DOUBLE-CHECKING EXECUTIVE EMERGENCY POWER: LESSONS FROM *HAMDI* AND *HAMDAN*

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I. INTRODUCTION

The Constitution is vague regarding how the respective powers of the various branches blend during national emergencies, such as war. It gives Congress the power to declare war,[1] outfit the military,[2] and set its rules of operation;[3] it gives the President the power to command military forces;[4] and it gives qualified protection for the jurisdiction of the courts.[5] Nevertheless, it largely neglects to describe or specify what the effects of war or other pressing emergencies might be on either the exercise of other governmental powers or the distribution of constitutional authority among the branches. Article I authorizes Congress to suspend the writ of habeas corpus in certain circumstances,[6] but other forms of emergency power, such as the authority to cancel or postpone elections, dissolve the legislature, fill gaps in presidential

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1. *See* U.S. CONST. art. I, § 8, cl. 11 ("The Congress shall have Power . . . [t]o declare War . . . .").

2. *See id.* art. I, § 8, cl. 12 ("The Congress shall have Power . . . [t]o raise and support Armies . . . .").

3. *See id.* art. I, § 8, cl. 14 ("The Congress shall have Power . . . [t]o make Rules for the Government and Regulation of the land and naval Forces . . . .").

4. *See id.* art. II, § 2, cl. 1 ("The President shall be Commander in Chief of the Army and Navy . . . .").

5. *See id.* art. III, § 2, cl. 1 ("The judicial Power shall extend to all Cases . . . arising under this Constitution, the Laws of the United States, and Treaties . . . ."); *id.* art. III, § 2, cl. 2 ("[T]he supreme Court shall have appellate Jurisdiction . . . with such Exceptions, and under such Regulations as the Congress shall make.").

6. *See* U.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."). While this clause does not explicitly vest in Congress the power to suspend the writ, its location in Article I has led to the conclusion that it is Congress, as opposed to the President, which has this power. *See, e.g.*, Hamdi v. Rumsfeld, 542 U.S. 507, 525 (2004) (plurality opinion) (noting Congress has only suspended writ in rarest circumstances); *Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 101 (1807) (noting that suspension is congressional prerogative).

succession, declare martial law, dispense military justice, resort to preventive detention and internment, use extraordinary investigative measures, suspend civil liberties, close the courts, or take other similar measures associated with emergency circumstances, are omitted from the explicit terms of the Constitution.[7] Such powers are left to the more fluid and open domains of implied authority and interbranch interaction that must be derived by extrapolation from the generalities of enumerated power and tempered by the lessons of experience.

Having lived through two wars fought in quick succession on American soil, the Framers were surely well aware of the potential for national emergencies that could interfere with the ordinary functions of civil government.[8] Some had been members of Congress when it was forced to flee Philadelphia, then the de facto capital, under the guns of the advancing British army.[9] Yet they chose to remain largely silent on what, if any, deviations from the normal practices of government should occur in such emergencies, leaving the balance of power to be struck by future practice and experience. This omission was no doubt deliberate, as the subject of explicit emergency powers surely would have torn the Constitutional Convention to shreds. Many of the delegates were highly suspicious of a central government even in peacetime, and they would have put up implacable resistance to suggestions for even temporary grants of extraordinary power to such a government during a national crisis.[10]

7. Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029, 1038 n.19, 1039 n.23 (2004), for an analysis of other nations' constitutional provisions relating to governmental emergency powers. The Polish, Portuguese, and Slovenian Constitutions also provide noteworthy enumerations of protected rights. *Id.* at 1039 n.23. See BRUCE ACKERMAN, BEFORE THE NEXT ATTACK: PRESERVING CIVIL LIBERTIES IN AN AGE OF TERRORISM 77-100 (2006), for an expanded version of his essay with a proposal for more explicit emergency powers for the federal government and a discussion of how these powers operate in other countries.

8. Most of the Framers were either directly experienced or were well aware of the French and Indian War of 1756 to 1763 (known as the Seven Years' War in Europe). Many officers in the Continental army, most notably George Washington, had experience fighting for the British in that war. Of course, all the Framers had some role, either in the Continental army, in Congress, or in state government, during the War of Independence and were well aware of the governmental emergencies that occurred during the war. *See, e.g.*, JOSEPH J. ELLIS, HIS EXCELLENCY: GEORGE WASHINGTON 125-30 (2004) (discussing Washington's dealings with Congress during Revolution); DAVID MCCULLOUGH, JOHN ADAMS 139-63 (2001) (discussing Adams's time in Congress during Revolution); EDMUND S. MORGAN, BENJAMIN FRANKLIN 220-41 (2002) (discussing Franklin's time in Congress during Revolution); WILLARD STERNE RANDALL, ALEXANDER HAMILTON: A LIFE 135-39, 150-60, 230-35 (2003) (discussing Hamilton's experiences with Congress during Revolution); GARY WILLS, JAMES MADISON 19-23 (Arthur M. Schlesinger, Jr. ed., 2002) (discussing Madison's wartime experiences). For example, Thomas Jefferson had particular trouble maintaining the basic functions of government during his term as Governor of Virginia and narrowly eluded capture by the British. JOSEPH J. ELLIS, AMERICAN SPHINX: THE CHARACTER OF THOMAS JEFFERSON 65-66 (1997).

9. Philadelphia was evacuated by Congress and occupied by the British in September of 1777. Congress did not return for nine months. *See, e.g.*, DON HIGGINBOTHAM, THE WAR OF AMERICAN INDEPENDENCE: MILITARY ATTITUDES, POLICIES, AND PRACTICE, 1763-1789, at 178-88, 245-52 (1971) (discussing status of Philadelphia during Revolution).

10. *See, e.g.*, 3 JAMES MADISON, THE WRITINGS OF JAMES MADISON 37-45 (Gaillard Hunt ed., 1902) (debating supremacy of national government); *id.* at 56-61, 79-81 (debating single or multiperson

Consequently, they described executive powers in open terms, enumerated several legislative powers that could be deployed in emergency situations, assured the independence of the judiciary, and hoped for the best in the event of catastrophe. Their underlying assumption was that the government would continue to operate much as it did in peacetime, with the same distributions of power and obligation, and that any deviations from that norm would be at worst temporary, to be worked out among the three branches and ultimately subject to the will of the people.

The American experience has been to give all three branches something to say about emergencies, but to give the President the largest practical hand in dealing with them.[11] The President's primacy in addressing national emergencies rests principally on the chief executive's superior capacity to respond both quickly and decisively, superior access to intelligence about emergent developments, and direct accountability through national election to the whole people of the United States.[12] This view of executive superiority is particularly evident in the wartime precedents of the Supreme Court, especially those from the Civil War and World War II, the two direst emergencies the United States has experienced under its present Constitution. Most (though not all) Supreme Court decisions on emergency power emanating from those periods either avoided direct confrontation with the executive or, when forced to decide, found grounds for supporting extraordinary executive measures.[13] Typically, when affirming executive power, the Court relied on what it deemed to be congressional authorization (or in some cases post hoc ratification) for the executive measures in question.[14] The message appeared to be that what Congress was willing to support, ratify, or at least tolerate, the Court should

executive); *id.* at 120-27 (debating giving national legislature veto power over state laws); *id.* at 170-78, 240-43, 250-53 (debating division of powers between state and federal governments); *see also* THORNTON ANDERSON, CREATING THE CONSTITUTION: THE CONVENTION OF 1787 AND THE FIRST CONGRESS 43-84, 117-72 (1993) (discussing debates listed above).

11. *See, e.g.*, LOUIS FISHER, PRESIDENTIAL WAR POWER 8-9 (2d ed. 2004) (detailing historical drift in war power from balanced approach to emergency powers to more executive-centric modern reality); HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR 67-100 (1990) (discussing history of national security power in America).

12. For a discussion of the advantages of executive action and a defense of unilateral executive use of force, see generally, for example, Robert J. Delahunty & John Yoo, *The President's Constitutional Authority to Conduct Military Operations Against Terrorist Organizations and the Nations that Harbor or Support Them*, 25 HARV. J.L. & PUB. POL'Y 487 (2002), which argues that the President has broad inherent authority for use of force, and Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1 (1993), which discusses these advantages of the executive while arguing for limited inherent authority. For a general discussion on the advantages of the executive, see, for example, THE FEDERALIST NO. 70, at 198 (Alexander Hamilton) (Roy P. Fairfield ed., 2d ed. 1981) which extols the virtues of a "vigorous Executive."

13. *See, e.g.*, Korematsu v. United States, 323 U.S. 214, 219 (1944) (upholding order excluding persons of Japanese ancestry); Hirabayashi v. United States, 320 U.S. 81, 85 (1943) (upholding curfew based on race); *Ex parte* Quirin, 317 U.S. 1, 26-27 (1942) (recognizing authority of executive to convene military commissions under Articles of War).

14. *See, e.g.*, Duncan v. Kahanamoku, 327 U.S. 304, 313 (1946) (finding that Congress and executive worked together to impose curfew restriction).

generally accept as a constitutional exercise of executive authority, even when it transgressed what otherwise would seem to be entrenched rights and liberties. Over time, judicial acquiescence in congressionally unchallenged exercise of extraordinary executive authority in times of a national security crisis has become the baseline of executive power debate.[15]

In present circumstances, there are reasons to wonder how firm that baseline ought to remain. While it is true that the President still enjoys advantages in terms of quick and decisive action, and ought to do so in terms of access to intelligence, other circumstances may have significantly aggravated the risks of acquiescence in unrestrained executive emergency power. The executive power baseline originated when the United States was much smaller in population and wealth, more vulnerable to territorial attack by an enemy sovereign, operating on the fringes of world politics, considerably less than a world military superpower, and only sporadically engaged in military conflicts at home or abroad.[16] The historical baseline does not envision a nation at the center of world politics, with unrivaled wealth and military might, or a President with immediate access to potentially world-destroying force, or a nation more or less continuously involved in armed conflict somewhere on the globe. Nor does it envision a Congress hampered in its ability to control the incidence of war by the modern practice of avoiding formal war declarations. Although many might argue with some force that these are changes in degree and not in kind, their cumulative effect is sufficiently vast at least to raise the question whether doctrines regarding executive authority developed in the early days of the Republic ought to have continuing force.[17]

This Article, however, does not challenge the executive power baseline, but rather treats it as the premise for the Court's most recent efforts to delineate the contours of executive emergency powers in the context of cases involving enemy detention and military trial. I will give particular attention to the Court's decision

15. *See* Haig v. Agee, 453 U.S. 280, 291 (1981) (noting that "in the areas of foreign policy and national security . . . congressional silence is not to be equated with congressional disapproval").

16. The population of the United States was under four million at the time of the first census in 1790 and gross domestic product ("GDP") was $3.6 billion (in 2000 dollars). The population now stands at over three hundred million and GDP at over $12 trillion. *See* Louis D. Johnston & Samuel H. Williamson, *The Annual Real and Nominal GDP for the United States, 1790-Present*, ECON. HIST. SERVICES, July 27, 2007, http://eh.net/hmit/gdp/ (calculating GDP figures as year 2000 dollars).

17. The original critique of the executive power baseline came from scholars who thought that it recognized greater executive power than the Constitution intended. *See, e.g.*, FISHER, *supra* note 11, at 265-67 (arguing Jackson's "zone of twilight" left too much to executive discretion). A newer critique comes from those who think the executive baseline provides for too little executive power. The foremost exponent of this view is former Bush administration official and current professor of law John Yoo. *See, e.g.*, JOHN YOO, THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11, at 17-24 (2005) (arguing Constitution vested executive with much more power than Congress over foreign affairs); JOHN YOO, WAR BY OTHER MEANS: AN INSIDER'S ACCOUNT OF THE WAR ON TERRORISM 102-04 (2006) (using his time in Washington to highlight his argument for expansive executive power); John Yoo, *An Imperial Judiciary at War:* Hamdan v. Rumsfeld, 2005-2006 CATO SUP. CT. REV. 83, 83 (2005), *available at* http://www.cato.org/pubs/scr/2006/yoo.pdf [hereinafter Yoo, *An Imperial Judiciary at War*] ("[T]he *Hamdan* decision ignores the basic workings of the American separation of powers . . . .").

in *Hamdan v. Rumsfeld*,[18] with some discussion of its immediate predecessors *Hamdi v. Rumsfeld*[19] and *Rasul v. Bush*.[20] I will argue that in all three decisions the Court left the executive power baseline intact, interpreting it, however, in a way that carves room for what amounts to a congressional and judicial "double check" of executive assertions of emergency authority. In doing so, the Court followed and developed the themes of Justice Jackson's famous concurrence in *Youngstown Sheet & Tube v. Sawyer (Steel Seizure)*.[21] Although this double-check approach reserves some space for judicial initiative in supervising executive exercise of emergency power, it places primary reliance on Congress, enabling intensive judicial review principally in situations where Congress has signaled some limitation on executive authority.

In the current round of cases, Congress's checking power stems from its capacity to exercise shared authority over noncombat aspects of military affairs, particularly the dispensation of military justice, in ways that limit or restrain executive discretion. The judiciary's checking power is reflected in its approach toward judicial review of claims of executive authority. It consists of an antipathy to naked assertions of executive power, especially where fundamental civil rights and liberties are threatened, a careful reading of congressional action to protect congressional control over legislative functions, protection of the courts from erection of a shadow military judiciary subject to complete executive control, and an assertion of independent judicial competence to evaluate executive claims of necessity for bypassing regular judicial process.

Both the legislative and judicial checks have roots in precedent and practice. Foremost, they follow Justice Jackson's famous categorical analysis of executive power in *Steel Seizure*, in that they are the legislative and judicial corollaries to his appraisal of executive authority.[22] Indeed, the recent enemy combatant cases read like an extensive commentary on Jackson's *Steel Seizure*

18. 126 S. Ct. 2749 (2006). See *infra* notes 130-50 and accompanying text for a discussion of the Supreme Court's limits on trial by military commission.

19. 542 U.S. 507 (2004). See *infra* notes 102-15 and accompanying text for a discussion of the Supreme Court's deference to executive authority when it finds congressional authorization of executive actions.

20. 542 U.S. 466 (2004). I will also discuss the more indirect influence of *Rumsfeld v. Padilla*, 542 U.S. 426 (2004). See *infra* notes 116-24 and accompanying text for discussion of *Rasul* and notes 125-29 and accompanying text for discussion of *Padilla*.

21. 343 U.S. 579 (1952).

