the interpretive question, “the birth, development, and growth of our political institutions.”<sup>173</sup> Because “courts and their procedural safeguards are indispensable to our system of government,” the Court would not construe an ambiguous statute to authorize the displacement, by the executive, of ordinary courts with military tribunals.<sup>174</sup>

The oldest example of a minimalist approach to civil liberties can be found during the Civil War period. President Lincoln suspended the writ of habeas corpus, referring to § 9, clause 2 of the Constitution, which says, “The Privilege of Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”<sup>175</sup> The Suspension Clause is phrased in the passive voice; it does not say who may suspend the great writ. Chief Justice Roger Taney ruled that the President could

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<sup>169</sup> 357 US at 128.

<sup>170</sup> *Id.* at 129.

<sup>171</sup> 327 US 304 (1946).

<sup>172</sup> *Id.* at 315.

<sup>173</sup> *Id.* at 319.

<sup>174</sup> *Id.* at 323.

<sup>175</sup> US Const, Art I, § 9, cl 2.



not suspend the writ on his own; he needed congressional authorization.<sup>176</sup> Chief Justice Taney was able to point to the fact that the Suspension Clause is found in Article I, which specifies the powers of Congress, rather than Article II, which deals with presidential authority. The textual argument is certainly powerful, but Chief Justice Taney's conclusion is also supported by a structural concern, to the effect that suspension of habeas corpus is a grave act, one that requires a judgment by a body that is both deliberative and diverse.

In fact a clear statement principle, rather than the Constitution by itself, underlies one of the most celebrated free speech decisions in American history: Judge Learned Hand's in the Masses case.<sup>177</sup> At issue was an effort by the postmaster of New York to prevent the mailing of a revolutionary journal called The Masses. The postmaster invoked the Espionage Act of 1917. Judge Hand's opinion, decided during World War I, was animated by free speech principles, but he rested his decision on narrow reading of the Act rather than on the First Amendment. Judge Hand contended under the Act, speech would be protected unless it expressly advocated lawless action; it could not be regulated merely because it did so indirectly or by implication.

This interpretation of the Act was hardly inevitable. By its terms, the Act banned any effort willfully "to cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States"; it also banned any effort willfully to "obstruct the recruiting or enlistment service of the United States."<sup>178</sup> These prohibitions could well have been understood to apply to the relevant issue of The Masses, which praised and even glorified conscientious objectors to the draft.<sup>179</sup> Judge Hand strained to argue that "One may admire and approve the course of a hero without feeling any duty to follow him. There is not the least implied intimation in these words

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<sup>176</sup> See Rehnquist, All the Laws at 36-38 (cited in note xx).

<sup>177</sup> See Masses Publishing Co v Patten, 244 F 535 (SDNY 1917); see generally Stone, Perilous Times at 164-70 (cited in note 14), for a detailed discussion.

<sup>178</sup> See Geoffrey R. Stone et al., Constitutional Law 1088 (Little, Brown 3d ed 1996).

<sup>179</sup> For example, the issue contained a poem called "Tribute," dedicated to Emma Goldman and Alexander Berkman, both in jail for opposing the war and the draft. The poem said, among other things, "Emma Goldman and Alexander Berkman/Are in prison tonight/But they have made themselves elemental forces . . ./They are working on our destinies/They are forging the love of the nations." This unambiguous "tribute" to lawbreakers opposing the draft could easily be taken as a willful obstruction of "the recruiting or enlistment service of the United States."

that others are under a duty to follow.”<sup>180</sup> Judge Hand’s narrow construction of the Act enabled him to avoid resolution of a difficult constitutional problem.

Judge Hand’s approach was followed in some of the most famous liberty-promoting dissenting opinions written in World War I, by Justices Louis Brandeis and Oliver Wendell Holmes.<sup>181</sup> Both Brandeis and Holmes are now celebrated for their insistence on the constitutional protection of free speech. But their opinions have unmistakable minimalist features, arguing for narrow construction of authorization to the executive, not for invalidation on constitutional grounds. In one case, the Postmaster General revoked the mailing privileges of a newspaper because it published articles that criticized America’s involvement in World War I and that therefore might be taken to obstruct military recruitment and enlistment. Refusing to interpret the Espionage Act in this way, both Brandeis and Holmes contended that the statute should not be read to grant such open-ended power to the President.<sup>182</sup> Justice Brandeis insisted that the real question “is one of statutory construction.”<sup>183</sup> The Postmaster General had argued that the relevant articles violated the Espionage Act, but the statute need not be taken in that way.<sup>184</sup> In a manner analogous to that pursued by the majority in Kent v Dulles, Justice Brandeis sketched the historical practices of Congress and the executive to suggest that the Postmaster General lacked the statutory authority to exclude materials that he deemed objectionable and even unlawful.<sup>185</sup> And Justice Brandeis explicitly invoked a clear statement principle on behalf of his narrow construction, suggesting that “even if the statutes were less clear in this respect than they seem, I should be led to adopt that construction because of the familiar rule” that legislative enactments should be read so as to avoid constitutional doubts.<sup>186</sup>

Justice Holmes spoke in identical terms, insisting that “it would take very strong language to convince me that Congress ever intended to give such a practically despotic power to any one man. . . . Therefore I do not consider the limits of its constitutional

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<sup>180</sup> 244 F at 538.

<sup>181</sup> United States v Bureleson, 255 US 407 (1921); Abrams v United States, 250 US 622 (1919).

<sup>182</sup> 255 US at 417 (Brandeis dissenting); id at 436 (Holmes dissenting).

<sup>183</sup> Id at 417.

<sup>184</sup> Id at 418-19.

<sup>185</sup> Id at 419-23.

<sup>186</sup> Id at 429.

power.”<sup>187</sup> Justice Holmes’ great dissenting opinion in Abrams did speak of the first amendment.<sup>188</sup> But his initial submission was that the governing statutes should be interpreted not to cover the speech that had been subject to prosecution.<sup>189</sup> Of course nothing here is meant to deny the fact that Brandeis and Holmes sometimes voted simply to strike legislation down on constitutional grounds. All I am emphasizing here is that in some striking opinions, they took a more minimalist approach to intrusions on free speech amidst war.

