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#### Recommended Citation

Cass R. Sunstein, "National Security, Liberty, and the D.C. Circuit Recent Decisions of the United States Court of Appeals for the District of Columbia Circuit," 73 *George Washington Law Review* 693 (2004).

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# National Security, Liberty, and the D.C. Circuit

Cass R. Sunstein\*

## *Introduction*

When the country faces a genuine threat, how should judges approach conflicts between national security and freedom? In the aftermath of September 11, this question has become one of the most pressing in all of American law.

It is easy to imagine two extreme positions that federal courts might adopt: National Security Fundamentalism and Liberty Perfectionism.<sup>1</sup> National Security Fundamentalists 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. For National Security Fundamentalists, courts should adopt a strong presumption in favor of allowing the president to do as he wishes. If the president cannot safeguard the nation's security, who will? By contrast, Liberty Perfectionists insist that in times of war, at least as much as in times of peace, federal judges must protect constitutional liberty.<sup>2</sup> Indeed, Liberty Perfectionists believe that under circumstances of war it is all the more important that federal judges take a strong stand on behalf of liberty.<sup>3</sup> Liberty Perfectionists emphasize that when national security is at risk, unjustified public panics are likely, even inevitable. If federal judges do not protect liberty in the face of panic, who will?

We can also imagine a third approach: minimalism.<sup>4</sup> Minimalists believe that, in the most controversial areas, judges should refuse to endorse any large-scale approach and should be reluctant to adopt wide rulings that will

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\* Karl N. Llewellyn Distinguished Service Professor, Law School and Department of Political Science, University of Chicago. This Essay is a sibling to the discussion in Cass R. Sunstein, *Minimalism at War*, 2004 SUP. CT. REV. 47; there is significant overlap between the two essays. My focus here, however, is on the particular practices of the D.C. Circuit and other lower federal courts, whereas my focus there is on the general practice of minimalism.

<sup>1</sup> See, e.g., Eric A. Posner & Adrian Vermeule, *Accommodating Emergencies*, 56 STAN. L. REV. 605, 606–10 (2003); Samuel Issacharoff & Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime*, 5 THEORETICAL INQUIRIES L. 1, 1–2 (2004), at <http://www.bepress.com/til/default/vol5/iss1/art1>. National Security Fundamentalism is an extreme version of what Posner and Vermeule call the accommodationist view; Liberty Perfectionism is akin to what they deem the strict enforcement view. See Posner & Vermeule, *supra*, at 605–10. 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. See *id.*

<sup>2</sup> See generally DAVID COLE, *ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM* (2003).

<sup>3</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* (2004).

<sup>4</sup> On minimalism in general, see CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* (1999).

bind the country in unforeseen circumstances. Instead, minimalists want judges to rule narrowly and cautiously. In the context of war, minimalists would like courts to avoid constitutional issues by, for example, holding that Congress has not authorized the executive to intrude into the domain of constitutionally protected interests. Minimalists also like to avoid broad judicial pronouncements about either presidential power or liberty, preferring instead close consideration of particular measures. In the aftermath of September 11, minimalists want courts to proceed in small steps, leaving the largest issues undecided as long as possible.

This Essay has three goals. The first is to sketch the rise of National Security Fundamentalism in various places, above all the United States Court of Appeals for the District of Columbia Circuit. Notably, the Supreme Court has not yet embraced National Security Fundamentalism; on the contrary, the Court appears to have repudiated it.<sup>5</sup> But National Security Fundamentalism has played a prominent role in the Department of Justice, in a remarkable opinion by Justice Clarence Thomas, and in a number of lower-court decisions. If the risk of terrorism increases, and if the nation is hit with additional serious terrorist attacks, the temptation to embrace National Security Fundamentalism might well prove overwhelming.

My second goal is to provide a brief outline of the tension between National Security Fundamentalism and the Constitution. I suggest that the latter provides no room for the former and that a number of loose statements in the recent past are based on a mistaken understanding of the founding document. My third and final goal is to understand the appeal of a constitutionally mischievous approach to liberty amidst war. I suggest that National Security Fundamentalism is especially tempting for lower courts consisting of judges appointed by a Republican president and asked to assess actions, by a Republican president, that are designed to protect national security. When national security is threatened, Republican appointees are exceedingly likely to defer to Republican presidents. This is especially so on the lower courts, which are likely to be most reluctant to invalidate acts of the commander in chief of the armed forces. Some of the more disturbing rhetoric in recent decisions by the D.C. Circuit, and by trial courts within that circuit, is best understood in this light.

