

**Wiley Rutledge and Executive Detention:
A Judicial Conscience for His Time and Ours**

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Judicial biography has never been more popular than it is today, nor more politically relevant. As a Harvard law professor, Felix Frankfurter long ago announced the need for full-length stories of Supreme Court Justices “to rescue the Court from the limbo of impersonality.”¹ He wrote that “[u]ntil we have penetrating studies of the influence of these [judges], we shall not have an adequate history of the Supreme Court, and, therefore, of the United States.”² That call has been answered with respect to many jurists,³ yet even fifty years after Wiley Rutledge died, no account had emerged of Frankfurter’s colleague on the Court from 1943 to 1949,⁴ leaving

¹FELIX FRANKFURTER, *THE COMMERCE CLAUSE* 6 (1937) [hereinafter FRANKFURTER, *THE COMMERCE CLAUSE*]. Frankfurter claimed that “[a] full-length analysis of only two or three of the seventy-eight Supreme Court Justices has been attempted.” That appraisal was at least slightly exaggerated when written. *See, e.g.*, ALBERT JEREMIAH BEVERIDGE, *THE LIFE OF JOHN MARSHALL* (1919); WILLIAM BROWN, *THE LIFE OF OLIVER ELLSWORTH* (1905); FRANK MONAGHAN, *JOHN JAY: DEFENDER OF LIBERTY* (1935); JAMES PIKE, *CHIEF JUSTICE CHASE* (1873); BERNARD STEINER, *LIFE OF ROGER BROOK TANEY, CHIEF JUSTICE OF THE UNITED STATES SUPREME COURT* (1922); CARL BRENT SWISHER, *STEPHEN J. FIELD, CRAFTSMAN OF THE LAW* (1930). And Frankfurter himself also contributed to the field. *See* FELIX FRANKFURTER, *MR. JUSTICE HOLMES AND THE CONSTITUTION; A REVIEW OF HIS TWENTY-FIVE YEARS ON THE SUPREME COURT* (1927); *cf.* *MR. JUSTICE BRANDEIS* (Felix Frankfurter, ed., 1932). Thus, any “impersonality” that might persist in cloaking the Court surely does not owe to a lack of judicial biographies. For recent examples, see for example, DENNIS J. HUTCHINSON, *THE MAN WHO ONCE WAS WHIZZER WHITE: A PORTRAIT OF JUSTICE BYRON R. WHITE* (1998); ANDREW PEYTON THOMAS, *CLARENCE THOMAS: A BIOGRAPHY* (2001); JOHN CALVIN JEFFRIES, *JUSTICE LEWIS F. POWELL* (2001); JUAN WILLIAMS, *THURGOOD MARSHALL: AMERICAN REVOLUTIONARY* (2000).

²FRANKFURTER, *THE COMMERCE CLAUSE*, *supra* note 1, at 6.

³*See, e.g.*, LIVA BAKER, *FELIX FRANKFURTER* (1969); J. WOODFORD HOWARD, JR., *MR. JUSTICE MURPHY: A POLITICAL BIOGRAPHY* (1968); ANDREW L. KAUFMAN, *CARDOZO* (1998); ALPHEUS THOMAS MASON, *HARLAN FISKE STONE: PILLAR OF THE LAW* (1956); BRUCE ALLEN MURPHY, *WILD BILL: THE LEGEND AND LIFE OF WILLIAM O. DOUGLAS* (2003); ROGER K. NEWMAN, *HUGO BLACK: A BIOGRAPHY* (1994).

⁴The only prior book-length writing on Rutledge is FOWLER V. HARPER, *JUSTICE RUTLEDGE AND THE BRIGHT CONSTELLATION* (1965), but it does not aspire to full biography and

many modern readers with no impression at all of Rutledge or his work. That is a real shame, but its force was known only to experts and insiders, not the legal community at large.⁵

John Ferren's *Salt of the Earth: Conscience of the Court*⁶ is the first full biography of Rutledge, one which should easily rescue Rutledge from the shadows of obscurity and his Court from any residual "limbo."⁷ Part I of this Review will show that Rutledge deserves that much. His pre-judicial life as a two-time dean, a force for legal reform, and an advocate of progressive politics holds interest in its own right, and provides important background for his work on the bench. Furthermore, as Ferren's book demonstrates, Rutledge's personal tale interweaves with broader national issues, including details of FDR's eight Supreme Court appointments, the path of twentieth-century legal education, and the New Deal's influence on both.

Part II of this Review will show that Rutledge's story has much more than Frankfurterian

is of varied quality. Until recently, the best sources on Rutledge were two essays, John Paul Stevens, *Mr. Justice Rutledge*, in *MR. JUSTICE 177* (1983) (Allison Dunham & Phillip Kurland, eds.), and Louis H. Pollak, *Wiley Blount Rutledge: Profile of a Judge*, in *SIX JUSTICES ON CIVIL RIGHTS* (Ronald D. Rotunda, ed. 1983) [hereinafter Pollak, *Profile of a Judge*], and a memorial published jointly by the Indiana and Iowa law journals, Symposium, *Mr. Justice Rutledge*, 25 *IND. L. J.* 421 (1950); 35 *IOWA L. REV.* 541 (1950). See also David M. Levitan, *Mr. Justice Rutledge*, 34 *VA. L. REV.* 393, 526 (1948); Louis H. Pollak, *Wiley B. Rutledge, 1943-1949*, in *THE SUPREME COURT JUSTICES, ILLUSTRATED BIOGRAPHIES, 1789-1993*, 41 (1993) (Clare Cushman, ed.); Fred Landon G. Rockwell, *Justice Rutledge on Civil Liberties*, 59 *YALE L.J.* 27 (1949).

⁵In describing how his book about Rutledge came to be, Ferren explains that he wanted, after leaving his own judicial post, to write a complete biography of "someone in our national political life." JOHN M. FERREN, *SALT OF THE EARTH, CONSCIENCE OF THE COURT* 543 (2004). In his search for a subject, Ferren contacted the Library of Congress's Assistant Chief of Manuscripts, who "immediately" named Wiley Rutledge as someone who had escaped due attention, and "whose papers, he assured me, contained a book worth writing." *Id.*

⁶FERREN, *supra* note 5.

⁷FRANKFURTER, *THE COMMERCE CLAUSE*, *supra* note 1, at 6.

history to recommend it. President Bush has claimed in today's courts a power to detain individuals without judicial oversight, without criminal charges, and at most with hand-crafted military commissions to judge alleged criminal behavior. Such issues may seem novel to modern minds, but they would not to Rutledge; indeed, the most important cases of his day concerned such detention authority. More than any Justice, Rutledge's career embodies the difficulties, perils, and even mistakes that surround issues of wartime detention. After nearly sixty years, Rutledge's analysis of executive detention has already proved uniquely influential in one recent case concerning Guantanamo Bay; another Rutledge opinion may affect modern analysis of military tribunals. In sum, after a lengthy period of neglect, there is no better time to study this judge and his work.

Part III's conclusion will briefly address the relevance of Rutledge's life and Ferren's book to the deepest issues of any judicial biography, namely, what judges should do and who they should be. Consider why any one reads judicial biographies in the first place. Compared to politicians, movie stars, and other common "biograph-ees," judges' lives are typically filled with plodding, sedentary events that would not make for a gripping read. A critical, unacknowledged reason that lawyers and scholars find such books are appealing, however, is the light their subjects shed on judging and judicial role.

That said, judicial biographies are typically written only about jurists who serve the Court for decades and radically reformulate one or another field of (preferably constitutional) law. Ferren's book is an intellectually significant invitation for readers to appreciate a judge who meets neither criterion. Insofar as Ferren succeeds, and Rutledge is recognized both as a distinctive "type" of judge and a worthy role model for judicial behavior, the book offers a

chance to rethink the standards by which we choose judicial heroes for study and celebration.

Drawing such questions to light is especially useful today, as politicians select new Justices, and those individuals seek to define their own approaches to the Court's work.

I. All-American Jurist

Before analyzing Rutledge's work as a judge, some readers may gain from knowing basic details about his life that unquestionably affected his approach to doctrine and law. A dominant virtue of Ferren's book is its balance of detail and brevity, and this Part pursues similar goals in more limited space.

