

THE COURT'S CONSTITUTION

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Departmentalism—the ability and right of each branch of the federal government to interpret the Constitution for itself—has a long and often honorable history.¹ But within the past seven decades the Supreme Court has come to dominate constitutional interpretation, and more recently has made clear that it intends to keep the Constitution as its own preserve. If a successful case or controversy can be framed, then when faced with claims for independent constitutional interpretation from other branches, the Court may assert that it defers when it agrees with that branch's interpretation, but the deference disappears when it disagrees.

I

Three months after his landslide 1936 reelection victory, President Franklin D. Roosevelt proposed expanding the number of Supreme Court justices from nine to fifteen. The Court-packing plan was a direct response to a conservative majority on the Court that had invalidated ten major New Deal statutes, including its industrial and agricultural centerpieces, in the previous two years and seemed poised to finish off the rest of the New Deal in the next year or so.

A cartoon shows FDR rehearsing his six new smiling justices. He instructs: "Great! Now, once more, all together." The six exclaim "Yes!" in unison. The Constitution and the Scales of Justice are partially visible in a trash barrel.² The cartoon was spot on. Not only Republicans, but also a number of Progressives believed that Roose-

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1 Andrew Jackson's veto of the rechartering of the Bank of the United States is typically cited as the quintessential example of departmentalism. But my favorite is an exchange between James Monroe and the Court over his veto of money for the Cumberland Road. Monroe sent a pamphlet to the justices articulating his views. They responded through William Johnson by telling him that because of *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), they would sustain funding for internal improvements. Monroe was unmoved.

2 Pictured in MARY ANN HARRELL & BURNETT ANDERSON, *EQUAL JUSTICE UNDER LAW: THE SUPREME COURT IN AMERICAN LIFE* 93 (6th ed. 1994).

velt, who had already dominated Congress, was intent on removing the last check on his rule. FDR did not see it that way (or so he asserted). What he opposed was not the Court or the Constitution, but rather the Court's highly restrictive interpretations of the Constitution. As he told an aide right after the second inaugural, "[w]hen the Chief Justice read me the oath and came to the words 'support the Constitution of the United States' I felt like saying: 'Yes, but it's the Constitution as I understand it, flexible enough to meet any new problem of democracy—not the kind of Constitution your Court has raised up as a barrier to progress and democracy.'"³

The Court-packing plan was decisively defeated. Chief Justice Charles Evans Hughes, who had been instrumental in its defeat, kept his nine-member Court, but the attack on the Court plus multiple appointments gave FDR the Constitution he wanted. No further New Deal statutes were invalidated.

Attorney General Robert Jackson wrote that "[w]hat we demanded for our generation was the right consciously to influence the evolutionary process of constitutional law, as other generations had done."⁴ Justice Robert Jackson's *Wickard v. Filburn*⁵ opinion helped turn evolution into revolution.

The summer after *Wickard*, FDR gave a Fireside Chat on inflation, the need for wage and price controls, and the necessity of rationing. He asked Congress for appropriate legislation, but "[i]n the event that the Congress should fail to act, and act adequately, I shall accept the responsibility, and I will act. . . . The President has the powers, under the Constitution and under Congressional Acts, to take measures necessary to avert a disaster which would interfere with the winning of the war."⁶ After noting that war-time responsibilities were "very grave," he stated that he could not tell what powers would be needed to win the war.⁷ He then added:

The American people can be sure that I will use my powers with a full sense of my responsibility to the Constitution and to my country. The American people can also be sure that I shall not hesitate to use every power vested in me to accomplish the defeat of our enemies When

3 SAMUEL I. ROSENMAN, *WORKING WITH ROOSEVELT* 144 (1st ed. 1952) (emphasis in original).

4 ROBERT H. JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY: A STUDY OF A CRISIS IN AMERICAN POWER POLITICS* xiv (1st ed. 1941).

5 317 U.S. 111 (1942) (interpreting the Commerce Clause to permit Congress to regulate home grown wheat consumed on the farm).

6 *THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT*, 1942, at 364 (Samuel I. Rosenman ed., 1950).

7 *Id.*

the war is won, the powers under which I act automatically revert to the people—to whom they belong.⁸

FDR had already exercised ample war powers. He had authorized the internment of all persons of Japanese descent on the West Coast. Closer to the Fireside Chat was the military trial of eight Nazis who were quickly captured after being put ashore by submarines to sabotage industrial facilities. Roosevelt ordered them tried in secret by an appointed military court without recourse to courts. Both of these actions resulted in Supreme Court opinions rubber-stamping the President's acts.

