

Art and the Constitution: The Supreme Court and the Rise of the Impressionist School of Constitutional Interpretation

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I. Introduction

Since the end of the last Supreme Court term, academic panels and conferences have developed the feel of a freshman art appreciation class as scholars debated the “nuance,” “thrust,” and “texture” of the recent trilogy of national security cases. *Hamdi v. Rumsfeld*,¹ *Rumsfeld v. Padilla*,² and *Rasul v. Bush*³ were generally viewed as among the most significant national security cases in decades. Yet, well after their release, these opinions are still being examined from every angle. Academics speak of the trilogy as if they are viewing some abstract composition by Wassily Kandinsky, debating different meanings or images that are suggested from different vantage points. Not surprisingly, legal experts who contemplated the same opinions came away with wildly varying interpretations, from clear victories to embarrassing defeats for President Bush.⁴ For David Rivkin and Lee Casey, the decisions were a victory and a “significant reaffirmation” of administration policies⁵ while David Cole and Neal K. Katyal

¹124 S. Ct. 2633 (2004).

²124 S. Ct. 2711 (2004).

³124 S. Ct. 2686 (2004).

⁴Editorial, *Terror and the Court*, Wall Street Journal, June 29, 2004, at A14 (noting that the Associated Press had concluded that the cases were “a setback” and clear defeat for the administration while the *Journal* found them to be “an important victory”); see also *Supreme Court Grants Suspected Terrorists Access to US Courts*, Frontrunner, June 29, 2004 (quoting diverse interpretations from academics and commentators).

⁵David B. Rivkin Jr. & Lee A. Casey, *Bush’s Good Day in Court*, Washington Post, August 4, 2004, at A19.

viewed the cases as a clear “rejection” of those policies and a repudiation of the administration.⁶

This search for meaning has become an annual ritual for academics due to the Supreme Court’s tendency toward increasingly vague and abstract rulings. The decreasing quality and clarity of decisions is in part due to the realities of a long-divided Court.⁷ When struggling to maintain a plurality or slim majority, justices will often gloss over core issues to simply deliver a holding that is driven more by its result than its reasoning. But, the *Hamdi*, *Padilla*, and *Rasul* opinions reflect something more than the ambiguous product of compromise decisionmaking. They reveal a fundamental difference in how the Constitution is viewed as an object for judicial interpretation. In many ways, the endeavors of law and art seem to have converged in the interpretation of the Constitution as the Court has moved from more classic to more impressionistic interpretations of constitutional provisions, particularly in the area of national security law.

Like classic art, constitutional interpretation began with a long period of formalism and structure. The Supreme Court favored fairly static interpretations of the Constitution; the text was given determinative emphasis and any interpretative departures from that text were minimized in favor of plain meaning. As the legal profession developed, particularly the teaching academy, classic interpretations became increasingly passé. Academics began to favor more fluid interpretations that gave moral or political theories, rather than the text, greater influence. Where the art community moved toward French Impressionism and ultimately abstract art, the legal community adopted equally impressionistic or abstract approaches to legal interpretation. The text of the Constitution was now viewed as a necessary starting place, but the “true” meaning was now viewed

⁶Jeffrey Smith, *Slim Legal Grounds for Torture Memos; Most Scholars Reject Broad View of Executive’s Power*, *Washington Post*, July 4, 2004, at A12 (quoting Cole as calling the cases a rejection of the extreme views of the president while Katyal is quoted as interpreting these recent events to mean that “the administration’s legal war on terror is utterly repudiated”).

⁷See generally Jonathan Turley, *Unpacking the Court: The Expansion of the Supreme Court in the Twenty-First Century*, 33 *Persp. On Pol. Sci.* 155 (2004) (discussing the effect of a closely divided court and proposing the expansion of the Supreme Court to nineteen members).

as evolutionary and dynamic. This new genre of legal reasoning released the pent-up creativity of law professors who sought to fashion new truths from old words. Conversely, those academics who favored more structured and clear interpretations were viewed as uncreative oafs, the way that classic painters were viewed after the modern art period began. A professor arguing for a textualist interpretation was tantamount to some paint-by-the-numbers hack filling hotel rooms with faux classics while “theorists” brought the “living” Constitution to life.

Abstract art and constitutional theory share a tendency toward the transcendent. Both often begin with an object but then transcend that object through a process of creative translation. In his famous work on surrealism, “The Surrealist Manifesto,” Andre Breton explained that modern artists took from the rational world but then created “an absolute reality, a surreality.”⁸ In the same fashion, modern legal theory often takes an object—the Constitution or a statute—and then reconstructs that object according to a new preferred reality. Sometimes constitutional provisions remain largely intact but distorted like the limp watches of Salvador Dali’s 1931 *Persistence of Memory*—the treatment of the Fourteenth Amendment in *Grutter v. Bollinger*⁹ is one such example. Sometimes otherwise clear constitutional provisions are reproduced with a type of intentional blurring or ambiguity as in Edgar Degas’ *Ballet Dancers*—the treatment of the First Amendment in *Virginia v. Black*¹⁰ has such Degas elements. Other times, provisions are reconstructed from clear text into something different by severing or ignoring clauses as in a cubist piece by Pablo Picasso—the treatment of the Fourth

⁸Andre Breton, *Manifestoes of Surrealism* 14 (1969); see also Jennifer Mundy, *Surrealism: Desire Unbound* (2003); H.H. Arnason, *History of Modern Art* 271 (3d ed. 1986).

⁹539 U.S. 306, 342 (2003) (acknowledging the demands of the Fourteenth Amendment to “do away with all governmentally imposed discrimination based on race” but then allowing such race-conscious admissions for roughly twenty-five years more); see Roger Pilon, *Principle and Policy in Public University Admissions: Grutter v. Bollinger and Gratz v. Bollinger*, 2002–2003 *Cato Sup. Ct. Rev.* 43 (2003).

¹⁰538 U.S. 343 (2003); see also Steven J. Heyman, *Nideological Conflict and the First Amendment*, 78 *Chi.-Kent L. Rev.* 531, 599 (2003) (noting that the decision allowing state bans on cross burning was a “retreat[] from the rigid formalism of [the Court’s decision in] *R.A.V.*”); James L. Swanson, *Unholy Fire: Cross-Burning, Symbolic Speech, and the First Amendment in Virginia v. Black*, 2002–2003 *Cato Sup. Ct. Rev.* 81 (2003).

Amendment in *Terry v. Ohio*¹¹ or *Board of Education v. Earls*¹² reveal such cubist influences.¹³ While the image changes, the impressionist and abstract legal artists all strive for a new constitutional reality, a constitutional surreality.

I confess to harboring a love for the classic in constitutional interpretation, favoring less interpretative treatments of the subject, and I still cling to the dated belief that text can have a discernible meaning. There are several artistic styles that appeal to such legal tastes. An analogy can be drawn to a Rockwell, but such a style is perhaps too literal to capture a classic form of intentionalism. Norman Rockwell painted in a highly narrative and univocal fashion. The Constitution must be interpreted, of course, and does not convey the instant narrative meaning of Rockwell's *Four Freedoms* or his more campy magazine covers. Likewise, it is not as sterile or severe as the work of Grant Woods. It is not *American Gothic*. The Constitution is meant to be interpreted, but a classic judicial artist does not view the interpretive element to be license for reconstruction of its meaning. A closer analogy could be drawn to the work of Andrew Wyeth, particularly his masterpiece *Winter 1946*. Admittedly my favorite painting, the picture shows a boy running down a barren hill in winter. It is both beautiful and haunting. It is a picture that calls for interpretation and an understanding of the purpose behind the images. It is legitimate to interpret the painting with a knowledge of its history and original conception. The painting was autobiographical and completed immediately after the death of Wyeth's father, the famous illustrator N.C. Wyeth. The boy's swinging arms seem to capture the sense of loss and untethered status of the fatherless Wyeth. For Wyeth, the hill was his father and, indeed, it was at the bottom of the hill that his father died in a car accident. The use of this information brings a deeper meaning to the images of the picture. Where there was clearly a sense of loneliness, the historical evidence defines the reason for the loneliness and deepens its affect and meaning. In the same way, the Constitution is often read with an effort to understand the intent or meaning given terms by its

¹¹392 U.S. 1 (1968).

¹²536 U.S. 822 (2002).

¹³*Id.* at 829. See Roger Pilon, Tenants, Students, and Drugs: A Comment on the War on the Rule of Law, 2001–2002 *Cato Sup. Ct. Rev.* 227 (2002).

Framers. In both exercises, the object is not changed but the meaning is clarified and deepened by the act of interpretation. The figure of a boy remains a figure of a boy. We simply learn more about the boy.

Narrative artists are often shunned by the artistic elite. Despite the presence of interpretation in Wyeth paintings, it remains too fixed to a single meaning and confines the viewer and artist alike. Likewise, for many law professors, the Constitution (and law generally) is viewed as transcending such finite meaning. Students are taught that they must accept the indeterminacy of language. For these academics, textual or even intentionalist approaches seem more like Andy Warhol's *Campbell Soup* paintings—a parody of pre-packaged legal theory. Those who strive for fixed meaning are viewed as academically lowbrow; unimaginative intellectual eunuchs who fail to understand the complexities of legal theory. Modern legal theory transcends language. Indeed, once free of the restraints of the determinacy of language and restrictive rules of intentionalism, legal scholars found themselves in the same position as modern artists when they broke from classic styles. New scientific theories, particularly atomic physics, had freed artists of the hold of the objects they painted. As Wassily Kandinsky said, “[a]ll things become flimsy, with no strength or certainty.”¹⁴ In a similar fashion, constitutional theory at law schools has increasingly freed itself of the structural rigidity of text. The resulting theories are as abstract as Picasso's cubism and at times appear as random as a Jackson Pollack painting.

Such abstraction, while in vogue in law schools, is not as popular with the courts. Rather, many judges favor more impressionistic views of the Constitution. This view is certainly apparent among members of the current Supreme Court. For justices like Sandra Day O'Connor, the Constitution is often presented as a mosaic of nuance where subtle shadings offer alternative meanings. It remains largely impressionistic rather than overtly surreal. Otherwise clear provisions are reproduced in a limp, Daliesque fashion—as in *Hamdi v. Rumsfeld*,¹⁵ where the Suspension Clause is recognized but presented al dente. It is a legal version of a Monet, more beautiful at a distance and less clear as one gets closer to the individual brushstrokes. It

¹⁴Sam Hunter & John Jacobus, *Modern Art* 10 (1985) (quoting Kandinsky).

¹⁵*Supra* note 1.

has indeed the makings of impressionism. Impressionists, Frederick Chevalier noted in 1877, emphasize the “contradictory qualities” and “conscious incoherence” of their subjects.¹⁶ Impressionists strive “not to render a landscape but the sensation produced by a landscape.”¹⁷ In the same way, the judicial impressionist takes clear constitutional provisions and, rather than derive and apply clear lines of authority, strives to convey their thrust or function—often in balanced interplay with other constitutional values.

As will be shown, the three national security cases of this term favor more abstract judicial interpretations, particularly O’Connor’s highly impressionistic opinion in *Hamdi*. Instinctively avoiding bright lines, both the *Hamdi* and *Rasul* decisions seem to consciously struggle to preserve abstractions and uncertainties in meaning. It would be comforting to view Monet-like opinions as the outgrowth of some deep-seated personal belief or artistic bent. But, this term offered further evidence that impressionistic interpretations are more a matter of convenience than conviction. Justices like O’Connor often adopt clear lines in areas like federalism or takings. For them, the use of a more fluid style appears simply a way to cut any number of compromises, excusing them from the need to hold to a difficult line on constitutional values. They are Rockwellians painting Monets. They are not alone. Many liberals and civil libertarians want to see a bold and clear Rockwell on civil liberties and other individual constitutional rights, yet they prefer a more impressionistic interpretation on issues like states rights and affirmative action. Many conservatives have the opposite preference. It is perhaps the ultimate expression of Mies Van der Roë’s concept of “form follows function”—the Constitution is either firm or fluid depending on the needs of a given moment in time.

On close examination, the Impressionist School of Constitutional Interpretation has long dominated decisions in the national security area.¹⁸ Whether due to conviction or convenience, justices often

¹⁶Hunter & Jacobus, *supra* note 14, at 10 (quoting Chevalier’s review of the Third Impressionist Exhibition).

¹⁷*Id.* (quoting an 1874 critique of impressionism).