In 1894, the boy who became Justice Rutledge was born to a Southern Baptist "circuit-riding preacher" and a mother who died of tuberculosis nine years later.⁸ After growing up with his father and other relatives in Kentucky, North Carolina, and Tennessee, Rutledge studied at the small Maryville College, where he joined the Law Club and engaged in assorted public debates and oratory. Rutledge was an outgoing collegian who earned social respect and academic success, especially in the humanities. Before his senior year, however, Rutledge transferred to the University of Wisconsin at Madison, and switched his academic focus to chemistry, which he thought would provide better career options than, for example, law.

When Rutledge (fortunately) found little success as a scientist, he studied shorthand and

⁸For more elaborate discussion supporting this summary of Rutledge's life, see generally FERREN, *supra* note 5, at 13-31 (describing Rutledge's youth and college experience); *id.* at 31-38 (treatment and teaching in New Mexico); *id.* at 38-51 (law school and private practice); *id.* at 51-52 (teaching at the University of Colorado); *id.* at 55-80 (teaching at the Washington University); *id.* at 81-83, 100-30 (teaching at the University of Iowa); *id.* at 137-50 (consideration for Justice Cardozo's vacancy); *id.* at 151-70 (consideration for Justice Brandeis's vacancy); *id.* at 173-207 (work on the Court of Appeals for the District of Columbia); *id.* at 208-21 (nomination to Justice Byrnes's vacancy); *id.* at 222-415 (work on the Supreme Court); *id.* at 416-22 (death and memorials).

moved to Bloomington, Indiana, where he took morning law classes and taught high school in the afternoon. After three semesters, Rutledge found the double-shifts unworkable. Because he could not afford full-time education, Rutledge moved again and began teaching high school full-time in eastern Indiana.

In 1916, a twenty-two year-old Rutledge was diagnosed with tuberculosis and sought treatment in North Carolina. The next eight months could have been intensely isolating, but Rutledge's drive to interpersonal contact led him to meet people from all walks of life whose suffering was worse than his own.⁹ Even after his inpatient treatment, Rutledge's health kept him from military service and almost kept him out of the public schools. Nonetheless, Rutledge married his lifelong love (a former Maryville teacher) and moved to New Mexico where he could teach high school business students in a climate congenial to physical recovery. Rutledge's wife taught English, and the family saved in order to complete Rutledge's education, which he compared to "a house, built to the roof, the rafters laid . . . but there's *no top*."¹⁰

In 1919, Rutledge began law school at the University of Colorado in Boulder while also teaching high school. This time, Rutledge flourished in both capacities. Professor Herbert S. Hadley, a former Governor and Attorney General of Missouri, was especially impressed, and, as a third-year student, Rutledge taught much of Hadley's first-year criminal law class. After

⁹*Id.* at 34 ("By his own accounting . . . [Rutledge] had come together with 'lawyers, doctors, preachers, students, students, teachers, mountaineers, steel workers, farmers, sheriffs, bankers, bookkeepers, clerks, railroad men, insurance men, scions of wealthy families, merchants, dependant children, nurses, and many, many others.' He met a man who looked like 'a living skeleton,' never spent an hour out of bed, was aware that death was certain, and yet never uttered a 'cheerless or discouraged' word.").

¹⁰*Id.* at 34 ("Don't you hate to see a house, built to the roof, the rafters laid, and left to stand there in the weather without a cover? That's just how I feel --- the foundation's there, the

graduation in 1922, Rutledge joined a local law firm, became a father, and reengaged his longstanding interest in public speaking. His private practice lasted only two years before an unexpected, life-shaping opportunity struck. Professor Hadley left Colorado to become chancellor at Washington University in St. Louis, another Colorado professor followed, and Rutledge filled the latter's vacancy. Rutledge made the most of the honor and soon earned reports of "very considerable success" as a teacher.¹¹ Rutledge's expertise lay in corporations and business law, but consistent with contemporary practice, his early years were spent "teaching around the curriculum" in a wide range of classes.

In 1926, Chancellor Hadley offered Rutledge a position at Washington University's law school. He accepted the offer not only for "usual considerations of advancement," but also so his family (now with a second child) could be closer to relatives.¹² In moving to St. Louis, Rutledge joined an institution in flux. The law school's faculty was of mixed quality, its transition to "case method" instruction was overdue, its students were poorly credentialed and immature, its finances were poor, and the Association of American Law Schools had imposed a two-year probation for poor standards and performance. Nevertheless, Rutledge continued to excel, earning a reputation as among the school's best, hardest, fairest teachers.¹³ Four years after

framework & all, but there's *no top*.").

¹¹*Id.* at 52.

¹²*Id.*

¹³*Id.* at 62 ("When several students were unprepared he was known to slam his book shut, dismiss the class, and walk out. The students considered him 'fair' nonetheless, even while definitely the 'hardest grader.'"); *id.* at 62-63 (quoting effusive praise from former students, some of whom regarded Rutledge as brilliant, the most outstanding law professor they'd ever met, and a man of great character); *cf. id.* at 111 ("One student spoke for many: 'I would have hated to inform him I was not prepared. . . . I would have had the feeling I was letting down a very, very

joining the faculty, Rutledge — at the age of thirty-seven — was named dean of the law school, and over 80 percent of Washington University’s senior class petitioned the board of directors to support that choice.¹⁴

Rutledge’s deanship from 1930 to 1935 was impressive. He restructured the law review’s admission process to improve student writing and access. He organized law school assemblies wherein lecturers analyzed connections between law and social sciences.¹⁵ He raised admission standards, consolidated the curriculum, expanded ethics instruction, began a legal aid clinic, started a master of laws degree, bolstered the school’s thesis requirement, and strengthened synergies between lawyers and social workers to increase opportunities for the law school and its students. Such progress was by no means universal. For example, Rutledge never confronted racial segregation at Washington University, nor did he commit to increase women’s enrollment. Still, Dean Rutledge led his school many steps forward, and in doing so attracted attention in academic circles and beyond.

Aside from his paternal responsibilities (now with three children), Rutledge was also active in St. Louis public life and was a strong advocate for legal reform, including the use of women jurors, criminal code revision, access to criminal defense, and apolitical bar standards. Rutledge was active on St. Louis’s Social Justice Commission, which sought to reduce racial and religious tensions, and he was a director on the St. Louis Civil Liberties Committee. On the

fine man.”).

¹⁴*Id.* at 66.

¹⁵It should be noted that interdisciplinary work in Rutledge’s day was viewed as a progressive alternative to the formalism that made Langdell famous. *See generally id.* at 87-89 (interpreting Rutledge’s legal philosophy as substantially linked to that of Roscoe Pound).

national stage, Rutledge served on the Association of American Law Schools and the American Law Institute; he was also a dedicated member of the National Conference of Commissioners on Uniform State Laws.¹⁶

The legal issue that drew Rutledge's most urgent attention was child labor, which, as the Depression worsened, caused marked increases in accidental injury, illiteracy, and childhood tuberculosis. The Supreme Court had twice invalidated congressional efforts to regulate child labor,¹⁷ and many prominent lawyers, including the American Bar Association's President, strongly opposed a constitutional amendment to overrule those decisions. Despite such views in the legal establishment, Rutledge's attacks on child labor were broad and forcefully stated:

Social progress in the form of national legislation is faced constantly with the three hurdles of so-called "natural rights," "state rights," and "republican institutions. . . . [These] are the sheep's wool in which the institution of human slavery was legally clothed; the guise under which . . . trusts sought freedom from national restraint in order to establish monopoly; the shield behind which vast power combinations seek similar freedom today; the basis upon which workmen's compensation acts, minimum wage laws, laws regulating hours of labor, and all other forms of legislation in the public interest have been resisted. Nowhere have these hoary philosophies been more effectively employed than in tying the hands of the federal government in the protection of children.¹⁸

¹⁶For Rutledge, not all of these accolades and responsibilities were equal in value. For example, Rutledge throughout his career preferred his work for the National Conference, which he viewed as more democratic and pragmatic, to the American Law Institute, which at that time risked the opposite. *See id.* at 84-85, 121-22. One of Rutledge's more significant social activities was the "Public Question Club," a professional group that held dinner discussions on issues from economics to football to philosophy to crime to science to politics to drama. Such talks led Rutledge not only to refine his public speaking, but to revise his private thinking as well. Ferren suggests that these meetings fed Rutledge's skepticism of religious dogma and of racial barriers in education and elsewhere. *Id.* at 72-73 (describing debates on topics such as "Have Minorities Any Rights?," and identifying Rutledge's wife as an important influence on his racial views).