The saboteurs' military defense counsel argued that *Ex parte Milligan*,⁹ where after the Civil War, the Court held courts martial could not try civilians while civil courts were open, afforded the defendants the right to be tried before civil courts. After three weeks of the military trial, but before the inevitable verdict, the Court rushed into a special summer session to hear the case. Attorney General Francis Biddle had privately told several members of the Court that Roosevelt would order executions regardless of what the Court held. Even though all justices had qualms about the procedure, they unanimously upheld the administration's act.¹⁰

The Court rendered its judgment two days after hearing the case; three days later the military commission found the defendants guilty, and within a week, six of the eight were executed. Speed on the habeas appeal was demanded by the President and a howling national press (although the Court could not write its opinion anywhere near as rapidly, hence it came down some months later). The saboteurs got what they should have expected if captured, but the procedure did not look pretty despite contemporary flag waving by the press, nicely illustrated by a self-congratulatory editorial in *The New Republic*: “[E]ven in wartime and even toward the enemy, we do not abandon our basic protection of individual rights.”¹¹

The relocation and confinement of 112,000 people of Japanese descent, most of whom were American citizens, was the biggest single blight on civil liberties in America in the twentieth century. Spurred by public fears after the attack on Pearl Harbor, long-standing prejudice against Asians, as well as national newspaper columnists, Roosevelt and then Congress authorized the War Department to declare

8 *Id.* at 365.

9 *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866).

10 *Ex parte Quirin*, 317 U.S. 1 (1942) (holding that the military tribunal had jurisdiction over unlawful combatants against the United States).

11 *The Saboteurs and the Court*, THE NEW REPUBLIC, Aug. 10, 1942, at 159.

certain areas as military zones and thereafter the commander of the area could impose curfews, travel restrictions, and order people excluded entirely from the area.

General John DeWitt, who commanded the West Coast, first imposed a curfew on all people of Japanese descent. In an Orwellian twist, the order referred to Japanese American citizens as “non-alien[s].”¹² DeWitt followed with an order prohibiting those covered from leaving the West Coast. Three weeks later he excluded them from the West Coast. Forbidden to leave, forbidden to stay, the only legal option was to leave jobs, homes, and possessions behind (or unload them at distress prices) and to report for internment, mainly in the arid west, in one of ten god-forsaken, dust-blown, barbed-wire fenced camps.

The curfew made sense pending determinations of the situation of who was loyal and who was not, but DeWitt had no intention of making those determinations, and Biddle’s legal objections and FBI Director J. Edgar Hoover’s conclusion that there was no evidence that any Japanese Americans were engaged in sabotage were brushed aside by FDR. The exclusion order meant that all Japanese Americans would be interred because, as DeWitt so delicately pronounced: “[A] Jap is a Jap.”¹³

A month before the 1944 presidential election, the Court heard oral arguments on the detention involving Fred Korematsu’s crime of violating the exclusion order, described by Jackson as “being present in the state whereof he is a citizen, near the place where he was born, and where all his life he has lived.”¹⁴ Six justices joined Black’s opinion that despite some rousing language—racial classifications “are immediately suspect” and must be subject “to the most rigid scrutiny”¹⁵—justified the detention on the ground that war is hell.

There were dissents. Owen Roberts found that the Catch-22 of the orders violated due process. Murphy accurately characterized the program as having descended “into the ugly abyss of racism.”¹⁶ The most interesting was Jackson’s conclusion that courts should abstain from reviewing the constitutionality of military orders because the outcome was fore-ordained: the pressures of war would cause the courts to validate the orders by “distort[ing] the Constitution to ap-

12 Civilian Exclusion Order No. 34, 7 FED. REG. 3967 (May 3, 1942); *Korematsu v. United States*, 323 U.S. 214, 234 (1944).

13 See PETER IRONS, *JUSTICE AT WAR* 46 (1983) (quoting DeWitt).

14 *Korematsu*, 323 U.S. at 243 (Jackson, J., dissenting).

15 *Id.* at 216.

16 *Id.* at 233 (Murphy, J., dissenting).

prove all that the military may deem expedient.”¹⁷ That had explained the World War I cases as well as those already decided during the current war. Jackson recognized that the military was carrying out a military program, not worrying about the niceties of the Constitution, but “[a] military order, however unconstitutional, is not apt to last longer than the military emergency.”¹⁸ When a court validates the order it offers “a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need. Every repetition imbeds that principle more deeply in our law and thinking and expands it to new purposes.”¹⁹

FDR did not live to return his wartime powers to the people. Because World War II merged almost seamlessly into the Cold War, the Court would spend decades trying to reclaim them. As Jackson noted, precedents matter.

II

During the Korean War, President Harry Truman tested that presidential authority when he ordered the steel mills seized to avert a strike that he claimed would adversely affect defense production. Truman claimed that the president’s executive authority justified his actions and noted that presidents from Lincoln to FDR had similarly exercised such a power. At trial, the U.S. Attorney asserted that while Congressional powers were limited by the Constitution, presidential powers were not. Thus there was no judicial role (except to validate Truman’s position). If there were objections, then elections or impeachment were the only remedies. It was not a winning argument and even when abandoned at the Court, Truman lost.

Hugo Black’s majority opinion made short work of Truman’s claims. “The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute.”²⁰ A sophisticated concurring opinion by Jackson noted that the president’s powers were at their lowest ebb when there was a conflicting legislative policy (as here) and at their highest when acting pursuant

17 *Id.* at 244 (Jackson, J., dissenting).

18 *Id.* at 246.