¹⁸I have previously written about the different and disparate treatment given legal interpretations in the national security field. See generally Jonathan Turley, *The Military Pocket Republic*, 97 Nw. U. L. Rev. 1 (2002); Jonathan Turley, *Pax Militaris: The Feres Doctrine and the Retention of Sovereign Immunity in the Military System of Governance*, 71 Geo. Wash. L. Rev. 1 (2003); Jonathan Turley, *Tribunals and Tribulations: The Antithetical Elements of the Military Justice System in a Madisonian*

embrace interpretations that avoid bright or, at times, even discernible lines in favor of a fluid style where the powers of the respective branches blend into indistinguishable hues. This interpretative school has long held influence with the Court in national security cases where the branches come into the sharpest conflict. Historically, the Supreme Court has avoided conflict in favor of compromise decisions. Classicists in every other area suddenly become Impressionists when the subject and audience change in wartime or national security cases. Indeed, the Court has developed ad hoc balancing and reasonableness tests to facilitate such impressionist opinions, as was evident in the *Hamdi* decision.

The dark side of judicial impressionism is found in national security cases in which the Court seeks to avoid an interbranch conflict by yielding to a president. Considered over its entire history, the Supreme Court has a mixed record in defending civil liberties and minorities. There have been moments of clarity, and even courage, in the protection of religious and political minorities. During periods of national crisis, however, the Court has repeatedly yielded to the demands of convenience over clarity. In the worst of times, the Court has even used its respected position to give prejudice and ignorance a patina of legitimacy, as in *Korematsu v. United States*.¹⁹ This term's trilogy of national security cases can be best understood along that historical continuum. *Hamdi*, *Padilla*, and *Rasul* reflect the Court's tradition of highly political, often vague, and at times opportunistic decisions during periods of unrest. In these cases, the Court had an opportunity to rehabilitate its tattered reputation in the area of national security, but chose the path of least resistance. It is certainly not the Court at its worst, but we have yet to see the Court at its best in protecting rights during wars or national emergencies.²⁰

Democracy, 70 *Geo. Wash. L. Rev.* 649 (2002); Jonathan Turley, *Through a Looking Glass Darkly: National Security and Statutory Interpretation*, 53 *SMU L. Rev.* 205 (2000).

¹⁹323 U.S. 214 (1944); see also *Scott v. Sandford*, 60 U.S. 393, 407 (1856) (observing that blacks "had for more than a century before [the founding] been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit").

²⁰See, e.g., *Reid v. Covert*, 354 U.S. 1 (1957); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866).

In the case of Yaser Esam Hamdi, the Supreme Court considered one of the president's most extreme assertions of power: his claim to have the unilateral and absolute authority to declare a citizen to be an enemy combatant and to strip him of his constitutional rights, including his right of access to court or counsel. In a plurality decision, Justice O'Connor found that a brief and ambiguous congressional resolution gave the president some such authority. While not ruling on the president's claim of inherent authority pursuant to his commander-in-chief power, the plurality ruled that Hamdi could be imprisoned indefinitely, but that he was entitled to some small modicum of due process to establish his status as an enemy combatant. This process, however, was left largely undefined.

For those frustrated by the blurred reasoning and holding in *Hamdi*, the *Padilla* decision was positively maddening. The Court sent the case back on the most technical of grounds, finding that Padilla had simply named the wrong official in his original lawsuit and should sue in a different district. Finally, in *Rasul*, the Court did make an important ruling that detainees were entitled to judicial review, but again, the reasoning and the holding proved less clear on close examination. Rather than offer a clear view on the constitutional issues raised by the Bush policy or on the continued reliance of the presumption against extraterritoriality, the Court first articulated a bold new view of jurisdiction but then largely confined that view (at least for the moment) to the unique characteristics of Guantanamo Bay.

This article will begin with a brief look at the Court's checkered history on civil liberties in times of war—with an emphasis on the issues of enemy combatant status and military tribunals. Section II will focus on the decision in *Ex parte Quirin*,²¹ where the Court abandoned not just the Constitution, but basic principles of judicial ethics. In Section III, the article will closely examine the trilogy of cases and the divergent methodologies adopted within them.

Ultimately, there is less than meets the eye in the three cases. While civil libertarians were quick to capitalize on clear losses for the administration, a close review of the cases shows something of a constitutional bait and switch. The Court speaks of first principles and vital constitutional guarantees in cases like *Hamdi* and *Rasul*,

²¹317 U.S. 1 (1942).

but in reality it imposes little on the administration to protect those values and rights. To be sure, the Court clearly rejects the extremist views of the Bush administration and the president's claim of unilateral and absolute authority. Yet the Court avoids any clear rules in favor of signature vagueness and ambiguity. Indeed, almost immediately the government rushed into the gaps left by the Court to minimize the impact of the cases and maximize the authority of the president. This article, in short, takes a critical view of the Court and its continued failure to stand by first principles. The plain fact is that this term's impressionistic opinions leave fundamental constitutional principles undefined—and therefore unprotected—at a time when they are most in need of clear expression.

II. Deference, Balance, and the Darker Side of Judicial Impressionism

In designing the broad contours of their new republic, the Framers were divided with respect to the office of the chief executive. Many were opposed to a single strong president, often citing the dangers of war-making and the abuses perpetrated by supreme leaders in other systems.²² While the Framers would ultimately reject the idea of an executive committee in favor of a president, they accommodated those concerns by strictly limiting the president's authority in the area of war making and habeas corpus. The Framers refused to give a president unilateral war-making authority and instead gave the power to declare war to Congress in Article I, section 8.²³ Yet, the Supreme Court, particularly in the mid-twentieth century, has shown a powerful preference toward a more fluid relationship between the president and Congress, which left the Court as the arbiter between the two branches in conflicts over national security. Justice Jackson captured this preference in his famous concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*²⁴ when he stated that “[p]residential powers are not fixed but fluctuate, depending on their disjunction or conjunction with those of Congress.”²⁵ In laying

²²See generally Turley, *The Military Pocket Republic*, *supra* note 18, at 1.

²³U.S. Const. art. I, § 8; see also 1 *The Records of the Federal Convention of 1781* 66–67 (M. Farrand ed., 1911); 6 *The Writings of James Madison* 174 (G. Hunt ed., 1903).

²⁴343 U.S. 579 (1952).

²⁵*Id.* at 635 (Jackson, J., concurring).

out his famous three categories of executive branch authority, Jackson noted that, even when the president is acting “in the absence of either a congressional grant or a denial of authority,” “there is a *zone of twilight* in which he and Congress may have concurrent authority, or in which its distribution is uncertain.”²⁶ On one level, Jackson’s concurrence stated the obvious. In a system of shared powers, there must be different levels of deference or presumption depending on the specific authority used for executive action. But the Court has readily embraced the notion of fluidity as an invitation for judicial impressionism.²⁷ Even the three categories, vague as they are, have been questioned as too rigid. In *Dames & Moore v. Regan*,²⁸ then-Justice William Rehnquist noted that “it is doubtless the case that executive action in any particular instance falls, not neatly in one of three pigeonholes, but rather at some point along a spectrum running from explicit congressional authorization to explicit congressional prohibition.”²⁹ When the president acted under his express or implied powers under Article II in wartime, the Court quickly embraced a level of extreme deference that bordered on willful blindness. The case often cited for this “deference” is *Ex parte Quirin*.³⁰

In both the *Hamdi* and *Rasul* opinion, *Quirin* is the foundation for references to deference and inherent presidential power. The determinative weight given *Quirin*, particularly in the plurality decision in *Hamdi*, is remarkable and alarming given its infamous record.

²⁶*Id.*

²⁷Jackson readily embraced the notion that the text and history of the Constitution were unavailing to any clear interpretation—a self-fulfilling prophecy that invited judicial invention:

A judge, like an executive adviser, may be surprised at the poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves. Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from the materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh.

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634–35 (1952) (Jackson, J., concurring).

²⁸453 U.S. 654 (1981).

²⁹*Id.* at 669.

³⁰*Supra* note 21.

To fully understand the Court's tendency toward judicial impressionism, it is essential to understand the true facts of *Quirin*, a case that reveals a Court frantically searching for justifications for the premature judgment that led to the executions of all but two captured German prisoners.³¹ It is the *Quirin* case, more than any other, that shows convenience rather than conviction guiding judicial styles of constitutional interpretation.

A. The Supreme Court and the Saboteurs in Quirin

The *Quirin* case actually began in 1941 when German military intelligence began Operation Pastorius,³² which called for two teams of saboteurs to commit a series of attacks on America's industry and economy. The plan was to put the two teams ashore by submarine. The saboteurs included two who were naturalized Americans: Ernest Peter Burger and Herbert Hans Haupt.³³ What the Germans did not know is that two of the saboteurs, including the operation's leader, George John Dasch, did not intend to go through with the plan. But Dasch and his colleague Burger would prove as great an inconvenience to American leaders as to the German high command.

Dasch was a former waiter who had spent nineteen years in the United States.³⁴ He claimed that he was eager to leave Nazi Germany and used the operation as a ruse to get to the United States. Such a claim by a captured war criminal would normally be viewed with suspicion except for one thing: Dasch's immediate efforts to reveal the operation after he landed. Early in the operation, Dasch revealed to his colleague, Ernest Peter Burger, that he intended to reveal the operation to the FBI.³⁵ He chose his co-conspirator with care. Burger was once a committed Nazi who participated in the 1932 Beer Hall putsch with Hitler.³⁶ In a crackdown shortly before the war, however,

³¹The account below is taken from two prior publications dealing with *Quirin*. Turley, *Tribunals and Tribulations*, *supra* note 18; Jonathan Turley, *Quirin Revisited: The Dark History of Military Tribunals*, *Nat'l L. J.*, Oct. 28, 2002, at A20. *Tribunals and Tribulations* contains references and citations to a broad set of academic pieces by other authors.

³²David J. Danelski, *The Saboteurs' Case*, 1 *J. Sup. Ct. Hist.* 61 (1996); see also Turley, *Tribunals and Tribulations*, *supra* note 18, at 734–35.

³³Danelski, *supra* note 32, at 63.

³⁴Turley, *Quirin Revisited*, *supra* note 31, at A20.

³⁵Francis Biddle, *In Brief Authority* 336 (1962); Danelski, *supra* note 32, at 64.

³⁶Turley, *Tribunals and Tribulations*, *supra* note 18, at 735 n.537.

he and his wife were arrested. The Gestapo tortured his wife, causing her to miscarry and leaving Burger with a deeply held hatred of the regime.³⁷

Dasch and Burger landed with the first boat on a beach at Amagansett, New York, just after midnight on June 13, 1942. A lone Coastguardsman almost immediately came upon them burying their supplies.³⁸ When the other men advocated killing the man, Dasch intervened and, in front of the others, gave the American guardsman money to forget about what he saw. However, he then quietly asked the guardsman to remember his identity.³⁹ The next day, Dasch called the FBI and revealed the operation, including the scheduled landing of the second boat in Florida.⁴⁰ Nothing happened and the report was apparently set aside on a pile. The following day, Dasch decided to take matters into his own hands and went to D.C. to get the FBI to act. When he showed up with \$80,000, the agents finally believed him and Dasch proceeded to dictate a 254-page statement.⁴¹ Dasch emphasized that Burger was not supporting the operation and was working with him to disclose the entire matter to the FBI.

Dasch's information unraveled the entire operation. This is when a critical decision was made by FBI Director J. Edgar Hoover. Eager to take credit for the arrests, Hoover released a false account to the public, claiming that he and his agents had uncovered the plot.⁴² In a false account given to President Roosevelt, Hoover even changed the date of Dasch's arrest—making it appear as if he was captured after the FBI broke the case. Hoover was made the hero of the hour and Roosevelt asked Congress to award him a special medal. This false account threatened to backfire, however, if Dasch or Burger were allowed to testify publicly on their critical role in disclosing the operation, including Dasch's repeated efforts to get the FBI to act. Hoover wanted either summary executions or a secret trial.

³⁷*Id.*

³⁸Danelski, *supra* note 32, at 533.

³⁹*Id.*

⁴⁰*Id.* at 64; Turley, *Tribunals and Tribulations*, *supra* note 18, at 735.

⁴¹Danelski, *supra* note 32, at 65; Turley, *Tribunals and Tribulations*, *supra* note 18, at 735.

⁴²Danelski, *supra* note 32, at 65; George Lardner, Jr., *Nazi Saboteurs Captured! FDR Orders Secret Tribunal*, *Washington Post Magazine*, Jan. 13, 2002, at 14.

He found a willing ear in Roosevelt, who wanted a guarantee of conviction and capital punishment.⁴³

The effort to gag and dispatch the saboteurs, particularly Dasch, would require the cooperation of the Supreme Court. The greatest problem was the two American citizens, particularly Haupt.⁴⁴ To guarantee results in the case, the administration proceeded to arrange a series of highly improper meetings with justices like Felix Frankfurter on how to structure the tribunal in anticipation of a Supreme Court appeal.⁴⁵ The level of collusion, dishonesty, and prejudice that appeared in the Supreme Court may be unrivaled in its history. It proved to be an institution acutely vulnerable to influence and even coercion by a determined president.