### *I. National Security Fundamentalism*

It should be unsurprising to find that, in the aftermath of the attacks of September 11, National Security Fundamentalism has obtained a great deal of support. As I have noted, the Supreme Court has refused to accept it, at least thus far.<sup>6</sup> But the basic approach can be found in many places, most prominently in Washington, D.C.

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<sup>5</sup> See *Rasul v. Bush*, 124 S. Ct. 2686, 2699 (2004); *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2647 (2004).

<sup>6</sup> See *supra* note 5 and accompanying text.

### A. Justice Clarence Thomas in *Hamdi*

In recent Supreme Court decisions involving the war on terrorism, National Security Fundamentalism failed to attract a majority opinion.<sup>7</sup> But it made a conspicuous appearance in a remarkable dissenting opinion by Justice Clarence Thomas in *Hamdi v. Rumsfeld*.<sup>8</sup> In Justice Thomas's view, the Constitution accords to the president the "primary responsibility . . . to protect the national security and to conduct the Nation's foreign relations."<sup>9</sup> And 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>10</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>11</sup>

With respect to the courts, Justice Thomas contended that "it is crucial to recognize that *judicial* interference in these domains destroys the purpose of vesting primary responsibility in a unitary Executive."<sup>12</sup> Judges "lack the relevant information and expertise to second-guess determinations made by the President."<sup>13</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>14</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>15</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>16</sup>

Justice Thomas's opinion is a form of National Security Fundamentalism 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."<sup>17</sup> In addition, he adopts a kind of interpretive principle in favor of presidential authority—suggesting, at least implicitly, that statutes should be read in a way that does not conflict with the president's inherent authority.<sup>18</sup> But from a reading of the Constitution alone, it would not be entirely clear whether the president or the Con-

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7 See *Rasul*, 124 S. Ct. at 2699; *Hamdi*, 124 S. Ct. at 2647; see also *Rumsfeld v. Padilla*, 124 S. Ct. 2711, 2715 (2004) (rejecting a threshold argument and thus not deciding the extent of the president's authority).

8 *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2674 (2004) (Thomas, J., dissenting).

9 *Id.* at 2675 (Thomas, J., dissenting).

10 *Id.* at 2674 (Thomas, J., dissenting).

11 See *id.* at 2674–75 (Thomas, J., dissenting).

12 *Id.* at 2676 (Thomas, J., dissenting).

13 *Id.* (Thomas, J., dissenting).

14 See *id.* at 2676–77 (Thomas, J., dissenting).

15 *Id.* at 2685 (Thomas, J., dissenting).

16 *Id.* at 2679 (Thomas, J., dissenting).

17 *Id.* at 2675 (Thomas, J., dissenting).

18 See *id.* at 2676–77 (Thomas, J., dissenting).

gress 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 a small or even nearly nonexistent role for courts, and thus exemplifies National Security Fundamentalism.

### B. *The Department of Justice*

In recent years, the most visible moment for National Security Fundamentalism came from the Office of Legal Counsel of the Department of Justice, with its 2002 memorandum on the legality of coerced interrogation.<sup>19</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>20</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>21</sup> In addition, the Office of Legal Counsel insisted that a core function of the commander in chief includes interrogation of the enemy.<sup>22</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>23</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 President.”<sup>24</sup> Hence, coercive interrogation, including torture, must be permitted if the president wants to engage in it.

Constitutional interpretation is, of course, very much a function of institutional role. Those who work for the House of Representatives or the Senate might well be expected to aggrandize the powers of Congress; those who

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<sup>19</sup> See Memorandum from the Office of Legal Counsel, United States Department of Justice, to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002) [hereinafter OLC Memorandum] (regarding “Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340–2340A”), available at <http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf>. This was the most visible moment for National Security Fundamentalism, but perhaps not the most extreme one. In *Rumsfeld v. Padilla*, 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. See Brief for the Petitioner at 35–38, *Rumsfeld v. Padilla*, 124 S. Ct. 2711 (2004) (No. 03-1027). I discuss *Padilla* below.