19 *Id.*

20 *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 587 (1952).

to an express or implied Congressional policy.²¹ He counseled against leveraging the president's largely unchecked foreign affairs powers into the domestic sphere "by his own commitment of the Nation's armed forces to some foreign venture."²²

Truman took the defeat badly in no small part because Chief Justice Fred Vinson, one of his four appointees to the Court, had advised him that a majority of the Court would back him and because two former attorneys general, FDR's Jackson and Truman's Tom Clark, had justified seizures while in the executive office. Indeed, Jackson had gone farther and in 1940 approved the excellent, but probably illegal, destroyers for bases deal with Great Britain. Yet both voted against Truman in the *Steel Seizure* case. One of Jackson's law clerks, William Rehnquist, attributed the loss to the related unpopularity of both Truman and the Korean War.²³ Bringing the presidency back into the Constitution also played a role.

III

Five years later, the Court found itself on the receiving end of a struggle over constitutional interpretation of the right of self-preservation against communists. After Senator Joseph McCarthy had been condemned by the Senate in December, 1954, the Court interpreted the action as signaling a waning of domestic anti-communism. Thus, in 1955, the Court cut back on summary dismissals from civil service on loyalty grounds by limiting them to employees who had access to sensitive information.²⁴ More significant were two state cases, *Pennsylvania v. Nelson*²⁵ and *Slochower v. Board of Higher Education of New York City*,²⁶ both decided a year later. *Nelson* reversed the sedition conviction of Steve Nelson, the leader of the Communist Party in Western Pennsylvania, on the ground that the state law was preempted by the various federal statutes dealing with communists. In *Slochower* the Court invalidated New York's policy of treating the invocation of the right against self-incrimination when questioned

21 Jackson's much-celebrated twilight zone (where there is no announced Congressional policy) is probably a null set. There are so many statutes that the Court can (probably) always find at least one to (mis)construe to situate the case as either following or overruling a Congressional policy.

22 *Steel Seizure*, 343 U.S. at 642 (Jackson, J., concurring).

23 WILLIAM H. REHNQUIST, *THE SUPREME COURT 190-91* (Alfred A. Knopf ed., 2d ed. 2001) (1987).

24 *Cole v. Young*, 351 U.S. 536 (1956).

25 350 U.S. 497 (1956).

26 350 U.S. 551 (1956).

about employment duties as a resignation. Seemingly ending the penalization of Fifth Amendment Communists, the Court ruled that because there were innocent reasons for pleading the Fifth, a state could not so penalize its use. These decisions provoked outcries from Southerners and national security conservatives, but were greeted with satisfaction by civil libertarians as signaling the end of judicial acquiescence to McCarthyism. The signal was unmistakable in the 1956 Term when the Court decided twelve cases dealing with communists or communism, and the government parties lost each time.

The Eighty-Fifth Congress, then in session, proved that just because McCarthy was dead (having drunk himself into the grave in early 1957), it didn't mean that anti-communism was also dead. The 1957 decisions caused the state attorneys general as well as the American Bar Association to join Congressional national security conservatives in sharp criticism of the Court. A number of bills were quickly introduced to curb the Court, but in the summer of 1957 little could be done because Congress was focused almost entirely on what would become the Civil Rights Act of 1957.²⁷ Thus, while Congress was not in a position to do much more than verbally trounce the Court, it nevertheless hurriedly passed the Jencks Act (on defendants' access to FBI interview notes of witnesses testifying against them) at the demand of FBI director J. Edgar Hoover. Although the Act basically codified one of the 1957 decisions,²⁸ it was opposed by the Court's defenders and seen by all as a slap at the Court.

The second session of the Eighty-Fifth Congress had time to consider Court-curbing bills even as the Court allowed states again to discharge Fifth Amendment Communists—this time on the grounds of incompetence.²⁹ The House passed measures, which created a presumption against finding that a federal statute preempted state counterparts; rewrote the Smith Act provisions on “organizing;” and authorized summary discharges of nonsensitive government personnel for security reasons. Senate action focused on William Jenner's proposal to strip the Court of jurisdiction in all the areas where it had in-

27 LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* 102 (2000).

28 *Jencks v. United States*, 353 U.S. 657 (1957) (holding that the petitioner was entitled to an order instructing the Government to produce at trial all FBI reports relating to testimony).

29 *See Beilan v. Bd. of Educ.*, 357 U.S. 399 (1958) (holding that a teacher's discharge for incompetency, as a result of his refusal to answer questions relating to communistic affiliations and activities, did not violate the Due Process Clause of the Fourteenth Amendment); *Lerner v. Casey*, 357 U.S. 468 (1958) (holding that firing a subway conductor when he refused to answer questions regarding Communist affiliations did not violate the Constitution).

terfered with the anti-communist programs. There was too much opposition, and Senator John Marshall Butler offered an amendment to Jenner's bill that would limit jurisdiction-stripping to admissions to the legal profession, but also undo an important holding limiting the House UnAmerican Activities Committee, rewrite the Smith Act on organizing, and change the preemption doctrine.