President Roosevelt left no question that he would not tolerate an independent, adverse ruling from the Supreme Court. Roosevelt gave his attorney general, Francis Biddle, a warning that was conveyed to the justices: "I won't give them up . . . I won't hand them over to any United States marshal armed with a writ of habeas corpus. Understand?"⁴⁶ This message was conveyed by Biddle, who warned the Court that the president would not accept anything but its total support. It was Justice Roberts who agreed to convey this message to the full Court in private. On July 29, 1942, Roberts told his colleagues that FDR intended to have all eight men shot if the Court did not acknowledge his authority.⁴⁷ The justices were advised that Biddle "feared that F.D.R. would execute the petitioners despite any Court action." Stone responded that "that would be a dreadful thing."⁴⁸

In a cascading failure of independent review—indeed, of the separation of powers—the Court now had a direct ultimatum from the president. At least three members—Frankfurter, Stone, and Roberts—had personal involvement in the development of the case,

⁴³Biddle, *supra* note 35, at 330; Danelski, *supra* note 32, at 66–67.

⁴⁴The Court only noted Haupt's claim to citizenship. *Ex parte Quirin*, 317 U.S. 1, 20 (1942).

⁴⁵Turley, *Tribunals and Tribulations*, *supra* note 18, at 737–38.

⁴⁶Biddle, *supra* note 35, at 331; Danelski, *supra* note 32, at 28.

⁴⁷Danelski, *supra* note 32, at 69.

⁴⁸*Id.*

including *ex parte* communications.⁴⁹ Justice Roberts had had *ex parte* conversations with the attorney general, and Justice Frankfurter had given an advisory opinion on the proper structure of the tribunal.⁵⁰ Justice Frank Murphy, a reserve army lieutenant colonel, brought this coalescing of conflicts and collusion into sharp relief by appearing in his military uniform.⁵¹ Finally, Chief Justice Stone, the author of the *Quirin* opinion, informed his colleagues that his son, Major Lauson Stone, was a member of the defense team.⁵²

But it was Justice James F. Byrnes Jr. who held perhaps the most glaring conflict. Byrnes had been working for the president for over seven months in an effectively full-time executive position while also sitting on the Court. Byrnes' role is made all the more suspect by the fact that he waited until after the decision to resign to assume a full-time position as Director of Economic Stabilization and later Director of War Mobilization.⁵³ Despite these conflicts and unethical contacts, only Murphy would recuse himself from the decision after being confronted by a hypocritical objection from Frankfurter.⁵⁴

Despite the secret meetings and messages, oral argument remained a danger for the administration in disclosing the true facts of the case. That danger seemed to be realized when Justice Jackson asked defense counsel sarcastically why some of the men did not go to the authorities if they were only using the operation as a subterfuge to leave Nazi Germany (as they claimed). Jackson adopted a mocking tone and noted that "They did not go to any agency and say, 'We got away from the Germans. Thank God we are free and we shall tell where we buried the [explosives].'"⁵⁵ In a

⁴⁹Turley, *Tribunals and Tribulations*, *supra* note 18, at 739.

⁵⁰*Id.*

⁵¹*Id.*

⁵²*Id.* To his credit, Chief Justice Stone raised this possible conflict with the parties before sitting in the case.

⁵³*Id.* (noting that Byrnes had spent so much time working with the administration that Biddle actually thought that he had resigned from the Court); Danelski, *supra* note 32, at 69.

⁵⁴Ironically, in light of the range of conflicts and improper conduct of his colleagues, Murphy recused himself "lest a breath of criticism be leveled at the Court." Michael R. Belknap, *The Supreme Court Goes to War: The Meaning and Implications of the Nazi Saboteur Case*, 89 *Mil. L. Rev.* 59, 78 (1980). The only other justice to address a conflict was Stone who properly raised the issue and solicited the views of counsel.

⁵⁵*Id.* at 70.

baffling response, defense counsel Royall publicly agreed that they did not take such an action and that “if they did that, there would not have been this litigation.”⁵⁶ In reality, Dasch had done exactly what Jackson had stated, with the support of Burger. While it is true that Dasch was not part of the appeal, Royall should have corrected Jackson’s statement, particularly since Burger had agreed to disclose the operation. Instead, the only public argument in the case reaffirmed a clearly false account by Hoover and the FBI.

With that opportunity missed, the Court was free to make fast work of the men. Knowing that Roosevelt did not want any further delay, the Court took the extraordinary step of issuing its conclusion without giving an opinion or detailed reason. Instead, it yielded to the president and promised to publish an opinion at some later date to explain why. What followed was a sham proceeding in which command influence was openly applied and rules of evidence discarded.⁵⁷ All eight men were convicted and sentenced to death on August 3, 1942. Six were executed by electric chair on August 8. For their part, Burger and Dasch were first sentenced to death and then given commutations. Burger’s sentence was commuted to life imprisonment while Dasch was given thirty years’ imprisonment.⁵⁸

It was only after the execution of the six men that members of the Court began to seriously deliberate the constitutional basis for their decision. Chief Justice Stone assumed the task of writing a post-execution justification. He found the task so difficult that he referred to it as “a mortification of the flesh.”⁵⁹ Some members were beginning to balk at the scope of executive authority claimed by Roosevelt and seemingly sanctioned by the ruling. Stone struggled with the justification, particularly in light of *Ex parte Milligan*.⁶⁰ His initial distinction of *Milligan* was transparent and unconvincing: “I distinguish *Milligan* on the ground that, whether or not *Milligan* violated the law of war, the petitioners clearly did.”⁶¹ His colleagues

⁵⁶*Id.*

⁵⁷Turley, *Tribunals and Tribulations*, *supra* note 18, at 739.

⁵⁸*Id.*

⁵⁹Alpheus T. Mason, *Harlan Fiske Stone: Pillar of the Law* 659 (1959).

⁶⁰71 U.S. (4 Wall.) 2 (1866).

⁶¹Danelski, *supra* note 32, at 73.

objected to the draft, and Justice Hugo Black specifically criticized the sweeping authority that the Court had given the president:

While Congress doubtless could declare all violation of the laws of war to be crimes against the United States, I seriously question whether Congress could constitutionally confer jurisdiction to try all such violations before military tribunals. In this case I want to go no further than to declare that these particular defendants are subject to the jurisdiction of a military tribunal because of the circumstances and purposes of their entry into this country as part of the enemy's war forces.⁶²

Black objected to the absence of any language stating that the president had exceeded his authority in seeking to bar access to the courts.⁶³ Frankfurter voiced an extreme position, stating that he believed that "the President has the power to suspend the writ [of habeas corpus], and so believing, I conclude also that his determination whether an emergency calls for such suspension is not subject to judicial review."⁶⁴ Frankfurter was not alone in taking an extreme position. Justice Robert H. Jackson suggested that he might write a concurrence that yielded entirely to the executive branch, and he expressed his doubt that the courts had the authority to "review[] the legality of the President's order [when] experience shows the judicial system is ill-adapted to deal with matters in which we must present a united front to a foreign foe."⁶⁵

Jackson's memorandum reflects a common trend on the Court—reaching conclusions on the preferred outcome and then desperately searching for a methodology or theory to justify it. Whether a *Rockwell* or a *Monet*, the style is merely a matter of convenience. This was evident in the work of Stone: He submitted alternative justifications for the earlier order with only the conclusion in common. Stone circulated memoranda that resembled the alternative pleadings of an attorney—openly discarding the notion that the question should not be how but why the Court reaches a particular result. Instead,

⁶²*Id.* at 76.

⁶³*Id.* at 75.

⁶⁴*Id.*

⁶⁵*Id.* at 76; see also Carl Tobias, *Terrorism and the Constitution: Civil Liberties in a New America*, 6 U. Pa. J. Const. L. 1116, 1139 (2004).

Stone wrote “[a]bout all I can say for what I have done is that I think [the draft] will present the Court all tenable and pseudo-tenable bases for decision.”⁶⁶ The search for even “pseudo-tenable” rationales shows a Court untethered from the text of the Constitution or its institutional obligations.

Frankfurter was particularly irate at even the suggestion that constitutional principles should undermine the need to give total support to the president. He encouraged his colleagues to look beyond the terms of the Constitution and to adopt an intentionally vague, impressionistic opinion. This pitch was made in a memorandum that can only be described as bizarre. Only recently discovered, the confidential memorandum takes the form of a long hypothetical dialogue between Frankfurter and the now dead saboteurs. Entitled “F.F.’s Soliloquy,” the dialogue begins with Frankfurter explaining how he would hold a hearing as a “judge” with the men he calls “saboteurs”—before any conviction:

Saboteurs: Your Honor, we are here to get a writ of habeas corpus from you.

F.F.: What entitles you to it?

Saboteurs: [making a *Milligan* argument].

F.F.: . . . You damned scoundrels have a helluva cheek to ask for a writ that would take you out of the hands of the Military Commission and give you the right to be tried, if at all, in a federal district court. You are just low-down, ordinary, enemy spies who, as enemy soldiers, have invaded our country and therefore could immediately have been shot by the military when caught in the act of invasion. Instead you were humanely ordered to be tried by a military tribunal convened by the Commander-in-Chief himself So I will deny your writ and leave you to the just deserts with the military.

Saboteurs: But, Your Honor, since as you say the President himself professed to act under the Articles of War, we appeal to those Articles of War as the governing procedure, even bowing to your ruling that we are not entitled to be tried by civil courts and may have our lives declared forfeit by this Military Commission

⁶⁶Danelski, *supra* note 32, at 75.

F.F.: . . . You've done enough mischief already without leaving the seeds of a bitter conflict involving the President, the courts and Congress after your bodies will be rotting in lime. It is a wise requirement of courts not to get into needless rows with the other branches of the government by talking about things that need not be talked about if a case can be disposed of with intellectual self-respect on grounds that do not raise such rows. I therefore do not propose to be seduced into inquiring what powers the President has or has not got, what limits the Congress may or may not put upon the Commander-in-Chief in time of war, when, as a matter of fact, the ground on which you claim to stand . . . exists only in your foolish fancy. That disposes of you scoundrels. Doubtless other judges may spell this out with appropriate documentation and learning But it all comes down to what I have told you the Articles of War[] don't apply to you. And so you will remain in your present custody and be damned.⁶⁷

Frankfurter then addressed his colleagues directly:

Some of the very best lawyers I know are now in the Solomon Island battle, some are seeing service in Australia, some are sub-chasers in the Atlantic, and some are on the various air fronts And I [can] almost hear their voices were they to read more than a single opinion in this case. They would say something like this but in language hardly becoming a judge's tongue: "What in hell do you fellows think you are doing? Haven't we got enough of a job trying to lick the Japs and the Nazis without having you fellows on the Supreme Court dissipate the thoughts and feelings and energies of the folks at home by stirring up a nice row as to who has what power when all of you are agreed that the President had the power to establish this Commission and that the procedure under the Articles of War for courts-martial and military commissions doesn't apply to this case. [sic] Haven't you got any more sense than to get people by the ear on one of the favorite American pastimes—abstract constitutional discussions Just relax and don't be too engrossed in your own interest in verbalistic conflicts because the inroads on energy and national unity that such conflict inevitably

⁶⁷Turley, *Tribunals and Tribulations*, *supra* note 18, at 740.

produce [sic], is a pastime we had better postpone until peacetime.⁶⁸

One would expect that such a clearly unhinged and biased memorandum would yield at least one objection or, even better, a condemnation. To the contrary, it seemed to actually sway members like Jackson, who fell in line.⁶⁹ The members wanted a unanimous decision despite the fact that they could not agree on the actual basis. Stone simply announced that they had “agreed to disagree” and issued an opinion of maddening ambiguity.

The Court declined to address the question of whether the president had the inherent authority to establish military tribunals. It declined to delineate the respective lines of authority between Congress and the president.⁷⁰ It declined even to articulate “the ultimate boundaries of the jurisdiction of military tribunals to try persons according to the law of war.”⁷¹ As Professors Christopher Bryant and Carl Tobias have noted, the justices simply “could not articulate the reasoning for their conclusion.”⁷² The result was a unanimous opinion that used broad, vague strokes to justify the Court’s earlier decision yielding to Roosevelt. The Court found congressional authority for the tribunals and rejected the habeas relief.⁷³ As for the true facts of the case, the Court merely dropped a footnote that observed, “a defense offered before the Military Commission was that petitioners had no intention to obey the orders given them by the officer of the German High Command.”⁷⁴ There was no mention that two of the men not only possessed no intention but in fact disclosed the operation to the FBI.