¹⁷*United States v. Darby Lumber Co.*, 312 U.S. 100 (1941); *Hammer v. Dagenhart*, 247 U.S. 251 (1918).

¹⁸*Id.* at 75.

Rutledge was repeatedly thwarted in urging Missouri to ratify the Child Labor Amendment, but he did succeed in setting forth his commitment to broad federal power, his progressive politics, and his view of contemporary Supreme Court jurisprudence.

In 1935, Rutledge left St. Louis to become dean at the University of Iowa, a move that owed chiefly to bureaucratic disputes among other Washington University administrators. The change also raised Rutledge's profile and gave him a home with greater academic resources and talent, but the environment was not entirely progressive. For example, when Rutledge sought curricular reforms favoring interdisciplinary and clinical education, faculty resistance limited such efforts to merely adding a "judicial process" class, which Rutledge himself agreed to teach.

Rutledge continued to succeed as a teacher, and he pursued extracurricular activities as before, including lectures on interdisciplinarity, speeches to social organizations, and service to the National Conference on Uniform State Laws. Rutledge increased his participation in the AALS, where he drafted a report criticizing inadequate services for the unemployed, and the bar's "almost appalling apathy and indifference . . . toward any effective general program of legal aid extension."¹⁹ He wrote that "[n]o legal system can survive . . . [when] so large a proportion of the general population" is ignored.²⁰ Similarly, at a state level, Rutledge advocated reforming bar standards and "unauthorized practice" rules to increase the service of indigent clients by

¹⁹*Id.* at 120.

²⁰*Id.* The unapologetic reformism of Rutledge's draft was not altogether welcomed by other deans. *See id.* at 121 (quoting the University of Illinois's dean as calling the report "too contentious," and Yale's dean as predicting it would "probably offend not merely the lawyers, but also the law teachers . . . [Y]ou would be well advised to change the tone of the report quite considerably."). *But cf. id.* (quoting other deans' support for the draft as "splendid" in its "provocative character").

laymen and nonlegal experts.

Among Rutledge's most controversial activities was supporting FDR's "court-packing plan," which would have added fifty judges to the federal bench, including six Supreme Court Justices, wherever existing judges were at least seventy years old with ten years of service.²¹ Rutledge shared others' concerns about "political control of the court," but he viewed the challenges of underconsumption, employment displacement, land planning, conservation, and social security as inexorably requiring dynamic government.²² Because Rutledge believed the Constitution was flexible enough to serve those needs, he characterized the Supreme Court's restrictive case law as threatening "basic principles of national democracy," possibly someday risking "another Dred Scott situation."²³ If States (like Missouri) could not ratify constitutional provisions like the Child Labor Amendment to overrule the Court's decisions, Rutledge thought a change in judicial personnel was the most feasible solution.²⁴

Rutledge delivered several speeches on the court-packing plan, and he even agreed to testify before Congress.²⁵ The Court, however, displaced any need for such testimony — and for

²¹Judiciary Reorganization Bill of 1937, S.1392, 62nd Cong. *See generally, e.g.,* WILLIAM E. LEUCHTENBERG, *THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT* 133-34 (1995) (describing the court-packing plan in more detail).

²²FERREN, *supra* note 5, at 124.

²³*Id.*

²⁴It should be said that, even in such dire circumstances, Rutledge did not support other proposals to rein in the Supreme Court, such as requiring a supermajority vote before the Court could invalidate a legislative act, or allowing Congress to reenact statutes that the Court had struck down. *Id.* at 127.

²⁵Rutledge's agreement to support of the court-packing proposal set him in direct opposition to the dean of the University of Michigan law school, a fact which was reported in the *Des Moines Register*, and once more placing Rutledge prominently in the public arena due to his

FDR's plan — by changing directions on its own. Even as legislative hearings were underway in March 1937, the Court reversed a one-year-old precedent and upheld a state minimum wage law; in April, the Court upheld the National Labor Relations Act; and in May, it upheld the Social Security Act.²⁶ Given such dramatic reversals, Congress contented itself with providing Justices over seventy years old with ten years' service the *option* of full-salary retirement.²⁷

Despite Roosevelt's failure to impose institutional change on the Court, he influenced that organ by making eight judicial appointments.²⁸ Rutledge was mentioned several times among FDR's nominees, first as a possible successor to Justice Cardozo in 1938.²⁹ Irving Brant, a democratic writer from St. Louis,³⁰ brought Rutledge to Roosevelt's attention, in part due to his views of child labor and social change in law. In Rutledge, Brant saw a young, liberal thinker who might combine personal skills, legal talents, and perseverance to "win over" the Court's moderate and conservative members.

The prohibitive frontrunner for Cardozo's seat, however, was the brilliant Harvard law

controversial, pro-Roosevelt views.

²⁶*West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), *overruling Ex rel. Tipaldo*, 298 U.S. 587 (1936); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937); *Helvering v. Davis*, 301 U.S. 619 (1937).

²⁷Supreme Court Retirement Act, 28 U.S.C. 375 (1937).

²⁸It should be said that one of those, Justice James F. Byrnes, served for only sixteen months before resigning to direct Roosevelt's Office of Economic Stabilization. FERREN, *supra* note 5, at 206-08.

²⁹Roosevelt's first two appointments were Hugo Black, who succeeded Willis Van Devanter, and Stanley Reed, who succeeded George Sutherland. *Id.* at 131-37.

³⁰Among Brant's numerous writings is an extraordinary biography of James Madison. IRVING BRANT, *JAMES MADISON*, 6 vols. (1941, 1948, 1950, 1953, 1956, 1961).

professor, Felix Frankfurter, whom even Brant himself preferred. Frankfurter's candidacy was opposed by significant pressures to place a "westerner" on the bench and to avoid (or appease) possible anti-semitic sentiment that might accompany the appointment of a second Jewish Justice.³¹ Therefore, Brant pressed Rutledge as a second-best option, or perhaps for future vacancies. Describing Iowa's dean as a man of "extreme modesty and simplicity," Brant added that "[h]e has met what I regard as the one and only absolute test of liberalism — he has been a liberal in conservative communities and against all counterpressures, and where all logical prospect of gain to himself, and all social factors, ran in the opposite direction."³² Such steadfastness appeared throughout Rutledge's political and academic life, from emphasizing interdisciplinary education to opposing child labor. Unknowingly confirming appraisals of his humility, Rutledge wrote to Brant that Frankfurter would be "an ideal selection, notwithstanding the geographical qualification," and suggested that geographic considerations "should be disregarded" because there was not "anyone west of the Mississippi that I know who would be even within close distance to Frankfurter on the basis of qualifications, with the possible exception of [Fifth Circuit Judge] Joseph C. Hutcheson of Texas."³³

Brant was by no means the only one pressing Rutledge's candidacy,³⁴ but his efforts combined with other forces to maintain Rutledge as an alternative to Frankfurter throughout a

³¹Such circumstances had previously emerged when President Hoover appointed Benjamin Cardozo to a Court on which Louis Brandeis continued to serve. FERREN, *supra* note 5, at 139.

³²*Id.* at 143.

³³*Id.*

³⁴Other supporters included faculty from Washington University and prominent members of the St. Louis and Iowa bar. *Id.* at 148-50.

long nomination process. When Frankfurter was chosen and confirmed, Rutledge supporters braced for other judicial vacancies, and they did not wait long, as Justice Brandeis retired just a few weeks after Frankfurter's confirmation. Rutledge was again a serious contender but was again passed over. This time, Roosevelt chose William Douglas for the Supreme Court and installed Rutledge on the Court of Appeals for the District of Columbia.

In 1939, Rutledge began his decade of judicial service with "perhaps the most strenuous year" of his life.³⁵ Rutledge's stressors had several causes, including a penchant for long writing, an academic's curiosity, a drive to maintain personal ties and correspondence, close attention to complex factual records, an insistence on teaching summer school classes, and inherent demands of the courts he served. Such double- and triple-duty was nothing new to Rutledge, but perhaps it sometimes weighed on him more as a judge. At the time of Rutledge's appointment, the District of Columbia's Court of Appeals had a unique docket, comprised of appeals from the federal district court, administrative agency reviews, and appeals from municipal courts that concerned contracts, torts, criminal, family law, and the like.³⁶ The court had six members, five of whom were Roosevelt appointees, four were former academics, and two were staunch conservatives. Although Rutledge never said so, his experience on this small appellate court, with its diverse docket and divided membership, must have been an ideal training ground for what was yet to come.³⁷

³⁵*Id.* at 181.