Senate majority leader Lyndon Johnson tried to prevent any votes on anti-Court measures and was successful until the end of the session neared. Jenner-Butler was ultimately tabled by a 49-41 vote, but that was accompanied by a tremendous amount of anti-Court feeling. Immediately on the heels of that, a motion to table the House proposals failed 39-45. There was pandemonium in the Senate, but Johnson secured a recess until the next day and between his arm-twisting and that of organized labor, enough votes were changed for the motion to recommit to pass 41-40. Even though no anti-Court measure had passed, the Court had been slapped about harder than during FDR's Court-packing fight.³⁰

Even the state chief justices piled on, adopting by a 36-8 vote a critical report on the Court that claimed "considerable doubt" that America was still a government of laws and not of men.³¹

A clear message had been sent, and the Court, or at least a five-man bloc of the Court, got it.³² Congressman Wint Smith had stated that "[t]he Court is simply blind to the reality of our times."³³ The second session of the Eighty-Fifth Congress gave it vision. The rout had morphed the jurisprudence of 1961 into that of 1951 when the Court had sustained any repression the federal government authorized.

Immediately after the Eighty-Fifth Congress had finished with its verbal bashing, the Court heard arguments in the Little Rock desegregation case. Massive resistance had come to Arkansas in 1957 when Governor Orval Faubus called out the National Guard to prevent nine Negro students from entering the previously all-white 2000 student Central High School in Little Rock pursuant to a court-ordered plan. When a federal judge ordered the Guard removed, their place was taken by a shrieking mob. After three weeks of horrible international publicity during which time the Secretary of State complained

³⁰ POWE, *supra* note 27, at 131-34.

³¹ THE CONFERENCE OF CHIEF JUSTICES, REPORT OF THE COMMITTEE ON FEDERAL-STATE RELATIONSHIPS AS AFFECTED BY JUDICIAL DECISIONS 35 (1958).

³² POWE, *supra* note 27, at 141-55 (describing the Court's shift to ruling for government parties in cases involving communism).

³³ 104 CONG. REC. H2,011 (daily ed. Feb. 10, 1958) (statement of Rep. Smith).

to Attorney General Herbert Brownell that Little Rock was ruining American foreign policy, Eisenhower sent in the 101st Airborne to enforce the court-ordered desegregation plan.

Little Rock came to the Court in *Cooper v. Aaron*³⁴ at a special summer session the next year over the issue of whether the “chaos, bedlam and turmoil” around Central justified postponing even the limited desegregation for a couple of years.³⁵ The outcome was overdetermined. If President Dwight Eisenhower, who Warren (wrongly) thought was opposed to *Brown v. Board of Education*,³⁶ could protect court-ordered desegregation with troops, the Court could not rule that he acted in vain. Furthermore to do otherwise would signal to every other Southern state that adopting a policy of violence at the first hint of desegregation was the road to legal salvation. A battered Court (this being immediately after the second session of the Eighty-Fifth Congress) ended the opinion with a bravado boast of its own potency. In an unprecedented move, the opinion of the Court listed all nine justices as its authors and for the first time equated the Constitution with its own pronouncements. Thus it claimed that when a public official—like Faubus—took the oath to support the Constitution, the official was duty-bound to support the Court’s interpretations.

This was an unprecedented claim of judicial authority. Obviously parties are bound by the judgment of the Court, but in *Cooper* the Court held nonparties—if they had taken an oath to support the Constitution as all public officials do—were bound. Nevertheless, this was the boasting of the weak. In its wake the Court summarily affirmed the validity of Alabama’s Pupil Placement Law, a cornerstone of that state’s policy of massive resistance. The justices adopted the reasoning of the court below, which opined that the court could not conclude “in advance of its application, that the Alabama Law will not be properly and constitutionally administered.”³⁷ Actually they could, but Alabama would have ignored any court decision, and Eisenhower was not going to send the army in everywhere—indeed anywhere again—in the South. Just as in the domestic security area, the Court was defeated (albeit temporarily).

34 358 U.S. 1 (1958).

35 *Id.* at 21.

36 347 U.S. 483 (1954).

37 *Shuttlesworth v. Birmingham Bd. of Educ.*, 358 U.S. 101 (1958), *aff'g* 162 F. Supp. 372, 381–82 (N.D. Ala. 1958).

IV

In 1958 the Court had been confronted by a Congress dominated by a coalition of Republicans and conservative (mostly Southern) Democrats. In the mid-1960s, the Republicans shifted to support Northern Democrats and defeat Southern filibusters in order to pass the Civil Rights Act of 1964 and the Voting Rights Act of 1965. That the Court viewed this new coalition with equanimity was apparent in *Katzenbach v. Morgan*³⁸ where it sustained section 4(e) of the Voting Rights Act that enfranchised any citizen who had completed the sixth grade in a Puerto Rican school where the instruction was in Spanish even if the person could not read or write English. The problem for 4(e) was that in 1959 a unanimous Court in *Lassiter v. Northampton County Board of Elections*³⁹ held that the ability to read English was not an unreasonable requirement for voting.

Katzenbach v. Morgan offered two rationales why 4(e) was constitutional (the first being voting to cure a discrimination in the provision of municipal services). The second was expansive as the Court stated "the result is no different if we confine our inquiry to the question whether section 4(e) was merely legislation aimed at the elimination of invidious discrimination in establishing voter qualifications."⁴⁰ But *Lassiter* held English literacy was not an invidious discrimination. In the next paragraph the Court offered sentences stating the "Congress might well have"⁴¹ which viewed Congress as having an identical and independent ability to interpret the Constitution and supercede the Court's contrary judgment.