<sup>20</sup> See OLC Memorandum, *supra* note 19, at 31.

<sup>21</sup> *Id.* at 33.

<sup>22</sup> See *id.* at 38.

<sup>23</sup> *Id.* at 34. To be sure, the position of the Department of Justice was stated with a degree of tentativeness. It announced that it “will not read” the congressional ban on torture as applying in the context of battlefield interrogations. *Id.* at 34. 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. See *id.* But the general impression is that the ban probably should be regarded as unconstitutional.

<sup>24</sup> *Id.* at 39.

work for the Department of State might well be expected to exaggerate the authority of the president. The Office of Legal Counsel is part of the executive branch, operating directly under the attorney general, 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>25</sup>

Whatever one's ultimate judgment on the merits, the memorandum of the Office of Legal Counsel provides a dramatic example of National Security Fundamentalism.

### C. *National Security Fundamentalism and the D.C. Circuit: The President and "the War Power"*

In the years since the September 11 attacks, National Security Fundamentalism has played a large role on the lower federal courts.<sup>26</sup> A single circuit has decided most of the key cases involving a conflict between national security and individual liberty: the United States Court of Appeals for the District of Columbia Circuit. That court has shown a remarkable tendency toward National Security Fundamentalism. In every case in which a serious challenge was mounted to the power of the president, the president has prevailed in the D.C. Circuit. Let us investigate a few examples.

One of the most striking decisions from the D.C. Circuit is *Center for National Security Studies v. Department of Justice*.<sup>27</sup> In that case, a divided court of appeals permitted an extraordinary level of secrecy from the executive branch. Its reasoning is far more important than its (plausible) conclu-

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<sup>25</sup> See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 644 (1952) (Jackson, J., concurring). 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>26</sup> The principal exception is *Padilla v. Rumsfeld*, 352 F.3d 695 (2d Cir. 2003), *rev'd on other grounds*, 124 S. Ct. 2711 (2004), in which the United States Court of Appeals for the Second Circuit 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. See *id.* at 712–18, 722–23. This is an example of minimalism in action, as discussed in Part IV *infra*.

<sup>27</sup> *Ctr. for Nat'l Sec. Studies v. Dep't of Justice*, 331 F.3d 918 (D.C. Cir. 2003), *cert. denied*, 540 U.S. 1104 (2004).

sion, simply because of its broad pronouncements about presidential authority.

A number of public interest groups invoked the Freedom of Information Act ("FOIA"),<sup>28</sup> 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.<sup>29</sup> The requested information included names, dates of arrest and release, and reasons for detention.<sup>30</sup> 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>31</sup>

As Judge Tatel emphasized in dissent, the court's interpretation of this exemption was contestable; the court could easily have gone the other way.<sup>32</sup> What is most important is that the court was exceptionally deferential to the government's vague statements about potential harms.<sup>33</sup> The court was entirely aware of this point. In language that is closely linked to Justice Thomas's dissenting opinion in *Hamdi*, the court emphasized:

[T]he 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>34</sup>

Indeed, the court went so far as to comment specifically on the distinctive nature and legal relevance of the current threat to national security: "America faces an enemy just as real as its former Cold War foes, with capabilities beyond the capacity of the judiciary to explore."<sup>35</sup> In fact, the court insisted that deference was "mandated by the separation of powers,"<sup>36</sup> suggesting that disclosure under FOIA would raise constitutional problems. The court left no doubt about the motivation for its action: "[W]e are in accord with several federal courts that have wisely respected the executive's judgment in prosecuting the national response to terrorism."<sup>37</sup> What is most noteworthy about the decision, then, is not the outcome, but the court's broad pronouncements about the need to defer to the executive and its inter-

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<sup>28</sup> Freedom of Information Act, 5 U.S.C. § 552 (2000).

<sup>29</sup> See *Ctr. for Nat'l Sec. Studies*, 331 F.3d at 920.

<sup>30</sup> See *id.*

<sup>31</sup> 5 U.S.C. § 552(b)(7).

<sup>32</sup> See *Ctr. for Nat'l Sec. Studies*, 331 F.3d at 939–40 (Tatel, J., dissenting).

<sup>33</sup> See *id.* at 926–28.

<sup>34</sup> *Id.* at 926–27.