22. *Steel Seizure*, 343 U.S. at 634-55 (Jackson, J., concurring). *See generally* MAVEA MARCUS, TRUMAN AND THE STEEL SEIZURE CASE: THE LIMITS OF PRESIDENTIAL POWER (William E. Leuchtenburg ed., 1977) (discussing in detail *Steel Seizure* case and controversy surrounding it); David Gray Adler, *The* Steel Seizure *Case and Inherent Presidential Power*, 19 CONST. COMMENT. 155 (2002) (arguing that *Steel Seizure* decision still has vitality); Patricia L. Bellia, *Executive Power in* Youngstown*'s Shadows*, 19 CONST. COMMENT. 87 (2002) (arguing that Justice Jackson's *Steel Seizure* opinion is of limited value in realm of foreign policy); Christopher Bryant & Carl Tobias, Youngstown *Revisited*, 29 HASTINGS CONST. L.Q. 373 (2002) (applying *Steel Seizure* case to war on terror); Adam J. White, *Justice Jackson's Draft Opinions in the* Steel Seizure *Cases*, 69 ALB. L. REV. 1107 (2006) (discussing evolution of Justice Jackson's concurring opinion).

concurrence.[23] Effectively, they require two-branch cooperation either to sustain executive authority or to constrain it. Alone, either branch's check has limited capacity to restrain executive authority. When exercised together, however, their double check stands as a potent guarantee against extravagant assertions of executive emergency power. When this double check has been deployed, as it was particularly in *Hamdan*, it results in relatively searching review of executive emergency national security claims, rather than the extreme deference to executive judgment that those claims have sometimes received, and it subjects executive discretion to constraint through meaningful legislative oversight.

The implications of this double-check method for the treatment of detainees in the war on terror depend heavily on congressional action, a result that is generally consistent with the aims of representative democracy. Responsibility falls in the first instance on the people's elected representatives to set the limits of executive authority in times of proclaimed national security crisis. When Congress takes an active role, the courts have the tools they need for an effective executive double check; if Congress remains passive, however, there is relatively little the judiciary can do on its own to restrain executive emergency power. So far in the war on terror, Congress has shown a disinclination to assume an active limiting role. In light of the Detainee Treatment Act of 2005 ("DTA")[24] and the Military Commissions Act of 2006 ("MCA"),[25] the double-check theory thus may not have as much impact on the present administration's conduct of the war on terrorism as some of its critics may have hoped.[26] The military commissions and practices of detention that were once the objects of executive fiat have now become the artifacts of legislative policy—making the military commissions for trial of enemy combatants what in other contexts we call, with reason, "Article I courts." If there are to be any further restraints on their power, they must come from the judiciary acting alone against executive emergency power, a development that is arguably unprecedented in our history. Nevertheless, the double-check theory's influence has begun to reshape the power contours and political dynamics of the

23. The majority cited Jackson in *Hamdan*, 126 S. Ct. at 2774 n.23, as did Justice Breyer's concurrence, *id.* at 2800 (Breyer, J., concurring), and Justice Thomas's dissent, *id.* at 2824 (Thomas, J., dissenting). The plurality in *Hamdi* also cited his opinion, 542 U.S. at 531, as did Justice Souter's concurring and dissenting opinion, *id.* at 552 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment).

24. Pub. L. No. 109-148, 119 Stat. 2739 (codified as amended at 42 U.S.C.A. §§ 2000dd to 2000dd-1 (West Supp. 2007)).

25. Pub. L. No. 109-366, 120 Stat. 2600 (codified as amended in scattered titles and sections of U.S.C.).

26. *See generally* David Golove, *United States: The Bush Administration's "War on Terrorism" in the Supreme Court*, 3 INT'L J. CONST. L. 128 (2005) (arguing that detainee decisions are more of rebuke to Bush than language of opinions suggest); Erwin Chemerinsky, *Three Decisions, One Big Victory for Civil Rights*, TRIAL, Sept. 2004, at 74 (celebrating detainee cases' restraints on executive but not addressing role of Congress); David Cole, *Comment: Profiles in Legal Courage*, NATION, Dec. 20, 2004, at 28 (praising judges that stand up to executive, while deemphasizing role of Congress); Editorial, *Reaffirming the Rule of Law*, N.Y. TIMES, June 29, 2004, at A26 (celebrating Court's check on executive while deemphasizing role of Congress).

present situation, showing that it serves as a more-than-symbolic potential limit on future executive authority claims.

Part II will trace the roots of the double-check theory in earlier case law, concentrating particularly on select precedent from the Civil War, World War II, and culminating in the landmark *Steel Seizure* decision during the Korean conflict. Part III will examine the development and use of the double-check theory in *Hamdan*, as well as its immediate predecessors, *Rasul* and *Hamdi*. Part IV will consider the implications of this approach in the application of the DTA and MCA, with some regard to post-*Hamdan* developments in the lower courts. It will also consider the question, which the Court may eventually face, whether the judiciary has authority on its own, without congressional limitations, to restrain arguable excesses of military justice. Part V will consider the double-check theory's implications for the future, with an emphasis on its potential to block aggressive assertions of emergency authority that could otherwise threaten basic republican values.

II. HISTORICAL ANTECEDENTS FOR THE DOUBLE-CHECK APPROACH

The Civil War decisions on executive authority do not individually delineate a double-check approach to limiting executive power, but in conjunction they support one. The leading decisions, which bookend the Court's treatment, are the *Prize Cases*[27] and *Ex parte Milligan*.[28] In the *Prize Cases*, the Court sustained the power of the President, without prior legislative authorization, to recognize commencement of hostilities by secessionist Southern states as an act of war.[29] The Court upheld the authority of the President to respond to the impending emergency on his own initiative, without waiting for congressional sanction.[30] Much of the Court's opinion is devoted to describing the realities of the situation.[31] It stresses the need for prompt action and quick response, as well as the potential threat to national security if the President were powerless to act.[32] It generalizes from these pragmatic considerations to the inference that the executive branch must be accorded the authority to recognize a state of war and to respond to it without awaiting congressional approval.[33] The Court's decision defers to presidential judgment, refusing to second-guess his determination of the state of hostilities.[34]

27. 67 U.S. (2 Black) 635 (1863).

28. 71 U.S. (4 Wall.) 2 (1866).

29. *The Prize Cases*, 67 U.S. (2 Black) at 670-71.

30. *Id.* at 671 ("[T]he President had a right, *jure belli*, to institute a blockade of ports in possession of the States in rebellion, which neutrals are bound to regard.").

31. *Id.* at 669-71 (emphasizing that with "belligerent parties in hostile array," President must determine what "degree of force the crisis demands").

32. *Id.* at 669-70.

33. *Id.* at 669 ("The President was bound to meet it in the shape it presented itself, without waiting for Congress to baptize it with a name . . . .").

34. *The Prize Cases*, 67 U.S. (2 Black) at 670 (holding that Court must defer to political branches' decisions, as they are departments "to which this power was entrusted").

Understandably, those who favor unrestrained inherent executive authority place great reliance on the *Prize Cases* for support, since the decision acknowledges an inherent executive power that does not depend either on explicit constitutional enumeration or prior legislative authorization.[35] But the *Prize Cases* also emphasize the facts that the emergency arose while Congress was not in session, that the President's assumption of authority was temporary on its own terms, and that Congress ratified the President's actions as soon as it reconvened.[36] Further, the Court's decision was rendered at a time when the accuracy of the President's judgment was plain. The case might have come out differently had the President declared indefinite authority to act on his own initiative, or had Congress expressed legislative disagreement with the President's judgment or withheld support for his actions, or had subsequent events cast doubt on the President's assessment. In the main, however, the Court took its cue in supporting the President's action from Congress.[37]

Ex parte Milligan falls on the other side of the spectrum, representing one of the few occasions when the Supreme Court has resisted a determined exercise of presidential military authority. The case involved a military trial of an Indiana civilian accused of conspiracy to interfere with the Union war effort.[38] The Court held that resort to military justice was improper, because there had been no showing that the government of Indiana was dysfunctional or that trial in an ordinary criminal court would be impracticable.[39] In reaching this holding, the Court read the scope of congressional authorization for military tribunals carefully, construing it to minimize interference with regular modes of justice.[40] The absence of explicit congressional authorization for the military commission in question was thus an essential component of the Court's reasoning.[41] It supplied the foundation for the Court's exercise of relatively searching review of the President's assertions of military necessity. Notably, the case also involved

35. *See, e.g.*, Michael Stokes Paulsen, *The Emancipation Proclamation and the Commander in Chief Power*, 40 GA. L. REV. 807, 825-27 (2006) (arguing that executive has broad powers to preserve American lives in emergency situations); U.S. Dep't of Justice, *The National Security Agency's Domestic Spying Program: Legal Authorities Supporting the Activities of the National Security Agency Described by the President*, 81 IND. L.J. 1374, 1374 (2005) (arguing President has inherent power for domestic electronic surveillance in time of war); John Yoo, *The Terrorist Surveillance Program and the Constitution*, 14 GEO. MASON L. REV. 565, 566 (2007) (arguing President has inherent power for domestic electronic surveillance in time of war).

36. *The Prize Cases*, 67 U.S. (2 Black) at 670 (explaining that in "almost every act passed at the extraordinary session of the Legislature of 1861" the orders of the President were issued as if they had been under Congress's "*express authority* and direction").

37. *Id.* at 670-71.

38. *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 4-6 (1866).

39. *Id.* at 131 (holding that trial of citizen by military commission was illegal).

40. *Id.* at 81 (finding that "convenient" rule of treating all persons associated with giving aid to Rebellion as public enemies who should be denied jury trial, would "outlaw every citizen the moment he is charged with a political offence [sic]").

41. *See id.* at 82-83 (noting that, while "[n]o human being in this country can exercise any kind of public authority which is not conferred by law," power of military commissions is both unregulated and "incapable of being so regulated" by law).

the familiar context of adjudication and a direct incursion on judicial powers, factors which further encouraged close judicial scrutiny of the President's claim to power. The Court thus effectively recognized and deployed a double check.

The World War II decisions probably represent the apex of judicial deference to presidential power. In part they represent the political realities of a highly experienced President (Franklin Roosevelt, who was serving his unprecedented third term), with extraordinary levels of popular support,[42] a relatively junior and inexperienced Court with unpaid debts of loyalty and gratitude to the executive,[43] and the military situation of a world war that truly threatened the existence of Western democratic political culture.[44] In a string of decisions, the Court sustained vast exercises of executive power, including resort to martial law, compulsory curfews, preventive exclusion and internment without individualized suspicion, profiling on the basis of race or ethnicity, and the use of military tribunals as a substitute for criminal courts in cases involving asserted war crimes by enemy combatants.[45]

The Court rationalized its deference by relying on congressional authorization for executive action. Thus, for example, in *Ex parte Quirin*[46] the Court read Congress's enactment of the Articles of War as explicit authority for

42. See DORIS KEARNS GOODWIN, NO ORDINARY TIME: FRANKLIN AND ELEANOR ROOSEVELT AND THE HOME FRONT IN WORLD WAR II 209, 321-22, 427-31 (1994), for a comprehensive analysis of the home front during World War II and Roosevelt's popularity.

43. For the cases under discussion here, Roosevelt had appointed seven justices himself and elevated Harlan Stone to Chief Justice. Thus, the only Justice who did not "owe" him anything was Owen Roberts, who, notably, dissented in *Korematsu v. United States*, 323 U.S. 214, 225-33 (1944) (Roberts, J., dissenting). See KENNETH S. DAVIS, FDR: THE NEW DEAL YEARS, 1933-1937, at 54, 506-08, 607-23 (1979), KENNETH S. DAVIS, FDR: THE WAR PRESIDENT, 1940-1943, at 206-08, 225 (2000), ROBERT H. JACKSON, THAT MAN: AN INSIDER'S PORTRAIT OF FRANKLIN D. ROOSEVELT, 75, 151-52, 177 (John Q. Barrett ed., 2003), and Michael Comiskey, *Can a President Pack—or Draft—the Supreme Court? FDR and the Court in the Great Depression and World War II*, 57 ALB. L. REV. 1043, 1044-45 (1994), for more on Roosevelt's appointments to the Supreme Court. See generally Laura E. Little, *Loyalty, Gratitude, and the Federal Judiciary*, 44 AM. U. L. REV. 699, 710-24 (1995), for a more complete discussion on the role of gratitude and loyalty in the decisional processes of federal judges.

44. Until the Battle of Stalingrad in 1942-43, there was still a significant chance that Germany would win the war in Europe and occupy most of the continent. The United States Pacific Fleet was in real danger of almost complete destruction until the dramatic victory at the Battle of Midway in June 1942. These turning points are, of course, more visible in hindsight than they were at the time. Hitler's winter 1944 offensive that resulted in the Battle of the Bulge also created real fear that Germany could hold out much longer than May of 1945, and debate still rages over how long it would have taken to subdue Japan without the use of atomic weapons. For a good general description of the war, see JOHN KEEGAN, THE SECOND WORLD WAR (1990). See generally Craig Green, *Wiley Rutledge, Executive Detention, and Judicial Conscience at War*, 84 WASH. U. L. REV. 99 (2006), and Dennis J. Hutchinson, *"The Achilles Heel" of the Constitution: Justice Jackson and the Japanese Exclusion Cases*, 2002 SUP. CT. REV. 455 (2002), for a discussion of the potential impact of these developments on the Court's thinking.

45. *See, e.g.*, Duncan v. Kahanamoku, 327 U.S. 304, 313 (1946) (recognizing potential need for martial law in certain situations, but striking it down in this case); Korematsu v. United States, 323 U.S. 214, 219 (1944) (upholding exclusion order based on race); Hirabayashi v. United States, 320 U.S. 81, 85 (1943) (upholding race-based curfew); *Ex parte* Quirin, 317 U.S. 1, 27 (1942) (recognizing executive authority to convene military commissions per Articles of War).

46. 317 U.S. 1 (1942).

military trials of unlawful enemy combatants operating under direction of the enemy.[47] It similarly stressed congressional authorization for the curfews in *Hirabayashi v. United States*[48] and the detentions in *Korematsu v. United States*,[49] as well as the military trial of an enemy general for war crimes in *In re Yamashita*.[50] In all these instances the Court read congressional authorization broadly. In addition, it deferred heavily to executive judgment regarding military necessity, refusing to exercise any meaningful judicial check on executive power in the absence of reinforcement from Congress. The Court cautioned that its decisions depended on the exigencies of active war and the dangers of imminent attack, implying that the same measures might not be permissible in less dangerous times, but for the most part it let the executive have its way.[51]

In some of the more extreme instances of deference, however, concurring and dissenting Justices argued for narrower readings of congressional action,[52] more stringent review of executive claims regarding military necessity,[53] and the application of constitutional human rights principles restraining both executive and legislative action.[54] These Justices (particularly Frank Murphy, later joined by Wiley Rutledge and sometimes Robert Jackson) outlined the characteristics of an independent judicial checking power. They emphasized the dangers to civil liberty presented by unrestrained executive discretion,[55] the availability of more regular procedures that could accomplish executive aims without undue risk,[56]

47. *Quirin*, 317 U.S. at 27 ("[T]he Articles [of War] also recognize the 'military commission' appointed by military command as an appropriate tribunal . . . .").

48. 320 U.S. 81, 89 (1943) ("It will be evident from the legislative history that the Act . . . contemplated and authorized the curfew . . . .").

49. 323 U.S. 214, 218 (1944) (noting that Court "cannot reject as unfounded the judgment of the military authorities and of Congress").

50. 327 U.S. 1, 11-12 (1946) (noting that war power includes authority "to remedy, at least in ways Congress has recognized, the evils which the military operations have produced" (quoting *Hirabayashi*, 320 U.S. at 99)).

51. *See, e.g.*, *Korematsu*, 323 U.S. at 224 (Frankfurter, J., concurring) (noting that "the validity of action under the war power must be judged wholly in the context of war").