Cooper held all public officials were bound by the Court's pronouncements. *Katzenbach v. Morgan* held that the Court's decisions were subject to legislative reversal when the Congress was expanding rights. The contrast could only be explained by the Court's enthusiasm over Congressional concern for minorities and the confident belief that liberalism was destined to dominate.

Katzenbach v. Morgan was indeed aberrational and three years later in *Powell v. McCormack*⁴² the Court reverted to *Cooper* in rejecting a claim of legislative primacy in interpreting Article I, Section 5 allowing Congress to judge the qualification of its own members. The House had excluded Adam Clayton Powell from taking his seat for

38 384 U.S. 641 (1966).

39 360 U.S. 45 (1959).

40 *Katzenbach*, 384 U.S. at 653-54.

41 *See id.* at 654.

42 395 U.S. 486 (1969).

wrongly diverting House funds and making false reports to the House. The Court held that the Qualifications Clause limited the House to judging age, citizenship, and residence as expressed in Article I, Section 2 and thus the House could add no other qualifications.

The Court took a similar position of adhering to *Cooper* when confronted with President Richard Nixon's claim of executive privilege as ground for refusing to comply with a subpoena for tape recordings of White House meetings in the aftermath of the break-in of the Democratic National Committee headquarters at the Watergate complex in 1972. The Court claimed that the scope of executive privilege was subject to the judicial power to say what the law is and therefore could not be shared with another branch.⁴³

Less than three weeks later, Nixon resigned. After swearing in President Gerald Ford, Burger expressed relief that "[the system] worked," and *Time* magazine enthusiastically agreed.⁴⁴ How myopic they were. If there had been no taping system—or if Nixon had destroyed the tapes (and it remains inexplicable that he did not)—then Watergate would have been a swearing contest between the President of the United States and his youthful former White House counsel John Dean, a man who looked every inch the snake that he was. It would have been no contest; even long-time Nixon haters would not have sided with Dean.

Nor did the Court play a great or heroic role. The House Judiciary Committee acted without the benefit of the tapes at issue and the House was sure to follow. What the Court did was revert to what it traditionally does—piling on to facilitate what is already happening. Nevertheless, the Court got a lot of good publicity and, in the Court-centered world of lawyers, a lot of credit. Thus, a decade later after Attorney General Edwin Meese targeted *Cooper v. Aaron*, a cascade of anathemas, pronounced by leaders of the bar, prominent academics, and columnists, rained down upon Meese. Everyone claimed Meese's position would undermine the rule of law. When he publicly recanted less than three weeks later it helped seal the Court's primacy over the Constitution (something easily demonstrated when the Court told President Bill Clinton that he could not delay until after his presidency a deposition in a pending civil suit⁴⁵).

⁴³ *United States v. Nixon*, 418 U.S. 683 (1974).

⁴⁴ *Time for Healing*, *TIME*, Aug. 19, 1974, at 9.

⁴⁵ *Clinton v. Jones*, 520 U.S. 681 (1997).

V

Equally as important as *Planned Parenthood v. Casey*'s⁴⁶ refusal to overrule *Roe v. Wade*⁴⁷ was what the opinion by Justices Sandra O'Connor, Anthony Kennedy, and David Souter said about the role of the Court in American society. According to the troika, the Court could not overrule *Roe* because to do so would destroy the essential perceptions of the American people about the Court. That would be too traumatic for everyone. The troika claimed that occasionally, as in *Roe*, the Court "decides a case in such a way as to resolve . . . [an] intensely divisive controversy."⁴⁸ These cases have a "dimension" that a routine case does not, one that is "present whenever the Court's interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution."⁴⁹

The troika's opinion in *Casey* is the most pretentious in the *United States Reports*. It asserted that the belief of Americans of themselves as a people who live according to the rule of law "[was] not readily separable from their understanding of the Court . . . speak[ing] before all others for their constitutional ideals."⁵⁰ Before meant way above. Thus "[i]f the Court's legitimacy should be undermined, then, so would the country be in its very ability to see itself through its constitutional ideals. The Court's concern with legitimacy is not for the sake of the Court, but for the sake of the Nation"⁵¹ As if the American people (the vast majority of whom cannot name two sitting justices) spend their time thinking about the issue. The troika spoke as if to say "we do it all for you, our people." And despite the contempt of Antonin Scalia's dissent, there was no disagreement among the Brethren with regard to the troika's essential position on the role of the Court—"we're number one."

The troika's opinion did *Cooper v. Aaron* one better. Under assault from the South, *Cooper* held that all public officials were bound by *Brown*. Under assault from Republicans, the troika stated that all Americans must fall in step with the Court and cease fighting over *Roe*.

46 505 U.S. 833 (1992)

47 410 U.S. 113 (1973).

48 *Casey*, 505 U.S. at 866.

49 *Id.* at 867.

50 *Id.* at 868.

51 *Id.*

The full Court showed it was serious about its primacy when it struck down federal statutes designed to overrule two 5-4 decisions. One was the 1990 holding in *Employment Division v. Smith*⁵² that free exercise claims could be trumped by any law that does not specifically target religion. The other was the Warren Court edict *Miranda v. Arizona*⁵³ with its notorious Miranda warnings.