<sup>35</sup> *Id.* at 928.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 932.

pretation of FOIA with clear and specific reference to separation of powers principles.

Another strikingly fundamentalist decision by the D.C. Circuit is *Al Odah v. United States*, which the Supreme Court reversed in *Rasul v. Bush*.<sup>38</sup> In its ambitious ruling, the D.C. Circuit held that aliens captured outside of the United States have no rights under the Due Process Clause.<sup>39</sup> The court said that the Guantánamo Bay detainees were, in law, analogous to German prisoners captured on the battlefield during World War II.<sup>40</sup> The court acknowledged that Guantánamo Bay is controlled by the United States military, but it insisted on the irrelevance of this fact because Cuba has sovereignty over the area.<sup>41</sup> The court's conclusion was hardly unreasonable. But there can be no doubt that the conclusion in favor of executive discretion stemmed from a broad and hardly mandatory reading of Supreme Court precedents.<sup>42</sup>

A concurring opinion by Judge Randolph (who wrote the majority opinion as well) was, in a sense, even more revealing. Judge Randolph went well beyond what was necessary to resolve the case. Consider his confessedly aggressive opening sentence: "I write separately to add two other grounds for rejecting the detainees' non-habeas claims."<sup>43</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>44</sup>

Here is an explicit endorsement of National Security Fundamentalism.

Within the D.C. Circuit, the trial courts have followed the lead of the court of appeals, showing a similar tendency toward National Security Fundamentalism. Consider, for example, *ACLU v. Department of Justice*,<sup>45</sup> in which organizations sought information involving the government's use of section 215 of the USA PATRIOT Act.<sup>46</sup> Section 215 gives the FBI broad power to "make an application for an order requiring the production of any tangible things . . . for an investigation to obtain foreign intelligence informa-

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<sup>38</sup> *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003), *rev'd sub nom.* *Rasul v. Bush*, 124 S. Ct. 2686 (2004).

<sup>39</sup> *See id.* at 1145.

<sup>40</sup> *See id.* at 1140.

<sup>41</sup> *See id.* at 1143.

<sup>42</sup> *See id.*

<sup>43</sup> *Id.* at 1145 (Randolph, J., concurring).

<sup>44</sup> *Id.* at 1150 (Randolph, J., concurring).

<sup>45</sup> *ACLU v. Dep't of Justice*, 321 F. Supp. 2d 24 (D.D.C. 2004).

<sup>46</sup> *See id.* at 26; Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001 § 215, 50 U.S.C. § 1861 (Supp. I 2003).



tion . . . or to protect against international terrorism.”<sup>47</sup> In particular, the plaintiffs sought to use FOIA to find out (1) the total number of section 215 requests received by the National Security Law Unit of the FBI and (2) any and all records relating to section 215.<sup>48</sup> Notwithstanding the fact that the Department of Justice had previously made several disclosures of its behavior under the USA PATRIOT Act, the court ruled broadly that the national security exemption of FOIA justified the failure to disclose the information.<sup>49</sup>

The court knew that it was dealing with a hard question, candidly acknowledging that the “issue is hardly free from doubt.”<sup>50</sup> But it ruled for the government “because it [was] mindful of the ‘long-recognized deference to the executive on national security issues.’”<sup>51</sup> Ultimately the court deferred, not to specific explanations by the executive, but to the exceedingly vague claims that release of the number of section 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>52</sup> The court’s willingness to embrace National Security Fundamentalism 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>53</sup> There the court gave an exceedingly broad reading to the “state secrets privilege” so as to dismiss a Privacy Act<sup>54</sup> claim brought by a self-styled whistleblower at the FBI.<sup>55</sup> 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>56</sup> Under FOIA, then, National Security Fundamentalism has been explicitly endorsed within the D.C. Circuit, in holdings that fit well with the general approach in *Al Odah*.

#### D. Fundamentalism Again: An Echo from the Fourth Circuit

Next to the D.C. Circuit, the United States Court of Appeals for the Fourth Circuit has been the most prominent court of appeals in cases involving the war on terror, and it has taken an approach strikingly similar to that of the D.C. Circuit.<sup>57</sup> The most prominent of its decisions is *Hamdi v. Rumsfeld*.<sup>58</sup> There the court held that enemy combatants, captured on the battle-

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<sup>47</sup> 50 U.S.C. § 1861.