In fact, an approach of this sort attracted the support of a majority of the Court at the height of the Cold War. Following Judge Hand and Justice Brandeis, the Court protected speech through an aggressive clear statement approach in Yates v United States.<sup>190</sup> At issue was a provision of the Smith Act, making it unlawful to “advocate, abet, advise, or teach the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence”; to print, sell, edit, display, or circulate written matters so advocating; and “to organize or to help to organize any group or assembly of persons who reach, advocate, or encourage overthrowing or destroying any government in the United States by force or violence.”<sup>191</sup> The Court narrowly construed these terms, concluding that the Act does not prohibit “advocacy and teaching of forcible overthrow as an abstract principle,” and that it reaches only efforts “to instigate action to that end.”<sup>192</sup> The Court referred to the constitutional difficulty but insisted: “We need not, however, decide the issue before us in terms of constitutional compulsion, for our first duty is to construe this statute. In doing so, we should not assume that Congress chose to disregard a constitutional danger zone so clearly marked.”<sup>193</sup>

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<sup>187</sup> Id at 437.

<sup>188</sup> Abrams, 250 US at 632 (1919) (Holmes dissenting).

<sup>189</sup> Id at 626-27. It would be easy to imagine a slight recasting of Holmes’ opinion in Abrams that would speak principally in statutory terms, emphasizing the constitutional backdrop as he did in Burleson. Notably, however, his Abrams opinion begins with the statute, but adds, “let me pass to the more important aspect of the case. I refer to the First Amendment of the Constitution that Congress shall make no law abridging the freedom of speech.” Id at 627. Holmes thus shows some (nonminimalist) impatience with the statutory issues, in a way that suggests an intense desire to clarify the constitutional problem.

<sup>190</sup> 354 US 298 (1957).

<sup>191</sup> Smith Act, June 28, 1940, 54 Stat 670, 671. See 354 US at 300-01.

<sup>192</sup> Id at 318.

<sup>193</sup> Id at 319.

The Court also offered a narrow construction of the term “organize,” which it limited to acts entering into the initial creation of an organization, not to acts performed in carrying on its activities.<sup>194</sup> The Court thus refused to permit the executive to interpret the Smith Act to enter into a “constitutional danger zone,” even though the language could easily have been taken to allow it to do so. What was required was clear congressional authorization.<sup>195</sup>

An analogous lesson emerges from the much-discussed decision in Ex Parte Quirin,<sup>196</sup> where the Court upheld the use of military commissions to try German saboteurs captured during World War II. In that case, the President asked the Court to hold that as Commander in Chief, the President had inherent authority to create and to use military tribunals. The Court refused to accept this argument: “It is unnecessary for present purposes to determine to what extent the President as Commander in Chief has constitutional power to create military commissions without the support of Congressional legislation. For here Congress has authorized trial of offenses against the law of war before such commissions.”<sup>197</sup> Thus the Court posed the question as involving the unified position of Congress and the executive: “We are concerned only with the question whether it is within the constitutional power of the National Government to place petitioners upon trial before a military commission for the offenses with which they are charged.”<sup>198</sup> The congressional grant of authority was far from unambiguous here, and hence the Court’s interpretation might have been motivated, in part, by a desire to avoid ruling on the President’s broad claims about his authority as Commander in Chief.<sup>199</sup> The crucial point is that the Court’s reliance on congressional authorization gives Quirin an unmistakable minimalist character.

In its ruling, the Quirin Court followed the path set out by the concurring justices in Ex Parte Milligan, which prohibited the use of military tribunals to try civilians during the Civil War.<sup>200</sup> Rejecting a broad constitutional ruling from the majority,<sup>201</sup> the

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<sup>194</sup> Id at 310.

<sup>195</sup> See Gerald Gunther, Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History, 27 Stan L Rev 719 753 (1975).

<sup>196</sup> 317 US 1 (1942).

<sup>197</sup> Id at 39.

<sup>198</sup> Id at 30 (emphasis added).

<sup>199</sup> See below.

<sup>200</sup> 71 US 2 (1866).

concurring justices said, “It is for Congress to determine the question of expediency. And Congress did determine it. That body did not see fit to authorize trials by military commission in Indiana, but by the strongest implication prohibited it . . .”<sup>202</sup> Avoiding the constitutional question, the concurring justices emphasized that the President had not been authorized to use military tribunals. So too in the Hamdi case, to which I will turn in due course; there the Court refused to consider the President’s broad claim of inherent authority to detain citizens who count as “enemy combatants.” It chose instead the minimalist route of emphasizing the existence of congressional authorization for such detentions.<sup>203</sup>

3. *Korematsu and Hirabayashi redux: minimalism in surprising places.* This catalogue should be sufficient to show that a primary precept of minimalism in war, requiring congressional authorization for intrusions on liberty, helps to organize a remarkable variety of judicial decisions. But I have not discussed the Supreme Court’s most notorious decisions in this domain: Hirabayashi v United States<sup>204</sup> and Korematsu v United States.<sup>205</sup> In Hirabayashi, the Court upheld a curfew order imposed by a military commander on an American citizen of Japanese ancestry. In Korematsu, the Court upheld a military order excluding an American citizen of Japanese descent from San Leandro, California. It is tempting and probably even right to see both decisions as cowardly and deplorable capitulations, on the part of the Court, to intrusions on liberty that could find no justification in national security concerns.<sup>206</sup> It is even tempting to see both decisions as vindications of National Security Maximalism. But the Court’s overall approach also has an unmistakable minimalist feature, requiring executive action to be authorized by Congress, and deferring to it only if it has been so authorized.

Hirabayashi was largely decided on institutional grounds. The Court’s initial submission was that “so far as it lawfully could, Congress authorized and implemented such curfew orders as the commanding officer should promulgate pursuant to the

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<sup>201</sup> See *id.*; this is one of the rare examples of Liberty Maximalism in American constitutional history.

<sup>202</sup> *Id.* at 141.

<sup>203</sup> 124 S Ct at 2639.

<sup>204</sup> 320 US 81 (1943).

<sup>205</sup> 323 US 214 (1944).

<sup>206</sup> See Stone, Perilous Times (cited in note 14). Compare Breyer, Liberty at 3 (cited in note xx) (“It seems fair to say that Korematsu now represents the kind of constitutional decision that courts should seek to avoid.”)