Almost immediately after *Smith* was decided, efforts began to return free exercise claims to their former status, and these bore fruit in 1993 with passage of the Religious Freedom Restoration Act (RFRA). Congress thoroughly vetted the constitutional issues involving Section 5 of the Fourteenth Amendment and was explicit in its intent to use Section 5 to return to the pre-*Smith* compelling state interest standard. With the support of both religious and civil liberties groups, RFRA passed the House unanimously and the Senate 97-3.

In holding RFRA unconstitutional (as applied to states) Justice Kennedy tersely held that Section 5 gave Congress power to enforce the Fourteenth Amendment, and “[l]egislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is.”⁵⁴ RFRA, by protecting religious conduct more generously than *Smith* did, was implementing a Congressional policy rather than enforcing the Constitution. Hence RFRA was beyond Congressional authority.

The Court said that because Congress was aware of the decision in *Smith* it had to know that “the Court will treat its precedents with the respect due them under settled principles, including *stare decisis*, and contrary expectations must be disappointed.”⁵⁵ The Constitution works best “when each part of the Government respects both the Constitution and the proper actions and determinations of the other branches.”⁵⁶ In other words, Congress should know its place and recognize judicial supremacy, and the Court should keep Congress in its subordinate place.

Meanwhile, *Miranda* had been unpopular with millions of Americans from the instant it was decided in 1966. Headlines proclaiming “Confessed Slayer of Wife and 5 Children Freed”⁵⁷ will do that. Summer riots, an escalating crime wave, the quagmire in Vietnam,

52 494 U.S. 872 (1990).

53 384 U.S. 436 (1966).

54 *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997).

55 *Id.* at 536 (Stevens, J., concurring).

56 *Id.* at 535-36 (Stevens, J., concurring).

57 FRED P. GRAHAM, *THE SELF-INFLICTED WOUND* 185 (1970).

and an impending presidential election led to the Omnibus Crime Control and Safe Streets Act of 1968,⁵⁸ with a provision specifically contrary to *Miranda*. If a judge found a confession was voluntary, based on the totality of the circumstances, then the statute proclaimed it was admissible against the defendant even if no warnings about constitutional rights had been given.

After three decades of nonenforcement, a federal appeals court admitted a suppressed, voluntary, but unmirandized confession based on the 1968 law. Justices Rehnquist, O'Connor, and Kennedy were on the record as opposing *Miranda's* rule, but the three nevertheless refused to overrule. Rehnquist's opinion in *Dickerson v. United States* bluntly stated that "Congress may not legislatively supersede our decisions interpreting and applying the Constitution."⁵⁹ Since *Miranda* applied a constitutional rule, Congress could not overrule it. Rehnquist, O'Connor, and Kennedy did not like *Miranda* one bit, but they liked the thought of Congress gutting a Supreme Court decision far less. Thus *Miranda* went from 5-4 at the height of the Warren Court to 7-2 (Justices Scalia and Thomas dissenting) at the Rehnquist Court. If it was not for judicial imperialism, such a result simply could not be possible.

VI

Beginning in 2004, the imperial Court faced the imperial presidency in time of war. With the war on terror and Americans fighting in both Afghanistan and Iraq, the government claimed to need a lot. Indeed, President George W. Bush and his administration were making claims of executive authority not seen since World War II (if then).

After September 11, 2001, administration lawyers studying legal issues that would be forthcoming agreed unanimously on only one issue—those captured would be held outside the United States (and therefore hopefully outside the law of the United States). Ultimately they decided captives were not to be criminal defendants where they would get a lawyer and a trial. Nor were they to be prisoners of war where they would be entitled to the protections of the Geneva Conventions (which the White House counsel Alberto Gonzales deemed

⁵⁸ Pub. L. No. 90-351, 82 Stat. 197 (1968).

⁵⁹ 530 U.S. 428, 437 (2000).

obsolete, quaint and inapplicable⁶⁰). Instead, they were enemy combatants to be held indefinitely for interrogation.

A pair of major problems for Bush's claims came from sequencing and timing. The first round of cases involved American citizens treated as if they had no rights. The next two rounds came after Bush was widely deemed to be incompetent.

The initial pair of cases to arise asked (1) whether an American citizen, captured in Afghanistan, could be held as an enemy combatant and denied an opportunity to prove his detention was wrongful, and (2) whether non-citizens detained abroad had the right to access American courts via habeas corpus to test the legality of their confinement. The evening of arguments for the former, CBS News broke the story of abuses at Abu Ghraib, and while the opinions were being written the so-called "torture memo" of the Justice Department was released.⁶¹ It claimed the President had the inherent authority to override a Congressional ban on torture. Neither helped the Bush administration.

In *Rasul v. Bush*, the Court held that there was pre-existing statutory jurisdiction to review the detention of non-citizens held at the Guantanamo Bay Naval Base. Justice Stevens's majority opinion also claimed that the allegations—that those seeking habeas had neither engaged in combat nor acts of terrorism against the United States and were held in detention without access to counsel or charges of wrong-doing—"unquestionably describe 'custody in violation of the Constitution or laws or treaties of the United States.'"⁶²

If non-citizens had a right to access to a federal court, then, a fortiori, citizens, even those detained as enemy combatants (a category defined specifically to fit the facts of battlefield capture), had at least that right also, and *Hamdi v. Rumsfeld* said so. With the exception of Thomas, the justices were unimpressed by the executive's claim that separation of powers principles meant that courts should have no role in this aspect of the war on terror.