<sup>48</sup> See *ACLU v. Dep’t of Justice*, 321 F. Supp. 2d at 27.

<sup>49</sup> See *id.* at 36.

<sup>50</sup> *Id.* at 35.

<sup>51</sup> *Id.* (quoting *McGehee v. Casey*, 718 F.2d 1137, 1148 (D.C. Cir. 1983)).

<sup>52</sup> *Id.* at 36 (quotation omitted).

<sup>53</sup> *Edmonds v. Dep’t of Justice*, 323 F. Supp. 2d 65 (D.D.C. 2004).

<sup>54</sup> Privacy Act of 1974, 5 U.S.C. § 552a (2000).

<sup>55</sup> See *Edmonds*, 323 F. Supp. 2d at 80–81.

<sup>56</sup> *Id.* at 82 n.7.

<sup>57</sup> See, e.g., *United States v. Moussaoui*, 382 F.3d 453 (4th Cir. 2004), *cert. denied*, 125 S. Ct. 1670 (2005).

<sup>58</sup> *Hamdi v. Rumsfeld*, 316 F.3d 450 (4th Cir. 2003), *rev’d*, 124 U.S. 2633 (2004).

field, could be detained indefinitely and without trial, even if they were American citizens.<sup>59</sup> In so ruling, the court relied largely on a constitutional source—the president’s power as commander in chief of the armed forces.<sup>60</sup> The court contended that this power includes “the authority to detain those captured in armed struggle” and also “to deport or detain alien enemies during the duration of hostilities and to confiscate or destroy enemy property.”<sup>61</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>62</sup> Hence, deference to the executive would be the basic rule.<sup>63</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 doctrine does not deny the executive branch the essential tool of adaptability.”<sup>64</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>65</sup> (I will return to this important statement, which seems to lie behind the D.C. Circuit opinions as well, 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>66</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>67</sup> The court left no doubt that this conclusion stemmed from National Security Fundamentalism: “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>68</sup>

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<sup>59</sup> *See id.* at 473.

<sup>60</sup> *See id.* at 463.

<sup>61</sup> *Id.* (citation omitted).

<sup>62</sup> *Id.*

<sup>63</sup> *See id.* at 464. Notably, however, the court was careful to limit the reach of its ruling in a way that suggests a form of minimalism described below. *See id.* at 465 (“We shall, in fact, go no further in this case than the specific context before us—that of the undisputed detention of a citizen during a combat operation undertaken in a foreign country and a determination by the executive that the citizen was allied with enemy forces.”).

<sup>64</sup> *Id.* at 466.

<sup>65</sup> *Id.* at 471.

<sup>66</sup> *Id.* at 472.

<sup>67</sup> *See id.* at 472–73.

<sup>68</sup> *Id.* at 474.

That deference required the conclusion that Hamdi could be held indefinitely, even after the end of the relevant hostilities.<sup>69</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>70</sup> Because the D.C. Circuit and the Fourth Circuit have been the most important sources of lower-court decisions involving liberty and the war on terrorism, it is fair to say that National Security Fundamentalism has played the dominant role on the federal courts in the aftermath of the September 11 attacks.

## II. National Security Fundamentalism and the Constitution

Why have lower courts been drawn to National Security Fundamentalism? In the abstract, National Security Fundamentalism 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>71</sup> These qualities are relevant above all in times of war. By contrast, courts lack good tools for assessing the president's claims of military necessity.

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;<sup>72</sup> 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 Perfectionism 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 Perfectionism is senseless. But these considerations should not be read for more than they are worth. Far from requiring National Security Fundamentalism, 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

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<sup>69</sup> See *id.* at 476.

<sup>70</sup> See *id.*

<sup>71</sup> See *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2675–76 (2004) (Thomas, J., dissenting). See generally Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1 (1994).

<sup>72</sup> See generally STONE, *supra* note 3.