Executive Order of the President.”<sup>207</sup> Thus dual branch lawmaking, rather than executive unilateralism,<sup>208</sup> was involved: “The question then is . . . whether, acting in cooperation, Congress and the President have constitutional authority to impose the curfew restriction here complained of.”<sup>209</sup> The Court ultimately concluded that “it was within the constitutional power of Congress and the executive arm of the Government to prescribe this curfew order for the period under consideration.”<sup>210</sup> In fact one of Hirabayashi’s principal objections was that the curfew had been an unconstitutional delegation by Congress; the Court’s response was that the statute was to be read together with the executive’s actions under it, so that “the standard set up for the guidance of the military commander, and the action taken and the reasons for it, are in fact recorded in the military orders.”<sup>211</sup>

Of course the Court could have ruled otherwise, and I am not suggesting that it was right to do as it did. The Court could have concluded that the orders were unacceptable unless Congress had specifically set out the governing standards through ordinary law. A nondelegation challenge was hardly implausible; and the Court would have done better, in my view, to have proceeded as in Kent v Dulles, so as to find an absence of sufficient legislative authorization for an extraordinary intrusion into the domain of liberty. The general tenor of the Court’s opinion might reasonably be invoked in support of National Security Maximalism: “Since the Constitution commits to the Executive and to Congress the exercise of the war power in all the vicissitudes and conditions of warfare, it has necessarily given them wide scope for the exercise of judgment and discretion in determining the nature and extent of the threatened injury or danger and in the selection of the means for resisting it. . . . [I]t is not for any court to sit in review of the wisdom of their action or substitute its judgment for theirs.”<sup>212</sup> Note, however, that even here, the Court stressed that both Congress and the executive had concurred; the executive was not acting on its own.

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<sup>207</sup> 320 US at 91.

<sup>208</sup> For the term, see Pildes and Issacharoff, Civil Libertarianism (cited in note xx).

<sup>209</sup> 320 US at 91.

<sup>210</sup> Id at 92.

<sup>211</sup> Id at 104.

<sup>212</sup> Id at 93.

In Korematsu, the Court similarly emphasized that the exclusion order was based on a recent statute, making it a crime to “remain in . . . any military area of military zone” so prescribed by a competent official.<sup>213</sup> The exclusion order, issued by General Dewitt, was specifically authorized by an Executive Order by the President, who was in turn acting under congressional authorization. The Court stressed the institutional force behind the exclusion: “The Hirabayashi conviction and this one thus rest on the same 1942 Congressional Act and the same basic executive and military orders.”<sup>214</sup> The Court pointedly noted that it was dealing not with the executive alone, but with “the war power of Congress and the Executive.”<sup>215</sup>

Justice Frankfurter underlined the institutional point: “I find nothing in the Constitution which denies to Congress the power to enforce such a valid military order by making its violation an offense triable in the civil courts.”<sup>216</sup> Justice Jackson, dissenting, also emphasized institutional factors, but saw them as cutting the other way: “[T]he ‘law’ of which this prisoner is convicted of disregarding is not found in an act of Congress, but in a military order. Neither the Act of Congress nor the Executive Order of the President, nor both together, would afford a basis for this conviction. It rests on the orders of General Dewitt.”<sup>217</sup> This institutional point plainly contributed to Justice Jackson’s refusal to vote to uphold the evacuation.

But let us take the Court’s three decisions as a whole. If we consider Hirabayashi and Korematsu together with Ex Parte Endo, we can obtain a fresh perspective on what the Court was doing with the American government’s acts of discrimination against Japanese-Americans. In short, it was rejecting National Security Maximalism and Liberty Maximalism in favor of a distinctive form of minimalism. In none of the three cases did the Court issue a broad ruling on presidential authority. When the executive acted without congressional authorization, it lost; it survived legal attack only when Congress had specifically permitted its action. In all three cases, the Court paid exceedingly careful attention to the role of legislation, and thus refused to rule that the Commander in Chief power allowed the President to act on his own. In permitting the executive to implement a

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<sup>213</sup> Act of Mar 21, 1942, 56 Stat 173.

<sup>214</sup> 323 US at 217.

<sup>215</sup> Id.

<sup>216</sup> Id at 225.

<sup>217</sup> Id at 244.

curfew and an exclusion order, the Court rejected Liberty Maximalism, indicating that it would yield to the shared judgments of the two democratically accountable branches.

Of course it would be possible to question the Court's holdings. In my view, the Court should have required greater legislative clarity in Hirabayashi. I have said that the Court should have ruled, in the fashion of Kent v Dulles, that if Japanese-Americans were going to be deprived of their liberty, it must be as a result of clear and specific instructions from the national legislature.<sup>218</sup> And in Korematsu, Justice Jackson's opinion could have been recast to emphasize the absence of clear authorization from either Congress or the President. But for present purposes, the most important point lies elsewhere. Hirabayashi, Korematsu, and Endo reflect an emphatically minimalist approach to civil liberties in wartime—an approach that both defers to, and insists on, agreement from both of the democratically accountable branches.

From the standpoint of liberty, of course, skeptics will object that deference is unacceptable even if both branches agree. All I am suggesting here is that congressional authorization should ordinarily be required for presidential intrusion into the domain of constitutionally sensitive interests -- and that outside of the egregious cases, courts will, and usually should, hesitate if such authorization is forthcoming.

4. *Clear statements and terrorism.* In the recent cases involving terrorism, clear statement principles have played a central role.

a. Hamdi. Such principles were endorsed most explicitly by Justice Souter, in his concurring opinion, joined by Justice Ginsburg, in Hamdi.<sup>219</sup> Justice Souter's central argument was that Congress had not authorized Hamdi's detention when a clear statement from Congress was required:

“In a government of separated powers, deciding finally on what is a reasonable degree of guaranteed liberty whether in peace or war (or some condition in between) is not well entrusted to the Executive Branch of Government, whose particular responsibility is to maintain security. For reasons of inescapable human nature, the branch of Government asked to counter a serious threat is not the branch on which to rest the Nation's entire reliance in striking the balance between the will to win and the cost in

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<sup>218</sup> Compare Gooding v Wilson, 405 US 518 (1972) (using vagueness principles to strike down a restriction on speech).