³⁶JEFFERY BRANDON MORRIS, *CALMLY TO POISE THE SCALES OF JUSTICE: A HISTORY OF THE COURTS OF THE DISTRICT OF COLUMBIA* 85-109 (2001).

³⁷*But cf.* Pollak, *Profile of a Judge*, *supra* note 4, at 183 (describing this period as a "substantial apprenticeship for the work which lay ahead on the Supreme Court").

Rutledge did not let judicial work curtail outside commitments. For example, he continued to stress in speeches across the country the meagerness of legal services for indigent populations. In 1941, Rutledge was picked to help a young Herbert Wechsler develop a “new legal personnel system for the Federal Government.”³⁸ He also served on the National Railway Labor Panel, which provided advice when mediation failed to resolve disputes affecting war efforts. Continuing his penchant for populist reform, Rutledge floated a proposal to amend District of Columbia’s government and grant residents congressional representation. Such engagements only further complicated Rutledge’s early years on the bench.

While Rutledge was on the D.C. Circuit, Roosevelt made four Supreme Court appointments, yet Rutledge was not a serious candidate until James Byrnes’s resignation in October 1943. Unlike other occasions, Rutledge actively discouraged the administration from appointing him, in part due to the job’s incredible workload,³⁹ but three factors pushed the other way. First, Attorney General Francis Biddle sought advice from Chief Justice Stone, Justice Black, and Justice Douglas. Those conversations confirmed Rutledge as the best available

³⁸FERREN, *supra* note 5, at 202.

³⁹*See, e.g., id.* at 209 (writing to a friend that a Supreme Court post would be undesirable because, “[w]hile I enjoy judging, I have had enough of it to know one has to make great sacrifices This includes giving up time with friends and family, foregoing many of the most pleasant associations in life, and grinding away at all hours of the day and night on hard, tough, legal knots.”); *id.* at 210 (writing to another friend, “For God’s sake, don’t do anything about stirring up the matter! I am uncomfortable enough as it is.”); *id.* (writing to Attorney General Francis Biddle, “I hope you will believe me when I say that I do not have Supreme Courtitis. My own feeling . . . was that the President should appoint a Republican to this vacancy, and I am still inclined to feel that would be the wiser thing both for the Court and for the country. . . . If [rumors about a Supreme Court nomination] I merely want merely to request that before any action is taken I be given an opportunity to talk with you.”).

option, with Black and Douglas particularly “enthusiastic.”⁴⁰

Second, Biddle asked his assistant, Herbert Wechsler, to analyze several candidates’ judicial work. The resultant memorandum noted Wechsler’s earlier experience with Rutledge, and a favorable impression therefrom. But most importantly, the report offers a rare appraisal, by someone as talented as Wechsler, of judicial work without flattery and exaggeration.⁴¹ Wechsler described Rutledge as having a “soundness of judgment, a searching mind, a properly progressive approach to legal issues, some mastery of phrase and style — especially after the first year — and a dominating effort to answer all the problems in terms that will satisfy the litigant and his lawyer that their points have not been ignored.”⁴² Wechsler continued that “Rutledge’s most striking trait [is] his warm sense for real people as the ultimate concern of law and his awareness of what real people are like throughout this broad land.”⁴³ And he stressed “constant evidence of the quality — so treasured in Holmes — of pointing [out] the implications of small things, if only by defining an underlying reason for a rule or a concealed principle of its growth.”⁴⁴ Finally, Wechsler noted that, in Rutledge’s judicial work, “[c]ivil liberty problems and review of administrative agencies, especially in the labor field, have been the major issues. His work leaves no room for doubt that these values are safe in his hand. More than this, however, I think

⁴⁰Another candidate favored by sitting Justices was Learned Hand, who was uniformly believed too old for the post, especially given the emphasis during FDR’s court-packing plan of the need for young, vigorous Justices. *Id.* at 213, 217.

⁴¹That said, many of the characteristics identified in Wechsler’s private report also appear in Rutledge’s postmortem eulogies. *See, e.g.*, sources cited *supra* note 4.

⁴²*Id.* at 215.

⁴³*Id.*

⁴⁴*Id.*

it shows an independence of mind within that framework. There is none of the easy factionalism to which so many liberals succumb.”⁴⁵

A third factor supporting Rutledge’s nomination was the tireless Brant, who ran a coordinated campaign on his behalf. Brant sought endorsements from influential lawyers and politicians in Missouri and Iowa, and he even visited FDR himself. As before, there remained pressure to appoint a Justice from west of the Mississippi, and when the President first greeted Rutledge as his nominee, he said — to the boy from Kentucky, North Carolina, and Tennessee, the teacher from New Mexico and Colorado, the dean from Missouri and Iowa, and the judge from the District of Columbia— “Wiley, you have a lot of geography.”⁴⁶

When Rutledge reached the Supreme Court in February 1943, his colleagues were already suffering interpersonal friction, and matters quickly grew worse. Seven of nine Justices were FDR appointees, but Justices Robert Jackson and Frankfurter were conservatives whom Justice Owen Roberts and Stanley Reed combined to oppose the Court’s liberal wing (Murphy, Douglas, Black, Rutledge, and Stone). Ideological divisions paled, however, beside the conflicts over propriety and ethics that reappeared throughout the Court’s next few years.⁴⁷ Such controversies

⁴⁵*Id.*

⁴⁶*Id.* at 219.

⁴⁷A few examples may be useful. *See* FERREN, *supra*, 272-85. In January 1944, someone leaked to the press that Rutledge could not decide how to vote in a pending administrative law case. Roberts was furious and demanded a meeting, where Frankfurter suggested that Murphy or Douglas was responsible. Both denied it, and the charge stoked their preexisting dislike of Frankfurter. Roberts unsuccessfully tried to force Black to name the leaker, and thereafter refused to speak to any Justice but Frankfurter and Jackson, decrying the rest as “men without honor.”

Frankfurter annoyed Black, Murphy, Douglas, and others with recurrent pedantry, condescension, and intracourt scheming. Douglas’s political ambitions were also a chronic irritant, as was his penchant for taking summer recess before others’ opinions had circulated.

are remarkable in their own right, but most important at present is the absence of bad behavior, and bad blood, on Rutledge's part. Whether it was his temperament, his experience as dean (where factiousness can be common), or other factors, what is clear is that Rutledge kept his interjudicial relations, like his public opinions, free of vitriol and snipe, despite working closely with men sometimes afflicted by both.⁴⁸

Ferren organizes his discussion of Rutledge's judicial product by topic, documenting Rutledge's contributions to varied fields such as federalism, religious freedom, criminal procedure, and free speech. This Review will not summarize that discussion, but Ferren's research offers ample insights about the Court's process and results during this period. Importantly, Ferren does not limit his story to Rutledge's more famous work regarding civil rights, nor to Rutledge's "successes" in influencing precedent and future Courts. Instead, the book offers a panoramic demonstration that, despite his lack of seniority and consequently

Many at the Court were unhappy that Jackson agreed to prosecute at the Nuremberg Trials without advising even Chief Justice Stone, even though the departure shifted heavy burdens to others on the Court. Black and Jackson had a terrible feud over whether Black should be recused from a case argued by his former law partner, culminating in loud argument and pounded tables. And Black and Stone divided bitterly over the language of a proposed retirement letter to Roberts.

Ferren summarized the Court's inner workings at the time Stone died in 1946: "Jackson and Black were feuding. Douglas and Frankfurter were ignoring each other. Frankfurter and Murphy exhibited mutual disdain, and, with Black, were still smarting after the [above press leak]. Jackson and Murphy continued to feel a mutual antipathy And tempers were smoldering since the fiasco surrounding Roberts resignation letter." The press reported that two Justices (Black and Douglas) would resign if Jackson were made the new Chief, and that Jackson would resign if Black were promoted. When Truman nominated Fred Vinson, Jackson wrote a truly disgraceful letter from Nuremberg to the chairmen of the Senate and House Judiciary Committees, reporting that his fight with Black went beyond a "mere personal vendetta," and struck at "the reputation of the court for nonpartisan and unbiased decision." *Id.* at 328; *see* Dennis J. Hutchinson, *The Jackson-Black Feud*, 1988 *Sup. Ct. Rev.* 455 (2003).