52. *See, e.g.*, *Yamashita*, 327 U.S. at 61-72 (Rutledge, J., dissenting) (arguing that majority misconstrued Articles of War); *see also Ex parte* Endo, 323 U.S. 283, 307 (Murphy, J., concurring) ("I am of the view that detention . . . [is] unauthorized by Congress . . . ."). See generally Green, *supra* note 44, for more on Justice Rutledge and his World War II jurisprudence.

53. *See, e.g.*, *Endo*, 323 U.S. at 307-08 (Murphy, J., concurring) (arguing that military necessity does not trump Constitution).

54. *See, e.g.*, *Yamashita*, 327 U.S. at 26 (Murphy, J., dissenting) (arguing that Fifth Amendment due process rights trump both executive and legislative action). *See generally* Matthew J. Perry, *Justice Murphy and the Fifth Amendment Equal Protection Doctrine: A Contribution Unrecognized*, 27 HASTINGS CONST. L.Q. 243 (2000) (recounting Justice Murphy's continued defense of individual liberties in time of war).

55. *See, e.g.*, Duncan v. Kahanamoku, 327 U.S. 304, 330 (1946) (Murphy, J., concurring) ("From time immemorial despots have used real or imagined threats to the public welfare as an excuse for needlessly abrogating human rights.").

56. *See, e.g.*, *Yamashita*, 327 U.S. at 41-43 (Rutledge, J., dissenting) (arguing that there was no reason not to try Yamashita in more traditional fashion); *Korematsu*, 323 U.S. at 241-42 (Murphy, J., dissenting) ("It seems incredible that under these circumstances it would have been impossible to hold loyalty hearings . . . .").

the lack of strong evidence to support the executive's more aggressive claims,[57] suspicious over- and underinclusiveness of executive policies,[58] and the importance of maintaining constitutional rights in times of crisis.[59] They also argued that Fifth Amendment due process principles ought to limit executive power even in circumstances where it was clothed with explicit congressional authorization.[60]

Justice Murphy's dissents are particularly noteworthy. He insisted that the Fifth Amendment Due Process Clause, which supplies its guarantees to "any person," ought to apply wherever the United States government sought to administer justice, including military commissions conducting war trials of enemy combatants.[61] Murphy thus read the Constitution as limiting executive power to dispense summary military justice even in situations where Congress had authorized it to do so. In essence, he asserted a judicial single check of the executive that emanated solely from the Court's authority to interpret and implement the Bill of Rights as a limitation of *both* Article I *and* Article II emergency power.[62]

Without more potent signals of limitation on the executive from Congress, however, Murphy and the other Justices who shared some of his views were unable to garner judicial majorities for imposing significant limits on executive power.[63] Today, the arguments of these dissenting judges arguably deserve more than ordinary weight, because the consensus of history is that their dissents in the more extreme cases (most notably *Korematsu*, and with somewhat more contest *Hirabayashi* and *Yamashita*) were warranted, and that their colleagues in the majority abdicated judicial responsibility by conferring dubious constitutional blessing on some of the worst executive abuses in American history.[64]

57. *See, e.g.*, *Korematsu*, 323 U.S. at 234 (Murphy, J., dissenting) (arguing there should be limits to deference to military judgment).

58. *See, e.g.*, *id.* at 243 (Jackson, J., dissenting) (noting that treasonous Americans and German aliens are not covered by exclusion order, but loyal Japanese Americans are).

59. *See, e.g.*, Hirabayashi v. United States, 320 U.S. 81, 110 (Murphy, J., concurring) ("It does not follow, however, that the broad guaranties of the Bill of Rights and other provisions of the Constitution protecting essential liberties are suspended by the mere existence of a state of war.").

60. *See, e.g.*, *Korematsu*, 323 U.S. at 233 (Roberts, J., dissenting) (arguing that congressional authorization of removal program for persons of Japanese ancestry is unconstitutional).

61. *See Yamashita*, 327 U.S. at 26 (Murphy, J., dissenting) ("The Fifth Amendment guarantee of due process of law applies to 'any person' who is accused of a crime by the Federal Government or any of its agencies.").

62. *See, e.g.*, Perry, *supra* note 54, at 279 (arguing Murphy's belief that all deserve equal protection under law); John H. Pickering, *A Tribute to Justice Frank Murphy*, 73 U. DET. MERCY L. REV. 703, 713-16 (1996) (discussing Murphy's views on constitutional rights).

63. See, for example, JOHN M. FERREN, SALT OF THE EARTH, CONSCIENCE OF THE COURT: THE STORY OF JUSTICE WILEY RUTLEDGE 236-59, 301-23 (2004), SIDNEY FINE, FRANK MURPHY: THE WASHINGTON YEARS 436-65 (1984), and Hutchinson, *supra* note 44, at 478-81, for the backstory on the maneuverings of the Court in the cases discussed.

64. Reaction in the legal community to these cases was swift and largely negative. *See generally, e.g.*, L.B. Brody, *Constitutional Law—Trial by Military Commission of Enemy Combatant After Cessation of Hostilities—Scope of Inquiry in Habeas Corpus Proceedings*, 44 MICH. L. REV. 855 (1946)

In addition to the arguments in dissent, in two key decisions, the World War II Court did recognize limits on presidential emergency power. One of these cases is *Duncan v. Kahanamoku*.[65] *Duncan* held that invocation and operation of martial law in the territory of Hawaii, long after the initial dangers associated with the attack on Pearl Harbor had subsided, unconstitutionally interfered with the operation of the territorial criminal courts.[66] Relying on *Milligan*, the majority reasoned that the constitutional conditions precedent for substituting military in place of civilian justice had not been satisfied, as there was no showing that at relevant times the existing criminal court system was incapable of functioning.[67] As in *Milligan*, the Court borrowed strength for its position from Congress, reasoning that the Organic Act for Hawaii, which Congress had neither modified nor repealed, stood in the way of general usurpation of judicial functions.[68] Concurring, Justice Murphy further argued that the use of military tribunals in the case also violated the principles of the Fifth Amendment, which continued to apply even though the executive had invoked emergency authority by declaring martial law.[69] While the Court confined its decision to criminal trials

(agreeing with Rutledge's dissent in *Yamashita*); James J.A. Daly, *The* Yamashita *Case and Martial Courts* (pt. 1), 21 CONN. B.J. 136 (1947) (explaining that most significant ruling in *Yamashita* was based on principles of military necessity); James J.A. Daly, *The* Yamashita *Case and Martial Courts* (pt. 2), 21 CONN. B.J. 210, 229 (1947) (arguing that "[k]illing a defeated enemy on sight or capture is to be preferred before we desecrate the most sacred of purely human activities by sacrilegious mockery of the tribunals"); Nanette Dembitz, *Racial Discrimination and the Military Judgment: The Supreme Court's* Korematsu *and* Endo *Decisions*, 45 COLUM. L. REV. 175 (1945) (arguing that *Korematsu* was abdication of judicial responsibility to review potentially unconstitutional military activities); John T. Ganoe, *The* Yamashita *Case and the Constitution*, 25 OR. L. REV. 143 (1946) (tentatively agreeing with *Yamashita* dissent); Eugene V. Rostow, *The Japanese American Cases—A Disaster*, 54 YALE L.J. 489 (1945) (criticizing *Hirabayashi* and *Korematsu*); Gerald Theis, *Constitutional Law—Due Process and the Military Commission*, 30 MARQ. L. REV. 190 (1946) (implying *Quirin* and *Yamashita* were incorrectly decided). Congress has since repudiated the Japanese internment programs. *See* Act of Aug. 10, 1988, Pub. L. No. 100-383, 102 Stat. 903 (codified as amended at 50 U.S.C. app. §§ 1989-1989d (2000)) (recognizing injustices committed against "citizens and permanent resident aliens of Japanese ancestry" during World War II). More recently, the Supreme Court has criticized *Korematsu*. *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 215 (1995) (calling decision in *Korematsu* "inexplicabl[e]"). *Korematsu* now receives near universal condemnation. *See, e.g.*, FRANK H. WU, YELLOW: RACE IN AMERICA BEYOND BLACK AND WHITE 95-103 (2002) (arguing that *Korematsu* was major error); Aya Gruber, *Raising the Red Flag: The Continued Relevance of the Japanese Internment in the Post*-Hamdi *World*, 54 U. KAN. L. REV. 307, 309 (2006) (noting that Supreme Court's "sordid" past is represented by *Korematsu*); Jerry Kang, *Watching the Watchers: Enemy Combatants in the Internment's Shadow*, 68 LAW & CONTEMP. PROBS. 255, 278 (2005) (arguing that *Hirabayashi* case should not be allowed to become respectable). But see Charles Fairman, *The Supreme Court on Military Jurisdiction: Martial Rule in Hawaii and the* Yamashita *Case*, 59 HARV. L. REV. 833, 882 (1946), for a more positive take that observes that numerous guilty men will go free, while innocent men probably will not be convicted.

65. 327 U.S. 304 (1946).

66. *Duncan*, 327 U.S. at 324.

67. *Id.* at 323-24.

68. *Id.* at 324; *see* Hawaiian Organic Act of 1900, ch. 339, § 67, 31 Stat. 141, 153 (giving Governor authority to declare martial law).

69. *Duncan*, 327 U.S. at 330-35 (Murphy, J., concurring).

of civilians who were not directly involved in military affairs,[70] its reasoning presents a significant limitation on the scope of martial authority.[71]

The second decision is *Ex parte Endo*.[72] *Endo* involved a challenge to indefinite detention of a Japanese American citizen of unquestioned loyalty at one of the detention centers established in furtherance of the exclusion order upheld by the Court in *Korematsu*.[73] In that earlier decision, while sustaining a conviction for violation of the exclusion order, the Court carefully avoided ruling on the constitutionality of the government's internment program itself.[74] In *Endo*, the Court again avoided directly confronting that issue. It concluded instead that Congress's authorization for internment did not extend to the indefinite confinement of a person of undoubted loyalty such as Endo,[75] and it rejected as beyond the scope of statutory authorization the government's argument that the exclusion was necessitated by an inability to find an appropriate situation for Endo's relocation.[76] As in *Milligan* and *Duncan*, the Court exercised what amounted to a double check.

The modern dimensions of double-checking began to take shape in the period following World War II, culminating in the first major theory of limits on the executive since the Civil War. This time, President Harry Truman, though certainly experienced, was substantially less popular than his predecessor and had considerably less influence on Congress.[77] The Court was more senior, and most of its leading Justices owed no debts to the existing administration.[78] The military situation had also changed. Although the fate of Western democracy still arguably hung in the balance, with the threat of a massively destructive third world war looming large, American military ascendancy and world power status relieved some of the sense of vulnerability to immediate attack on American soil that had pervaded much of the World War II executive power jurisprudence.[79]

70. *Id.* at 313-14 (majority opinion). It may be significant that *Duncan* was decided after the Allies' victory in World War II. In dissent, Justice Burton asserted that the matter might well have been treated differently if the nation had still been engaged in hostilities. *See id.* at 351 (Burton, J., dissenting) ("It is all too easy *in this postwar period* to assume the success which our forces attained was inevitable . . . ." (emphasis added)).

71. See LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 238 (2d ed. 1988), for a discussion of the potential significance of *Duncan*.

72. 323 U.S. 283 (1944).

73. *Endo*, 323 U.S. at 284-85.

74. Korematsu v. United States, 323 U.S. 214, 223-24 (1944).

75. *Endo*, 323 U.S. at 302-03.

76. *Id.* at 304.

77. See DAVID MCCULLOUGH, TRUMAN 467-923 (1992), for a rigorous, yet sympathetic, account of Truman's travails while in office, including his handling of the *Steel Seizure* case.

78. The Court that decided *Youngstown Sheet & Tube Co. v. Sawyer* (*Steel Seizure*), 343 U.S. 579 (1952), consisted of six Justices appointed by Roosevelt and three Justices appointed by Truman. *See* MARCUS, *supra* note 22, at 182-91. The Roosevelt Justices voted five to one with the majority whereas the Truman Justices voted two to one in favor of the dissent. *See id.* at 197 (listing Justices that voted for and against majority in six to three split).

79. *See generally* JOHN LEWIS GADDIS, THE COLD WAR: A NEW HISTORY (2005) (discussing American military ascendancy post-World War II).

The military conflict in question was also more complicated. It lacked the imprimatur of a formal congressional war declaration, thus representing the first in what is now a long series of formally undeclared wars.[80] The stage was set for the most formidable judicial confrontation of executive power since *Milligan*—the *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)* case.[81]

The *Steel Seizure* decision represents a watershed constitutional moment. Perhaps aware that it had bent too far backward to support the executive in the previous decade, the Court stood up to claims of executive authority. It held that the President lacked power to seize America's steel mills in order to avoid a national strike that could harm military forces fighting in Korea.[82] While Justice Jackson's concurrence[83] gets the bulk of scholarly attention today, one should read it in pari materia with the other opinions supporting the majority. In particular, both Justice Black's majority opinion[84] and Justice Douglas's concurrence[85] deserve careful study. All three of these opinions regard skeptically the President's claims of indeterminate and elastic inherent executive authority.[86] While they acknowledge congressional power to authorize seizure (a power Congress often exercised in the past), they stress both implicit and explicit limits that Congress typically imposed by law on executive seizures.[87] Importantly, they recognize the President's unilateral action as an arrogation of undelegated legislative power in domains (such as the taking of private property) reserved to Congress under the terms of Article I.[88] All engage in searching judicial review, questioning the President's claim that the seizures were essential to national security, especially in light of other legally authorized but less severe forms of intervention available to deal with the labor-management dispute that had prompted the President's action, and that the President had failed to attempt.[89] All explore the potential for abuse that would arise from unchecked executive authority.[90]

Justice Jackson's concurrence captures the imagination more than the other opinions supporting the majority because it so effectively encapsulates the

80. See generally PAUL M. EDWARDS, THE A TO Z OF THE KOREAN WAR (2005), for more on the military situation in Korea, and GADDIS, *supra* note 79, for more on the international security situation in the years following World War II.

81. 343 U.S. 579 (1952).

82. *Steel Seizure*, 343 U.S. at 588.

83. *Id.* at 634-55 (Jackson, J., concurring).

84. *Id.* at 582-89 (majority opinion).

85. *Id.* at 629-34 (Douglas, J., concurring).

86. *Id.* at 587 (majority opinion); *id.* at 633 (Douglas, J., concurring); *id.* at 637 (Jackson, J., concurring).

87. *Steel Seizure*, 343 U.S. at 585-86 (majority opinion); *id.* at 631 (Douglas J., concurring); *id.* at 637 (Jackson, J., concurring).

88. *Id.* at 588 (majority opinion); *id.* at 629 (Douglas, J., concurring); *id.* at 637 (Jackson, J., concurring).

89. *Id.* at 586, 588 (majority opinion); *id.* at 629 (Douglas, J., concurring); *id.* at 634 (Jackson, J., concurring).