<sup>219</sup> Hamdi v Rumsfeld, 124 US 2633 (2004).



liberty on the way to victory. . . . a reasonable balance is more likely to be reached on the judgment of a different branch.”<sup>220</sup>

In making this argument, Justice Souter invoked the Non-Detention Act, which plainly states, “No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.”<sup>221</sup> In his view, the Non-Detention Act ought generally to be read in accordance with its apparently “severe” terms.<sup>222</sup> One reason is that the Act was enacted against the background “of an interpretive regime that subjected enactments limiting liberty in wartime to the requirement of a clear statement and [Congress] presumably intended” the Act “to be read accordingly.”<sup>223</sup> Emphasizing the cautionary examples afforded by history, and proceeding in light of the executive’s incentive to favor security over liberty, Justice Souter contended that “manifest authority to detain” should be demanded “before detention is authorized.”<sup>224</sup>

Hence Justice Souter emphasized “the need for a clearly expressed congressional resolution of the competing claims.”<sup>225</sup> Not having found any such resolution, he concluded that the detention was unlawful. In a fashion reminiscent of Justice Jackson in The Steel Seizure Case, Justice Souter went on “to note the weakness of the Government’s claim of inherent, executive authority” to detain people.<sup>226</sup> He acknowledged the possibility that the President could do this “in a moment of genuine emergency, when the Government must act with no time for deliberation.”<sup>227</sup> But that was not the case here.

I believe that Justice Souter was entirely correct to stress the importance of requiring a clear statement from Congress before authorizing detentions of this sort by the executive. But for two different reasons, I am not sure that Justice Souter was correct in his conclusion in Hamdi. First, and most fundamentally, a congressional authorization to use force is reasonably read to include the authority to detain those combatants who were captured during hostilities, at least for the period of those hostilities—a point to

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<sup>220</sup> Id at 2655.

<sup>221</sup> 18 USC 4001(a) (2000).

<sup>222</sup> 124 S Ct at 2653-54.

<sup>223</sup> Id at 2655.

<sup>224</sup> Id.

<sup>225</sup> Id.

<sup>226</sup> Id at 2659.

<sup>227</sup> Id.

which I will return. Second, the President claimed inherent authority to detain those captured on the battlefield—a claim that was at least plausible under the Commander in Chief clause. For this reason, the plurality’s conclusion—that Congress had authorized the detention—actually helped to avoid the resolution of a serious constitutional question.

This latter point raises some real complexities for minimalism and the use of clear statement principles to limit presidential power. Such principles are justified, as in Kent v Dulles, as a means of avoiding constitutional questions by requiring a judgment by two branches, rather than simply one, that an invasion of liberty is justified. But in some (narrow) contexts, the President will be able to make a plausible argument that he has inherent authority to proceed with some course of action. If so, there is reason for an opposing clear statement principle, one that reads ambiguous statutory provisions as authorizing, rather than forbidding, presidential action. In fact this is an important form of judicial minimalism, and it is one reading of the Court’s opinion in Ex Parte Quirin.<sup>228</sup> When the President has a strong claim of inherent power, the clear statement approach does not argue in favor of limiting his authority. But for the reasons sketched by Justice Jackson, broad claims of inherent power, made by reference to the Commander in Chief Clause, are usually not strong. On the contrary, they are usually implausible. When they are strong, the Hamdi plurality’s approach is the right form of minimalism. When they lack plausibility, Justice Souter provides the best path for the future.

Indeed, an important aspect of the Hamdi plurality’s own approach reflects an endorsement of Justice Souter’s central idea. The government had argued that as a result of Congress’ authorization of the use of force, it was permitted to detain Hamdi indefinitely.<sup>229</sup> The plurality rejected this argument, invoking a kind of clear statement principle, one that read the authorization to allow detention only during active prosecution of the war in Afghanistan. The Court noted that “the national security underpinnings of the ‘war on terror,’ although crucially important, are broad and malleable.”<sup>230</sup> A longstanding war on terror might mean that “Hamdi’s detention could

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<sup>228</sup> This is because in that case, the asserted statutory authorization for the President’s creation of military tribunals was ambiguous; a clear statement principle would not have found it sufficient. See Jack L. Goldsmith and Cass R. Sunstein, What A Difference Fifty Years Makes, 19 Const Commentary 621 (2002).

<sup>229</sup> Hamdi, 124 S Ct at 2641.

<sup>230</sup> Id.

last for the rest of his life.”<sup>231</sup> Congress had said nothing to allow the President to reach this conclusion. The Court insisted, in this light, that “indefinite detention for the purpose of interrogation is not authorized.”<sup>232</sup> It went on to conclude that detention could occur only for the duration of the hostilities in Afghanistan.<sup>233</sup> This conclusion, based on a narrow reading of the authorization of the use of force, is a more modest version of Justice Souter’s plea for a clear statement principle in Hamdi.

b. Padilla. Minimalism of the same sort played the central role in the powerful decision of the court of appeals in the Padilla case.<sup>234</sup> At issue was the legality of the detention of Jose Padilla, an American citizen held as an enemy combatant after having been seized on American soil. The court squarely rejected the claim, urged by the executive and rooted in National Security Maximalism, to the effect that the “President has the inherent authority to detain those who take up arms against this country.”<sup>235</sup> The court of appeals correctly emphasized that Articles I and II divide the war powers, rather than conferring them on the executive alone.<sup>236</sup> The court added that the grant of numerous war-related powers “to Congress is a powerful indication that, absent express congressional authorization, the President’s Commander in Chief powers do not support” the confinement of an American citizen captured on American soil. It stressed that Quirin, the government’s best precedent, rested on congressional authorization rather than on inherent presidential authority.<sup>237</sup>

Thus the key issue was whether such authorization could be found here. In the court’s view, Congress’ authorization to use “all necessary and appropriate force” to respond to the September 11 attacks should be understood in light of Endo. There the Court emphasized that “in interpreting a war-time measure we must assume that [the purpose of Congress and the Executive] was to allow for the greatest possible accommodation between those liberties and the exigencies of war.”<sup>238</sup> Here no clear and

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<sup>231</sup> Id.

<sup>232</sup> Id at 2641.

<sup>233</sup> Id at 2642.

<sup>234</sup> Padilla v Rumsfeld, 352 F3d 695 (2d Cir 2003), reversed on other grounds, Rumsfeld v Padilla, 124 S Ct 2711 (2004).

<sup>235</sup> 352 F3d at 712.

<sup>236</sup> Id at 713-14.

<sup>237</sup> Id at 716.

<sup>238</sup> Id at 722-23.

unmistakable statement could be found; and that was what was required.<sup>239</sup> This decision is an unambiguous exercise in minimalism at war.