⁴⁸*See* FERREN, *supra* note 5, at 329.

limited assignments, Rutledge produced an extremely distinguished record of opinions and votes. The “Roosevelt Court” had many fine judges — among the most distinguished enneads ever — yet Ferren proves that Rutledge’s overall work compares favorably with that of any other Justice in that time.

If Ferren’s description of Rutledge’s judicial service is unusually broad, that owes partly to the fact that Rutledge served the Court for only six years. In March 1947, Rutledge learned he had high blood pressure, which was not helped by his unhealthful habits and exhausting extrajudicial commitments. Clerks and family urged him to slow down, but in August 1949, during the Court’s summer recess, a massive stroke caused Rutledge to collapse while driving, and he died a few weeks later at the age of fifty-five.

* * * * *

As the foregoing sketch of Rutledge’s life suggests, Ferren’s work reinforces the historical relevance of full-length judicial biographies. When one reads a Rutledge opinion, it is the work of a professor, a New Dealer, a dean, a midwesterner, and above all one who deeply respected other people and earned in similar coin. The details presented in Ferren’s book allow readers to measurably further their understanding of what Rutledge accomplished, and what his decisions meant to the Court and the country. As necessary sidelights, the book also illustrates FDR’s efforts at “court-picking” and describes those legal issues that preoccupied the Court during the years between the death of *Lochner* and the birth of *Brown*. Perhaps one cannot grasp any era’s judicial work without seeing whence the Court came and where it went. And although Ferren’s part of that tale is cast in personal terms, his efforts are a valuable resource for anyone interested in the Supreme Court’s history and enduring significance.

Before leaving this discussion, two items deserve mention. First is Ferren’s focus on Rutledge’s character and warmth, which appears from the book’s first page to its last. Some readers may regard such sentimentality with skepticism, but a notable feature of Ferren’s work is the evidence supporting his judgment. Ferren cites interviews with former law students and colleagues from Washington University and Iowa, stories from family members, interviews with those who clerked for Rutledge and other Justices, memoranda from presidential advisers, comments from local store owners, and abundant personal correspondence. Such materials confirm Ferren’s view of Rutledge’s personality and its link to his success. As Rutledge wrote in a letter after his nomination to the Court:

I kn[ow] enough of myself to realize . . . that some mysterious leaven works up a very small amount of real merit into a big return. The leaven isn’t brains, or knowledge, or grandeur of character, or any such unusual thing. So far as I can guess what it is — it’s that I like people, have some sort way of letting them know it, and in turn they like me regardless of all the other deficiencies.⁴⁹

Ferren wants to ensure that Rutledge’s humility and compassion are not lost amid other historical details. Indeed, Ferren suggests that such personal traits were strong factors motivating Rutledge’s consistent concern for minority religious and racial groups, as well as his attention to procedural fairness.⁵⁰

A second personal dimension of the story, which Ferren underplays, concerns Rutledge’s law clerks. Beginning in the late nineteenth century, Supreme Court Justices have hired young law graduates to help research issues, manage requests for certiorari, and sometimes draft

⁴⁹FERREN, *supra* note 5, at 219.

⁵⁰*See, e.g.*, FERREN, *supra* note 5, at 1; sources cite note 4.

opinions.⁵¹ Although American legal education was once based entirely on apprenticeship, clerking — at the Supreme Court and elsewhere — is among the last great examples of such institutionalized mentoring. To be sure, clerkships vary immensely based on the personalities involved, but the experience often propels young graduates toward careers with singularly persistent impressions of what passes for law and good judgment.

For most of Rutledge’s tenure, Justices hired one law clerk per year; in 1948 and 1949, they hired two. Rutledge thus had nine clerks at the Court, and they were a remarkable bunch: One is a Harvard professor of corporate law, several became accomplished private counsel, one was a two-time law school dean and is now a district court judge, another served the Seventh Circuit, and another is Justice John Paul Stevens. Even among the lofty ranks of Supreme Court clerks, such distinctions stand out,⁵² and several Rutledge clerks name their former employer as a continued influence on their view of life and law.⁵³ This aspect of Rutledge’s legacy is perhaps the strongest testament to his force as a teacher and role model. And as the next Part indicates, that force has more than pure historical significance.

II. Executive Power, Judicial Limits

⁵¹See ALEXANDER M. BICKEL & BENNO C. SCHMIDT, JR., *HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE JUDICIARY AND RESPONSIBLE GOVERNMENT 1910-21*, at 82-84 (1984) (summarizing the early history of Supreme Court law clerks); Chester A. Newland, *Personal Assistants to Supreme Court Justices: The Law Clerks*, 40 O. R. L. REV. 299 (1961) (offering more extended analysis).

⁵²*Cf.* Pollak, *Profile of a Judge*, *supra* note 4, at 190 n.4 (cataloguing the even-more-extraordinary influence of Frankfurter’s clerks).

⁵³Cliff Sloan, *The Mourning After: John Roberts Gives for His Mentor*, SLATE (Sept. 7, 2005), at <http://www.slate.com/id/2125848> (“The influence on these former-clerk justices of the justices for whom they once worked is profound. Stevens speaks and writes reverentially of the little-known Wiley Rutledge more than five decades after his clerkship.”).

As is now clear, Ferren’s book and Rutledge’s story amply satisfy Frankfurter’s historical aims for judicial biographies. But for many readers, history is not enough. Any artful biography would convey the context surrounding its subject, yet few of us track down books about simply any Justice. It is thus important for today’s audience that Ferren’s work lists more than Frankfurter as a recommendation. Even for readers uninterested in history for its own sake, a key feature that boosts the modern relevance of Rutledge’s story is its connection to present-day circumstances. There are several fields in which Rutledge’s work relates to current legal debates,⁵⁴ but the most important is executive detention. After decades of jurisprudential quiet, the President’s authority to detain is again a central issue in public life. This Part hopes to demonstrate that the history of Justice Rutledge, more than any other, showshow such detentions test the limits of judicial competence and legal principle.

Judicial review of executive detention can be analyzed in three parts: (i) jurisdiction for courts to evaluate such detention, (ii) substantive standards for detaining those who are not charged with any crime, and (iii) requirements for detainees who are charged for trial in military tribunals. In each instance, the World War II cases in which Justice Rutledge played a critical role have strong connections with modern cases that are pending or recently decided. First, with respect to jurisdiction, Rutledge’s dissent in *Ahrens v. Clark* addressed the territorial limits of

⁵⁴For other doctrinal parallels and analogies, compare, for example, *Everson v. Board of Educ.*, 330 U.S. 1 (1947) (addressing the constitutionality of public payments to religious schools); *Louisiana v. Resweber*, 329 U.S. 466 (1947) (analyzing due process constraints on states’ use of capital punishment) WILEY B. RUTLEDGE, *A DECLARATION OF LEGAL FAITH* (1947) (discussing the constitutionality of Congress’s commerce power), with, for example, *Zelman v. Simmons-Harris*, 122 S. Ct. 2460 (2002) (upholding school vouchers); *Gonzales v. Raich*, 125 S. Ct. 2195 (2005) (upholding the commerce regulation of medical marijuana); *Roper v. Simmons*, 125 S. Ct. 1183 (2005) (finding unconstitutional the execution of juvenile defendants).

habeas jurisdiction, which was a key issue in *Rasul v. Bush* concerning modern detentions at Guantanamo Bay. Justice Stevens was the Rutledge law clerk who helped draft the *Ahrens* dissent, and (incredibly) it was Stevens half-a century later who wrote *Rasul*'s majority. We shall see, however, that *Ahrens*'s force grew from much more than just a law clerk's loyalties.

Second, with respect to substantive standards for uncharged detention, Rutledge was the dispositive fifth vote at conference in *Korematsu v. United States*, which involved the evacuation of Japanese-Americans during World War II. Five decades later, *Hamdi v. Rumsfeld* addressed the detention of uncharged "enemy combatants" in Guantanamo Bay, and the three opinions forming the *Hamdi* majority sought to avoid "another" *Korematsu*. Revisiting the basis for Rutledge's mistake in *Korematsu* offers unique insight to assessing whether modern Courts are doomed to repeat it.