The treatment of Haupt, who had a claim of citizenship, was one of the most disturbing aspects of the case. The Court held:

⁶⁸*Id.* at 741–42.

⁶⁹Danelski, *supra* note 32, at 78.

⁷⁰Ex parte Quirin, 317 U.S. 1, 47 (1942).

⁷¹*Id.* at 45.

⁷²A. Christopher Bryant & Carl Tobias, Quirin Revisited, 2003 Wis. L. Rev. 309, 330 (2003).

⁷³Professors Bryant and Tobias have argued that the case reflected an earlier and narrower view of habeas corpus and should have been limited as precedent on that basis. *Id.* at 332–333.

⁷⁴Ex parte Quirin, 317 U.S. at 25 n.4.

Citizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful because in violation of the law of war. Citizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts, are enemy belligerents within the meaning of the Hague Convention and the law of war. It is as an enemy belligerent that petitioner Haupt is charged with entering the United States, and unlawful belligerency is the gravamen of the offense of which he is accused.⁷⁵

Missing is any attention to the interplay between the authority to try and execute unlawful combatants and the countervailing rights of citizens to due process and other basic guarantees. Obviously, the question of whether “citizens . . . associate themselves with the military arm of the enemy government” is the matter in dispute in such cases. Missing also is an answer to the question of why a citizen, due to the simple fact of citizenship, cannot demand greater legal rights than noncitizens. That question would not go unnoticed, sixty years later, by individuals in the Bush administration seeking to radically expand the inherent powers of the president.

B. The Resurrection of Quirin and the Claim of Absolute Presidential Power in Times of National Crisis

For decades after the *Quirin* decision (and long before the disclosure of the Court’s shameful internal conduct), scholars questioned it, as well as the *Korematsu*⁷⁶ decision, on any number of grounds. Even Frankfurter would belatedly speak of the case as “not a happy precedent,” and Justice Douglas singled it out, causing the entire Court to regret its actions.⁷⁷ Judicial clerks serving the Court during the *Quirin* decision were especially scathing, insisting that the decision was made without legal authority and adding that it constituted a mockery of justice.⁷⁸ In law school classrooms, professors would

⁷⁵*Id.* at 38–39.

⁷⁶*Supra* note 19.

⁷⁷Turley, *Tribunals and Tribulations*, *supra* note 18, at 743 n.601.

⁷⁸Justice Black’s clerk, John Frank, would later accuse the Court of being “stamped” by the president and added that “if judges are to run a court of law and not a butcher shop, the reasons for killing a man should be expressed before he is dead.” John P. Frank, *Marble Palace* 249, 250 (1972).

routinely suggest that *Korematsu* and *Quirin* may be legal relics of the period with more historical than precedential value.

It was a considerable surprise, therefore, to find *Quirin* embraced almost immediately after September 11, 2001, as the very foundation for the administration's authority in the war on terror. President Bush, Attorney General John Ashcroft, White House Counsel Alberto Gonzales, and others repeatedly cited the case as a virtual blank check for both military tribunals and the enemy combatant policy. The impressionistic opinion lent itself to the most extreme interpretations. President Bush promulgated tribunal rules modeled on the Roosevelt orders, including his own outcome-determinative rules of evidence and standards of proof. In federal court, the Justice Department insisted that federal judges had no constitutional role beyond confirming that the government had declared an individual to be an enemy combatant.⁷⁹ It simply submitted declarations filled with conclusory statements that individuals like Padilla and Hamdi were enemy combatants—with no underlying support for the assertions.⁸⁰ And it barred those prisoners from access to counsel. When pressed in court, the government insisted that revealing details or allowing the individuals access to counsel would present grave dangers to the nation's security.

Padilla and *Hamdi* were perhaps the inevitable consequences of *Quirin*. Once a president was given such unbridled authority over a citizen and the Court exercised such limited review, it was all but certain that a future president would push his power to its limit. That point came when Jose Padilla, an American citizen arrested at O'Hare International Airport, was stripped of his constitutional rights, including access to counsel, on the basis of a conclusory declaration. The government's legal position was denounced widely in both the United States and abroad. Lower court judges rejected the authority claimed in both *Hamdi* and *Padilla*, although the Fourth Circuit Court of Appeals would later rule in favor of the government in the *Hamdi* case.⁸¹

⁷⁹*Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2644 (2004) (noting the extreme view of both DOJ and the Fourth Circuit as "easily rejected").

⁸⁰*Id.* at 2636 (discussing the "Mobbs Declaration").

⁸¹To its credit, the Supreme Court dismissed the extreme opinion of the Fourth Circuit with little serious attention. *Id.* at 2644.

Despite its earlier representations in lower courts, the government's position changed when facing final decisions from the Supreme Court. Shortly before the decisions came down, the government allowed Hamdi and Padilla to meet with counsel, though under tight restrictions.⁸² Then, in a highly inappropriate move, the Justice Department held a press conference only weeks before the expected issuance of the opinions to announce incriminating facts about Padilla. Although the government had earlier refused to reveal these same facts as a matter of dire national security, it now released them along with statements of interrogations of Padilla. When reporters challenged the Department of Justice for appearing to influence the Supreme Court, its defense was that it was not trying to influence the Court but rather "the court of public opinion."⁸³ It was immediately clear that this was an effort to influence not just the Court but, specifically, Justice O'Connor—viewed by some as susceptible to such extrajudicial influence.⁸⁴ It was a thoroughly improper and hypocritical act by the Justice Department, showing its opportunistic use of "national security" in the past to refuse disclosures. The department's desire to influence "the court of public opinion" served only to illustrate the dangers of leaving an administration with the extreme powers sanctioned by the *Quirin* court.⁸⁵

III. "Discontent with . . . Destiny": The Court's Transcendence of Constitutional Text

*Man, that inveterate dreamer, daily more discontent with his destiny, has trouble assessing the objects he has been led to use, objects that his nonchalance has brought his way.*⁸⁶

⁸²*Id.* at 2652.

⁸³Scott Turow, Trial by News Conference: No Justice in That, Washinton Post, June 13, 2004, at B01 (stating as "as a former federal prosecutor and a criminal defense lawyer, [the department's] performance constituted one more legally and ethically dubious maneuver by our government in a case that I already regarded as one of the most troubling in memory").

⁸⁴Jonathan Turley, You Have Rights—if Bush Says You Do, Los Angeles Times, June 3, 2004, at 11.

⁸⁵With a vote of five to four (with O'Connor in the majority), the administration's "dog and Padilla" show may have achieved its purpose.

⁸⁶Andre Breton, Surrealist Manifesto 10 (1924).

In the world of modern art, objects begin in clarity and become more abstract in interpretation. Judicial impressionists like Sandra Day O'Connor often approach the object of the Constitution in the same way. A provision like the Suspension Clause is abundantly, if not inescapably, clear. But, the judicial impressionist views the object through the lens of experience and contemporary realities, distorting and reproducing it in a new interpretative form. In this sense, O'Connor's plurality decision in *Hamdi* was a masterwork of judicial impressionism. Indeed, unlike less honest impressionists—the authors of *Quirin*, for example—O'Connor openly engages in reconstructing meaning from the text of the Constitution to meet her view of the preferred balance of individual rights and executive powers. She has long favored balancing and reasonableness tests in constitutional interpretation, precisely because they allow such reconstructive and impressionistic rulings. Under such tests (like the *Mathews* test that she applied in *Hamdi*), the Court becomes a sort of constitutional jury, applying its own community standards on reasonable policies and practices. The array of opinions in the national security trilogy this year reflects the ad hoc approach of the Court in dealing with most of the fundamental guarantees of the Constitution.

A. The Faux-Impressionism of Hamdi v. Rumsfeld

Many modern artists have strived to escape the hold of the object and have sought to present their unique view of it through the act of artistic translation or interpretation. For a true impressionist, such translation is the very essence of its truth or meaning. For a faux-impressionist, the act of changing or manipulating the object is not a matter of truth but convenience. Justice O'Connor has repeatedly shown herself to be a faux-impressionist, adopting this style simply as a convenient vehicle to achieve her pre-conceived outcome. Thus, in one case she strikes a decidedly Rockwellian style in strictly reading federalism provisions, while in another she treats the Constitution as a mere object for extrapolation and reinvention. It is true that O'Connor is not alone in her embrace of faux judicial art; nonetheless, as the Court's consistent swing vote, her changes in artistic style have produced sweeping changes in national policies and practices.⁸⁷

⁸⁷See Jonathan Turley, Justice O'Connor Wields A Mighty Vote, Los Angeles Times, July 4, 2002, at A17.

From the very beginning of the *Hamdi* decision, O'Connor reveals her intent to reinvent the objects of the case. The case presented a pair of obvious and difficult threshold questions that she clearly wished to avoid. First, there was the question of a president's inherent authority to unilaterally declare a citizen to be an enemy combatant and thereby strip him of his constitutional rights. Second, there was the related question of whether the "war on terrorism" declared by the president could trigger such unilateral authority. From the outset of her decision, O'Connor establishes that she will not address either of those questions. The only way to avoid the knotty issue of the president's inherent authority and the issue of what is truly meant by a declared war would be to find that Congress actually gave the president the authority over such enemy combatants. After all, 18 U.S.C. § 4001(a) clearly states "no citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress."⁸⁸ The only problem is that no such congressional authorization can be found in the plain words or legislative history of the congressional resolution that followed the 9/11 attacks—an omission that was quickly corrected with some impressionistic judicial artistry.

In *Hamdi*, O'Connor was faced with two legal objects to interpret. The first was a clear constitutional provision that mandated that only Congress could suspend habeas corpus.⁸⁹ The second was a federal statute expressly denying the president the right to detain citizens except pursuant to congressional authorization.⁹⁰ O'Connor quickly set aside the restraints of the federal statute by adopting a radically impressionistic interpretation of a third legal object, the Authorization for Use of Military Force, or the "Force Resolution."⁹¹ Congress passed the Force Resolution one week after the 9/11 attacks with the smoke still rising over the World Trade Center. It was a fairly predictable piece of legislation expressing national commitment to hunt down the culprits and affirming the president's authority to do so. The president is specifically authorized, under the Force

⁸⁸18 U.S.C. § 4001(a).

⁸⁹U.S. Const. art I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public safety may require it.')

⁹⁰18 U.S.C. § 4001(a).

⁹¹Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

Resolution, to “use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks” or “harbored such organizations or persons, in order to prevent any future actions of international terrorism against the United States by such nations, organizations or persons.”⁹²

Normally, the generality of the Force Resolution should have produced little difficulty for a jurist faced with a claim of congressional authorization for extreme detention policies. The resolution says nothing about the detention of citizens or even hints at the type of sweeping enemy combatants policies that the administration would eventually advocate. More important, the countervailing language in § 4001(a) is quite clear on the need for specific authorization for such detentions. In enacting the law, Congress repealed a 1950 statute that expressly gave the attorney general the authority to detain individuals who were suspected of espionage or sabotage—the very justification of the Bush enemy combatant policy.⁹³ Congress repealed this law in 1971 in light of the infamous internment of Japanese-American citizens during World War II.⁹⁴ Rather than simply repeal the 1950 statute, however, Congress went further, requiring express congressional authority for any future detentions to protect the nation from “arbitrary executive action, with no clear demarcation of the limits of executive authority.”⁹⁵

Thus, Congress expressly enacted § 4001(a) to avoid the very arguments made in *Hamdi*: The idea that detentions could be based on vague justifications by a president. In light of such a clear and direct statute, the vagueness of the Force Resolution is placed into even sharper relief. This vagueness is further magnified by the fact that, after enacting the Force Resolution, Congress passed the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT ACT),⁹⁶ which expressly limited the detention of aliens to

⁹²*Id.*

⁹³Emergency Detention Act of 1950 (formerly 50 U.S.C. § 811 et seq. (1970 ed.)).

⁹⁴H.R. Rep. No. 92-116, at 2-5 (1971).

⁹⁵H.R. Rep. No. 92-116, at 5; see also *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2654-2657 (2004).