No opinion garnered a majority of the justices. Justice O'Connor for Rehnquist, Kennedy, and Breyer emphasized that the Congressional authorization of the use of force authorized detention but

60 Memorandum from Alberto R. Gonzales to George W. Bush, Decision Re Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban, (Jan. 25, 2002), in *THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB* 119–20 (Karen J. Greenberg & Joshua L. Dratel eds., 2005).

61 Memorandum from Jay S. Bybee to Alberto Gonzales (Aug. 1, 2002), in *THE TORTURE PAPERS* *supra* note 60, at 172.

62 *Rasul v. Bush*, 542 U.S. 466, 483 n.15 (2004) (quoting 28 U.S.C. § 2241(c)(3)).

might not authorize prolonged detention, which “carries the potential to become a means for oppression and abuse.”⁶³ She also concluded that due process required some ability to contest the facts supporting detention. Thus there had to be a fair hearing before a neutral tribunal. Souter, with Ginsburg, found that only a clear expression of Congressional intent could justify holding an American citizen without trial, and that the authorization of force was not such a declaration. Scalia, with Stevens, went farther and concluded that, to hold an American, the government must either try him criminally or else obtain a statutory suspension of the writ of habeas corpus.

Thomas’s lone dissent tracked the Bush Administration position—the judiciary lacked the expertise to second-guess the executive. So long as the executive was acting in good faith to defend the public, it had plenary authority to detain a citizen captured abroad.

Immediately after the decision, the Defense Department created tribunals to review the status of all the detainees at Guantanamo, and the government released Hamdi to Saudi Arabia (after he renounced his American citizenship). After holding him without charges for three years, the government stated he no longer posed a threat to the United States. That pattern would replay itself again and again.

Before the Court heard another war on terror case, two separate developments occurred. First, there were leaks to the news media of heretofore secret and perhaps illegal programs.⁶⁴ The second development was passage of the Detainee Treatment Act of 2005, which required adherence to the Geneva Conventions but also withdrew jurisdiction of federal courts to hear habeas petitions by Guantanamo detainees.⁶⁵ In combination, these developments suggested an Executive Branch that believed it could fight the war on terror without Congressional help (or oversight) and a (Republican) Congress that believed the judiciary should keep out of it.

Hamdan v. Rumsfeld was a habeas challenge to the military tribunals created to try detainees.⁶⁶ Hamdan, arrested in November 2001, but not charged until after *Hamdi*, challenged both the definition of the substantive offense he was charged with—joining an enterprise dedicated to attacking civilians—as well as the structures and procedures of the military commissions. The Court, over dissents by Tho-

63 Hamdi v. Rumsfeld, 542 U.S. 507, 530 (2004).

64 See generally JAMES RISEN, STATE OF WAR: THE SECRET HISTORY OF THE CIA AND THE BUSH ADMINISTRATION (2006) (describing the Bush administration’s domestic spying program and the ensuing coverage in the media).

65 Pub. L. No. 109-148, 119 Stat. 2739 (2005).

66 548 U.S. 557 (2006).

mas, Scalia, and Alito (Roberts being disqualified because he had participated in the opinion below anticipating the position of the dissenters), first concluded that the DTA did not apply to Hamdan's case. The majority then held that Congress had not authorized the tribunals, and, indeed, they were contrary to the Uniform Code of Military Justice and the Geneva Conventions. In an extraordinary declaration, the Court stated "the Executive is bound to comply with the Rule of Law that prevails in this jurisdiction," thereby making clear that the Executive was not acting in accordance with the "Rule of Law."⁶⁷

Breyer's concurring opinion twice stated that the President could go to Congress to seek whatever authority he deemed necessary. With his hand forced by *Hamdan*, that is exactly what Bush did, and the supine Republican Congress, abetted by electorally-frightened Democrats, responded in barely over three weeks with the Military Commissions Act of 2006 (MCA)⁶⁸ giving Bush everything he wanted—including the ability to use evidence obtained by torture prior to December 20, 2005, as well as a specific provision eliminating judicial review except by a single appeal of a verdict by a military commission (limited to issues of law and not fact). Breyer had stated that the Court's "conclusion ultimately rests upon a single ground: Congress had not issued the Executive a 'blank check.'"⁶⁹ With the MCA, the Congress deposited that check in the Executive's account. Some members of Congress knew they had checked their principles at the door. Senate Judiciary Chairman Arlen Specter, for instance, acknowledged that the MCA was unconstitutional and voted aye anyway.

Whether the MCA is consistent with the Constitution is a contested question. If Bush had asked for the MCA in 2003, Congress would have readily handed it to him and its chances of approval would have been far greater prior to the 2006 elections. Now, however, there are two ways to view *Hamdan*. One is based on separation of powers, a demand that Congress be brought into the process of deciding how to treat detainees. The other is a "Rule of Law" demand that procedures be consistent with the Due Process Clause. After the Court successfully cut Congress in, Congress tried to cut the Court out with the MCA. Not surprisingly there were challenges to the MCA even before there were trials before the commissions.