Third, Rutledge's most well known opinion is his dissent in *In re Yamashita*, concerning the trial of a Japanese general before a military commission. A pending Supreme Court case, *Hamdan v. Rumsfeld*, raises similar issues in a military trial of Osama bin Laden's driver. If the Court grants certiorari in *Hamdan*, or in any of several military commission cases making their way through the judicial branch, Rutledge's work may again prove central in determining how courts limit executive authority during an asserted national crisis.

A. *Ahrens* and *Rasul*

In *Ahrens v. Clark*, the Attorney General ordered that over a hundred German nationals be deported under the Alien Enemy Act of 1798, which grants broad power over citizens of nations at war with the United States.⁵⁵ While the *Ahrens* detainees were at New York's Ellis

⁵⁵335 U.S. 188 (1948); see 50 U.S.C. §§ 20-21; 10 Fed. Reg. 8947 (1945).

Island, they filed habeas corpus petitions in the District of Columbia, claiming that their deportation orders issued unlawfully after the German war's end. The decisive jurisdictional issue in the Supreme Court was whether the district court could grant habeas relief to detainees outside the District of Columbia. Seeking a quick resolution on the merits, the United States did not contest jurisdiction and waived all defenses against reaching a decision in the District of Columbia.⁵⁶

Voting six to three, the Supreme Court found jurisdiction improper. Federal habeas statutes allow federal judges, “*within their respective jurisdictions, . . . to grant writs of habeas corpus for the purpose of an inquiry into the cause of restraint of liberty.*”⁵⁷ In *Ahrens*, the Attorney General was undeniably “within” the district court’s jurisdiction. Yet Justice Douglas wrote for the Court that habeas could not be granted to detainees who were not “confined or restrained within the [court’s] territorial jurisdiction.”⁵⁸ It was not enough “that the jailer or custodian alone be found in the jurisdiction”; the detainees themselves must be present as well.⁵⁹ The Court discussed possible travel and security problems if prisoners across the country could seek habeas, and ultimately appear, in a court where only their custodian was present.⁶⁰ Relying on (inconclusive) legislative history, the Court thus held that Congress excluded from habeas

⁵⁶*Ahrens*, 335 U.S. at 193.

⁵⁷28 U.S.C. 2241(a) (2000); *cf.* Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 82 (authorizing habeas relief for prisoners “in custody, under or by colour of the authority of the United States, or committed for trial before some court of the same”).

⁵⁸*Ahrens*, 335 U.S. at 192.

⁵⁹*Id.* at 190.

⁶⁰*Id.* at 190-91.

jurisdiction all detainees located outside the issuing court's territorial boundaries.⁶¹

Rutledge's dissent was a classic, and has been described as "sufficiently representative to provide us with an introduction to its author's judicial career."⁶² It met Douglas's five-page majority with eighteen in response, and Rutledge began by claiming that "[t]he jurisdictional turn this case has taken gives it importance far beyond the serious questions tendered on the merits of petitioners' application."⁶³ Unlike the majority, Rutledge's primary concern was not governmental convenience in this case or others. Instead, he saw *Ahrens* as addressing the nature of habeas corpus itself, with potentially serious consequences for circumstances where relief is most essential.

Describing habeas review as basic to "the personal security of every citizen," Rutledge could not accept that a detainee's physical location was prerequisite to judicial oversight.⁶⁴ In three circumstances, he found the majority's "place-of-the-body" rule particularly unsatisfying: (i) where the place of imprisonment is unknown, (ii) where the detainee is located in a district where her custodian cannot be served, and (iii) where the place of detention is outside the limits of any district court's territorial jurisdiction.⁶⁵ In such contexts, Rutledge viewed the *Ahrens*

⁶¹*Id.* at 191-93.

⁶²Stevens, *supra* note 4, at 178.

⁶³*Ahrens*, 335 U.S. at 193 (Rutledge, J., dissenting); *cf.* FERREN, *supra* note 5, at 215 (attributing to Rutledge "the quality — so treasured in Holmes — of pointing [out] the implications of small things, if only by defining an underlying reason for a rule or a concealed principle of its growth").

⁶⁴*Ahrens*, 335 U.S. at 193 (Rutledge, J., dissenting).

⁶⁵*Id.* at 195. As a matter of style, former-Professor Rutledge's introduction of these points reads much like a classroom transcript, where the instructor poses hypothetical questions not directly at issue but possible as extensions of the principle at stake.

majority as creating insuperable barriers that could permit illegal detention without any chance of relief.

Having identified that basic problem, Rutledge as legal technician surveyed statutory language, legislative history, and other court decisions in painstaking detail, demonstrating that none compelled the majority's result.⁶⁶ He further showed that the Court's policy concerns about travel and convenience would be better served by principles of venue, rather than inflexible jurisdictional rules, because the latter cannot be waived or modified even under extraordinary circumstances. Rutledge knew it would be "only the exceptional case of detention outside the District and pursuant to authority independent of its affairs, which would require or even permit the exercise of jurisdiction by its courts," but "[i]t is one thing to lay down a rule of discretion adequate to prevent flooding of the courts of the District of Columbia with applications for *habeas corpus* from the country at large. It is entirely another to tie their hands, and those of all inferior federal courts, with a strict jurisdictional limitation which can only defeat the writ's efficacy in many cases where it may be most needed."⁶⁷

Rutledge methodically rebutted each step of the majority's reasoning, and the Court did not try to respond. His affirmative basis for granting jurisdiction, however, was less technical and more rooted in a substantive view of *habeas corpus*. For Rutledge, *Ahrens's* worst results could arise for detainees held "in places unknown to those who would apply for *habeas corpus* in

⁶⁶*Id.* at 201-07.

⁶⁷*Id.* at 209-10. Rutledge noted that the majority "reserved decision upon cases where the place of confinement is not within the territorial jurisdiction of any court." But the fact of allowing such a reservation "goes far to destroy the validity of the present decision's grounding." *Id.* at 208. Mustering other examples, Rutledge also discussed the local impact of *Ahrens* for the District of Columbia, which confined some of its prisoners in Virginia. *Id.* at 207 & n.24.

their behalf. Without knowing the district of confinement, a petitioner would be unable to sustain the burden of establishing jurisdiction in any court in the land.”⁶⁸ Rutledge speculated that such events might arise from “military detention,” from “mass evacuation of groups . . . in time of emergency,” or “possibly, though it is to be hoped not often, even from wilful misconduct by arbitrary executive officials overreaching their constitutional or statutory authority.”⁶⁹ Those specific scenarios did not immediately materialize, but Rutledge’s discussion of wartime detentions, which clearly marks the *Ahrens* dissent as a work of its time, also explain the relevance of that opinion fifty years later.

Two cases decided between *Ahrens* and *Rasul* need quick mention. In *Eisentrager v. Johnson* (one year after Rutledge died), the Court refused habeas relief to foreigners imprisoned by the United States Army in Germany.⁷⁰ A military tribunal had convicted the petitioners of conducting hostile military activities after Germany’s surrender. The Court cited a history of denying judicial access to “nonresident enemy aliens,” and concluded that “[n]othing in the text of the Constitution . . . [or] anything in our statutes” provides habeas jurisdiction to persons outside the United States.⁷¹ The district court, expressing fidelity to *Ahrens*’s view of territorial jurisdiction, was affirmed. Because the detainees lay outside the federal district’s boundaries, they could receive no relief. The court of appeals had sought to bypass *Ahrens* using

⁶⁸*Id.* at 210.

⁶⁹*Id.*

⁷⁰339 U.S. 763 (1950). Justice Black dissented, joined by Justices Douglas and Murphy.