⁹⁶USA PATRIOT ACT of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001) (codified in scattered sections of the United States Code).

no more than seven days without criminal charge or deportation proceedings.⁹⁷ It would be rather odd if Congress intended to allow aliens greater rights than U.S. citizens.⁹⁸

Yet, even without § 4001(a), authority for detentions should have required an express statement in light of the countervailing constitutional values contained in provisions like the Due Process and Suspension Clauses. Such a stretch required not just impressionistic judicial art but extreme impressionism. Citing the phrase, “all necessary and appropriate force,” O’Connor interpreted the Force Resolution as being perfectly clear on the use of detentions against citizens and non-citizens alike:

There can be no doubt that individuals who fought against the United States in Afghanistan as part of the Taliban, an organization known to have supported the al Qaeda terrorist network responsible for the attacks, are individuals Congress sought to target in passing AUMF. We conclude that detention of individuals falling into the limited category we are considering, for the duration of the particular conflict in which they were captured, is so fundamental and accepted an incident to war as to be an exercise of the “necessary and appropriate force” Congress authorized the President to use.⁹⁹

Relying on *Quirin*, O’Connor simply observes that such detentions are part of war-making.¹⁰⁰ Thus, she dismisses the notion that more is required: “[I]t is of no moment that the [Force Resolution] does not use specific language of detention.”¹⁰¹ By insisting that the resolution’s meaning is clear, she gives the impression that she is actually still tracking the language. Yet, her interpretation is vintage impressionism, beginning with the object and then translating its appearance according to her own view of its essential meaning.¹⁰²

⁹⁷8 U.S.C. § 1226a(5) (2000 ed. Supp. I).

⁹⁸This anomaly was addressed skillfully by Justices Souter and Ginsburg in their concurring and dissenting opinion. *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2659 (2004).

⁹⁹*Id.* at 2640.

¹⁰⁰*Id.*

¹⁰¹*Id.* at 2641.

¹⁰²It is the view espoused by another impressionist of language: “When I use a word,” Humpty Dumpty said, in a rather scornful tone, “it means just what I choose it to mean—neither more nor less.” Lewis Carroll, *Through the Looking Glass*, in *The Complete Works of Lewis Carroll* 196 (1939).

To achieve this result in the face of an express countervailing congressional statute, O'Connor not only embraces *Quirin* but reinforces its continuing authority. She notes that "nothing in *Quirin* suggests that [Hamdi's] citizenship would have precluded his mere detention for the duration of the relevant hostilities."¹⁰³ While cases like *Milligan* seem to contradict such sweeping deference to the president, O'Connor stresses that *Quirin* was "a unanimous opinion [that] both postdates and clarifies *Milligan*, providing us with the most apposite precedent that we have on the question of whether citizens may be detained in such circumstances."¹⁰⁴ It is telling that O'Connor would emphasize *Quirin*, the case that most reflects the type of political, impressionist decisionmaking that has characterized her own jurisprudence. Yet the resurrection of *Quirin* without even a hint of concern or correction is distressing. In the Court's checkered history on civil liberties in wartime, *Quirin* stands out as an institutional disgrace. Like the *Hamdi* plurality opinion, it was anything but an example of justices who revealed their "discontent . . . with destiny."¹⁰⁵

In *Hamdi* the Court had an opportunity to expunge the stain of *Quirin*, to show that it could transcend transient fears to protect the Constitution's first principles. Instead, *Hamdi* showed that at least four members—O'Connor, Rehnquist, Kennedy and Breyer—remain willing to ignore both constitutional provisions and clear congressional statutory language to fashion their own preferred balance of individual rights, congressional authority, and presidential power. To this group must be added Justice Thomas, who wrote a dissent that virtually dismisses the Suspension Clause as an inconvenient relic in modern wartime. Indeed, he challenges the authority of courts to play any meaningful role in enemy combatant cases.¹⁰⁶

¹⁰³Hamdi, 124 S. Ct. at 2640.

¹⁰⁴*Id.* at 2643.

¹⁰⁵Andre Breton, *Surrealist Manifesto* 10 (1924).

¹⁰⁶A jurist who had often defined himself as faithful to the Constitution and its text, Thomas sets aside both language and tradition to accommodate the administration's demands in *Hamdi*:

Undeniably, Hamdi has been deprived of a serious interest, one actually protected by the Due Process Clause. Against this, however, is the Government's overriding interest in protecting the Nation. If a deprivation of liberty can be justified by the need to protect a town, the protection of the Nation, *a fortiori*, justifies it.

Hamdi, 124 S. Ct. at 2685.

In addition to his extreme view of inherent executive authority, Thomas expands on a long and questionable line of cases expressing institutional incompetence as a basis for extreme deference.¹⁰⁷ Yet even with such cases, Thomas' level of judicial deference to unilateral executive authority has not been seen since the 1627 *Case of the Five Knights*.¹⁰⁸ It is impossible to maintain a doctrine of separation of powers if the Court systemically yields by voluntary concession what was given by constitutional design.

Once the plurality broke from the clarity of the legal objects, the impressionist style freed them in the remainder of the opinion from any need for clarity or specificity. The first natural question concerns the meaning of the category "enemy combatants" for future cases. The plurality expressly refuses to grapple with that question, simply noting in a footnote that "[t]he legal category of enemy combatant has not been elaborated upon in great detail. The permissible bounds of the category will be defined by the lower courts as subsequent cases are presented to them."¹⁰⁹ And despite the fact that citizens have been detained without access to courts or counsel, the plurality feels no compulsion to define the scope of the detention authority, even as upholds the authority as a legal principle.

The second obvious question concerns the scope of the due process that must be given accused enemy combatants. The plurality, to its credit, rejects the absolute authority asserted by President Bush.¹¹⁰

¹⁰⁷*Id.* at 2674 ("The plurality utterly fails to account for the Government's compelling interests and for our own institutional inability to weigh competing concerns correctly."); see generally Turley, *Pax Militaris*, *supra* note 18 (discussing the questionable foundation for institutional incompetence rationales).

¹⁰⁸In that case, the King's Bench found that defendants were entitled to habeas review but deferred on the legality of detention—a ruling that led to reforms in Parliament. *Darnel's Case*, 3 How. St. Tr. 1 (K.B. 1627).

¹⁰⁹*Hamdi*, 124 S. Ct. at 2642 n.1 (Thomas, J., dissenting).

¹¹⁰O'Connor addresses the separation-of-powers arguments raised by the president rather than the threat posed by yielding to the president on the scope of the due process entitled to a citizen accused of being an enemy combatant. On the government's separation of powers argument, she profoundly states:

[W]e necessarily reject the Government's assertion that separation of powers principles mandate a heavily circumscribed role for the courts in such circumstances. Indeed, the position that the courts must forgo any examination of the individual case and focus exclusively on the legality of the broader detention scheme cannot be mandated by any reasonable view of separation of powers, as this approach serves only to *condense* power into a single branch of govern-

Specifically, it states that the approach of the Fourth Circuit (and the Justice Department) could be “easily rejected.”¹¹¹ Thus, the Court insists that accused enemy combatants are entitled to judicial review and access to counsel. When the specific process is addressed, however, the plurality adopts a standard that is ready-made for judicial impressionism: *Mathews v. Eldridge*.¹¹² A case that dealt with disability benefits rather than core issues of separation of powers and individual rights, *Mathews* gave the Court a license to use its own translation of rights in light of other contemporary concerns and issues: “*Mathews* dictates that the process due in any given instance is determined by weighing ‘the private interest that will be affected by the official action’ against the Government’s asserted interest, ‘including the function involved’ and the burdens the Government would face in providing greater process.”¹¹³ After adopting this broad “balancing test,” the Court proceeds to issue a standard that is so general and prosaic that it is virtually unintelligible on a practical level. The Court holds that the Constitution protects the right of “a citizen-detainee . . . to challenge his classification, and a fair opportunity to rebut the Government’s factual assertions before a neutral decisionmaker.”¹¹⁴ In case this standard were not vague enough, O’Connor adds presumptions and accommodations for the government:

[T]he exigencies of the circumstances may demand that, aside from these core elements, enemy combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict. Hearsay, for example, may need to be accepted as the most reliable

ment. We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation’s citizens.

Hamdi, 124 S. Ct. at 2650.

¹¹¹*Id.* at 2644.

¹¹²424 U.S. 319 (1976). Justice Scalia correctly criticizes the use of this standard in his dissenting opinion: “Whatever the merits of this technique when newly recognized property rights are at issue (and even there they are questionable), it has no place where the Constitution and the common law already supply an answer.” Hamdi, 124 S. Ct. at 2672.

¹¹³Hamdi, 124 S. Ct. at 2626 (quoting *Mathews v. Eldridge*, 424 U.S. at 33).

¹¹⁴124 S. Ct. at 2649.

available evidence from the Government in such a proceeding. Likewise, the Constitution would not be offended by a presumption in favor of the Government's evidence, so long as that presumption remained a rebuttable one and fair opportunity for rebuttal were provided. Thus, once the Government puts forth credible evidence that the habeas petitioner meets the enemy-combatant criteria, the onus could shift to the petitioner to rebut that evidence with more persuasive evidence that he falls outside the criteria. A burden-shifting scheme of this sort would meet the goal of ensuring that the errant tourist, embedded journalist, or local aid worker has a chance to prove military error while giving due regard to the Executive once it has put forth meaningful support for its conclusion that the detainee is in fact an enemy combatant.¹¹⁵

Regarding the forum for such a hearing, O'Connor once again favors the broad-brush technique, stating simply that "[t]here remains the possibility that the standards we have articulated could be met by an appropriately authorized and properly constituted military tribunal."¹¹⁶

O'Connor's insistence that "the Constitution would not be offended" by such a proceeding is conceivable only if one has redefined that legal object into a new judicial form. The plurality succeeded in creating a procedure designed to (1) achieve minimal due process, (2) eliminate core evidentiary protections, and (3) shift the burden to the defendant to essentially "prove the negative" of not being an enemy combatant once a perfunctory showing is made. To say that such a process does not offend the Constitution requires the Court's own unique community standard of the constitutionally obscene.

Despite all of this, it must be said that *Hamdi* does show an institutional improvement since *Quirin*. This was a plurality decision, after all; there are members of this Court who are unwilling to adopt O'Connor's opportunistic and impressionistic methodology. Indeed, the honor of the Court as an institution was upheld in dissent by Justices Scalia and Stevens. In his dissent, Scalia takes as his legal object the Suspension Clause and, rather than reconstruct it, uses

¹¹⁵*Id.*

¹¹⁶*Id.* at 2651.

its clear meaning to structure his interpretation.¹¹⁷ For Scalia and Stevens, the arrest of a citizen engaged as a member of an enemy force requires a charge under a criminal statute, such as treason, in the absence of a congressional suspension of habeas corpus.¹¹⁸ The dissent is a model of classic judicial form: honoring the clear lines of the Constitution and allowing history to inform us of the reasons for those lines. To use the earlier Wyeth example of *Winter 1946*, we learn about the reason the boy is running without changing the image of the boy.

Where Scalia and Stevens fail is not in their methodology or conclusion, but in their effort to accommodate rather than repudiate *Quirin*. Scalia notes that “the case was not this Court’s finest hour,” a unique (albeit fleeting) recognition of *Quirin*’s problems.¹¹⁹ Scalia

¹¹⁷Scalia also takes a justified, trademark swipe at the plurality:

There is a certain harmony of approach in the plurality’s making up for Congress’s failure to invoke the *Suspension Clause* and its making up for the Executive’s failure to apply what it says are needed protections—an approach that reflects what might be called a Mr. Fix-it Mentality. The plurality seems to view it as its mission to Make Everything Come Out Right, rather than merely to decree the consequences, as far as individual rights are concerned, of the other two branches’ actions and omissions The problem with this approach is not only that it steps out of the courts’ modest and limited role in a democratic society; but that by repeatedly doing what it thinks the political branches ought to do it encourages their lassitude and saps the vitality of government by the people.

Id. at 2673.

¹¹⁸Among the sources supporting this obvious reading of the Constitution is an interesting exchange between Jefferson and Madison on the meaning of and need for a Suspension Clause. Jefferson wrote:

Why suspend the Hab. Corp in insurrections and rebellions? The parties who may be arrested may be charged instantly with a well-defined crime. Of course, the judge will remand them. If the publick safety requires that the government should have a man imprisoned on less probable testimony in those than in other emergencies; let him be taken and tried, retaken and retried, while the necessity continues, only giving him redress against the government for damages.

13 Papers of Thomas Jefferson 442 (July 31, 1788) (J. Boyd ed., 1956). As noted by Scalia and Stevens, such sources reflect a clear understanding supporting the clear text that the government has two and only two options in cases like *Hamdi*: a criminal charge in federal court or a request for suspension from Congress. *Hamdi*, 124 S. Ct. at 2667 (Scalia, J., dissenting).