States.”<sup>73</sup> He is allowed “to make Treaties,” at least when two-thirds of the senators concur.<sup>74</sup> He is authorized to “appoint Ambassadors” and “other public Ministers and Consuls.”<sup>75</sup> He “shall receive Ambassadors and other public Ministers.”<sup>76</sup> But none of this supports Justice Thomas’s 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.”<sup>77</sup> Nor does anything in the document support the Fourth Circuit’s suggestion that under Article II “the President is given the war power.”<sup>78</sup> Nor does the Constitution support the view, at least implicit in the rulings of the D.C. Circuit, that the domain of war is the domain of largely unbounded presidential discretion.<sup>79</sup> 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 “[t]o declare War.”<sup>80</sup> The Constitution also grants Congress, not the president, the power “[t]o raise and support Armies.”<sup>81</sup> It authorizes Congress “[t]o provide and maintain a Navy.”<sup>82</sup> 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.”<sup>83</sup> It is Congress that is authorized to raise funds to “provide for the Common Defence and general Welfare of the United States.”<sup>84</sup> Congress, rather than the president, is empowered to “regulate Commerce with foreign Nations.”<sup>85</sup> Congress is also authorized to “define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations,”<sup>86</sup> and also to “make Rules concerning Captures on Land and Water.”<sup>87</sup> 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.”<sup>88</sup> 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.

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<sup>73</sup> U.S. CONST. art. II, § 2, cl. 1.

<sup>74</sup> *Id.* art. II, § 2, cl. 2.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* art. II, § 3.

<sup>77</sup> *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2675 (2004) (Thomas, J., dissenting).

<sup>78</sup> *Hamdi v. Rumsfeld*, 316 F.3d 450, 471 (4th Cir. 2003), *rev’d*, 124 S. Ct. 2633 (2004).

<sup>79</sup> *See, e.g.,* *Ctr. for Nat’l Sec. Studies v. Dep’t of Justice*, 331 F.3d 918, 926–27 (D.C. Cir. 2003) (noting that “the judiciary owes some measure of deference to the executive in cases implicating national security, a uniquely executive purview”), *cert. denied*, 540 U.S. 1104 (2004).

<sup>80</sup> U.S. CONST. art. I, § 8, cl. 11. For treatment of some of the complexities here, with reference to the literature, see Curtis Bradley & Jack Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. (forthcoming 2005).

<sup>81</sup> U.S. CONST. art. I, § 8, cl. 12.

<sup>82</sup> *Id.* art. I, § 8, cl. 13.

<sup>83</sup> *Id.* art. I, § 8, cl. 14.

<sup>84</sup> *Id.* art. I, § 8, cl. 1.

<sup>85</sup> *Id.* art. I, § 8, cl. 3.

<sup>86</sup> *Id.* art. I, § 8, cl. 10.

<sup>87</sup> *Id.* art. I, § 8, cl. 11.

<sup>88</sup> *Id.* art. I, § 9, cl. 2.

In this light, the Constitution does not repose in the president anything like the general authority “to protect the national security.”<sup>89</sup> 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>90</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>91</sup> The Commander in Chief Clause allows the president to manage wars; but it does not give him “the war power.” All of this means that National Security Fundamentalism cannot claim a strong constitutional pedigree.

Of course, the constitutional text is hardly all there is to our constitutional tradition.<sup>92</sup> In the domain of separation of powers, historical practices and changes over time are highly relevant. As Justice Frankfurter contended, “[i]t 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>93</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>94</sup>

Historical “glosses” on constitutional text might well be taken to argue in the direction of National Security Fundamentalism. 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 lower courts have been responding in part to that fact. Equally 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

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<sup>89</sup> Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2675 (2004) (Thomas, J., dissenting).

<sup>90</sup> See Loving v. United States, 517 U.S. 748, 768 (1996).

<sup>91</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).

<sup>92</sup> See generally David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996).

<sup>93</sup> See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring). See generally Bradley & Goldsmith, *supra* note 80.

<sup>94</sup> For relevant discussion, see HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 38–40 (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 (1990); Harold Hongju Koh, *The Coase Theorem and the War Power: A Response*, 41 DUKE L.J. 122, 127 (1991); Gregory Sidak, *To Declare War*, 41 DUKE L.J. 27 (1991).

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 as well, unambiguously retains Congress's role as the nation's lawmaker.

### III. *The Minimalist Alternative*

If National Security Fundamentalism is to be rejected, what should be put in its place? What should courts do instead?