5. *What kind of authorization?* A general emphasis on the need for congressional authorization hardly answers all questions about the relationship between statutory provisions and presidential power.<sup>240</sup> We can group the cases discussed thus far into three categories. Sometimes Congress is required to authorize; the President cannot act without some grant of power from the national legislature. Sometimes Congress is required to authorize clearly; in the face of ambiguity, the President is not permitted to engage in a certain course of conduct. Sometimes Congress is required to authorize both clearly and specifically; without an express grant of authority to act in a specific way, the President is powerless. My emphasis has been on the need for clear authorization, which dominates the cases on liberty amidst war. But as the discussion thus far should suggest, the other categories are relevant as well.

When the President has inherent authority to act, legislative authorization is by hypothesis irrelevant. If, for example, prompt presidential warmaking is needed to repel a sudden attack on the United States, the best reading of the Constitution is that the President can take action whether or not Congress has authorized him to do so.<sup>241</sup> But suppose that the President merely has a plausible claim of inherent authority to act—and that there is a reasonable dispute about whether that authority actually exists. In such cases, the minimalist route is to require congressional authorization, and to find such authorization both necessary and sufficient whether or not it is clear. Because a constitutional question would be presented if such authorization were absent, minimalist judges reasonably rule that the authorization need not be clear. Indeed, such judges might aggressively construe the existing statutory materials to enable the President to do what (he plausibly claims) the Constitution enables him to do on his own. Ex Parte Quirin, finding authorization that cannot fairly be described as clear,<sup>242</sup> is the most important example of this kind of minimalism.

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<sup>239</sup> Id at 723.

<sup>240</sup> See Bradley and Goldsmith, *Harv L Rev* (cited in note xx).

<sup>241</sup> See sources cited in note xx.

<sup>242</sup> See Goldsmith and Sunstein, Fifty Years (cited in note xx).

But compare a case in which the President lacks a strong claim of constitutional power and in which some kind of liberty-based objection is mounted against his action. Here the proper course is to require a high degree of clarity. Hamdi, Kahanamoku, Masses, and Yates comfortably fall in this category. And where the liberty-based objection is especially strong, both clarity and specificity should be required. The difference between the two is usually unimportant, because clarity is usually absent without specificity. But we can see the relevance of the distinction in the disagreement between the plurality and Justice Souter in Hamdi. Justice Souter would have required specificity in the form of an express grant of authority to detain. By contrast, the plurality was satisfied with the general authorization for the use of force, which seemed relatively clear in light of historical understandings.<sup>243</sup> I will return to this dispute shortly. Note in this regard that Kent v Dulles is the strongest precedent for the view that congressional authorization must be both clear and specific; and Ex Parte Endo speaks in similar terms. The most sensible orienting point here is that the demand for specificity grows with the magnitude of the intrusion on liberty—a claim that will shortly bring us to the second component of minimalism at war.

6. *On the necessity and sufficiency of congressional authorization.* Under the law as I have reconstructed it here, congressional authorization is ordinarily both a necessary and a sufficient condition for presidential intrusions into the domain of constitutionally sensitive interests. I have also noted that in some areas, such authorization is not necessary. And many civil libertarians will argue that in many areas, such authorization is not sufficient. They will fear that in times of genuine crisis, Congress is likely to do whatever the President wants; and if the stakes are high enough, it will do so fairly automatically, capitulating to his will. Isn't it better, and in a sense more minimalist, to say that while congressional authorization is often sufficient, it should not always be, and that question must be resolved on a case-by-case basis rather than categorically?

A committed minimalist would be tempted to answer this question with an enthusiastic “Yes.” In fact I have already suggested that congressional authorization is sometimes insufficient. Even if Congress and the President agree to silence political

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<sup>243</sup> See Bradley and Goldsmith, *Harv L Rev* (cited in note xx), for detailed discussion of the history and interpretation of such authorizations.

dissent during war, the first amendment should stand in their way; and for reasons to be discussed shortly, fair hearings should generally be required even if the democratic branches want to dispense with them. But committed minimalists should also agree that outside of the egregious cases, and when Congress and the President have settled on a certain course of action, courts should be reluctant to rule against them. At the very least, American history attests to the likelihood that courts will follow this path when the stakes are high. Of course we can imagine clear constitutional violations, even outrages, in which we might expect, and certainly hope for, a degree of judicial courage.<sup>244</sup> Unfortunately, national experience testifies to the existence and future likelihood of such violations. The jury remains out, so to speak, on the likelihood of future judicial courage. What I am emphasizing here is that congressional authorization should be seen as the first line of defense against intrusions into the domain of constitutionally sensitive interests.

### **B. Minimally Fair Procedures**

In one of the wisest and most important pronouncements in the history of American law, Justice Felix Frankfurter wrote, “The history of liberty has largely been the history of the observance of procedural safeguards.”<sup>245</sup> A primary component of the minimalist program is to take this pronouncement extremely seriously, by requiring, where the legal materials are ambiguous, some kind of hearing for those who are deprived of their liberty.

Indeed, many of the cases explored thus far are centrally concerned with procedural safeguards. The clearest statement along these lines is found in Duncan v Kahanamoku, the martial law case from Hawaii, in which the Court narrowly construed the Hawaiian Organic Act so as to ensure that civilians would receive access to ordinary courts.<sup>246</sup> There the Court offered a ringing endorsement of “procedural safeguards,” describing them as “indispensable to our system of government” and as ensuring checks on executive absolutism.<sup>247</sup> Ex Parte Endo is best read in this general spirit. So too, Chief

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<sup>244</sup> See Stone, Perilous Times (cited in note 14).

<sup>245</sup> McNabb v United States, 318 US 332, 347 (1943).

<sup>246</sup> 327 US 304 (1945).

<sup>247</sup> *Id.* at 322.

Justice Taney's rejection of President Lincoln's claim of authority to suspend the writ of habeas corpus endorses this aspect of minimalism at war.

The requirement of a hearing before people can lose their liberty deserves firm judicial support even when national security is at risk. Of course a general proposition of this kind does not resolve all cases; if people have been captured on the battlefield and are held beyond the territorial jurisdiction of American courts, then judges are powerless to intervene.<sup>248</sup> But if the legal materials can fairly be interpreted to require procedural protection, they should be so interpreted. And indeed this idea has received ringing endorsement in recent Supreme Court decisions involving the war on terrorism. Of these the more elaborately reasoned was the plurality opinion in Hamdi v Rumsfeld,<sup>249</sup> mentioned above; it is now time to explore that ruling in more detail.