67 *Hamdan*, 548 U.S. at 635.

68 Pub. L. No. 109-366, 120 Stat. 2600 (2006).

69 *Hamdan*, 548 U.S. at 636 (Breyer, J., concurring) (citing *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004)).

Events undermined the military commission system beginning with the repudiation of the Republicans in the 2006 elections. In the eighteen months after the Democratic victories, more and more information about the administration policies on detainees became public. The first challenge to the MCA was denied review over three dissents. Then, almost three months later, after an officer involved with the commissions called the supposed trials a farce, the Court agreed to hear the case, meaning at least two justices who had previously voted not to review (Kennedy and Stevens), switched.

Subsequent news reports disclosed that the highest administration officials had met in the White House to discuss which detainees to torture and what coercive means should be used. A general in the Pentagon was found by a military judge to have asserted unlawful command influence by engaging in “nanomanagement of the [Guantanamo] prosecutors’ office.”⁷⁰ The former chief prosecutor testified that Pentagon officials had pressured him to bring well-known detainees to trial before the 2008 election because otherwise “this thing’s going to implode.”⁷¹ The Pentagon supervisor demanded that evidence acquired by torture be used even though prosecutors have an ethical obligation to present evidence only if they consider it reliable. And it appeared that torture may have been widespread. Prosecutors were also told there could be no acquittals (because otherwise how could the years of detention be justified?). All in all, the executive branch had deemed the Rule of Law outmoded in a post-9/11 world.

With Roberts able to participate, the likely vote was 5-4, and given Kennedy’s switch plus his connections with European jurists, he was highly likely to vote with the liberals. In June, 2008, Kennedy, indeed, authored the 5-4 rebuke to both the administration and the formerly Republican Congress by holding that the denial of habeas in the MCA was unconstitutional and that detainees had a right to a habeas hearing in a federal court.⁷² Combat Review Status Tribunals were deemed an inadequate substitute for habeas (where a judge can order a prisoner released). This was the ultimate defeat of the administration’s legal theory for holding detainees off-shore—because the Court ruled that detainees did have rights under the Constitution and federal courts could enforce them.

⁷⁰ William Glaberson, *Judge’s Guantánamo Ruling Bodes Ill for System*, N.Y. TIMES, May 11, 2008, at A22.

⁷¹ William Glaberson, *Ex-Prosecutor Tells of Push by Pentagon on Detainees*, N.Y. TIMES, Apr. 29, 2008, at A12.

⁷² *Boumediene v. Bush*, 128 S. Ct. 2229 (2008).

Roberts's dissent (joined by the other three conservatives) asserted that the decision was premature and accused the majority of judicial triumphalism. The majority felt, however, that after six years of confinement and with the prospect of lifetime incarceration in case of possible mistaken imprisonment, that action now was necessary. (When Hamdan complained that he won at the Court and yet received nothing for his victory, the prosecutor rejoined that he had his name and victory in the law books.) Scalia's dissent claimed that the Court's decision would cost American lives. (One hopes his ready "I told you so" proves as wrong as Harry Blackmun's similar assertion in his *Pentagon Papers* dissent.⁷³)

Republicans and Democrats split completely over the decision. Soon-to-be Republican standard bearer, John McCain, proclaimed the decision among the worst in American history. His Democratic counterpart, Barack Obama, hailed it as a step "toward reestablishing our credibility as a nation committed to the rule of law."⁷⁴ Yet, as previously, the Court left important questions unanswered. What is the substantive standard justifying continued detention? Does the decision affect those the government intends to try by military commission as well as whether the procedures before the commissions comport with due process?

Berkeley Professor John Yoo, author of the infamous "torture memo" as head of the Office of Legal Counsel, has lamented that the Court has not accorded Bush the deference an earlier Court granted FDR.⁷⁵ There are at least four reasons for this, the latter two being the more important. First, and not flippantly, Bush is no FDR. Bush made spectacular claims of authority matched with the spectacular incompetence of his administration. Second, Bush had but two appointees (and two other reliable votes). Third, after decades of trying to put the executive into balance the Court was unlikely to reverse course and offer the President the constitutional blank check he wanted. Fourth, since *Casey* the Court has trumpeted judicial imperialism. As with bringing the executive back to the Constitution, it seems unlikely to reverse its course.

⁷³ *New York Times Co. v. United States*, 403 U.S. 713, 762–63 (1971) (Blackmun, J., dissenting) (stating concern that the publication of certain documents in newspapers could result in harm including deaths of soldiers and foreign relations problems).

⁷⁴ Kate Zernike, *McCain and Obama Split on Justices' Ruling*, N.Y. TIMES, June 13, 2008, at A23.

⁷⁵ John Yoo, *FDR, Civil Liberties, and the War on Terrorism*, in *SECURITY V. LIBERTY: CONFLICTS BETWEEN CIVIL LIBERTIES AND NATIONAL SECURITY IN AMERICAN HISTORY* 61–63 (Daniel Farber ed., 2008).