¹¹⁹*Hamdi*, 124 S. Ct. at 2669.

then stumbles when he tries to distinguish the case on the ground that “it was uncontested that the petitioners were members of enemy forces. They were ‘admitted enemy invaders.’”¹²⁰ O’Connor correctly chastises the dissent on the relevance of such a concession in a system “in which the only options are congressional suspension of the writ of habeas corpus or prosecution of treason or some other crime.”¹²¹ Moreover, the statement is factually wrong. While the record before the Court in *Quirin* did indicate such concessions by all of the accused (and, as previously noted, this was curiously affirmed by defense counsel), that was not the case. Again, two of the men never intended to engage in sabotage and were responsible for revealing the operation. The fact that the record was false was relevant to the need for a true hearing on the status of the men—a fact that Scalia could have included as a matter of judicial notice. Notwithstanding their failure to repudiate *Quirin*, however, Scalia and Stevens remained the most faithful to the legal object and can be credited with refusing to untether their decision from the text.

Justices Souter and Ginsburg also showed greater attention to the Constitution and the other legal sources in their concurring and dissenting opinion, lashing the plurality for its failure to give force to the express statement of Congress in § 4001(a) and masterfully rebutting the plurality’s reinvention of the language of the Force Resolution.¹²² And they challenge the plurality’s presumption in favor of the government in such cases by returning to first principles and the separation of powers:

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 the 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 liberty on the way to victory; the responsibility for security will naturally

¹²⁰*Id.* at 2670 (quoting *Ex parte Quirin*, 317 U.S. 1, 47 (1942) (emphasis in original)).

¹²¹124 S. Ct. at 2643.

¹²²*Id.* at 2654–56.

amplify the claim that security legitimately raises. A reasonable balance is more likely to be reached on the judgment of a different branch, just as Madison said in remarking that “the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other—that the private interest of every individual may be a sentinel over the public rights.”¹²³

Given such clear and powerful language, it is doubly distressing to see Souter and Ginsburg stumble in the specific standards and their ultimate conclusion. First, they partially embrace *Quirin* and vaguely hint at possible support for its extreme application: “[T]he United States may detain captured enemies, and *Ex parte Quirin* . . . may perhaps be claimed for the proposition that the American citizenship of such a captive does not as such limit the Government’s power to deal with him under the usages of war.”¹²⁴ Whatever this “may perhaps be claimed” language means, it is clear that Souter and Ginsburg are not repudiating but, rather, reconciling their opinion with *Quirin*. More important, Souter accepts the ad hoc due process measures outlined by the plurality on the basis that it “will allow Hamdi to offer evidence that he is not an enemy combatant, and he should at the least have the benefit of that opportunity.”¹²⁵ But, Souter then proceeds to say, “I do not mean to imply agreement that the Government could claim an evidentiary presumption casting the burden of rebuttal on Hamdi . . . or that an opportunity to litigate before a military tribunal might obviate or truncate enquiry by a court on habeas.”¹²⁶ This ending is both confusing and unworthy of Souter and Ginsburg. It will remain a matter of debate just why they agreed to concur with the plurality rather than simply dissent. Their opinion remains a freakishly divided piece, part classic and part impressionistic. It would be best-captioned an “unfinished work” of Souter except that he allowed it to be published.

Hamdi should become a textbook example of the opportunistic styles of the Supreme Court and, in the case of Justices Scalia and Stevens, the lingering potential of members of the Court to fulfill

¹²³*Id.* (quoting the Federalist No. 51, at 349 (James Madison) (J. Cooke ed., 1961)).

¹²⁴124 S. Ct. at 2657 (emphasis added).

¹²⁵*Id.* at 2660.

¹²⁶*Id.*

the vaunted purposes of that institution as a guarantor of individual liberty. Unfortunately, as the *Rasul* opinion shows, at least four or five members have continued a long history of concessions to presidents in the national security context.¹²⁷ With the adoption of the *Mathews* test, the *Hamdi* Court has produced the potential for even greater concessions. In the play, *A Man for All Seasons*, an associate of Sir Thomas More criticized his tendency to yield to the demands of friends:

My master Thomas More would give anything to anyone. Some say that good and some that that's bad, but I say he can't help it—and that's bad—because some day someone's going to ask him for something that he wants to keep; and he'll be out of practice.¹²⁸

When it comes to civil liberties and due process, the Supreme Court has proven an easy touch for the executive branch and, while sharing More's giving personality, has lacked his allegiance to core principles. While declining to give the president his claim of absolute authority, *Hamdi* reflected this predisposition to give rather than to withhold from the chief executive. As such cases mount, one fears that when the Court majority finally decides that there is something it wants to keep in wartime, it will discover it is "out of practice," with no precedent to easily withhold what is demanded.

B. *Padilla and Pointillism*

In *Hamdi* and *Padilla* the administration was advancing some of its most extreme interpretations of inherent presidential powers in the area of national security. President Bush asserted the right to unilaterally designate a citizen to be an enemy combatant and then strip him of his constitutional rights, including his access to courts and counsel. As noted earlier, Jose Padilla presented the most difficult case for the administration—a citizen arrested not on a "hot" battlefield like *Hamdi* but at O'Hare International Airport. Even if the accounts of the administration are correct and Padilla was pursuing potential terrorist targets, he was indistinguishable from a host of criminal defendants indicted and tried under the criminal code for terrorist activities. He claimed innocence, but the president

¹²⁷*Rasul v. Bush*, 124 S. Ct. 2686, 2701 (2004) (Scalia, J., dissenting).

¹²⁸Robert Bolt, *A Man for All Seasons*, act 1, sc. 2 (Methuen Drama 1995).

declared him an enemy combatant and refused to give him access to courts or counsel to prove his innocence. If there were ever an opportunity for a clear and classic interpretation of the Constitution, *Rumsfeld v. Padilla*¹²⁹ was the case for it.

The Great Writ remains the touchstone of a free society, the quintessential protection of a society committed to the rule of law.¹³⁰ In recognition of its importance, the Supreme Court has traditionally strived to resist its denial on technical grounds. Indeed, the Court has “consistently rejected interpretations that would suffocate the writ in stifling formalisms or hobble its effectiveness with the manacles of arcane and scholastic procedural requirements.”¹³¹ The result is a litany of past cases in which the Court granted exceptions to hear flawed habeas actions.¹³² Although there was disagreement over the likely outcome of a decision on the merits, it was widely assumed that, given the gravity of the case, the Court would look beyond the jurisdictional and venue errors of the original Padilla filing—which sued Secretary of Defense Rumsfeld in New York. Instead, five justices ordered Padilla’s case dismissed without prejudice because he sued Rumsfeld rather than Commander Melanie Marr, the commander of the brig in which Padilla is being held.¹³³ Likewise, the Court found that the Southern District of New York was not the proper federal district in which to bring the action. Obviously, those objections are technically correct, and the defense clearly blundered in the early fashioning of the case. The longer question, however,

¹²⁹*Supra* note 2.

¹³⁰Justice Story wrote of the Great Writ in such terms:

It is . . . justly esteemed the great bulwark of personal liberty; since it is the appropriate remedy to ascertain, whether any person is rightfully in confinement or not, and the cause of his confinement; and if no sufficient ground of detention appears, the party is entitled to his immediate discharge. This writ is most beneficially construed; and is applied to every case of illegal restraint, whatever it may; for every restraint on a man’s liberty is, in the eye of the law, an imprisonment, wherever may be the place or whatever may be the manner, in which the restraint is effect.

3 Joseph Story, *Commentaries on the Constitution* 1333–1336 (1883).

¹³¹*Hensley v. Municipal Court*, 411 U.S. 345, 350 (1973); see also *Rumsfeld v. Padilla*, 124 S. Ct. 2711, 2729 (2004) (Stevens, J., dissenting).

¹³²See, e.g., *Braden v. 30th Judicial Circuit Court*, 410 U.S. 484, 495 (1973); *Ex parte Endo*, 323 U.S. 283 (1944); see also *Padilla*, 124 S. Ct. at 2727 (Kennedy, J., concurring).

¹³³*Padilla*, 124 S. Ct. at 2724.

is whether such errors justified the dismissal of the action under these circumstances. Chief Justice Rehnquist insisted that Padilla's case is "not unique in any way" and the government "did not attempt to hide from Padilla's lawyer where it had taken him."¹³⁴

That portrayal of Padilla's case was overtly evasive and artificial. The Court seemed to go out of its way to focus on the most insular procedural facts while ignoring the larger picture. To extend the earlier artistic analogy, the Rehnquist opinion read like a type of judicial pointillism. Georges Seurat made the pointillist style famous with his masterpiece *A Sunday in the Park on the Island of La Grande Jatte*, a massive picture composed of an estimated 3,346,000 individual dots. In some ways, pointillism is a highly deceptive style of painting. A precursor to more abstract art, pointillism retains a narrative object, depicting the true image in a slightly idealized fashion. Yet, as one draws closer, the picture is lost and one finds a series of individual dots. Thus, one requires distance to achieve the effect of "optical mixing" in which the colors and objects are fully apparent. Rehnquist takes the style in reverse. He reduces a case of sweeping importance to individual legal dots and then forces the attention of the Court to the smallest possible dot. The larger picture is apparent only when one stands back and contemplates the authoritarian character of the powers claimed by President Bush, or the deprivation of the citizen's basic liberties for almost two years. Rehnquist focuses instead on the caption of the case, the smallest dot.

By focusing on the smallest dot, Rehnquist avoids the broader pictures of separation-of-powers issues.¹³⁵ In holding a citizen for almost two years without charge or trial, President Bush was asserting supremacy over both legislative and judicial authority. Moreover, this usurpation of authority was done for the worst of possible

¹³⁴*Id.* at 2721.

¹³⁵Chief Justice Rehnquist has long been thought to hold the most extreme view of inherent presidential power of anyone on the Court—at least before Justice Thomas' dissent in *Hamdi*. Rehnquist had previously stated that aspects of *Korematsu* were rightly decided and had criticized the inclination of civil libertarians to resolve disputes by favoring liberty interests over governmental interests:

In any civilized society the most important task is achieving a proper balance between freedom and order. In wartime, reason and history both suggest that this balance shifts to some degree in favor of order—in favor of the government's ability to deal with conditions that threaten the national well-being. It simply cannot be said, therefore, that in every conflict between individual liberty and governmental authority the former should prevail. And if we feel

reasons under the Constitution: to elicit information from a suspect.¹³⁶ Contrary to Rehnquist's account, the government did not tell Padilla's lawyer where he was held. It is unclear what constitutes the hiding of a prisoner, but Padilla was clearly being held incommunicado, and his location was discovered only through the media.¹³⁷ The government claimed the right to move Padilla secretly and unilaterally. As an enemy combatant under the Bush policy, Padilla's location was virtually arbitrary since he was held and interrogated at the whim of the chief executive. Thus, the Court's refusal to see a basis for an exception in such a case appears more an act of willful blindness than admirable restraint, particularly given the Court's past willingness to grant exceptions in less significant cases—not to mention its willingness this term to blissfully set aside a host of

free to criticize court decisions that curtail civil liberty, we must also feel free to look critically at decisions favorable to civil liberty.

William H. Rehnquist, *All the Laws But One: Civil Liberties in Wartime* 222–23 (1998). While few would argue that civil liberties should always trump national security claims, there are solid constitutional arguments for a presumption in favor of civil liberties. See generally Randy Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* (2004). Moreover, this quote does suggest that Rehnquist, like O'Connor, is inclined toward a fluid balancing test that leaves the Court as the arbiter of such conflicts.

¹³⁶There was surprisingly little discussion, except in Justice Stevens' dissent, of the open motivation of the government to use such long-term, isolated detention as a method of interrogation. The flagrant use of unconstitutional measures for interrogation clearly reflects an ends-justifies-the-means approach in the Bush administration that seems to have contributed to such abuses as the torture scandal at Abu Ghraib prison and allegations of homicides in interrogation. It is remarkable that the administration's repeated references to the benefits of such interrogations (including in its public press conference on *Padilla* before the ruling) did not warrant greater attention from the Court. Instead, there remains an appearance that, at least for some of the members, such abuses are less reprehensible when done for the "right reason." It is precisely what Justice Louis Brandeis cautioned against in his famous warning on the inherent dangers to liberty:

Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.

Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting). It is a warning that seems prophetic for both the policies of the current administration and the unguarded attitude of a majority of the current Supreme Court.