Yaser Esam Hamdi, an American citizen born in Louisiana, was seized by members of the Northern Alliance in Afghanistan. From there he was transferred to Guantanamo Bay, then to a naval brig in Norfolk Virginia, and then to a brig in Charleston, South Carolina. According to the United States government, Hamdi qualified as an "enemy combatant" and hence could be held indefinitely without formal proceedings of any kind. The government urged that Hamdi had become affiliated with a Taliban military unit, received weapons training, and had an assault rifle with him at the time that he surrendered to the Northern Alliance.

The initial question was whether the executive had been authorized to detain citizens who qualify as "enemy combatants." This was an unusually complex question, for the government argued that even if Congress had not so authorized the executive, the executive "possesses plenary power to detain pursuant to Article II of the Constitution."<sup>250</sup> As I have noted, the plurality avoided the constitutional question by holding that Congress had authorized presidential detentions. The plurality pointed to the language of the authorization for the use of military force, which gives the President the authority to use "all necessary and appropriate force" against "nations, organizations, or persons" associated with the terrorist attacks of September 11, 2001. The plurality concluded that the detention of "enemy combatants," at least for the duration of the

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<sup>248</sup> See Johnson v Eisentrager, 339 US 763 (1950).

<sup>249</sup> 124 S Ct 2633 (2004).

<sup>250</sup> *Id* at 2639.

conflict in which the capture occurred, “is so fundamental and accepted an incident to war as to be” an authorized exercise of “necessary and appropriate force.”<sup>251</sup>

This was not an inevitable conclusion. As I have noted, Justice Souter contended that an explicit legislative statement should be required and that no such statement could be found. The plurality responded, plausibly, that detention to prevent return to the battlefield “is a fundamental incident of war.” But we have also seen that the plurality rejected the government’s claim that Congress had authorized indefinite detention by the executive. In its view, the “detention may last no longer than active hostilities.”<sup>252</sup> As a matter of statutory interpretation, the plurality said that Congress’ grant of authority to use force included the power to detain only for the duration of the relevant conflict. In good minimalist fashion, the plurality acknowledged that this “understanding may unravel” if “the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war.”<sup>253</sup> But this “is not the situation we face as of this date.”<sup>254</sup>

Having found that the detention of Hamdi was authorized, at least for the duration of the conflict, the plurality turned to the question of due process. The government contended that because Hamdi was seized in a combat zone, no factfinding was necessary. The plurality disagreed. For Hamdi to be lawfully detained, he would have to have been part of armed forces engaged in conflict against the United States. This question was disputed and the conclusion of the executive would not be enough. The government also argued that no individual procedure was justified “in light of the extraordinary constitutional interests at stake”—or at most, that the court should ask whether “some evidence” supported the executive’s determination that a citizen is an enemy combatant.<sup>255</sup> The plurality disagreed here as well. In the key passage, the plurality said that an enemy combatant must be supplied with “notice of the factual basis

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<sup>251</sup> Id at 2640.

<sup>252</sup> Id at 2642.

<sup>253</sup> Id at 2641.

<sup>254</sup> Id at 2642.

<sup>255</sup> Id at 2645.



for his classification, and a fair opportunity to rebut the Government’s factual assertions before a neutral decisionmaker.”<sup>256</sup>

The plurality acknowledged the possibility that the constitutional requirements could be met before a military tribunal.<sup>257</sup> What was necessary was not any particular set of procedures, but a process that offers both notice and a chance to be heard. “We anticipate that a District Court would proceed with the caution that we have indicated is necessary in this setting, engaging in a factfinding process that is both prudent and incremental.”<sup>258</sup>

What is noteworthy about the plurality’s reasoning is its insistence on the right to a fair hearing before a deprivation of freedom, which is called one of the “essential liberties that remain vibrant even in times of security concerns.”<sup>259</sup> Minimalists emphasize that right above all others. Of all the opinions in the Court’s terrorism cases, the clearest endorsement of this point can be found in Justice Stevens’ dissenting opinion in Padilla, where he wrote that “[u]nconstrained Executive detention for the purpose of investigating and preventing subversive activity is the hallmark of the Star Chamber,” and added that the ability to retain “counsel for the purpose of protecting the citizen from official mistakes and mistreatment is the hallmark of due process,” even when the nation is attempting “to resist an assault by the forces of tyranny.”<sup>260</sup> In so saying, Justice Stevens was writing in the same spirit as the Court’s majority, which has yet to question the general requirement of fair hearings.<sup>261</sup>

Of course that requirement has exceptions. Good minimalists cannot claim that hearings are always required; the very endorsement of hearing rights is, in its way, a departure from the minimalist reluctance to rule widely. As the Court said in Rasul, “there is a realm of political authority over military affairs where the judicial power may not enter.”<sup>262</sup> If an enemy combatant is being held for a specific period in an area outside

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<sup>256</sup> Id at 2651 (“There remains the possibility that the standards we have articulated could be met by an appropriately authorized and properly constituted military tribunal”).

<sup>257</sup> Id at 2651.

<sup>258</sup> Id at 2652.

<sup>259</sup> Id at 2652.

<sup>260</sup> Rumsfeld v Padilla, 124 S Ct 2711, 2735 (2004) (Stevens dissenting).

<sup>261</sup> Padilla itself was decided not on the merits, but on jurisdictional grounds. See id at 2727 (ruling that Padilla was required to bring his habeas petition in South Carolina, not the Southern District of New York).

<sup>262</sup> Rasul v Bush, 124 S Ct at 2700.

the territorial control of the United States, federal courts may not intervene.<sup>263</sup> It is clear that as Commander in Chief, the President can authorize the capture and detention of enemy combatants for specified periods of time, free from federal judicial oversight. But even in such situations, American courts have been careful to reject indefinite detention without trial, and have looked to ensure that some kind of procedure was available to reduce the risk of error.<sup>264</sup> In times of war, minimalist judges are reluctant to impose sharp constraints on the executive. But they are less reluctant to intervene when they are being asked to ensure against arbitrary or mistaken deprivations of liberty.

### C. Narrow and Incompletely Theorized Rulings

Thus far my emphasis has been on the need to restrain executive power. But there is also a need for courts to restrain themselves. In the context of war, minimalists endorse narrow, incompletely theorized rulings in order to promote two goals. First, judges ought to avoid excessive intrusions into the executive domain. Minimalist rulings help to ensure against judicial overreaching. Second, judges ought to avoid setting precedents that will, in retrospect, appear to give excessive authority to the President.<sup>265</sup> Minimalist rulings help to ensure against that risk as well.