90. *Id.* at 587-88 (majority opinion); *id.* at 631 (Douglas, J., concurring); *id.* at 634 (Jackson, J., concurring).

majority's thinking through its categorical analysis. Having previously served as President Roosevelt's Attorney General, Jackson was well aware of the pragmatic advantages of decisive executive action, and his approach attempted to accommodate their objective reality.[91] Rather than excluding executive power outright, he accepted the executive power baseline, but reconceived the power dynamics between the branches as a fluid process of ebb and flow. Thus, in areas of shared authority (such as the power to seize private property), executive authority enabled by legislative action flowed toward the high watermark of executive power, while executive initiative restrained by legislative action ebbed toward the lower limits of executive power.[92] The one power either supplemented or countered the other, operating as either an additive or a subtractive element. The Court's job was to measure the result.[93]

Jackson's analysis makes good sense, and it dovetails nicely with the reasoning in the military justice and exclusion cases discussed above. Jackson's approach, however, arguably fails to give adequate attention to the presence of a third dynamic in the situation—the level and intensity of review by the courts. When his opinion is read together with the opinions of Black and Douglas, that third dimension comes into sharper relief. They maintain that when the executive action amounts to an assumption of authority that is covered by an enumerated legislative power, separation of powers principles are threatened, necessitating a greater intensity of judicial review.[94] This view was, indeed, the principal line of demarcation between the majority and the dissents in *Steel Seizure*. Although they also asserted that congressional intent to limit the authority of the President was less clear than the majority supposed, the dissenters mainly argued that the Court should defer to the President's military judgment that a national steel strike would endanger our troops in active combat and threaten the success of our military commitments.[95] In other words, they argued for a high level of judicial deference to executive decisions, similar to that which the Court had extended in *Korematsu* and *Yamashita*, rather than the more exacting position taken by the Justices in the majority. The contrasting positions of majority and dissent on the judicial role underline the conclusion that *Steel Seizure*, like *Duncan*, *Endo*, and *Milligan*, involved a double check.[96]

91. *See generally, e.g.*, EUGENE C. GERHART, ROBERT H. JACKSON: COUNTRY LAWYER, SUPREME COURT JUSTICE, AMERICA'S ADVOCATE, 142-228 (2003) (discussing Jackson's time at Justice Department).

92. *Steel Seizure*, 343 U.S. at 637-38 (Jackson, J., concurring).

93. *Id.* at 638 ("Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution . . . .").

94. *Id.* at 585-89 (majority opinion); *id.* at 631-34 (Douglas, J., concurring).

95. *Id.* at 680 (Vinson, C.J., dissenting) ("[I]f the President has any power under the Constitution to meet a critical situation in the absence of express statutory authorization, there is no basis whatever for criticizing the exercise of such power in this case.").

96. *See generally* Samuel Issacharoff & Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime*, 5 THEORETICAL INQUIRIES L. 1 (2004) (addressing double-check approach without using term). For further discussion on congressional and judicial checks in the context of suspending habeas corpus and the *Hamdi* opinion, see generally Trevor W. Morrison, Hamdi*'s Habeas Puzzle: Suspension as*

What these cases do not answer is whether, in addition to the double check, there is also a single check—in other words, whether the judiciary ever has the authority to declare a congressionally authorized executive emergency action unconstitutional. In theory, there ought to be such a power, because the Bill of Rights and other provisions of the Constitution restrain *both* executive *and* legislative authority, without making any explicit exception (aside from the suspension of habeas corpus)[97] for emergency situations.

From the perspective of the early twenty-first century, *Korematsu* seems to have been a tailor-made opportunity for the Court to exercise such a single judicial check. Curiously, as a matter of abstract theory, the Court arguably did, even though it reached the wrong result. Even though it found that exclusion had been ratified by Congress, the Court *said* that the use of an explicit classification on the basis of race or ethnicity in the exclusion order triggered searching judicial review (presumably under the Fifth Amendment), requiring a showing of "[p]ressing public necessity" before allowing the use of such a disfavored form of classification.[98] Unfortunately—and as we now acknowledge, erroneously—the Court held that this standard was satisfied.[99] Still, as a matter of constitutional theory *Korematsu* stands for the proposition that the Court may employ searching review where congressionally authorized executive emergency power threatens to violate constitutionally protected fundamental liberties.

Although the results of the World War II-era and *Steel Seizure* decisions are mixed, the cases all show the double check at work. When Congress and courts both act to check executive authority, as in *Duncan*, *Endo*, and *Steel Seizure*, the executive loses, especially if the executive either exceeds the terms of congressional enactment, or encroaches directly on another branch's enumerated powers, or both. When Congress (through authorizing legislation), the courts (through deferential review), or both, line up with executive authority, however, as in *Hirabayashi*, *Korematsu*, and *Quirin*, the judiciary accepts executive judgment and the executive wins. In the idiom of card games, it apparently takes two trumps (one legislative and one judicial) to counter an executive national security emergency ace. This is the theory of the *Steel Seizure* majority and a logical corollary of Jackson's categorical analysis.

This double-check approach serves as an important bulwark against totalitarian abuse of emergency authority of the kind the world had recently experienced in the regimes of National Socialism (during World War II)[100] and

Authorization?, 91 CORNELL L. REV. 411 (2006) (addressing congressional and judicial checks in context of suspending habeas corpus).

97. See *supra* note 6 for a discussion of the Constitution's provision for suspension of habeas corpus. See also U.S. CONST. amends. I-X for restraints on executive and legislative authority under the Bill of Rights.

98. Korematsu v. United States, 323 U.S. 214, 216 (1944) (asserting that "[p]ressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can").

99. *Id.* at 219-20.

100. The constitution of Weimar Germany was even more protective of individual liberties than the U.S. Constitution. Yet Hitler still managed to seize absolute power by convincing President Hindenburg to invoke his emergency powers. See generally WILLIAM L. SHIRER, THE RISE AND FALL

Soviet Communism (in the background of Korea).[101] Two-branch authorization, with close-at-hand electoral accountability, is always required for the exercise of anything other than purely temporary emergency power. The double-check analysis thus enables the self-correcting process of the constitutional system of checks and balances as a protection against undue concentrations of emergency power. It enhances the prospect that the people, through national elections, will be able to register either their support for or opposition to emergency measures within no more than two years of their implementation, arguably before such measures have an opportunity to become entrenched. Yet at the same time the double-check method preserves the historic baseline of executive initiative to deal with emergency situations.

III. DETENTION AND MILITARY TRIAL OF ENEMY COMBATANTS: *HAMDI*, *RASUL*, AND *HAMDAN*

A. Hamdi*,* Rasul*, and the Limits of Indefinite Detention*

This double-check approach animates the Court's recent enemy combatant decisions. In *Hamdi v. Rumsfeld*,[102] Justice O'Connor's plurality opinion deferred to executive power to detain, finding it to be authorized by Congress in the Authorization for Use of Military Force ("AUMF") that Congress adopted after the 9/11 attacks.[103] But her opinion did not defer to the executive on the absence of hearings at which detained individuals could contest their alleged enemy combatant status. Rather, Justice O'Connor interpreted congressional action as qualified in this regard. In effect she treated congressional authorization as operating within and constrained by the typical administrative requirements of procedural due process.[104] Justice O'Connor interpreted the general language of the AUMF to authorize detention of enemy combatants as a necessary incident of the use of force, but she did not extend that reasoning to

OF THE THIRD REICH: A HISTORY OF NAZI GERMANY (1960), for the most exhaustive telling of this story, and RICHARD J. EVANS, THE THIRD REICH IN POWER, 1933-1939 (2005), for a more modern take on Hitler's consolidation of power.

101. See generally PETER KENEZ, A HISTORY OF THE SOVIET UNION FROM THE BEGINNING TO THE END 160-83 (1999), for information on the nature of Soviet totalitarianism in the Korean War era. See also generally PHILIP BOOBBYER, THE STALIN ERA (2000), and ROBERT SERVICE, STALIN: A BIOGRAPHY (2004), for further discussion of Soviet Communism under the Stalin regime.

102. 542 U.S. 507 (2004) (plurality opinion).

103. *Hamdi*, 542 U.S. at 517. O'Connor reasoned that detention of enemy combatants captured, as was Hamdi, in the theater of military operations, was a necessary incident of Congress's authorization for use of force in Afghanistan. *See* Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001) ("[T]he President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.").

104. *Hamdi*, 542 U.S. at 532-33 (holding that even though detention of enemy combatants is authorized, "'the risk of an erroneous deprivation' of a detainee's liberty interest is unacceptably high" under government's proposed process (quoting Mathews v. Eldridge, 424 U.S. 319, 335 (1976))).

permanent indefinite detention without a hearing.[105] Rather, since the necessary condition precedent for congressional authorization was enemy combatant status itself, and since that status could not be confirmed in disputed cases without some kind of a hearing, the authorization by Congress implicitly entailed the obligation to devise a fair means for determining combatant status.[106]

As a consequence, the Court imported the requirements of Fifth Amendment civil due process into the realm of the military commission.[107] Although the circumstances that produced it may have been unusual, the Court effectively treated the detention itself as a fairly typical (if unusually extensive) administrative deprivation of a recognized liberty interest, triggering the familiar *Goldberg v. Kelly*[108] requirement of fair process to determine whether eligibility for continued detention was satisfied.[109] On this question of procedure, the Court did not defer to the executive but rather asserted independent competence to assess what process should be due, an inquiry under the time-tested *Mathews v. Eldridge*[110] balancing standard with which the judiciary is both familiar and practiced.[111]

Justice Souter would have gone even further. He read the Non-Detention Act[112] (enacted in 1971 to prevent circumstances such as the Japanese exclusion orders in World War II from recurring) as an active congressional limitation on executive authority requiring more specific congressional authorization to detain

105. *Id.*

106. *Id.* See, for example, Lloyd C. Anderson, *The Detention Trilogy: Striking the Proper Balance Between National Security and Individual Liberty in an Era of Unconventional Warfare*, 27 WHITTIER L. REV. 217, 249-51, 256-58 (2005), Sarah H. Cleveland, Hamdi *meets* Youngstown*: Justice Jackson's Wartime Security Jurisprudence and the Detention of "Enemy Combatants,"* 68 ALB. L. REV. 1127, 1138-42 (2005), and Ronald D. Rotunda, *The Detainee Cases of 2004 and 2006 and Their Aftermath*, 57 SYRACUSE L. REV. 1, 16-18, 28-29 (2006), for scholarly debate over Justice O'Connor's interpretation of the AUMF.

107. Several scholars have discussed this aspect of Justice O'Connor's opinion. *See, e.g.*, James B. Anderson, Hamdi v. Rumsfeld*: Judicious Balancing at the Intersection of the Executive's Power to Detain and the Citizen-Detainee's Right to Due Process*, 95 J. CRIM. L. & CRIMINOLOGY 689, 709-15 (2005) (arguing that using *Mathews* test was improper and alterations to "normal due process" are unjustified); Jonathan L. Hafetz, *The Supreme Court's "Enemy Combatant" Decisions: Recognizing the Rights of Non-Citizens and the Rule of Law*, 14 TEMP. POL. & CIV. RTS. L. REV. 409, 423-24 (2005) (arguing plurality opinion is relevant to citizens and noncitizens alike); Douglas W. Kmiec, *Observing the Separation of Powers: The President's War Power Necessarily Remains "The Power to Wage War Successfully,"* 53 DRAKE L. REV. 851, 871-72 (2005) (calling *Hamdi* due process reasoning "commonsense accommodation"); Daniel Moeckli, *The US Supreme Court's 'Enemy Combatant' Decisions: A 'Major Victory for the Rule of Law'?*, 10 J. CONFLICT & SECURITY L. 75, 90-92 (2005) (arguing that Justice O'Connor does not provide enough guidance as to what due process standards apply).

108. 397 U.S. 254 (1970).

109. *Hamdi*, 542 U.S. at 529. Although the *Hamdi* Court did not actually mention *Goldberg*, its reasoning was instructive. The *Goldberg* Court considered what process was due to the recipient of public assistance payments before such payments could be terminated and held that due process required an adequate hearing before the termination of benefits. *Goldberg*, 397 U.S. at 260-61.

110. 424 U.S. 319 (1976).

111. *Hamdi*, 542 U.S. at 529.

112. 18 U.S.C. § 4001(a) (2000).

than he could glean from the AUMF.[113] Consequently, Justice Souter supported a double check of the executive's initial authority to detain, as well as its authority to hold detainees without a hearing. Both Justice O'Connor's lead opinion and Justice Souter's partial concurrence thus utilize the double-check method of analysis. Congress failed to authorize indefinite detention without hearings, and the judiciary possessed the authority to insist on minimum due process for detainees. The Court refused to defer to executive assertions that such hearings would compromise national security, claiming instead that they could be structured to minimize executive concerns.[114] Its exercise of relatively searching review on this point contrasts sharply with Justice Thomas's dissenting argument for extreme deference to executive judgment.[115]

In *Rasul v. Bush*,[116] the double check is less evident but still there. The decision was more limited in focus, as it concerned only the question of jurisdiction. The government maintained that the Court lacked jurisdiction because (1) federal habeas corpus jurisdiction did not extend extraterritorially to Guantánamo Bay, which formally belongs to Cuba; and (2) *Johnson v. Eisentrager*[117] ruled that habeas corpus is unavailable to military prisoners.[118] Rejecting both arguments, the Court asserted habeas jurisdiction over cases filed by Guantánamo detainees, thus preserving the opportunity for a double check by enabling judicial review.[119] While the Court did not find explicit congressional action to limit executive power, it did rely on statutory grants of habeas jurisdiction, which it concluded extended to cases arising from Guantánamo internment.[120] The Court also relied on its own interpretation of the relevant habeas statute in *Braden v. 30th Judicial Circuit Court of Kentucky*,[121] an interpretation of long standing that Congress had apparently accepted, and that the Court treated as undercutting its earlier reasoning in *Eisentrager*, which had relied on a limiting interpretation of habeas jurisdiction that the decision in *Braden* overruled.[122] The Court also relied on a realist understanding of the statutory reach of habeas to territory (such as Guantánamo Bay) over which the United States exercised functional sovereign control, even though it was

113. *Hamdi*, 542 U.S. at 541 (Souter, J., concurring) ("[T]he Non-Detention Act entitles Hamdi to be released.").

114. *Id.* at 534-35 (majority opinion).

115. *Id.* at 579-99 (Thomas, J., dissenting).

116. 542 U.S. 466 (2004).

117. 339 U.S. 763 (1950).

118. *Rasul*, 542 U.S. at 472-73 (citing *Eisentrager*, 339 U.S. at 777-78).

119. *Id.* at 480-82, 484-85.

120. *Id.* at 478.

121. 410 U.S. 484 (1973).