⁷¹*Id.* at 768.

constitutional norms and “fundamentals,” and that decision was reversed.⁷²

By contrast, *Braden v. 30th Judicial Circuit Court*⁷³ signaled growing dissatisfaction with *Ahrens*. Braden was an Alabama prisoner who filed a habeas petition challenging a three-year-old Kentucky indictment as a violation of his speedy trial rights. Because Braden filed in Kentucky’s district court, the question arose whether his case was “within” the district court’s “respective jurisdiction[.]” while he was being held in Alabama.⁷⁴ Justice Brennan wrote for a majority that jurisdiction in Kentucky was proper, because, as Rutledge had argued in *Ahrens*, “[t]he writ of habeas corpus does not act *upon the prisoner* who seeks relief, but *upon the person who holds him* in what is alleged to be unlawful custody.”⁷⁵ The Court in *Braden* viewed statutory and doctrinal developments as having had “a profound effect on [*Ahrens*’s] continuing vitality,” and held that *Ahrens* could no longer stand as “an inflexible jurisdictional rule” but only as a decision applying “traditional principles of venue.”⁷⁶

Then came Guantanamo Bay and *Rasul*. After the September 11 attacks, Congress authorized the President to use “all necessary and appropriate force against those nations,

⁷²*Id.* at 768, 790.

⁷³410 U.S. 484 (1973).

⁷⁴28 U.S.C. 2241(a) (2000). Other issues in the case concerned timing and exhaustion requirements applicable to speedy trial claims. *Braden*, 410 U.S. at 488-93.

⁷⁵*Braden*, 410 U.S. at 494-95 (emphasis added); *see Ahrens*, 335 U.S. at 196-97 (Rutledge, J., dissenting). Incidentally, Brennan was the lineal successor to Rutledge’s seat on the Court.

⁷⁶Technically, it should be said that the holding in *Ahrens* cannot possibly be explained using venue principles. That is because the government in *Ahrens* waived any defenses to hearing the case in the District of Columbia, *Ahrens*, 335 U.S. at 193, thereby rendering any waivable defense such as venue (unlike jurisdiction) wholly irrelevant.

organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks . . . or harbored such organizations or persons.”⁷⁷ As the President took military action in Afghanistan, the United States began confining hundreds of non-American citizens at the Guantanamo Bay Naval Base, on Cuba’s southeastern coast. A 1903 lease between the United States and Cuba stated that “the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over [Guantanamo Bay],” but that “the Republic of Cuba consents that during the period of the occupation by the United States . . . the United States shall exercise complete jurisdiction and control over and within said areas.”⁷⁸ By later treaty, the Guantanamo lease became indefinite, and it will last as long as the United States does not abandon the base.⁷⁹

In 2002, foreign detainees at Guantanamo filed habeas petitions in the District of Columbia against Defense Secretary Rumsfeld. The petitioners claimed that they had not performed any terrorist act, that they were not combatants against the United States, and that they were unlawfully held without charges, counsel, or access to any court or tribunal. In response, the government argued that federal courts lacked jurisdiction to review Guantanamo detentions, citing *Eisentrager*’s decision to deny jurisdiction and arguing that the Guantanamo detainees were not “within [the district court’s] respective jurisdictions.”

The district court and court of appeals denied jurisdiction, but the Supreme Court reversed. Justice Stevens’s majority opinion relied on the *Ahrens* dissent that law-clerk Stevens

⁷⁷Authorization for Military Force, Pub. L. 107-40, §§ 1-2, 115 Stat. 224 (2001).

⁷⁸*Rasul v. Bush*, 124 S. Ct. 2686, 2690-91 (2004).

⁷⁹*Id.* at 2691.

had helped draft fifty years earlier.⁸⁰ Like his mentor, Stevens declared the broad historic importance of habeas “as a means of reviewing the legality of Executive detention” and stressed its availability “in a wide variety of cases . . . , in wartime as well as in times of peace.”⁸¹

Rebutting the government’s reliance on *Eisentrager*, Stevens held that *Braden*’s vindication of the *Ahrens* dissent made *Eisentrager*’s constitutional and quasi-constitutional analysis unnecessary and, thus, unhelpful to the government.⁸² In *Eisentrager*, the detainees resorted to constitutionally inspired arguments only because they were forced to accept, as a statutory matter, the *Ahrens* majority’s “place-of-the-body” rule. Because *Braden* repudiated that analysis, Stevens viewed *Ahrens* as now relevant “only to the question of the appropriate forum, not to whether the claim can be heard at all.”⁸³

The *Rasul* majority did more than simply embrace *Braden*’s attack on the *Ahrens*

⁸⁰*Id.* at 2694 & n.7 (citing and quoting the Rutledge dissent); *id.* at 2695 & n.9 (interpreting *Braden* as having overruled *Ahrens*); see also John Paul Stevens, *What I Did This Summer*, 18 CHICAGO BAR ASSOCIATION RECORD 34, 35 (Oct. 2004) (“[H]istory played an important role in our [*Rasul*] decision concerning the Guantanamo detainees. The precedent on which the court of appeals based its decision, a case named *Johnson v. Eisentrager*, was decided before *Ahrens* was overruled and had treated *Ahrens* as controlling precedent. . . . However, because the Court had not had the opportunity to revisit *Eisentrager* . . . , many observers wrongly assumed that the case would control the outcome of our Guantanamo decision. Thus the Rutledge dissent written in 1948 significantly influenced an important case decided less than three months ago.”).

⁸¹*Id.* at 2692.

⁸²*Id.* at 2695 (“Because subsequent decisions of this Court [*i.e.*, *Braden*] have filled the statutory gap that had occasioned *Eisentrager*’s resort to ‘fundamentals,’ persons detained outside the territorial jurisdiction of any federal district court no longer need rely on the Constitution as the source of their right to federal habeas review.”). Justice Stevens also noted that *Rasul*’s facts differed from *Eisentrager*’s because the *Rasul* petitioners were not citizens of “enemy nations,” they denied any aggression against the United States, they were not tried in a military tribunal, and they were imprisoned for over two years. *Id.*

⁸³*Id.*

majority, however. As Justices Kennedy and Scalia protested, the *majority* opinions in *Braden* and *Ahrens* said nothing about detainees outside the United States.⁸⁴ But that ignores *the Rutledge dissent*, which Kennedy and Scalia did not cite. Going well beyond the majority's analysis, and the case at hand, Rutledge crafted his opinion with a case like *Rasul* expressly in mind, and that broader conceptual analysis --- absent from any other opinion in any other case --- is what ultimately formed the core of the *Rasul* majority's analysis. The risk that technical barriers would block review of wartime detentions was what motivated Rutledge to press so strongly for habeas jurisdiction over Ellis Island (in a case that otherwise lacked much emotional allure). Rutledge would surely have been disappointed that the Court in *Eisentrager* extended *Ahrens*'s approach and denied habeas jurisdiction to international detainees.⁸⁵ But when the Court returned to similar issues fifty-four years later, the principles underlying Rutledge's position enabled a ruling that was hard to anticipate and is difficult otherwise to explain.⁸⁶ What is most remarkable about *Rasul* is that the Court reached beyond Rutledge's technical arguments (which *Braden* had already accepted) and applied his normative view of habeas corpus in the context of wartime executive detention that had concerned him most. The coincidence that Justice Stevens wrote the opinion producing that result is stunning, but perhaps also appropriate.

⁸⁴*Rasul*, 124 S. Ct. at 2699 (Kennedy, J., concurring); *id.* at 2701 (Scalia, J., dissenting); *cf. Ahrens*, 335 U.S. at 192 n.4 (“We need not determine the question of what process, if any, a person confined in an area not subject to the jurisdiction of any federal court may employ to assert federal rights.”).

⁸⁵Rutledge might also have been disappointed by *Ex parte Quirin*, 317 U.S. 1 (1942), which allowed trials by military commission of anti-American saboteurs, and was decided just before Rutledge joined the Court. *But cf. In re Yamashita*, 327 U.S. 1, 46-47 (1946) (Rutledge, J., dissenting) (distinguishing *Quirin* without arguing that it should be overruled).

⁸⁶Of course, Justice Stevens, in his own right, has written strong opinions defending the availability of habeas corpus. *See, e.g., INS v. St. Cyr.*, 533 U.S. 289 (2001).