I cannot answer that question in this space.<sup>95</sup> It is surely relevant that, in a number of decisions, the Supreme Court has rejected unlimited presidential authority and insisted on the relevance of a congressional grant of power.<sup>96</sup> For a recent illustration, let us explore the leading alternative to the approach of the D.C. Circuit and the Fourth Circuit—one that offers a very different understanding both of the constitutional foundations and the appropriate judicial role. In the relevant decision, the United States Court of Appeals for the Second Circuit endorsed a form of minimalism in *Padilla v. Rumsfeld*.<sup>97</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.<sup>98</sup> The court squarely rejected the claim, urged by the executive and rooted in National Security Fundamentalism, that the “President has the inherent authority to detain those who take up arms against this country.”<sup>99</sup> The court of appeals correctly emphasized that Articles I and II divide the war powers, rather than confer them on the executive alone.<sup>100</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.<sup>101</sup> It stressed that *Ex parte Quirin*,<sup>102</sup> the government’s best precedent, rested on congressional authorization rather than on inherent presidential authority.<sup>103</sup>

The key issue thus was whether such authorization could be found here. In the court’s view, Congress’s authorization to use “all necessary and appropriate force” to respond to the September 11 attacks<sup>104</sup> should be understood in light of the Supreme Court’s several efforts to ensure that both Congress and the president, rather than the president alone, authorize interferences

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<sup>95</sup> See Cass R. Sunstein, *Minimalism at War*, 2004 SUP. CT. REV. 47, for detailed discussion.

<sup>96</sup> See, e.g., *Duncan v. Kahanamoku*, 327 U.S. 304, 322 (1946); *Ex parte Endo*, 323 U.S. 283, 300–02 (1944); *Hirabayashi v. United States*, 320 U.S. 81, 90–93 (1943). For further discussion, see Issacharoff & Pildes, *supra* note 1, at 7–9.

<sup>97</sup> *Padilla v. Rumsfeld*, 352 F.3d 695 (2d Cir. 2003), *rev’d on other grounds*, 124 S. Ct. 2711 (2004).

<sup>98</sup> See *id.* at 698.

<sup>99</sup> *Id.* at 712.

<sup>100</sup> See *id.* at 713–14.

<sup>101</sup> *Id.* at 715.

<sup>102</sup> *Ex parte Quirin*, 317 U.S. 1 (1942).

<sup>103</sup> See *Padilla*, 352 F.3d at 715–16.

<sup>104</sup> Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001).

with constitutionally sensitive interests.<sup>105</sup> The Supreme Court thus had emphasized that “[i]n 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>106</sup> In *Padilla* the court of appeals said, correctly, that no clear and unmistakable statement could be found.<sup>107</sup> Such a statement was required, and hence the indefinite detention of Padilla was beyond the President’s power.<sup>108</sup>

This decision is an unambiguous exercise in minimalism at war. It stands in sharp contrast with the National Security Fundamentalism that has dominated the D.C. Circuit. I am not sure that on the particular issue the Second Circuit was correct; the authorization for the use of force is not implausibly interpreted to provide a basis for what the executive did in *Padilla*.<sup>109</sup>

#### IV. Lower Courts, Ideology, and the Irresistible (?) Appeal of National Security Fundamentalism

I have suggested that much of the appeal of National Security Fundamentalism lies in functional and structural considerations. Federal judges, no less than ordinary citizens, want to support the president when the nation is at risk. Moreover, it is not implausible to suggest that aspects of the constitutional structure argue in favor of National Security Fundamentalism. But I have suggested that this approach fits poorly with the founding document, all things considered. When judges adopt it, why are they doing so? At least in the recent past, I believe that two factors have, regrettably, been playing a significant role.

##### A. Republican Judges, Republican Presidents

The first factor has to do with the likely posture of Republican judicial appointees confronted with the efforts of a Republican president to protect the nation in the aftermath of an attack. No one can doubt that Democratic appointees and Republican appointees differ with one another on many crucial questions.<sup>110</sup> With respect to national security, there is reason to speculate that Republican appointees would be somewhat more likely to rule in favor of presidential authority than Democratic appointees. (Nothing I have said demonstrates that they are wrong to be inclined in this direction.) But their tendency, I suggest, is likely to be heightened when the president in question is also Republican. In other contexts, this effect has been powerfully documented; Republican-appointed judges are distinctly willing to defer to Republican presidents in the general domain of administrative

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<sup>105</sup> See *Duncan v. Kahanamoku*, 327 U.S. 304, 322 (1946); *Ex parte Endo*, 323 U.S. 283, 300–02 (1944); *Hirabayashi v. United States*, 320 U.S. 81, 90–93 (1943).