122. *Rasul*, 542 U.S. at 479. *Eisentrager* depended on a narrow reading of habeas jurisdiction that the Court adopted in *Ahrens v. Clark*, 335 U.S. 188 (1948), a decision that *Braden* overruled. See generally Joseph T. Thai, *The Law Clerk Who Wrote* Rasul v. Bush*: John Paul Stevens's Influence from World War II to the War on Terror*, 92 VA. L. REV. 501 (2006), for an interesting discussion of possible connections between Justice Stevens's role as a law clerk for dissenting Justice Rutledge when *Ahrens* was decided and his later reasoning for the Court in *Rasul*.

technically foreign soil.[123] Importantly, the Court interpreted the law in such a way as to prevent the creation of a "jurisdiction-free" zone in which the executive could act free of judicial oversight. If there was to be a double check of any kind at Guantánamo, this decision was a necessary precondition for its operation.[124]

I have not yet discussed the third 2004 enemy combatant detention case, *Rumsfeld v. Padilla*.[125] The Court's decision in the case does not cut much for or against the double-check approach, because it turned on a technicality. Padilla filed his habeas corpus petition in the U.S. District Court for the Southern District of New York (where the government had initially commenced criminal proceedings against him, which it abruptly terminated when the President declared Padilla to be an enemy combatant).[126] Since Padilla had been transferred to a navy brig in South Carolina, the Court ruled that he was obliged to file his habeas petition in the U.S. District Court for the District of South Carolina, the district which had jurisdiction over the federal official responsible for his detention.[127]

Nevertheless, in one way the *Padilla* case might well be regarded as the proverbial "elephant in the room" for the Court's double-check analysis, because of the circumstances of Padilla's "capture." Unlike Hamdi and Rasul, both of whom were taken into U.S. custody on the field of military operations in Afghanistan, Padilla was taken into government custody in a Chicago airport.[128] His case thus palpably demonstrated that the President's claim of executive

123. *Rasul*, 542 U.S. at 481 ("Application of the habeas statute to persons detained at the base is consistent with the historical reach of the writ of habeas corpus.").

124. Several scholars have discussed the *Rasul* decision. *See generally, e.g.*, Randolph N. Jonakait, Rasul v. Bush*: Unanswered Questions*, 13 WM. & MARY BILL RTS. J. 1103 (2005) (noting that *Rasul* left open many questions of rights possessed by detainees); Neal K. Katyal, *Executive and Judicial Overreaction in the Guantanamo Cases*, 2004 CATO SUP. CT. REV. 49 (arguing that *Rasul* sweeps too far as reaction to Bush administration's excessive claims of inherent executive power); David A. Martin, *Offshore Detainees and the Role of Courts after* Rasul v. Bush*: The Underappreciated Virtues of Deferential Review*, 25 B.C. THIRD WORLD L.J. 125 (2005) (arguing standard of review outlined in *Rasul* and *Hamdi* strikes appropriate balance between civil liberties and war powers); Sameh Mobarek, Rasul v. Bush*: A Courageous Decision but a Missed Opportunity*, 3 LOY. U. CHI. INT'L L. REV. 41 (2005) (arguing that *Rasul* was correctly decided, but should have gone further in defining detainee rights); Joseph Pope, *Opening the Flood Gates:* Rasul v. Bush *and the Federal Court's New World-Wide Habeas Corpus Jurisdiction*, 26 N. ILL. U. L. REV. 331 (2006) (arguing that majority made political, rather than legal, decision); Christopher M. Schumann, *Bring It On: The Supreme Court Opens the Floodgates with* Rasul v. Bush, 55 A.F. L. REV. 349 (2004) (arguing that decision is unnecessary hindrance on President's war powers); Elizabeth A. Wilson, *The War on Terrorism and "The Water's Edge": Sovereignty, "Territorial Jurisdiction," and the Reach of the U.S. Constitution in the Guantánamo Detainee Litigation*, 8 U. PA. J. CONST. L. 165 (2006) (arguing that *Rasul* should be read as evidence of shifting jurisprudence of applicability of Bill of Rights to aliens from majority opinion in *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), to Justice Kennedy's concurring opinion resulting in broader application of constitutional rights).

125. 542 U.S. 426 (2004).

126. *Padilla*, 542 U.S. at 432.

127. *Id.* at 451.

128. *Id.* at 430-31.

authority over "enemy combatants" was worldwide and included all U.S. territory. To the extent that detention could lead to eventual military trial for war crimes under the President's already created (but not yet actually implemented) system of military tribunals, Padilla's case thus also supported the inference that this system of military commissions could operate as an alternative court system, giving the executive the choice, for any individual suspected of the fairly wide range of crimes involved in the war on terror, of routing them to trial by a military commission under the aegis of executive authority and control, rather than to a jury trial in the constitutionally separate and independent federal criminal courts. In the past, the Court had deemed such embracing claims of military commission authority to be a threat to Article III's role in the separation of powers.[129] That concern supplied an additional reason to treat warily the President's claims of inherent executive authority and to interpret with care Congress's grants of statutory authority for detention.

Thus, the 2004 enemy combatant cases collectively demonstrate the Court's emerging commitment to a double-check approach. The cases look first to congressional action, and where that action confers clear authority, they largely defer to executive discretion. When, however, the authority from Congress is less clear, or when it contains internal limitations or constraints, the cases read executive power more narrowly and defer less wholeheartedly to executive discretion. Importantly, they maintain a foundation for continuing judicial review of executive action, and they apply principles of due process as active restraints on executive emergency power. In the absence of clear evidence to the contrary, they treat due process as an underlying and implicit qualification to congressional authorization.

B. Hamdan*'s Limits on Trial by Military Commission*

As applied to matters of military justice, the double-check method really achieves full force in *Hamdan v. Rumsfeld*.[130] The questions in *Hamdan* were (1) whether the Court possessed jurisdiction; (2) whether the military commission by which Hamdan was to be tried exceeded executive power; and (3) whether the commissions complied with U.S. obligations under international law, specifically the Geneva Conventions.[131] The government gave the Court at least five arguments for ruling in its favor—two jurisdictional arguments, two claims of statutory authority, and one claim of inherent and unlimitable executive power[132]—all of which the Court rejected.[133] In each instance, the Court relied

129. *See, e.g.*, Reid v. Covert, 354 U.S. 1, 49 (1957) (holding by plurality that civilian dependents of members of armed forces overseas cannot be tried for capital offenses by courts-martial in times of peace); United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 23 (1955) (holding that civilian ex-servicemen are not subject to courts-martial).

130. 126 S. Ct. 2749 (2006).

131. *Hamdan*, 126 S. Ct. at 2759-60, 2762-63.

132. Jurisdictionally, the government argued both that the DTA had prohibited jurisdiction and that principles of abstention applied. It claimed statutory authority under both the AUMF and the Uniform Code of Military Justice ("UCMJ"). Finally, it argued that the President's powers as commander in chief and his inherent authority obviated the need for legislative authorization. *See, e.g.*,

on a double-check method of reasoning to support its judgment.

With respect to jurisdiction, the Court read the DTA narrowly, concluding that Congress had not curtailed jurisdiction for cases such as Hamdan's that had been filed before their effective date.[134] This reasoning is consistent with *Rasul* in preserving the opportunity for a double check. The Court also refused to invoke the judicial doctrine of abstention it had previously applied to military trials, ruling that the doctrine did not extend to challenges to a military tribunal's constitutional authority.[135]

On the merits, the Court refused to accept the government's claim for authority under either the AUMF or the Uniform Code of Military Justice ("UCMJ").[136] The Court read the AUMF somewhat more narrowly than it had in *Hamdi*, yet in a fashion consistent with *Hamdi*'s due process reasoning. The Court determined that the AUMF could be read to authorize only such military commissions as conformed to prior practice and complied with the basic procedural requirements of the UCMJ, the statutory successor to the Articles of War.[137] The Court then read the UCMJ itself to exact important procedural guarantees that were missing from the military commissions the President had ordered.[138] Additionally, the Court concluded that the terms of the UCMJ incorporated by reference the protections of the Geneva Conventions, which required trials in "regularly constituted" tribunals.[139] Because the military commissions in question failed the requirements of the UCMJ, they were not "regularly constituted" within the meaning of the Geneva Conventions.[140] Finally, throughout its analysis the Court rejected the government's claim to inherent authority to create the tribunals in question and determine their mode of operation.[141] It treated congressional authorization as an essential condition precedent to the exercise of executive power, at least in a context (such as

Brief for Respondents at 12, Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006), No. 05-184 (Feb. 23, 2006) (arguing lack of jurisdiction); *id.* at 15-17 (arguing Congress granted authority under AUMF and UCMJ); *id.* at 20-21 (arguing President possesses inherent power to act unilaterally); *id.* at 30 (arguing Geneva Conventions do not create judicially enforced rights); *id.* at 48 (arguing Geneva Convention Article 3 does not apply to this military commission).

133. *Hamdan*, 126 S. Ct. at 2759-60; *see also, e.g.*, Peter J. Spiro, *International Decisions:* Hamdan v. Rumsfeld, 100 AM. J. INT'L L. 888, 888-91 (2006) (articulating Court's rejection of jurisdictional arguments and Court's findings of violations of UCMJ); Mark Tushnet, Carmack Waterhouse Professor of Constitutional Law, Georgetown Univ., Georgetown University Law Center Panel Discussion on the Supreme Court Decision in the Case of *Hamdan v. Rumsfeld* 4-8 (June 30, 2006), *available at* http://www.law.georgetown.edu/news/documents/hamdanTranscript.pdf (summarizing Court's ruling and articulating possible legal ramifications of Court's ruling).

134. *Hamdan*, 126 S. Ct. at 2764-65.

135. *Id.* at 2772.

136. 10 U.S.C. §§ 801-946 (2000).

137. *Hamdan*, 126 S. Ct. at 2775.

138. *Id.* at 2791-93 (discussing rules for courts-martial generally, and specifically mentioning need for properly sworn and authenticated evidence).

139. *Id.* at 2796; *see generally* Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (covering treatment of prisoners of war).

140. *Hamdan*, 126 S. Ct. at 2797.

141. *Id.* at 2773.

military trials) which Congress had consistently and routinely regulated.[142]

As Justice Kennedy forcefully argued in concurrence, this analysis depends at almost every turn on Congress.[143] The Court's key holdings all rest on statutory interpretation. Thus the Court took its cue from the legislative limits on executive initiative it found in the AUMF, the UCMJ, and the DTA. These statutory soundings were critical to the Court's analysis. They enabled judicial action to limit executive power, placing the case in the category where Justice Jackson, in *Youngstown Steel & Tube v. Sawyer (Steel Seizure)*,[144] had proclaimed executive authority to be at is lowest ebb.

Yet, the case actually involved a double check, because the holdings are equally attributable to the Court's own willingness to engage in relatively searching judicial review. The statutes on which the Court relied were all formally cast, not as negative restraints on executive power, but as affirmative authorizations for executive authority. Nevertheless, in each instance the Court measured the dimensions of congressional authorization carefully, concluding that the military commissions the President ordered lay beyond their outer limits. The commissions failed to conform to past patterns with respect to the operation of military tribunals, and they failed to comport with congressional expectations regarding conformity to the commands of international law. For these reasons, the Court pointedly refused to adopt the more expansive and deferential reading of the same statutes offered by Justice Alito's dissent.[145] Additionally, as in *Hamdi* and *Rasul*, it rejected the calls for extreme deference to executive discretion in the face of national emergency advanced by dissenting Justices Thomas[146] and Scalia.[147] Absent a more explicit grant of authority from Congress, the Court was unwilling to give the executive a free hand in structuring its military commissions. Although the World War II decisions are all distinguishable in various ways, *Hamdan* thus contrasts with *Ex parte Quirin*,[148] *Hirabayashi v. United States*,[149] and *In re Yamashita*[150] in its willingness to engage in relatively searching judicial review.

This searching judicial stance may well have been due to two factors that link *Hamdan* with *Ex parte Milligan*,[151] *Duncan v. Kahanamoku*,[152] *Ex parte Endo*,[153] and *Steel Seizure*. The link with *Milligan* and *Duncan* comes from the

142. *Hamdan*, 126 S. Ct. at 2773-74.

143. *Id.* at 2799-809 (Kennedy, J., concurring). See Green, *supra* note 44, at 156-75, for more on the importance of legislative action in detainee jurisprudence with a focus on Justice Kennedy's voting pattern.

144. 343 U.S. 579, 637-38 (1952).

145. *Hamdan*, 126 S. Ct. at 2849-55 (Alito, J., dissenting).

146. *Id.* at 2823-49 (Thomas, J., dissenting).

147. *Id.* at 2810-23 (Scalia, J., dissenting).

148. 317 U.S. 1 (1942).

149. 320 U.S. 81 (1943).

150. 327 U.S. 1 (1946).

151. 71 U.S. (4 Wall.) 2 (1866).

152. 327 U.S. 304 (1946).

153. 323 U.S. 83 (1944).

fact that the military commissions represented a direct incursion on the jurisdiction of the judiciary by exercising power over cases that could as easily have been filed in regularly constituted federal courts. As in those earlier cases, there was no showing that the courts would have been incapable of dealing with these cases. Although the government asserted that ordinary criminal trials might jeopardize national security,[154] its arguments were general, lacking in particularity, and belied by past experience involving successful criminal prosecution of international terrorists.[155] Additionally, while Hamdan himself had been captured on foreign soil in a theater of military operations, the jurisdiction of the commissions extended well beyond those facts to include prisoners who might be captured anywhere in the world, including (as in *Padilla*) the United States. Thus, the military commissions threatened to function as a parallel "shadow" court system, lacking the fundamental guarantees of the criminal process and the independence of Article III judges, that could be used in any instance in which the President elected to designate an individual as an "enemy combatant" triable for a broad array of loosely defined "war crimes," including apparently such open-ended transgressions as conspiracy to commit terroristic acts. In the Court's judgment, this represented a far greater intrusion on judicial authority than either past military practice or the congressional statutes on military justice envisioned.[156]

The link with *Endo* comes from the Court's reading of a statutory authorization as including implicit limitations. In *Endo*, the authorization for internment did not extend to indefinite detention of an individual of unquestioned loyalty for reasons that amounted to administrative convenience.[157] Similarly in *Hamdan* the authority derived from the AUMF and the UCMJ did not extend to use of novel military commissions that lacked the traditional procedural safeguards established by prior practice, the military code of justice, and international law.

The link with *Steel Seizure* comes from the conclusion that the President, by ordering the creation of the commissions, engaged in a lawmaking function

154. Brief for Respondents, *supra* note 132, at 12-13.

155. Terrorists were tried and convictions obtained in federal court in cases involving the 1993 World Trade Center Bombing, a 1996 plot to hijack several airliners, the 1998 U.S. Embassy bombings, the September 11 attacks, and the so-called "shoe bomber." *See* Pam Belluck, *Unrepentant Shoe Bomber is Given a Life Sentence for Trying to Blow Up Jet*, N.Y. TIMES, Jan. 31, 2003, at A13 (reporting on conviction in attempted airliner bombing); *Guilty Verdicts in Terror Trial*, N.Y. TIMES, Oct. 2, 1995, at B1 (reporting ten persons convicted in conspiracy to bomb targets in New York); Neil A. Lewis, *Moussaoui Given Life Term By Jury over Link to 9/11*, N.Y. TIMES, May 4, 2006, at A1 (reporting conviction of coconspirator in September 11 attacks); Benjamin Weiser, *4 Guilty in Terror Bombings of 2 U.S. Embassies in Africa; Jury to Weigh 2 Executions*, N.Y. TIMES, May 30, 2001, at A1 (reporting convictions in embassy bombings); Christopher S. Wren, *U.S. Jury Convicts 3 in a Conspiracy to Bomb Airliners*, N.Y. TIMES, Sept. 6, 1996, at A1 (reporting convictions of three in highjacking plot, including alleged mastermind of 1993 World Trade Center bombing). Jose Padilla was convicted and was recently sentenced to seventeen years and four months in prison. Kirk Semple, *Padilla Gets 17-Year Term for Role in Conspiracy*, N.Y. TIMES, Jan. 23, 2008, at A14.

156. Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2784-86 (2006).

157. *Ex parte* Endo, 323 U.S. 283, 301-02 (1944).

entrusted by Article I to Congress. Here, Justice Douglas's concurrence in *Steel Seizure* is particularly instructive. In *Steel Seizure*, Douglas pointed out that the President's seizure amounted to a taking of property, an act that would potentially require just compensation under the Fifth Amendment.[158] Yet Article I specifically vests such decisions regarding takings, with their attendant financial and budgetary consequences under the Taxing and Spending Clauses, to Congress.[159] Similarly, in *Hamdan* the President set the contours of the new military commission's structure and function, ignoring the fact that Article I confers the powers to establish inferior tribunals and set the rules of military justice on Congress. Thus in both *Steel Seizure* and in *Hamdan*, the executive effectively commandeered legislative functions, invading powers that the Constitution specifically vested in another branch, without any evidence to show that Congress was incapable of exercising those functions on its own. Allowing such a power grab would upset the Constitution's system of checks and balances.

C. Implications of Hamdi *and* Hamdan

The double-check approach has several implications for executive power analysis regarding military justice. As a preliminary matter, it requires judicial skepticism regarding claims of inherent executive power. Once a court acknowledges inherent executive authority to act independently of congressional oversight or control, it faces the strong claim (one advanced unsuccessfully by the government in *Hamdan*) that any attempt by Congress or the judiciary to place limitations on the scope of that authority would be illegitimate.[160] For the double check to work, it must operate in a zone of shared authority. Thus, the courts must recognize that, outside the context of actual military field operations, the arena of truly independent inherent executive power over military justice is small.

Additionally, the courts must recognize that, in the context of military justice, the *Steel Seizure* "zone of twilight"[161] (an area of shared authority where Congress has taken no position on the scope of executive power) is, at this juncture in our history, also vanishingly small. Indeed, it is virtually a null set. As a practical matter, Congress has spoken, at least indirectly, though more often specifically and even comprehensively, on most matters of military justice, so that circumstances in which the executive will be acting in a true legislative vacuum are likely to be extremely rare. For the most part, some congressional action will operate to set the terms of executive authority, either by authorizing or ratifying the executive acts in question, or by placing limitations on them, or

158. Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579, 631-32 (1952) (Douglas, J., concurring).

159. U.S. CONST. art. I, § 8, cl. 1.

160. *See, e.g.*, Brief for Respondents, *supra* note 132, at 23 (arguing congressional authorization was unnecessary for military commissions); *see also* Yoo, *An Imperial Judiciary at War*, *supra* note 17, at 83-84 (arguing that intrusive role of Supreme Court in *Hamdan* will impede ability of future executives to respond to emergencies and war).

161. *Steel Seizure*, 343 U.S. at 637 (Jackson, J., concurring).

both. Thus executive power will rarely depend on Article II alone. Rather, in most circumstances, executive power will either be buttressed by congressional authorization or circumscribed by congressional limitation.

Third, the courts must adopt a practice of carefully construing congressional action. As *Hamdan* illustrates, this is not an area in which courts should interpret congressional action broadly, particularly given the inescapable fact that individual civil liberties are always at stake. Rather, courts should require clear statements of congressional authorization for resort to extraordinary military tribunals, and they should carefully enforce both implicit and explicit limitations on emergency power to convene them. In doing so, both context and tradition are relevant factors. In particular, the courts should be wary of departures from practical norms for military justice established by past practice, and they should give weight to congressional assumptions and expectations founded on past experience, international norms regarding the laws of war,[162] information about the nature of current emergent circumstances, and other foundations for congressional judgment. While some room for executive flexibility needs to be maintained, major departures from typical practice should require new and explicit sources of authority. Failure to utilize existing lines of authority, or failure to seek explicit authorization for aggressive assertions of power, should count against the scope of executive power.

Finally, in this area of shared authority the Court should not readily defer to claims of superior executive expertise. On such judicial or quasi-judicial matters as the fairness of process, the probity of evidence, and the rights that should be afforded to the accused, the courts possess at least equal, if not in fact superior, competence to the executive. These issues are the everyday grist of the judicial mill. Additionally, the Court should require well-documented and particularized support for any claims of exigency or threats to national security. As the experience of *Korematsu* demonstrates, undue deference to such claims may well present the gravest danger to the preservation of equal justice under law.[163]

This approach, though it enables rigorous judicial review, has the practical effect of allowing Congress to cast the deciding card in most situations. *Hamdan* firmly establishes that Congress has the power to limit executive authority. Provided it is sufficiently explicit, Congress also has the power to enable executive authority. As with other Article I courts, there are relatively few substantive limitations on Congress's capacity to direct matters that would otherwise be triable in an Article III court to a military tribunal. The only

162. The detainee cases have received as much attention abroad as they have in the United States, yet international law seems to get short shrift in these opinions in spite of its clear applicability. *See* W. Michael Reisman, Rasul v. Bush: *A Failure to Apply International Law*, 2 J. INT'L CRIM. JUST. 973, 980 (2004) (noting that majority, concurring, and dissenting opinions are "oblivious" to international law); Spiro, *supra* note 133, at 889 (noting that only plurality reached international law issues). For further discussion on reference to foreign and international law sources in Supreme Court jurisprudence, see generally Mark C. Rahdert, *Comparative Constitutional Advocacy*, 56 AM. U. L. REV. 553 (2007).

163. See *supra* note 64 for commentary on the danger of an excess of deference to the executive in military matters in the context of *Korematsu*.

limitations are those imposed by the Article III-Article I balancing framework emerging from cases such as *Commodity Futures Trading Commission v. Schor*,[164] constitutional limits on suspension of habeas corpus, plus the constitutional limitations of the Bill of Rights, to the (as yet largely undetermined) extent they may apply.

For the Court to apply any of these constitutional limitations, moreover, it will need to break new constitutional ground. To my knowledge, the Court has never directly held that any military court process involving enemy combatants violated constitutionally guaranteed rights of the accused. Indeed, both *Quirin* and *Yamashita* suggest that some (though perhaps not all) Bill of Rights provisions simply do not apply.[165] Nor has the Court ever held that Congress unconstitutionally attempted to suspend habeas corpus or found military jurisdiction over enemy combatants to violate the terms of Article III.[166] Decisions on any of these issues would require the courts to claim a power to single-check the executive, a position the Court has yet to enforce in this arena.

That does not mean the Court entirely lacks guideposts. There are three possible avenues of reasoning. *First*, *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*[167] suggests that there are certain circumstances where vesting of robust judiciary-like authority in a nonjudicial tribunal, without providing adequate means of ultimate judicial review over the Article I court's determinations, can offend the requirements of Article III.[168] While *Northern Pipeline* involved bankruptcy courts, its principles could well apply to military tribunals. In both *United States ex rel. Toth v. Quarles*[169] and *Reid v. Covert*,[170] the Court applied functionally similar reasoning to set limits on the jurisdiction of military courts. In those cases the Court's lead opinions stress limits on Congress's ability to use its Article I powers over the military to vest military courts with criminal jurisdiction over civilians, in part because doing so invades the authority of Article III courts. While neither case involved enemy combatants, their reasoning could potentially extend to military courts with jurisdiction over such "combatants," particularly when they are apprehended, held, and being tried for crimes in the United States that would fall within the customary jurisdiction of Article III criminal courts.

164. 478 U.S. 833 (1986) (utilizing balance-of-interests approach to determine that Commodity Futures Trading Commission's limited assumption of jurisdiction over state law did not violate Article III).

165. *See In re* Yamashita. 327 U.S. 1, 23 (1946) (holding military commission's rules of evidence not reviewable by courts); *Ex parte* Quirin, 317 U.S. 1, 29 (1942) (noting petitioner's offense against law of war does not require trial by jury).

166. *Compare* Johnson v. Eisentrager, 339 U.S. 763, 786-87 (1950) (holding that court had no jurisdiction over enemy aliens held overseas), *with* United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 13-15 (1955) (holding that military court had no jurisdiction over U.S. veteran after discharge).

167. 458 U.S. 50 (1982).

168. *Northern Pipeline*, 458 U.S. at 87 (holding that bankruptcy court's exercise of jurisdiction violated Article III).

169. 350 U.S. 11, 23 (1955) (holding that civilian ex-servicemen are not subject to courts-martial).

170. 354 U.S. 1, 40-41 (1957) (holding by plurality that civilian dependents of members of armed forces overseas cannot be tried for capital offenses by courts-martial in times of peace).

Second, principles of habeas corpus jurisdiction recognize that there are limits on Congress's power to withdraw the core functions of habeas corpus from the courts, and the Court's cases occasionally go to great lengths of statutory construction in order to avoid concluding that habeas corpus jurisdiction was suspended.[171] Protection of habeas corpus jurisdiction is critically important, because without it there may be no opportunity for the double check that is necessary to limit executive emergency power. As the Court recognized in *Rasul*, habeas challenges to the government's authority to detain alleged enemies of the state lie close to the core purposes of habeas corpus jurisdiction.[172] Thus, at a minimum, any withdrawal of habeas jurisdiction by Congress must be unambiguously explicit. Arguably it should also be tied to documented findings that the constitutionally prescribed circumstances for suspension of habeas corpus exist.[173]

Third, the dissenting and concurring arguments of Justices Murphy and Rutledge in some of the World War II military justice cases set a preliminary framework for applying the guarantees of due process to military commissions, even in circumstances when enemy combatants captured in actual military operations stand accused of war crimes.[174] Whether, after sixty years of growth in

171. *See, e.g.*, INS v. St. Cyr, 533 U.S. 289, 298-306 (2001) (construing Immigration and Nationality Act § 212(c) so as not to implicate Suspension Clause), *superseded by statute*, Real ID Act of 2005, Pub. L. No. 109-13, Div. B., 119 Stat. 231, 302; Felker v. Turpin, 518 U.S. 651, 663-64 (1996) (construing Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1217 (codified as amended in scattered sections of 28 U.S.C.), so as not to violate Suspension Clause); Swain v. Pressley, 430 U.S. 372, 381-82 (1977) (upholding clause similar to 28 U.S.C. § 2255 in District of Columbia Code even though it removes habeas corpus jurisdiction for some defendants due to alternative means of review); United States v. Hayman, 342 U.S. 205, 223 (1952) (holding 28 U.S.C. § 2255 does not violate Suspension Clause, for similar reasons).

172. Rasul v. Bush, 542 U.S. 466, 474 (2004) ("'At its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention . . . .'" (quoting INS v. St. Cyr, 533 U.S. at 301)).

173. In several opinions, however, Justice Scalia treats suspension as a purely political question in which Congress is entitled to absolute deference, provided it makes a clear statement of suspension. *See, e.g.*, Hamdi v. Rumsfeld, 542 U.S. 507, 578 (2004) (Scalia, J., dissenting) (arguing that what constitutes "rebellion or invasion" for purposes of Suspension Clause is for Congress to decide and not within competence of courts); *St. Cyr*, 533 U.S. at 337-38 (Scalia, J., dissenting) (arguing that Suspension Clause does not create an affirmative right to habeas). For further discussion, see Richard H. Fallon, Jr., *Applying the Suspension Clause to Immigration Cases*, 98 COLUM. L. REV. 1068, 1071 (1998) (arguing that judicial inquiry under Suspension Clause should parallel that under Due Process Clause); Morrison, *supra* note 96, at 429-32 (pointing out that availability of judicial review of suspension is open question); Gerald L. Neuman, *The Habeas Corpus Suspension Clause after* INS v. St. Cyr, 33 COLUM. HUM. RTS. L. REV. 555, 568-69 (2002) (pointing out one early interpretation of Suspension Clause was to protect states rights from Congress); David L. Shapiro, *Habeas Corpus, Suspension, and Detention: Another View*, 82 NOTRE DAME L. REV. 59, 78-79 (2006) (noting that at least some aspects of suspension must be open to judicial review); Jordan Steiker, *Incorporating the Suspension Clause: Is There a Constitutional Right to Federal Habeas Corpus for State Prisoners?*, 92 MICH. L. REV. 862, 888-89 (1994) (stating case that Suspension Clause is incorporated by Fourteenth Amendment and should be judicially interpreted accordingly); and Amanda L. Tyler, *Is Suspension a Political Question?*, 59 STAN. L. REV. 333, 351-79 (2006) (detailing arguments on each side but concluding that suspension is not political question).

174. See *supra* notes 54-64 and accompanying text for a discussion of dissenting and concurring

federal human rights jurisprudence, the Court can muster the votes to elevate those arguments from dissent to majority may well be the next big watershed question in the executive power arena.[175] *Hamdi* and *Hamdan* send some affirmative signals, but they are fairly weak. *Hamdi* did, in fact, apply due process to enemy combatant detention but did so in its civil rather than criminal law form and did so only in the context of detention of an American citizen. Whether its reasoning would apply to criminal due process protections, and whether it would do so in cases involving noncitizen enemy combatants, remain open questions.[176]

Should due process apply, the Court will face the further challenge of determining what *criminal* process is due in war-crimes military tribunals, leading perhaps to a new federal-court to military-commission version of the old due process incorporation debate. The Court will need to assess which guarantees of the Bill of Rights are so fundamental to the concept of ordered liberty that they apply, through the Fifth Amendment Due Process Clause, to the operation of military tribunals and commissions.[177] Clearly, not all guarantees will apply: at a minimum, it seems clear that if military commissions are legitimate at all, the right to trial by jury would not extend fully to them.[178] Whether other rights, such as assistance of counsel, conviction beyond reasonable doubt, confrontation of witnesses, and the like, do or do not apply would require the development of a new military-justice due process jurisprudence.[179]

While each of these arguments for a judicial single check on military commissions has some merit, all three require a stretch beyond current precedent. More significantly, they also require an adjustment of the executive power baseline described at the beginning of this Article. They place the courts in the uncomfortable position of setting themselves up as the sole institutional

opinions of Justices Murphy and Rutledge.

175. See Anita Krishnakumar, *On the Evolution of the Canonical Dissent*, 52 RUTGERS L. REV. 781, 816-22 (2000), for an interesting take on how dissents sometimes transform into majority holdings.

176. Tung Yin, *Procedural Due Process to Determine "Enemy Combatant" Status in the War on Terrorism*, 73 TENN. L. REV. 351, 363-84 (2006) (discussing in-depth evolution of due process with regard to aliens).

177. For more on which due process rights may be guaranteed to enemy combatants, see Daryl L. Hecht, *Controlling the Executive's Power to Detain Aliens Offshore: What Process is Due the Guantanamo Prisoners?*, 50 S.D. L. REV. 78, 94-110 (2005) (arguing some due process is due to Guantánamo prisoners); Yin, *supra* note 176, at 399-413 (using analogical reasoning model to determine scope of due process that should be afforded to detainees); Tung Yin, *The Role of Article III Courts in the War on Terrorism*, 13 WM. & MARY BILL RTS. J. 1035, 1064-74 (2005) (discussing elements of due process and which might be available to enemy combatants).