¹³⁷*Padilla*, 124 S. Ct. at 2732 (Stevens, J., dissenting).

procedural barriers in the case of Vice President Dick Cheney.¹³⁸ In *Cheney v. United States District Court*¹³⁹ the majority had little difficulty facing the separation of powers issue; it didn't focus on the insular procedural dots, as it did in *Padilla*. To the contrary, Kennedy (with Rehnquist joining) repeatedly brought the focus back from the dots to the broader picture:

These separation-of-powers considerations should inform a court of appeals' evaluation of a mandamus petition involving the President or the Vice President. Accepted mandamus standards are broad enough to allow a court of appeals to prevent a lower court from interfering with a coequal branch's ability to discharge its constitutional responsibilities

. . . A party's need for information is only one facet of the problem. An important factor weighing in the opposite direction is the burden imposed by the discovery orders. This is not a routine discovery dispute. The discovery requests are directed to the Vice President and other senior Government officials . . . to give advice and make recommendations to the President This Court has held, on more than one occasion, that "[t]he high respect that is owed to the office of the Chief Executive . . . is a matter that should inform the conduct of the entire proceeding, including the timing and scope of discovery," . . . and that the Executive's "constitutional responsibilities and status [are] factors counseling judicial deference and restraint" in the conduct of litigation against it.¹⁴⁰

That broader picture was omitted when the interest at stake was that of an individual—and, by extension, all citizens subject to a unilateral enemy combatant determination. Whereas a discovery case against the vice president is clearly "not a routine discovery dispute," *Padilla*'s case was "not unique in any way." Whereas mandamus rules were "broad enough" to hear the merits of Cheney's claims, there was no special reason to grant an exception to a simple citizen languishing for nearly two years in a Navy brig. Rather than address those issues, Rehnquist raised the spectre of

¹³⁸*Cheney v. U.S. Dist. Court for the Dist. of Columbia*, 124 S. Ct. 2576 (2004).

¹³⁹*Id.*

¹⁴⁰*Id.* at 2589–2590.

“rampant forum shopping” by habeas prisoners¹⁴¹ if an exception were granted—despite the fact that the Court could easily craft this exception so narrowly as to avoid any such floodgate of litigation. While the Court in *Padilla* and *Hamdi* repeatedly refers to the need to offer deference and support to a president in wartime, it does not see the countervailing exigency in protecting the rights of citizens during wartime. History has shown that citizens are at greatest risk of abuse during wartime, but there is no countervailing urgency to support their interests in cases like *Padilla*.

In his dissenting opinion, Justice Stevens excoriates the majority for its refusal to hear the merits of a case of such “profound importance.”¹⁴² To refuse on such technical grounds begs the question of why, when the Court can grant an exception, it chose not to do so. Stevens notes that it is rather hard to maintain a “bright line rule” rationale in an area riddled with exceptions.¹⁴³ Even without a single past exception, however, the *Padilla* case would justify such a measure of discretion—particularly when, as Stevens points out, the government was preventing access to courts and counsel to assist in unlawful interrogations.

[Executive detention] may not . . . be justified by the naked interest in using unlawful procedures to extract information. Incommunicado detention for months on end is such a procedure. Whether the information so procured is more or less reliable than that acquired by more extreme forms of torture is of no consequence. For if this Nation is to remain true to the ideals symbolized by its flag, it must not wield the tools of tyrants even to resist an assault by the forces of tyranny.¹⁴⁴

Stevens correctly labels the policies used against *Padilla* for what they are: tools of tyranny. Clearly, many Framers would have viewed such measures in the same terms—regardless of the motivation or promises of self-restraint in the use of unchecked authority.

¹⁴¹Ironically, while the Justice Department emphasized this danger, it was silent on its own record of blatant forum shopping, of moving defendants like John Walker Lindh, Yaser Hamdi, and Zacarias Moussoui to the U.S. Court of Appeals for the Fourth Circuit because of its reputation for extreme deference to the government and political conservatism.

¹⁴²*Padilla*, 124 S. Ct. at 2729 (Stevens, J., dissenting).

¹⁴³*Id.* at 2732.

¹⁴⁴*Id.* at 2735.

Blackstone once observed that if “the preservation of . . . personal liberty . . . were left in the power of any, the highest magistrate to imprison arbitrarily whoever he or his officers thought proper, . . . there would soon be an end of all other rights and immunities.”¹⁴⁵ Blackstone’s admonition could not have been more relevant and compelling than in the case of Jose Padilla. The majority’s effort to downplay the importance of the case, or its sweeping implications, is nevertheless impressive. It takes remarkable concentration to stare at this single pointillist dot and not allow the overall picture to enter one’s peripheral vision. After all, these same justices were willing to circumvent clear federal statutes and the Suspension Clause in *Hamdi* to adopt a more flexible accommodation of the president. Likewise, in the *Cheney* case, these same justices overcame procedural barriers to accommodate the interests of the vice president.¹⁴⁶ In such cases, these justices proudly highlighted their constitutional *realpolitik* in balancing interests and creating ad hoc procedures. But, when a citizen has been imprisoned for nearly two years in flagrant violation of the Constitution, the Court can find no basis to grant a procedural exception to protect not just his liberty but the integrity of the tripartite system itself. In *Padilla*, the Court came face to face with the raw use of autocratic power and walked past it, without comment, to rule on an insular procedural point. It was a failure of the highest order for a court designed as the final line of defense against governmental abuse.

C. *A Question of Control: Rasul and the Near Extraterritorial Application of U.S. Constitutional Law*

The final case of the trilogy, *Rasul v. Bush*,¹⁴⁷ presented a different claim of authority on the part of the president. Like *Hamdi* and *Padilla*, *Rasul* involves a claim of unilateral and absolute authority—a claim so extreme that it threatened the balance of power in our tripartite system. In *Rasul*, however, the president was in a far stronger position because the individuals were neither U.S. citizens nor held in the United States. In establishing the prison camp at Guantanamo Bay, Cuba, the government clearly sought not just

¹⁴⁵1 W. Blackstone, Commentaries on the Laws of England 132.

¹⁴⁶*Cheney v. U.S. Dist. Court for the Dist. of Columbia*, 124 S. Ct. 2576, 2593 (2004).

¹⁴⁷See *supra* note 3.

added security from foreign terrorists but also added protection from federal jurists. President Bush sought to create his own prison system, with its own standards, just beyond our borders. As such, this action represented one of the greatest threats to the independent judicial system since *Marbury v. Madison*.¹⁴⁸ If the president could operate such an alternative legal system, he would have a kind of “railroad switch” with which to control which cases went to the federal courts and which went to his own court system.

Indeed, President Bush had already displayed a taste for such plenary power. Zacarias Moussaoui is a foreign national who was arrested in the United States as an alleged al-Qaeda terrorist.¹⁴⁹ He was sent to federal court for trial. Jose Padilla is a U.S. citizen arrested in the United States as an alleged al-Qaeda terrorist. He was denied access to counsel or the courts. Richard Reid is a foreign citizen arrested in the United States as an admitted al-Qaeda member.¹⁵⁰ He was given access to counsel and the courts. Hundreds of other suspected terrorists were sent to Guantanamo Bay and denied access to federal court. Yaser Hamdi is a citizen who was sent to Guantanamo Bay, but was then sent to the United States. He was denied access to counsel or the courts. John Walker Lindh is a citizen arrested, like Hamdi, on a battlefield, but then was given access to counsel and the courts.¹⁵¹ These cases reflect a Caesar-like power in the president in which fundamental rights under the Constitution become a matter of pure discretion.¹⁵² Central to this power is the maintenance of a parallel alternative judicial system that can be utilized at the will or whim of the president.

Because of the location of the prison and the nationality of the detainees, *Rasul* was admittedly a more difficult case than either *Padilla* or *Hamdi*. Although I have called for greater extraterritorial

¹⁴⁸5 U.S. 137 (1803).

¹⁴⁹Jerry Markin, *Terror Case Is Cleared For Trial*, *Washington Post*, April 23, 2004, at A1.

¹⁵⁰*Bomb Suspect Offers Guilty Plea*, *Washington Post*, October 3, 2002, at A1.

¹⁵¹See Katherine Q. Seelye, *The American in the Taliban; Regretful Lindh Gets 20 Years in the Taliban Case*, *New York Times*, Oct. 5, 2002, at A1.

¹⁵²Jonathan Turley, *Naked Power, Arbitrary Rule*, *Los Angeles Times*, July 21, 2003, at 14.

application of U.S. laws in statutory¹⁵³ and constitutional cases¹⁵⁴ and criticized the presumption against extraterritorial application, there are compelling arguments that can be made against such extraterritoriality. Moreover, a president's inherent authority is at its apex in the case of actions taken abroad in the name of foreign policy or national security. If a president has authority to order the assassination of a foreign national abroad, a detention or trial before execution could be viewed simply as a lesser power included in the greater.¹⁵⁵ *Rasul* seemed to pit the authority of all three branches in a zero-sum struggle on the question of authority over noncitizen detainees held abroad.

The two Australian and twelve Kuwaiti citizens who were plaintiffs in *Rasul* forced the Court to confront whether the president has the right to bar access to counsel and the courts for foreign nationals indefinitely detained. The Supreme Court was not prepared to answer such questions, however. Instead, Justice Stevens structured

¹⁵³See generally Jonathan Turley, "When in Rome": Multinational Misconduct and the Presumption Against Extraterritoriality, 84 Nw. U. L. Rev. 598 (1990); Jonathan Turley, Transnational Discrimination and the Economics of Extraterritorial Regulation, 70 B.U. L. Rev. 339 (1990).

¹⁵⁴Turley, *Tribunals and Tribulations*, *supra* note 18.

¹⁵⁵The answer to such questions may be found in the very fact of long-term detention. A president is sometimes required to issue special orders to kill a foreign national as a matter of urgency and immediate threat to the United States. President Bush would and could not execute such orders for the hundreds of prisoners being detained, particularly given the relative paucity of evidence that some of these detainees are actually unlawful combatants. Once detained, the claim of exigency, while not eliminated entirely, is certainly reduced. This point was raised by Justice Kennedy in his concurring opinion:

Indefinite detention without trial or other proceeding presents altogether different considerations. It allows friends and foes alike to remain in detention. It suggests a weaker case of military necessity and much greater alignment with the traditional function of habeas corpus. Perhaps, where detainees are taken from a zone of hostilities, detention without proceedings or trial would be justified by military necessity for a matter of weeks; but as the period of detention stretches from months to years, the case for continued detention to meet military exigencies becomes weaker.

Rasul v. Bush, 124 S. Ct. 2686, 2700 (2004).

the case as a strictly statutory matter. Distinguishing the decision in *Johnson v. Eisentrager*,¹⁵⁶ a case that reviewed and rejected *constitutional* claims, Stevens insisted that *Rasul* raised the alternative *statutory* basis for such claims.¹⁵⁷ As a matter of *statutory* authority, Stevens adopted a broad interpretation of the authorization to hear cases “within their respective jurisdictions” to rule that the Guantanamo Bay prisoners were entitled to judicial review under 28 U.S.C. § 2241. Emphasizing *Braden v. 30th Judicial Circuit Court of Kentucky*¹⁵⁸ as the controlling precedent, Stevens read the terms as allowing the exercise of jurisdiction as long as “the custodian can be reached by service of process.”¹⁵⁹ While there will remain a roaring debate over true precedent before *Rasul*,¹⁶⁰ Stevens adopted a clear test as to future petitions for review, a test that focuses not on the location of the custody but on the custodian.

This clarity was quickly lost, however, when Stevens attempted to conform such a view to the Court’s general presumption against extraterritoriality. Stevens resolved the tension, but insisted that *Rasul* was not an extraterritorial but rather a strictly territorial case. Since Guantanamo Bay was a military base under the *control* of the United States, he construed the locus to be territory *of* the United States.¹⁶¹ Like the opinion of Souter and Ginsburg in *Hamdi*, the opinion of Stevens in *Rasul* was clear (albeit controversial) until the final pages, at which point Stevens shifted to a convenient rationale. The opinion seemed to confine the new ruling to the facts of Guantanamo Bay, suggesting that, in the absence of the fairly unique language of the 1903 lease agreement, the question remains open.¹⁶² At the same time, when he declined to speculate about “[w]hatever traction the presumption against extraterritoriality might have in other contexts,”¹⁶³ Stevens seemed to suggest that the *Rasul* decision

¹⁵⁶339 U.S. 763 (1950).

¹⁵⁷*Rasul*, 124 S. Ct. at 2694.

¹⁵⁸410 U.S. 484 (1973).

¹⁵⁹*Rasul*, 124 S. Ct. at 2695.

¹⁶⁰*Id.* at 2703 (“To do so neatly and cleanly, it must either argue that our decision in *Braden* overruled *Eisentrager*, or admit that it is overruling *Eisentrager*.”) (Scalia, J., dissenting).

¹⁶¹*Id.* at 2691.

¹⁶²*Id.* at 2696.

¹⁶³*Id.*

may indeed be expanded. Such judicial minimalism can be easily justified on the institutional preference to rule on the narrowest possible ground, but it seems more the product of a deeply divided Court. *Rasul* was a case calling for a holistic and complete decision. It makes little sense to focus on the lease agreement if the test is one of control over the custody of an individual. Whether a detainee is held at the Bagram Air Base in Afghanistan or at Camp X-Ray at Guantanamo Bay, the status of the custodian does not appear materially different.