Justice Frankfurter's concurring opinion in The Steel Seizure Case offers the most elaborate discussion of the basic point.<sup>266</sup> He emphasized that "[r]igorous adherence to the narrow scope of the judicial function" is especially important in constitutional cases when national security is at risk, notwithstanding the national "eagerness to settle—preferably forever—a specific problem on the basis of the broadest possible constitutional pronouncement."<sup>267</sup> In his view, the Court's duty "lies in the opposite direction," through judgments that make it unnecessary to consider "delicate problems of power under the Constitution."<sup>268</sup> Thus the Court has an obligation "to avoid putting fetters upon the future by needless pronouncements today."<sup>269</sup> Thus he would have ruled, very narrowly, that the President had been deprived, by Congress, of the authority to

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<sup>263</sup> See *id.*, relying on Johnson v Eisentrager, 339 US 763 (1950).

<sup>264</sup> 124 S Ct at 2700; 339 US at 777-78.

<sup>265</sup> On this risk, see Lee Epstein et al., Supreme Silence (cited in note xx).

<sup>266</sup> 343 US at 594-597.

<sup>267</sup> *Id.* at 594.

<sup>268</sup> *Id.* at 595.

<sup>269</sup> *Id.* at 596.

engage in the seizure of the steel mills—a ruling that would have said exceedingly little about the hardest constitutional questions.<sup>270</sup>

We have already encountered a number of illustrations of analogous forms of judicial self-discipline. The ruling in Kent v Dulles left the largest constitutional questions for another day. So too, the concurring justices in Ex Parte Milligan argued against a broad ruling on individual rights. In the same vein, Ex Parte Quirin, emphasizing congressional authorization, was a narrow ruling, simply because it left so much in legislative hands. In Masses, Judge Hand did not hold that Congress lacked the constitutional power to punish the relevant speech; he ruled more modestly that Congress had not seen fit to exercise whatever power it might have. The Supreme Court followed precisely the same approach in Yates.

The same tendency toward minimalist rulings was on fine display in 2004. In Rasul v Bush,<sup>271</sup> the Court was asked to say whether federal courts have jurisdiction to consider the detentions of foreign nationals captured and incarcerated at Guantanamo Bay. The Court chose to restrict itself to two exceedingly narrow questions. It held only that the federal habeas statute granted jurisdiction to federal courts to hear challenges by foreign nationals to their detentions, and that the Alien Tort Statute did not bar federal jurisdiction.<sup>272</sup> Having reached these conclusions, the Court said almost nothing else: “Whether and what proceedings may become necessary after respondents make their response to the merits of petitioners’ claims are matters that we need not address now. 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.”<sup>273</sup>

We might compare the majority’s approach here with the maximalist approaches of Justices Scalia and Thomas. Characteristically, Justice Scalia produced two opinions that were both deep and wide. In Hamdi, he argued that unless Congress has suspended the writ of habeas corpus, an American citizen is entitled to challenge his imprisonment

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<sup>270</sup> Id at 602.

<sup>271</sup> 124 S Ct 2686 (2004).

<sup>272</sup> Id at 2698-99.

<sup>273</sup> Id at 2699.

and to obtain release unless and until criminal proceedings are brought.<sup>274</sup> The implication here is large: The President of the United States may not detain American citizens indefinitely, even if they are captured on the battlefield, unless the writ of habeas corpus has been suspended. “Many think it not only inevitable but entirely proper that liberty give way to security in times of national crisis . . . Whatever the general merits of the view that war silences law or modulates its voice, that view has no place in the interpretation and application of a Constitution designed precisely to confront war and, in a manner that accords with democratic principles, to accommodate it.”<sup>275</sup> Suspension of habeas corpus, or an ordinary trial-type hearing, is the rule for American citizens.

Justice Scalia’s preference for a maximalist ruling fits well with one of his strongest arguments on behalf of wide rather than narrow decisions: Width works not only to constrain judges but also to embolden them. “The chances that frail men and women will stand up to their unpleasant duty are greatly increased if they can stand behind the solid shield of a firm, clear principle enunciated in earlier cases.”<sup>276</sup>

Justice Scalia urges a different but similarly wide rule for foreign nationals detained overseas by the United States military.<sup>277</sup> Here his rule is also clear: The federal habeas corpus statute does not apply at all, and the President can detain people free from judicial oversight. Thus Justice Scalia rejects the Court’s conclusion that some kind of hearing is necessary to support detention. “For this Court to create such a monstrous scheme in time of war, and in frustration of our military commanders’ reliance upon clearly stated prior law, is judicial adventurism of the worst sort.”<sup>278</sup> Justice Thomas joined Justice Scalia on the point; and as we have seen, he also favors a broad rule for American citizens, permitting the President to detain enemy combatants indefinitely. For present purposes, what is noteworthy about the Scalia and Thomas opinions is that they favor both width and depth. Justice Thomas is quite explicit on this point, objecting specifically to the Court’s use of a “balancing scheme” and responding, “I do not think that the Federal Government’s war powers can be balanced away by this Court.”<sup>279</sup>

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<sup>274</sup> 124 S Ct 2633, 2671 (Scalia dissenting).

<sup>275</sup> *Id.* at 2674.

<sup>276</sup> See Scalia, *Rule of Law* at 1181 (cited in note xx).

<sup>277</sup> *Rasul v. Bush*, 124 S Ct 2686 (2004).

<sup>278</sup> *Id.* at 2711.

<sup>279</sup> *Id.* at 2674.

Of course civil libertarians are likely to approve of Justice Scalia's approach in Hamdi and to reject that of Justices Scalia and Thomas in Rasul. But as Justice Thomas points out, Justice Scalia's liberty-protecting position in Hamdi creates risks simply because of its breadth.<sup>280</sup> If Justice Scalia or Justice Thomas were clearly right on the law, then no one could object to their plea for depth and width. But suppose that the law is not clear and that a deep or wide ruling might be confounded by unanticipated circumstances. If so, there is every reason for federal judges to issue shallow and narrow opinions, refusing to freeze the future and allowing decisions to turn on particular circumstances. Indeed, the Court's very refusal to decide the Padilla case on the merits, relying instead on a jurisdictional objection, can be understood as an extreme example of an insistence on shallowness and narrowness<sup>281</sup>; and if the underlying issues are extremely complex, then it is not hard to understand the Court's reluctance to resolve them.<sup>282</sup>

At this point it would be possible to object that narrow decisions, stressing particular facts, are in a sense more intrusive than those that offer greater width and depth. The reason is that narrow decisions leave the executive, and other institutions, so unclear about what they are supposed to do. This is a significant and legitimate concern about Rasul in particular. I have emphasized that that decision is highly minimalist, holding only that on these particular facts, these detainees are entitled to hearings. But this ruling leaves the government with very little guidance. Are those held at an air force base in Afghanistan or Iraq entitled to hearings? Does it matter if they are only being held for a few weeks, while the government explores the relevant facts, obtains a translator, and so forth? Justice Kennedy's concurring opinion appears responsive to the

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<sup>280</sup> The difficulty is that it is easy to imagine cases of emergency in which the writ may not be suspended, because "Cases of Rebellion or Invasion" are not involved. 124 S Ct 2682-83. If the writ may not be suspended, then the President must hold formal trials and may not detain people – perhaps a plausible conclusion, but not what Justice Scalia intended.