178. *See Ex parte* Quirin, 317 U.S. 1, 29 (1942) ("[T]hese petitioners were charged with an offense against the law of war which the Constitution does not require to be tried by jury.").

179. *See In re* Yamashita, 327 U.S. 1, 49 (1946) (Rutledge, J., dissenting) (arguing admissibility and probative value of evidence should mirror federal rules of evidence); *id.* at 56-57 (arguing for adequate time to prepare a defense and adequate representation by counsel); *id.* at 78-81 (arguing about need for Fifth Amendment due process generally). See Hecht, *supra*, note 177, at 87-88; Yin, *supra* note 176, at 399-413; Yin, *supra* note 177, at 1064-89, for more on what due process rights may be guaranteed to enemy combatants.

check against emergency executive authority, at least in some limited circumstances. Whether the Court is either capable or willing to take on that role in the context of military justice are questions that have yet to be answered.

IV. THE DETAINEE TREATMENT AND MILITARY COMMISSIONS ACTS

The implication of the double-check approach for the current crisis strongly suggests that the executive will largely have its way with the Guantánamo detainees in military court. Together, the DTA and the MCA go a long way toward giving congressional blessing to the military tribunals established by the Bush administration. After the decision in *Hamdan v. Rumsfeld*,[180] the President took advantage of what turned out to be the waning days of Republican control over Congress to push through legislation (the MCA) that would authorize many of the characteristics of the military commissions the President had ordered in 2001.[181] The legislation also purported to insulate most of the military commissions' decisions from judicial review,[182] cut off at least some habeas corpus jurisdiction as a means of testing the constitutionality of the new measures,[183] denied prisoners standing to raise Geneva Convention claims,[184] and attempted to give the President, rather than the courts, authority to interpret the requirements of the Geneva Conventions.[185] In adopting these measures, Congress converted the military commissions from artifacts of executive fiat, as they were seen in *Hamdan*, to instruments of congressional policy. Congress authorized and regularized their function, effectively anointing the enemy combatant military commissions as true "Article I" tribunals.

Congress's action has already affected the progress of ongoing challenges to the military commissions in lower federal courts. Most notably, the D.C. Circuit held, in *Boumediene v. Bush*,[186] that the MCA effectively deprived the federal courts of jurisdiction to entertain habeas challenges seeking collateral review of the constitutionality of Combatant Status Review Tribunal ("CSRT")

180. 126 S. Ct. 2749 (2006).

181. *See, e.g.*, Military Commissions Act of 2006, Pub. L. No. 109-366 § 2, 120 Stat. 2600, 2600 (codified as amended in scattered titles and sections of U.S.C.) (declaring that nothing in act could be construed as limiting previous executive power); *id.* § 3, 120 Stat. at 2602 (declaring that UCMJ right to speedy trial and pretrial investigation regulations not applicable); *id.* (declaring commissions to fall within Geneva Convention Common Article 3); *id.* § 3, 120 Stat. at 2603 (requiring no legal experience to serve on military commission); *id.* § 3, 120 Stat. at 2607 (declaring that some statements obtained under coercion could be admissible at commission's discretion); *id.* § 3, 120 Stat. at 2614 (declaring that certain classified information may be withheld from defense counsel).

182. *See* Military Commissions Act § 3, 120 Stat. at 2622 (declaring only questions of law and not of fact reviewable).

183. *See id.* § 7(a), 120 Stat. at 2636 (declaring that no "court, justice, or judge" can hear habeas petition from one properly determined or awaiting determination as enemy combatant).

184. *See id.* § 3, 120 Stat. at 2602 ("No alien unlawful enemy combatant subject to trial by military commission under this chapter may invoke the Geneva Convention as a source of rights.").

185. *See id.* § 6, 120 Stat. at 2632 ("[T]he President has the authority for the United States to interpret the meaning and application of the Geneva Conventions . . . .").

186. 476 F.3d 981 (D.C. Cir. 2007).

proceedings.[187] The decision occasioned a spirited debate between the majority and dissent regarding the applicability of the Suspension Clause and the standards for interpreting it.[188] It also included an assertion by the majority that constitutional guarantees applicable within the United States did not extend to enemy combatants held on the technically foreign soil at Guantánamo. With three Justices dissenting, the Supreme Court initially denied certiorari.[189] Justices Stevens and Kennedy took the somewhat unusual step of issuing an opinion concurring in the denial which suggested that the case might be appropriate for review at a later stage. Although it is always risky to read substance into Court decisions to deny certiorari, their concurrence seemed implicitly to accept, at least for the moment, the legitimacy of Congress's decision to authorize further military proceedings without providing for immediate habeas review. The Court's initial reluctance to review suggested an inclination by the Justices to reserve any definitive decision as to the constitutionality of the measures Congress authorized in the MCA until later appeal (or petition for habeas), perhaps not until after a military tribunal's war-crimes conviction.

On the other hand, in *al-Marri v. Wright*,[190] the Fourth Circuit, also in a split decision, held that the MCA did not preclude habeas jurisdiction over a case brought by a detainee held at the naval brig in Charleston, South Carolina who was "captured" in the United States (in Peoria, Illinois) while attending university.[191] Over a strong dissent, the majority opinion by Judge Motz read the MCA narrowly to conclude that it did not preclude jurisdiction in such a context.[192] The court also concluded that the petitioner could not properly be classified as an "enemy combatant" for purposes of continued detention.[193] The decision gave the government the options of prosecuting Ali Saleh Kahlah al-Marri in federal criminal court or seeking his deportation, but held that it may not try him in a military tribunal or continue to detain him as an "enemy combatant" at the Charleston facility.[194] In some tension with the decision in *Boumediene*, the court concluded that because of the petitioner's "substantial

187. *Boumediene*, 476 F.3d at 986-88.

188. The majority held that because the detainees would not have had access to the writ in 1789, they do not have any rights under the Suspension Clause. *Id.* at 990. The majority also held that the Constitution confers no rights at all on "aliens without property or presence within the United States." *Id.* at 991. The dissent argued that the question of whether the Constitution confers rights on nonresident aliens is unnecessary because the Suspension Clause is a restriction on congressional action and thus the distinction between citizen and alien is irrelevant. *Id.* at 995-96 (Rogers, J., dissenting). Judge Rogers also argued that the relative lack of precedent from the eighteenth century is not dispositive because the situation of the detainees is so unique. *Id.* at 1000-01. Judge Rogers concluded that the central purpose of the writ would have made it available in 1789, if not necessarily practical to obtain. *Id.* at 1003-04.

189. Boumediene v. Bush, 127 S. Ct. 1478, 1479 (2007).

190. 487 F.3d 160 (4th Cir. 2007).

191. *Al-Marri*, 487 F.3d at 167-68.

192. *Id.* at 168 ("[T]he MCA does not apply to al-Marri.").

193. *Id.* at 184.

194. *Id.* at 195.

connections" to the United States, due process principles governed the circumstances of his detention, trial, and potential punishment.[195] The government declared its intention to seek review by the full Fourth Circuit, where the matter is currently subject to rehearing en banc.[196]

On the final day of its October 2006 Term, in an unusual turnabout, the Supreme Court granted certiorari in *Boumediene* and a companion case, *Al Odah v. United States*.[197] Under the Court's rules, the extraordinary decision to reconsider certiorari required five Justices to vote in favor of review, prompting speculation that the Justices may be concerned about the adequacy of the military commissions' proceedings.[198] The Court heard argument in these cases early in December 2007, promising another important enemy detention decision after this Article has gone to press. In its decision, the Court will almost certainly be called on to interpret the jurisdictional provisions of the MCA, and depending on its reading of the statute, it may be called on to decide the constitutionality of Congress's efforts to insulate the military tribunals from federal court habeas corpus review, as well as the constitutionality of the military commission proceedings themselves.[199]

195. *Id.* at 175.

196. *See* Adam Liptak, *Judges Say U.S. Can't Hold Man as 'Combatant*,' N.Y. TIMES, June 12, 2007, at A1 (discussing reaction to *al-Marri* decision).

197. 127 S. Ct. 3067 (2007).

198. *See* William Glaberson, *An Unlikely Adversary Arises to Criticize Detainee Hearings*, N.Y. TIMES, July 23, 2007, at A1 (discussing potential role of insider revelations in getting Supreme Court to hear *Boumediene* case).

199. The petitioners in *Boumediene* and *Al Odah* argue that the MCA does not preclude jurisdiction, that if it does it constitutes an unlawful suspension of habeas corpus, and that the proceedings of the CSRTs are constitutionally defective. *See* Brief for the *Boumediene* Petitioners at 9, Boumediene v. Bush, No. 06-1195 (U.S. Aug. 2007), *available at* http://www.scotusblog.com/movabletype/archives/Boumediene_merits_brief.pdf ("[A]t a minimum, the Suspension Clause protects habeas corpus as it existed in 1789, and . . . access to the Great Writ may not be restricted unless Congress clearly and validly suspends the writ or provides an adequate and effective substitute for habeas review."); *id.* at 15 (arguing that *Eisentrager* does not control); *id.* at 20 (claiming that CSRT process fails to provide criminal trial protections, offers "no meaningful notice" of factual allegations warranting detention, and denies assistance of counsel); Brief for Petitioners Al Odah, et al. at 11, Al Odah v. United States, No. 06-1196 (U.S. Aug. 2007), *available at* http://www.scotusblog.com/movabletype/archives/probono_AlOdah_Abdah.pdf (arguing that MCA's elimination of habeas relief is violation of Suspension Clause); *id.* at 19 (noting that detainees have fundamental due process rights); *id.* at 31 (claiming that DTA review of CSRTs does not adequately substitute for federal habeas court review). The United States contests all three of these assertions. Additionally, in a reprise of arguments it made in *Rasul*, the government contends that habeas jurisdiction and due process do not extend to Guantánamo. Brief for the Respondents at 33-38, Boumediene v. Bush, No. 06-1195, Al Odah v. United States, No. 06-1196 (Oct. 2007), *available at* http://www.scotusblog.com/wp/wp-content/uploads/2007/10/us-brief-boumediene-10-9-07.pdf. Whether the Court reaches the , the Court may well remand on the substantive questions merits of the military commission process will obviously depend on its disposition of the jurisdictional claims. Even if it upholds jurisdiction, moreoversurrounding the military commission proceedings. Even such a limited decision, however, would go a long way toward establishing judicial authority to enforce guarantees of due process in military commission proceedings.

As in the *Prize Cases*,[200] *Ex parte Quirin*,[201] *Hirabayashi v. United States*,[202] and *Korematsu v. United States*,[203] Congress's endorsement of the military commissions through the MCA creates powerful momentum toward constitutionality, at least as applied to individuals who are appropriately classified as enemy combatants under traditional principles applicable to actual warfare. Under the reasoning of both *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*[204] and *Hamdan*, Congress's decision to clothe executive action with congressional authority in that context reverses the tidal direction of executive power. This step is what Justice Breyer, in his *Hamdan* concurrence, effectively invited Congress to take.[205] There are currently efforts underway in Congress to try to reinsert some limits on executive power by enacting amendments to the MCA that would eliminate some of its more aggressive jurisdiction-limiting provisions.[206] But even if such measures were to pass both Houses, they would likely meet with a presidential veto. Consequently, legislative authority for the military commissions is likely to stand. If the Court is to find any further limitations on the military commissions' authority, it must do so through single-checking, in a context where under Jackson's *Steel Seizure* analysis the flow of power to the executive is greatest and the independent role of judiciary is now at *its* "lowest ebb."[207]

If the Court is to possess any authority on its own to limit the operation of the Commissions, it will have to do so on one or more of three rationales: (1) that the MCA unconstitutionally invades the province of Article III, (2) that it

200. 67 U.S. (2 Black) 635 (1863).

201. 317 U.S. 1 (1942).

202. 320 U.S. 81 (1943).

203. 323 U.S. 214 (1944).

204. 343 U.S. 579 (1952).

205. Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2799 (2006) (Breyer, J., concurring). Justices Kennedy, Souter, and Ginsburg joined in this opinion.

206. On June 7, 2007, the Habeas Corpus Restoration Act, S. 185, 110th Cong. (2007), passed the Senate Judiciary Committee, largely along party lines. *See* Josh White, *Senate Committee Approves Bill for Detainee Hearings*, WASH. POST, June 8, 2007, at A3 (reporting on Senate Judiciary Committee approval of Habeas Corpus Act). Given current political divisions in the House and Senate, final action on any such proposal is unlikely.

207. *Steel Seizure*, 343 U.S. at 637 (Jackson, J., concurring). I see one possibility for a double check lurking in the *Boumediene* case. If the Court were to determine that Congress's jurisdictional limitations on the federal courts depended on certain structural and procedural assumptions regarding the operation of the military tribunals, and if the Court were to determine that the actual operation of the tribunals deviated so substantially from congressional expectations as to constitute a difference not in degree but in kind, the Court might be able to determine that the jurisdiction-limiting provisions of the MCA itself are inapplicable to the circumstances of the *Boumediene* and *Al Odah* petitions. While there is some evidence before the Court which might support such a conclusion, there is a fairly strong argument that this represents an unduly strained reading of Congress's position in the MCA, which was to head off court challenges until after the military tribunals had an opportunity to complete their work. *See, e.g.*, Military Commissions Act of 2006, Pub. L. No. 109-366, § 3, 120 Stat. 2600, 2622 (codified as amended in scattered titles and sections of U.S.C.) (declaring that U.S. Court of Appeals for D.C. Circuit "may not review the final judgment until all other appeals under this chapter have been waived or exhausted").

unconstitutionally suspends habeas corpus, or (3) that the MCA violates fundamental liberties guaranteed by the Bill of Rights. As matters presently stand, it seems doubtful that a majority of the Court will take any of these three positions.

With respect to the Article III, the argument is weakened by the fact that the MCA preserves, at least theoretically, ultimate Supreme Court review, after exhaustion of military avenues of appeal.[208] Cases defining the scope of congressional authority to establish Article I courts generally have emphasized the saving power of such ultimate Article III court review.[209] Where eventual review by an Article III court is available, particularly on questions that go to the limits of federal legislative authority, direction of the subject matter to an Article I system of tribunals is usually permissible.

With respect to the Suspension Clause issue, although there is very little precedent, it seems likely that the Court would conclude that such a limited restraint on habeas corpus jurisdiction is permissible, particularly given the narrow role that civilian courts have played in reviewing decisions regarding incarceration of military combatants since the eighteenth century.[210] The Court

208. *See* Military Commissions Act § 3, 120 Stat. at 2622 (declaring that "[t]he Supreme Court may review by writ of certiorari the final judgment of the Court of Appeals pursuant to section 1257 of title 28").