Rasul was framed not by what was included in the opinion but by what was consciously omitted. There is no analysis of the fundamental implications for the separation-of-powers doctrine. The Court is silent on the threat to a tripartite system if the president can create a fully functioning independent judicial system just beyond the border.¹⁶⁴ It is silent on the distortion arising from the presumption against extraterritoriality. If Congress did mean for § 2241 to be read expansively so that jurisdiction would follow the custodian, it is unclear why the presumption is even relevant or why it would trump such an intent.¹⁶⁵

With such core issues missing from the case, *Rasul* looks like a Jim Dine painting. Dine's *Self-Portrait* was a picture of the artist's clothing, but he was missing. One was left looking at the suit and

¹⁶⁴Stevens declined to incorporate separation of powers rationales even when pressed by Scalia. Scalia challenged the Court "to explain why our almost categorical rule of *stare decisis* in statutory cases should be set aside in order to complicate the present war, and, having set it aside, to explain why the habeas statute does not mean what it plainly says." *Id.* at 2704. Putting aside the questionable suggestion that hearings would "complicate the present war," one factor that may have influenced the Court to adopt a broader interpretation is the threat posed by the president's policies to separation of powers. Here, the president had forced the issue by capitalizing on a possible gap in federal jurisdiction to create his own alternative judicial system. Absent an express limitation in the statutory language, the extreme assertion of presidential power can inform the Court's statutory interpretation—even if the Court is not deciding on constitutional grounds.

¹⁶⁵As noted in an earlier work, the Court has accepted that the presumption against extraterritoriality is no longer relevant to some types of statutes, particularly antitrust and "market" statutes, Turley, *When in Rome*, *supra* note 153. In the same fashion, the globalization of the war on terror may have made the presumption a legal anachronism. President Bush has repeatedly stressed that borders have little contemporary meaning in the war on terror. See, e.g., Joseph Curl, *You Will Pay a Serious Price, Bush Tells Aggressor Nations*, *Washington Times*, Oct. 18, 2001, at A1.

wondering about the man. This technique makes for intriguing art, but poor law. What was missing in *Rasul* was the Court itself. The case dealt vaguely with hearings and habeas but not the necessary and independent role of the judiciary at a time of war. Once again the Court had succeeded in resolving a dispute, but done little to create a coherent and unified theory of judicial review for foreign nationals held beyond our borders. Stevens completes this picture of omission in his final paragraph:

Whether and what further proceedings may become necessary after respondents make their response to the merits of petitioners' claims are matters that we need not address now. 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.¹⁶⁶

This has now become a standard signature for this divided Court: leaving any and all potentially divisive issues for a later case—and leaving both the detainees and lower courts with years of litigation.¹⁶⁷

¹⁶⁶Rasul, 124 S. Ct. at 2699.

¹⁶⁷This habit has led to massive and avoidable confusion, as in the recent decision in *Blakely v. Washington*, 124 S. Ct. 2531 (2004), that suggested (but did not rule) that the federal guidelines may be unconstitutional in whole or in part—producing national confusion among the circuits and uncertainty as to the status of a significant percentage of federal cases. *United States v. Curtis*, No. 02-16224, 2004 U.S. App. LEXIS 16432 (11th Cir. August 10, 2004) (holding that *Blakely* does not apply to sentences under the Federal Sentencing Guidelines); *United States v. Booker*, 375 F.3d 508 (7th Cir. 2004) (holding that *Blakely* applies to sentences imposed under the Federal Sentencing Guidelines); *United States v. Ameline*, 376 F.3d 967 (9th Cir. 2004) (holding that *Blakely* applies to sentences imposed under the Federal Sentencing Guidelines); *United States v. Mooney*, No. 02-3388, 2004 WL 1636960 (8th Cir. July, 23 2004) (holding the Federal Sentencing Guidelines unconstitutional under *Blakely*); *United States v. Pineiro*, No. 03-30437, 2004 WL 1543170 (5th Cir. July 12, 2004) (holding that *Blakely* does not apply to sentences imposed under the Federal Sentencing Guidelines); and *United States v. Hammoud*, No. 03-4253, 2004 WL 1730309 (4th Cir. Aug. 2, 2004) (en banc) (holding that *Blakely* does not overturn sentences under the Federal Guidelines). This confusion and alarm was so great that a question was certified for the Court to clarify its earlier opinion, by the Second Circuit. See *United States v. Penaranda*, 375 F.3d 238 (2d Cir. 2004) (certifying question of *Blakely's* application to the Supreme Court). As in *Hamdi* and *Rasul*, *Blakely* should be an embarrassing failure of the Court to satisfy the minimal requirement of judicial review—to clarify rather than confuse the legal issues raised by litigants.

There is certainly a value in allowing lower courts to develop such issues before the Supreme Court issues a ruling. However, as in its fatally ambiguous rulings in *Blakely v. Washington*,¹⁶⁸ the failure to give any guidelines to judges inevitably leaves a vacuum of authority and confusion. With hundreds of men deprived of their liberty without judicial review, the Court's inclination to leave such an important question to a later date is a reckless habit.¹⁶⁹ Indeed, the administration has already expanded on the gaps in *Rasul* and *Hamdi* in an attempt to minimize the significance of the decisions—including conducting hearings at Guantanamo Bay that lack basic due process protections.¹⁷⁰

The dissent by Justice Scalia artfully deconstructs the majority opinion and criticizes each effort to brush over conflicting precedent or gaps in analysis. But Scalia also declines to offer substantive analysis on the implications of the Bush policies for the separation of powers, despite his criticism of the constitutional/statutory distinction. Moreover, Scalia does not question the continued relevance of a territorial presumption in the age of global anti-terrorism rules. Finally, Scalia places great emphasis on the different constitutional status of citizens versus non-citizens. This is perfectly consistent with Scalia's dissent in *Hamdi*. In *Hamdi*, O'Connor dismissed the relevance of citizenship for enemy combatants.¹⁷¹ Yet, in *Rasul*, the dissenting justices cite the hypocritical statement of the solicitor general that "citizens of the United States, because of their constitutional circumstances, may have greater rights with respect to the scope and reach of the habeas statute as the Court has or would interpret it."¹⁷² Suddenly, the impressionists of *Hamdi* were reconverted into more classic judicial artists when the latter style served to support the president's anti-terror policies.

¹⁶⁸124 S. Ct. 2531 (2004).

¹⁶⁹This is not to say that this is a recently adopted habit, only an increasing habit. Indeed, in *Youngstown*, Jackson complained that "court decisions are indecisive because of the judicial practice of dealing with the largest questions in the most narrow way." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

¹⁷⁰Melissa Block, Federal Government Files Brief Stating They Believe Guantanamo Bay Detainees Should Not Be Granted Access to Legal Counsel Despite Supreme Court Ruling Allowing Them Court Access (NPR Broadcast, Aug. 3, 2004).

¹⁷¹*Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2640 (2004).

¹⁷²*Rasul v. Bush*, 124 S. Ct. 2686, 2708 (2004) (quoting Transcript of Oral Argument at 40, *Rasul v. Bush*, 124 S. Ct. 2684 (2004) (03-334) (argument of solicitor general)).

Despite these criticisms, it is important to observe that the Stevens and Scalia opinions in *Rasul* were significantly more thoughtful and honest in their analysis than the Court's opinion in *Hamdi*. Moreover, the effort of the Court to extend jurisdiction to the detainees was a corrective measure, albeit on statutory rather than on constitutional grounds. Yet, it is also important not to overplay *Rasul*, *Hamdi*, or *Padilla*. After all, even *Quirin* granted review of the basis for the detention and trial of the saboteurs. Missing are the details that define due process. As the Bush military tribunal proceedings illustrate, it is of little value to have a "hearing" when it is structured to virtually guarantee whatever outcome is demanded by the administration. Indeed, it may be worse, as in *Hamdi*, to grant hearings but allow them to be conducted without basic procedural protections. Such hearings amount to superficial reproductions of a legitimate judicial system—lending an appearance of legitimacy without the substance of true adversarial proceedings. In many ways, proceedings like those being conducted at Guantanamo Bay (or likely to be conducted under the *Hamdi* decision) are the legal version of the Potemkin Village. The legend has it that Prince Grigory Aleksandrovich Potemkin hired artists to create realistic facades of actual villages to give the appearance of progress as Catherine II made her grand tour of Ukraine and the Crimea in 1787. It now appears that detainees are likely to be moved through Potemkin proceedings, where a facade of courts, judges, and rules will hide the lack of substance demanded by fundamental principles of due process.

IV. Conclusion

The analogy of changing methodologies of the Supreme Court to different artistic styles reflects common elements between the law and art. Both are creative and interpretative enterprises. Even more classic narrative artists like Wyeth are engaged in interpretation or translation of their subjects. Artistic works are not photographic pieces but the translation of an object through the lens of an artistic eye. Nevertheless, there are radically different artistic views on how to honor the original object, a spectrum from a more narrative style to complete abstraction. In the same way, legal theories of interpretation spread across a similar spectrum from more narrative to abstract translations. Textualism comes closest to classic schools of painting, where the faithful depiction of the object is at the core of the artistic

effort. Intentionalism comes closest to modern painters like Wyeth who remain largely faithful to the object but allow some interpretative expansion on the object. New theories of legal interpretation like those of hermeneutics come closest to abstract art where the object has the least hold on the creative enterprise. These more abstract theories of interpretation are distinctly reader-centered rather than text-centered and share a certain affinity to the works of artists like Picasso or Kandinsky.

The analogy to these art forms is intended to differentiate between true judicial artistic expression and faux styles adopted for the convenience of the moment. Obviously, the use of this vehicle to examine the trilogy of national security cases reveals a highly negative view of the quality and consistency of the Court's opinions. This is certainly the case with the plurality decision in *Hamdi* and the jurisprudence of Justice O'Connor. However, it reflects something more profound than an admittedly peevish take on the cases. The Supreme Court as an institution has proven to be deeply flawed during these critical times. Moreover, the Court's increasing use of vague opinions is due to a dysfunctional split on the Court that robs any majority or plurality author of the ability to go beyond the most minimalist expression. In my view, this latter problem is due in part to the size of the Court itself. Decisions like *Rasul* reflect the long-standing split on the Court. The Court often (as is shown in all three cases) opts to leave major and relevant questions unresolved to maintain a plurality or a five-justice majority.¹⁷³ The nine-member Court is particularly susceptible to such divisions and produces other negative consequences for the Court.¹⁷⁴ While such sharp divisions would not be eliminated on a nineteen-member court (any more than such divisions are eliminated on courts of appeal), I believe that an expansion of the Court is long overdue and badly needed. The low quality of these decisions should focus attention not just on their implication for detainees but their implication for the institution itself. I submit that it is time to have a good-faith debate about the optimal structure and size of the Supreme Court.

¹⁷³See Jonathan Turley, Justice O'Connor Wields A Mighty Vote, *Los Angeles Times*, July 4, 2002, at A17.

¹⁷⁴See generally Turley, Unpacking the Court, *supra* note 7, at 155.

Putting aside my annual call for an expansion of the Court, the trilogy of national security cases offers reason for both hope and alarm. While Justices Souter and Ginsburg sought, curiously, to join in concurrence with the plurality in *Hamdi* (despite their fundamental disagreement with that decision), there was no blind insistence of unanimity on any possible ground that we saw in *Quirin*. However, these cases reaffirm the fragility of our constitutional rights and the uncertain commitment of the Supreme Court as their final line of defense. There remain four or five justices who seem willing, if not eager, to yield core protections to the exigencies of the moment. It seems tragically similar to Andre Breton's description of abstract artists' "discontent with [their] destiny."¹⁷⁵ The Constitution was designed for this very moment in time; it was designed for that moment when the Court stood in the path of a president seeking tyrannical or autocratic power. Given the natural inclination of the powerful to exceed their limitations, it was a moment that the Framers knew was likely to occur not once but repeatedly through the life of this Republic. In that moment is the destiny of the Court, a moment that defines it and explains the extraordinary steps taken to create it and to protect it as an institution. The refusal to carry out that destiny reflects a corruption of the Court that began long ago in the national security area and persists in such cases as *Hamdi*. Through balancing tests and fluid interpretations of provisions like the Suspension Clause, the Court has been unwilling to be confined by the text and first principles in the Constitution. Instead, it has asserted the right to determine its own destiny, defining a new reality, a constitutional surreality.

¹⁷⁵Andre Breton, *Surrealist Manifesto* 10 (1924).