<sup>106</sup> *Padilla*, 352 F.3d at 722–23 (alterations in original) (quoting *Ex parte Endo*, 323 U.S. at 300).

<sup>107</sup> See *id.* at 723.

<sup>108</sup> See *id.*

<sup>109</sup> See Bradley & Goldsmith, *supra* note 80.

<sup>110</sup> See generally Cass R. Sunstein et al., *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. REV. 301 (2004).

law—and much less willing to defer to Democratic presidents.<sup>111</sup> I have not done an empirical analysis of lower-court decisions when national security collides with liberty, but there is every reason to believe that the tendency I am describing would hold.

Here is a more concrete way to put the point. It is possible to imagine the following combinations of interactions: Democratic president, Democratic-appointed judges; Democratic president, Republican-appointed judges; Republican president, Democratic-appointed judges; Republican president, Republican-appointed judges. My speculation is that when presidents are taking steps to protect security at the possible expense of liberty, the likelihood of a judicial victory is highest, and probably by far the highest, when Republican judges are assessing the decisions of a Republican president. For the other three possible combinations, federal judges are more likely to invalidate presidential actions that raise serious legal difficulties.

I am suggesting, then, that in general Democratic-appointed judges would look more skeptically at liberty-infringing acts by the chief executive, whether Republican or Democratic, and that Republican-appointed judges would look more skeptically at intrusions on liberty by (say) President Clinton than at intrusions on liberty by (say) President George W. Bush. It is revealing in this regard that the primary illustrations of National Security Fundamentalism in the recent past have come from Republican appointees speaking approvingly of exercises of authority of President Bush. Recall that Judge Ray Randolph wrote both the majority and the concurring opinion in *Al Odah*; in addition, Judge Harvey Wilkinson wrote the majority opinion in *Hamdi*. These are mere examples, and nothing I am saying here demonstrates that these judges were wrong in their particular conclusions. I am making a simple descriptive (and predictive) point: National Security Fundamentalism will have most appeal to Republican appointees on the lower courts when the president whose acts are at issue is also Republican.

#### B. *Judicial Courage: A Concluding Note*

The final point has to do with the institutional position of lower courts as compared with the institutional position of the Supreme Court of the United States. To say the least, it is uncomfortable for federal judges to invalidate a decision of the president. Invalidation of presidential acts is particularly uncomfortable when national security is at risk. Our history attests to this point.<sup>112</sup> If federal judges are going to reject a presidential decision in the name of liberty, they will have to demonstrate a great deal of courage. Lower courts, precisely because they are lower, are less likely to show that courage. Because of its unique place in American government and because of its national prestige, the Supreme Court is in a far better position to do so.<sup>113</sup> This is not to say that the Supreme Court will reliably protect liberty,

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<sup>111</sup> See, e.g., Linda R. Cohen & Matthew L. Spitzer, *Solving the Chevron Puzzle*, 57 *LAW & CONTEMP. PROBS.* 65 (1994) (finding that justices are far more likely to defer to an agency's statutory construction when the agency is controlled by a president of the same political party as the justice).

<sup>112</sup> See *supra* text accompanying note 72.

<sup>113</sup> See *STONE*, *supra* note 3, *passim*, for a catalogue of cases in which the Supreme Court



even when the legal materials call for it to do so. Judges are merely judges, and when national security is at risk, an aggressive judicial role is neither likely nor desirable. It is for this reason that Liberty Perfectionism is a non-starter. But to the extent that federal judges need a great deal of courage to protect constitutional rights when the stakes are high, the Supreme Court is more reliable than other judicial institutions, at least as a general tendency.

The best guess, then, is that lower courts, including the D.C. Circuit, will be inclined to follow the constitutionally mischievous path of National Security Fundamentalism. I hope that I am proved wrong.

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has been reluctant to protect liberty amidst a public panic; see SUNSTEIN, *supra* note 4, at 61–72, for a suggestion that the Court has often protected liberty through minimalist rulings.