209. Only once in recent times has the Supreme Court struck down an Article I court on Article III grounds. In *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), the Supreme Court struck down the new bankruptcy courts. Nevertheless, the Court could not obtain a majority opinion and four years later adopted a balancing approach similar to Justice White's dissent in *Northern Pipeline*, 458 U.S. at 92-118 (White, J., dissenting), in *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833 (1986). One consistent principle in this balancing approach, sometimes stated, sometimes not, is the importance of Article III appellate review of Article I tribunal decisions. *See, e.g.*, Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 916, 943-74 (1988) (arguing that Article III review should be seen as necessary and sufficient for establishment of Article I courts); Daniel J. Meltzer, *Legislative Courts, Legislative Power, and the Constitution*, 65 IND. L.J. 291, 296-304 (1990) (arguing that Article III review of non-Article III tribunals is necessary and within judicial power); Richard B. Saphire & Michael E. Solimine, *Shoring up Article III: Legislative Court Doctrine in the Post* CFTC v. Schor *Era*, 68 B.U. L. REV. 85, 135-51 (1988) (arguing that Article III appellate review should be necessary, but not sufficient, for Article I court constitutionality). *But see* James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 645, 667-71 (2004) (arguing that appellate review has not been historically necessary in all cases, nor should it be considered sufficient).

210. The two cases most on point here are *Rex v. Schiever*, (1759) 97 Eng. Rep. 551 (K.B.), and *The Case of Three Spanish Sailors*, (1779) 96 Eng. Rep. 775 (K.B.). Both cases involve prisoners of war and both were resolved in favor of the Crown. In *Boumediene*, the dissent read into these cases an implicit conclusion that habeas relief could have been available to the prisoners if the court had ruled that they were improperly held. Boumediene v. Bush, 476 F.3d 981, 1001 (2007) (Rogers, J., dissenting). The D.C. Circuit majority, while not accepting this argument, distinguished these cases because the prisoners were held on sovereign territory, which in their view Guantánamo Bay is not. *Id.* at 989 (majority opinion). The constitutional significance of these and other historical precedents is a major subject of dispute in *Boumediene* and *Al Odah*. *Compare, e.g.*, Brief for the *Boumediene* Petitioners, *supra* note 199, at 23 (citing *Schiever* and *Case of Three Spanish Sailors* in support of statement that "[e]ven alleged prisoners of war in military detention were able to offer evidence supporting release, when they were detained within the jurisdiction of functioning courts and away

has taken the view that the status of habeas jurisdiction in 1789 is a key datum for interpreting suspension.[211] Under the analysis in *INS v. St. Cyr*,[212] Congress is relatively free to withdraw additions to habeas jurisdiction that occurred after 1789 without triggering Suspension Clause concerns.[213] Only changes in habeas jurisdiction that impede the core functions of habeas as they were understood at the time of ratification would require a determination of the scope of Congress's suspension authority. Although the matter is not entirely clear, it is doubtful that enemy combatants had much access to habeas corpus in the late eighteenth century. Consequently, as long as the Court adheres to the *St. Cyr* analysis, there may be no foundation for applying the Suspension Clause to the actions taken by Congress in the MCA.[214]

The most potent potential source of a single check, then, would be judicial recognition of Fifth Amendment procedural requirements for both civil and criminal trials in military courts. This possibility is the issue that Justice Murphy raised for the Court in the World War II cases but that the majority never directly entertained.[215] As mentioned above,[216] there are good arguments in support of applying the Fifth Amendment to trials of enemy combatants before military tribunals, however constituted, but accepting them would require a

from active hostilities"), *with, e.g.*, Brief for the Respondents, *supra* note 199, at 47 (arguing that "[t]he cases [of *Schiever* and *Case of Three Spanish Sailors*] . . . do not establish that the detainees would have been entitled to an evidentiary hearing in habeas; indeed, they do not even establish that the courts had jurisdiction over claims by aliens held as prisoners of war").

211. *See* INS v. St. Cyr, 533 U.S. 289, 301 (2001) ("[A]t the absolute minimum, the Suspension Clause protects the writ 'as it existed in 1789.'" (quoting Felker v. Turpin, 518 U.S. 651, 664 (1996))).

212. 533 U.S. 289 (2001).

213. *St. Cyr*, 533 U.S. at 300-01.

214. In *Rasul v. Bush*, the majority argued that its decision upholding jurisdiction was "[c]onsistent with the historic purpose of the writ." 542 U.S. 466, 474 (2004). Both the majority opinion by Justice Stevens, *id.* at 480-84, and the dissent by Justice Scalia, *id.* at 500-06 (Scalia, J., dissenting), discussed historical precedent from the eighteenth century to buttress their contrasting positions. The same historical issue was canvassed and debated in more depth in the D.C. Circuit's *Boumediene* opinions. *See Boumediene*, 476 F.3d at 988-90 (discussing common law cases from eighteenth century that addressed the habeas corpus issue); *id.* at 999-1004 (Rogers, J., dissenting) (discussing common law cases from eighteenth century that addressed habeas corpus issue and reaching different conclusion than majority opinion). As framed by the court in *Boumediene*, the question depends on eighteenth-century access by aliens to the writ of habeas corpus. *Id.* at 988-89 (majority opinion). Given the paucity of eighteenth century cases involving aliens held in nonsovereign, but sovereign-controlled territory (such as Guantánamo) seeking the writ, when viewed this way the issue may ultimately turn on arguably conflicting statements in Lord Mansfield's rather cryptic opinion in *Rex v. Cowle*, (1759) 97 Eng. Rep. 587 (K.B.). A more functional analysis would be to ask what the core functions of habeas are in our constitutional system, and whether Congress's action under the MCA invaded that core. Such an approach, however, might require some modification (or at least clarification) of *St. Cyr*. Under this approach, habeas practice as of 1789 would certainly be instructive, but particular eighteenth-century decisions would not necessarily determine the scope of the habeas rights the Suspension Clause guarantees. For critical commentary on the suspension question, see *supra* note 173.

215. See *supra* notes 54-64 and accompanying text for a discussion of the dissenting and concurring opinions of Justices Murphy and Rutledge in World War II military justice cases.

216. See *supra* notes 174-79 and accompanying text discussing whether due process will eventually apply to military commissions and what that due process may encompass.

substantial step beyond the more limited civil Fifth Amendment applications extended to U.S. citizen-detainees in *Hamdi* and *Korematsu*. Even if it applied Fifth Amendment principles, no doubt the Court would require considerably less process than what applies in civilian criminal courts, but it could conceivably recognize the operation of some constitutional constraints, particularly those that go to the heart of the basic fairness of the system. For example, more ample notice of the charges and evidence against the accused, restrictions on government use of coerced testimony, more robust protection for the assistance of counsel, greater opportunity for confrontation of witnesses, safeguards for the impartiality and independence of the military judges, and some access to exculpatory evidence might be among the essential guarantees that the Court could require.[217] But the momentum of precedent runs against the imposition of due process obligations in the military trials of enemy combatants.[218] And if the Court is to impose such requirements, it is more likely to do so by ultimate review of specific claims regarding the constitutionality of individual convictions than in any early habeas challenges to the structure of the entire system.[219]

V. LOOKING TO THE FUTURE

The present U.S. dispute over the extent of executive authority to impose military justice is relatively mild in contrast to assertions of emergency power that have been experienced elsewhere in the world.[220] President Bush's orders on

217. See *supra* note 146 and accompanying text detailing Justice Thomas's dissenting opinion in *Hamdan*.

218. See *Ex parte Quirin*, 317 U.S. 1, 41 (1942), and *In re Yamashita*, 327 U.S. 1, 23 (1946), for two precedential cases in which the Court declined to impose due process requirements in military trials of enemy combatants.

219. *See Boumediene v. Bush*, 127 S. Ct. 1478, 1478 (2007) (statement of Stevens & Kennedy, JJ., respecting denial of certiori) (stating that "our practice of requiring the exhaustion of available remedies . . . make[s] it appropriate to deny these petitions at this time").

220. There is a tradition in the Western world of concentrating executive power in times of emergency dating back to the early Roman practice of appointing a *dictator* during crises. See ACKERMAN, *supra* note 7, at 78-90, for a discussion of the evolution of the Western custom of concentrating power in times of emergency. Elsewhere in the world, contemporary examples of emergency power abound. Egypt, which has a nominally democratic government, has operated under a state of emergency with enhanced executive powers since the assassination of President Anwar Sadat in 1981. *See, e.g.*, Charles Robert Davidson, *Reform and Repression in Mubarak's Egypt*, FLETCHER F. WORLD AFF., Fall 2000, at 75, 78-94 (discussing Presidency of Hosni Mubarak and changes in Egyptian government after death of Anwar Sadat). Peru recently declared a state of emergency to deal with a land dispute. The declaration of the state of emergency triggered the suspension of certain constitutional rights. *See, e.g.*, *Peru Announces State of Emergency in Santa Anita over Land Dispute*, XINHUA NEWS, May 26, 2007 (discussing Peruvian government's involvement in land dispute between merchants and city of Lima, Peru). In the recently ended Obasanjo administration in Nigeria, the President declared a state of emergency in order to remove elected governors with whom he disagreed. *See, e.g.*, Emaka Ngige, *Obasanjo and the Constitution: Will History be Kind to Him?*, THIS DAY (Nig.), June 4, 2007 (critiquing Obasanjo administration). Obasanjo's successor has threatened to invoke a state of emergency to sort out problems in the energy sector. *See, e.g.*, Kayode Komolafe, *Awaiting the Yar'Adua Restoration*, THIS DAY (Nig.), May 30, 2007 (discussing inaugural speech of Umaru Yar'Adua, Obasanjo's predecessor). According to several NGO reports, over 100 states have operated under a state of emergency between 1985 and 1997. *See,*

detention and military trials seem aggressive when viewed against American tradition and past experience, but they are mild compared to assertions of executive emergency authority that have been advanced, and sustained, elsewhere. If most of the President's powers are ultimately sustained under the DTA and the MCA, many of his administration's supporters will probably maintain that congressional vindication of the executive proves the decisions in *Hamdi v. Rumsfeld*[221] and *Hamdan v. Rumsfeld*[222] were wrong. I disagree.

Hamdi and *Hamdan* recognized that the indefinite detention of enemy combatants and the military commissions ordered by the President substantially exceeded in their reach what had been done, and authorized, in the context of military justice during past national emergencies.[223] Without abandoning the executive power baseline, they effectively required the President to obtain explicit new authority from Congress for his departures.[224] The Court's decisions identified the limits of existing executive authority and properly put the matter of further extensions to that authority before Congress, where it belonged.[225] By requiring the executive to seek enabling legislation, the Court, in other words, gave Congress the opportunity to decide whether or not to reinforce a double check. Congress chose instead to side with the executive and give the President most of the authority he requested. That was its call.

Some might argue that the Court's insistence on affirmative congressional authorization was an unnecessary obstruction of executive authority, or that it amounted to an unnecessary formalism. Once again, I disagree. Requiring the President to get congressional approval is neither rude obstructionism nor formalistic cosmetics. It is part of the constitutional plan. Shared authority is as much a part of that plan as separation of powers. In the case of the emergency power double check, it ensures the coalescence of the two elected branches of government in all but purely temporary responses to crisis situations. As events transpired, one could argue that *Hamdan*, in particular, obliged Congress, by enacting the MCA, to take a measure of direct responsibility for the military justice aspects of the war against terror, effectively giving the people a voice about that war, and how it is being waged, in the 2006 elections. To the extent the 2006 elections can be seen as a referendum on the handling of the war against terror, they were at least partly a referendum against some of the

e.g., Mark Neocleous, *The Problem with Normality: Taking Exception to "Permanent Emergency,"* 31 ALTERNATIVES: GLOBAL, LOC., POL. 191, 191-92 (2006) (arguing that states of national emergency have become the permanent rule, rather than exception).

221. 542 U.S. 507 (2004).

222. 126 S. Ct. 2749 (2006).

223. *Hamdi*, 542 U.S. at 509, 521; *see also Hamdan*, 126 S. Ct. at 2785 (pointing to "a broader inability on the Executive's part here to satisfy the most basic precondition—at least in the absence of specific congressional authorization—for establishment of military commissions: military necessity").

224. *See generally* Military Commissions Act of 2006, Pub. L. No. 109-366 § 2, 120 Stat. 2600, 2600 (codified as amended in scattered titles and sections of U.S.C.) (authorizing presidential establishment of military commissions).

225. See *supra* notes 180-85 and accompanying text for a discussion of the impetus for, and purported purposes of, the MCA.

executive's more extreme measures in dealing with enemy combatants. In the future, that voice could be critical in preserving democracy from an autocratic presidency.[226]

226. As this Article goes to press, several cases involving detainees have made their way through the federal court system or the military courts. Jose Padilla, who had been held as an enemy combatant for three and a half years, was found guilty of terrorism conspiracy charges on August 16, 2007. *See* Abby Goodnough & Scott Shane, *Padilla is Guilty on All Charges in Terror Trial*, N.Y. TIMES, Aug. 17, 2007, at A1. See *supra* notes 125-28 and accompanying text for a discussion of the *Padilla* case. As noted in the text, a divided panel of the Fourth Circuit recently denied the President's authority to detain an alien in the country legally who has not carried arms against the United States in a foreign country. Al-Marri v. Wright, 487 F.3d 160, 193 (4th Cir. 2007). The government announced its intention to seek a rehearing en banc, which has been granted. *Id.*, *reh'g granted*, No. 06-7427 (4th Cir. Aug. 22, 2007); *see also* Liptak, *supra* note 196 (discussing Fourth Circuit's ruling in *al-Marri* case). The cases of *Boumediene v. Bush* and *Al Odah v. United States*, also discussed in the text, have been argued and are currently awaiting decision by the Supreme Court. Al Odah v. United States, 127 S. Ct. 3067 (2007); Boumediene v. Bush, 127 S. Ct. 3078 (2007). The Guantánamo Bay Military Commission proceedings have commenced, but are off to an inauspicious start, as military judges dismissed charges against two detainees on procedural grounds. Among other things, the military judges have ruled that the designation "enemy combatant" is overbroad, as only *unlawful* enemy combatants may be prosecuted. *See, e.g.*, William Glaberson, *Military Judges Dismiss Charges for 2 Detainees*, N.Y. Times, June 5, 2007, at A1 (discussing dismissal of charges in two Guantánamo Bay detainee cases). The government appealed these decisions to a hastily convened administrative appeals tribunal, which has reversed and remanded on the issue of "unlawful" enemy combatant status. William Glaberson, *Court Advances Military Trials for Detainees*, N.Y. TIMES, Sept. 25, 2007, at A1. There also now seems to be gathering steam in the Bush administration to shut down the detention facility at Guantánamo in its entirety and transfer the detainees to the naval brig in Charleston or Fort Leavenworth in Kansas. *See, e.g.*, Helene Cooper & William Glaberson, *At White House, Renewed Debate on Guantánamo*, N.Y. TIMES, June 23, 2007, at A1 (reporting on debate over whether to close Guantánamo Bay facility). Holding detainees on undisputed U.S. sovereign territory could alter the legal calculus in future detainee cases. Finally, there is ongoing debate about how dangerous a threat the captives remaining at the Guantánamo facility actually pose. *See* William Glaberson, *Pentagon Study Sees Threat in Guantánamo Detainees*, N.Y. TIMES, July 26, 2007, at A16 (describing Pentagon study asserting that detainees pose serious threat, commissioned in part to counter earlier private study concluding opposite).