<sup>281</sup> Rumsfeld v Padilla, 124 S Ct 2711 (2004). The extreme case may, of course, conflict with the second feature of minimalism if it results in a failure to require a minimally fair hearing. Note, however, that there is a difference between a refusal to decide whether such a hearing is required and a ruling that such a hearing is not required; the Supreme Court's ruling in Padilla does not foreclose a future decision that the court of appeals was correct on the merits, as I believe that it was. See *supra*.

<sup>282</sup> See the discussion of the passive virtues in Alexander Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics (1962).

government's need for a measure of clarity.<sup>283</sup> If the Court leaves too much undecided, the government will have to proceed in the dark, in a way that might lead to a range of problems.

As evidence, consider here the distinctive problems that have emerged in the aftermath of *Rasul*. In December 2004, a federal district court “served as the stage for the beginning of what [was] expected to be a long and bruising second phase of the legal battle” over the fate of prisoners at Guantanamo Bay.<sup>284</sup> The administration argued for a narrow reading of *Rasul*, one that would be satisfied by a hearing at the naval base in which detainees were permitted to argue that they were not properly characterized as enemy combatants.<sup>285</sup> By contrast, the detainees contended that they were entitled to a lawyer and to an opportunity to see the evidence against them.<sup>286</sup> Because the Supreme Court did not resolve this dispute, protracted litigation was inevitable. In this light, it is reasonable to worry whether narrowness might not create unnecessary and even damaging uncertainty.

The concern is justified, and for some problems, it offers a good reason for a degree of width; but that reason is only one of a set of relevant considerations, many of them pointing toward narrow rulings in the context of war. If judges can be confident about a wider ruling, then they should issue it. By doing so, they reduce uncertainty, and they do so (by hypothesis) without compromising other important values. But if judges lack confidence in a wider ruling, the costs of uncertainty may be worth incurring. The argument in *Rasul* involved the narrow questions the Court decided, not the broader ones that have arisen in the aftermath of its decision. The most that can be said is that government's need for planning provides a cautionary note about narrow and shallow rulings -- suggesting the need to be minimalist, so to speak, about minimalism itself. But I hope that I have said enough to show that during war, a minimalist posture, of the sort defined by the three principles, provides the best general orientation.

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<sup>283</sup> 124 S Ct at 2699-2670 (Kennedy concurring in the judgment).

<sup>284</sup> See Neil Lewis, *Fate of Guantanamo Detainees is Debated in Federal Court*, *New York Times*, December 2, 2004, at p. 36.

<sup>285</sup> *Id.*

<sup>286</sup> *Id.*

## Conclusion

I have attempted to outline and to evaluate three general approaches to conflicts among civil liberty and national security: Liberty Maximalism, National Security Maximalism, and minimalism. Courts are most unlikely to adopt Liberty Maximalism, and for good reason. The extent of liberty depends, in large part, on the strength and the legitimacy of the reasons for intruding on it, and when national security is genuinely at risk, the legitimate reasons for intruding on liberty are stronger. Of course courts should strike down indefensible restrictions on constitutional rights, above all freedom of speech.<sup>287</sup> But where the founding document leaves gaps and ambiguities, judicial caution is entirely appropriate amidst war.

By contrast, National Security Maximalism might seem highly attractive to reviewing courts, and there are strong arguments on its behalf. More than anyone else, the President is in a strong position to protect the country, because he is uniquely well-equipped to acquire relevant information, and because he can act both in a coordinated way and with dispatch. These points are closely connected with central ideas about the executive branch in the founding era.<sup>288</sup> For their part, judges lack the information that would permit them to make sensible judgments about when an intrusion on liberty is justified, and the costs of judicial errors in the direction of liberty may turn out to be catastrophic. Notably, National Security Maximalism has received some strong endorsements on federal courts of appeals amidst the war on terrorism.

Notwithstanding its attractions, National Security Maximalism cannot claim much support in the Constitution itself. The founding document carefully divides authority between the President and Congress. It does not give a general “war power” to the President. With respect to war, the Constitution is easily read to give the national legislature the primary role. In addition, National Security Maximalism neglects institutional factors that create a grave risk that the executive branch will support unjustified intrusions on civil liberties. Group polarization is a significant danger, particularly for a branch specifically designed to consist of like-minded people. As a

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<sup>287</sup> See Stone, *Perilous Times* (cited in note 14).

<sup>288</sup> See Lessig and Sunstein, 94 *Colum L Rev* 1 (1994) (cited in note xx).

result, the executive might well support interferences with freedom that are not adequately justified by security concerns. This is especially likely if those interferences affect identifiable groups rather than the public as a whole.

In the face of the relevant risks, the best general orientation is a particular form of minimalism, with its three principal requirements, representing a kind of Due Process Writ Large. First, Congress should be required to provide clear authorization for executive intrusions on interests that have a strong claim to constitutional protection. Second, some kind of hearing should be required before the executive deprives people of their freedom. Third, courts should discipline themselves through narrow, incompletely theorized rulings. To a remarkable degree, these three ideas capture the practices of the Supreme Court in dealing with claimed violations of constitutional rights when national security has been threatened. Minimalism can find prominent endorsement during the Civil War, World War I, World War II, the Cold War, and the contemporary war on terrorism.

In numerous cases, the Court, and its most celebrated members, have adopted a form of minimalism in war. To be sure, minimalist decisions are unlikely to do all that should be done to prevent unjustified intrusions into the domain of liberty. But such decisions have the significant advantage of carving out a role that is admirably well-suited to the institutional strengths and weaknesses of the federal judiciary.

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