Before leaving this discussion, one might mention that, despite common substantive principles shared by Stevens's *Rasul* opinion and the *Ahrens* dissent, there are important differences. Rutledge literally disassembled the *Ahrens* majority's analysis, mustering counterpoints for each point, attaching warrants to every conclusion, and filling footnotes with scholarly research. By contrast, the *Rasul* Court's habeas analysis contains only three elements: a general celebration of the writ,⁸⁷ a rebuttal concerning *Eisentrager*,⁸⁸ and a second rebuttal concerning presumptions against extraterritoriality.⁸⁹ With respect to the latter, *Rasul* held that Guantanamo's lease brought that territory "within the territorial jurisdiction of the United States" for habeas purposes.⁹⁰

As that responsive structure suggests, *Rasul*'s affirmative argument for habeas relief is spare;⁹¹ moreover, its two rebuttals stand in some apparent tension. As Justice Scalia puzzled:

[Part III of the Court's opinion held] that the place of detention of an alien has no bearing on the statutory availability of habeas relief, but "is strictly relevant only to the question of the appropriate forum." . . . Once that has been said, the status of Guantanamo Bay is entirely irrelevant The habeas statute is (according to the Court) being applied *domestically*, to "petitioners' custodians," and the doctrine that statutes are presumed to have no extraterritorial effect simply has no application. Nevertheless, the Court spends most of Part IV rejecting respondents' invocation of that doctrine on the peculiar ground that it has no application to Guantanamo Bay.⁹²

⁸⁷*Rasul*, 124 S. Ct. at 2692-93.

⁸⁸*Id.* at 2693-95.

⁸⁹*Id.* at 2696-98.

⁹⁰*Id.* at 2696 (internal quotation marks omitted).

⁹¹Perhaps the opinion's clearest statement of its holding was the oddly textual declaration: "No party questions the District Court's jurisdiction over petitioners' custodians. Section 2241, by its terms, requires nothing more." *Id.* at 2698.

⁹²*Id.* at 2707 (Scalia, J., dissenting).

To rephrase Scalia's point, if *Rasul* adopted the *Ahrens* dissent, why did the Court discuss, in its extraterritoriality analysis, the peculiar status of Guantanamo Bay?⁹³ On the other hand, if the decision rested on peculiarities of Guantanamo Bay, why did the Court more generally hold that custodial presence is sufficient for habeas relief?

One reason for such vagueness was Justice Stevens's need to write for an uncertain majority. Academics admire dissents and concurring opinions because they more often state principles broadly, without the risks of losing votes or making bad law. Indeed, it may be a professorial hazard to prefer quotable phrases and articulated ideals above other judgely virtues. In a case like *Rasul*, however, Stevens may have decided not to explicitly overrule *Eisentrager*, and may have added language (of uncertain significance) concerning Guantanamo Bay, to attract Kennedy's vote or keep O'Connor's. As a former scholar, too often dissatisfied with busy judges' terse explanations for their rulings, Rutledge may have felt compelled to project his view of habeas jurisdiction to unforeseen circumstances. But some members of the *Rasul* Court, while willing to find jurisdiction in the case presented, were perhaps uneasy at restricting governmental action before contours of our present "War On Terror" more clearly emerged.

B. *Hirabayashi, Korematsu and Hamdi*

1. World War II Detentions

If *Rasul* partly vindicated Rutledge's dissent in *Ahrens*, *Hamdi* condemned his vote in *Korematsu*. Many details about the Japanese-American cases are well known, but some are not. In February 1942, President Roosevelt, citing his power as Commander in Chief, ordered the

⁹³Stevens also discussed, in this part of the Court's opinion, the application of traditional habeas jurisdiction to England's "exempt jurisdictions" and "dominions." *Id.* at 2696-97.

Secretary of War and military commanders to establish “military areas . . . from which any or all persons may be excluded, and with respect to which, the right of any person to enter, remain in, or leave shall be subject to whatever restrictions the Secretary [or commanders] . . . may impose in [their] discretion.”⁹⁴ Implementing that order, Lieutenant General DeWitt, Military Commander of the Western Defense Command, designated the Pacific Coast as various “military areas” that were judged peculiarly vulnerable to attack, sabotage, and espionage.⁹⁵ In March 1942, Congress criminalized any violation of military-area regulations and authorized penalties up to a \$5000 fine and a year in prison.⁹⁶

A few weeks later, DeWitt ordered that all alien Germans and Italians, and all “persons of Japanese ancestry” in specified parts of Arizona, California, Washington, and Oregon must be: in their homes each night from 8:00 p.m. to 6:00 a.m., and at all other times at their residence, their workplace, traveling between the two, or within five miles of their residence.⁹⁷ Though the name understates their breadth, these instructions would later be called “the curfew order.” DeWitt also ordered that “to insure the orderly evacuation and resettlement of Japanese *voluntarily migrating*” from the Pacific Coast, all persons of Japanese ancestry were prohibited from leaving the area unless so instructed.⁹⁸ This perplexing order blocked innocent persons, who might

⁹⁴Exec. Order No. 9066, 7 Fed. Reg.1407 (1942).

⁹⁵Public Proclamation No. 1, 7 Fed. Reg. 2320 (1942).

⁹⁶Act of March 21, 1942, Pub. L. No. 77-503, 56 Stat. 173.

⁹⁷Public Proclamation No. 3, 7 Fed. Reg. 2543 (1942). Regulated persons were also permitted to do business at a Post Office, Employment Service Office, or Wartime Civil Control Administration Office.

⁹⁸Public Proclamation No. 4, 7 Fed. Reg. 2601 (1942).

migrate to avoid even seeming dangerous, from leaving areas that were important and militarily vulnerable.

On May 3, 1942, DeWitt issued several orders prescribing that all persons of Japanese ancestry should evacuate certain military zones. Every Japanese family had to have one family member report to “Civil Control Stations,” and the only exemption was for persons in governmental “Assembly Centers.”⁹⁹ These mandates were called “exclusion orders.” DeWitt later prescribed that Japanese-Americans be detained in Assembly Centers and Relocation Centers, which have been called “internment camps,” “detention camps,” “prisons,” and “concentration camps.”¹⁰⁰ Whatever their name, the War Relocation Authority used such centers to house over 100,000 Japanese-American persons for indefinite periods after their evacuation from houses, jobs, and communities.¹⁰¹ Relocation and detention were deemed necessary to allow governmental investigation of the detainees’ loyalty, which allegedly could not be pursued if Japanese-Americans were allowed to live unsupervised in their homes.¹⁰²

⁹⁹*E.g.*, Exclusion Order No. 34, 7 Fed. Reg. 3607 (1942).

¹⁰⁰*Korematsu v. United States*, 323 U.S. 213, 223 (1944); *id.* at 230 (Roberts, J., dissenting) (“prison”); *id.* at 232 (“concentration camp”); *id.* at 243 (Jackson, J., dissenting) (“detention camps”); *Korematsu v. United States*, 140 F.3d 289, 300 (9th Cir. 1943) (Denman, J., dissenting) (“internment camps”).

¹⁰¹*See* PETER IRONS, *JUSTICE AT WAR*, vii (1983); ERIC K. YAMAMOTO, ET AL., *RACE, RIGHTS AND REPARATION: LAW AND THE JAPANESE AMERICAN INTERNMENT*, 194 (2001); *see also* ERIC L. MULLER, *FREE TO DIE FOR THEIR COUNTRY: THE JAPANESE AMERICAN DRAFT RESISTERS OF WORLD WAR II* (2001).

¹⁰²Brief of the United States at 73-75, 79-81, *Korematsu v. United States*, 323 U.S. 213 (1944) (No. 45-12); *cf.* Nanette Dembitz, *Racial Discrimination and the Military Judgment*, 45 *COLUM. L. REV.* 175, 201 (1945) (“It may be startling to observe that the apprehension of disloyalty among citizens of Japanese ancestry was viewed as necessitating their mass racial exclusion but was not viewed as sufficiently grave to require the segregation of the disloyal from the loyal or any special precautionary measures with respect to the activities of any of the

In *Hirabayashi v. United States*, the Court unanimously upheld the race-based curfew’s application to an American citizen.¹⁰³ Kiyoshi Hirabayashi was convicted on two counts: violating the curfew order by not being in his residence after 8:00 p.m., and violating the exclusion order by not reporting to a Civil Control Station. For each count, he was sentenced to three months, which ran concurrently.¹⁰⁴ Hirabayashi challenged both the curfew order and the exclusion order as unconstitutional delegations of power and as unconstitutional discrimination against Japanese-Americans.¹⁰⁵ Because lawful conviction of either count was sufficient to support Hirabayashi’s three-month sentence, the Supreme Court opted to rule only on Hirabayashi’s curfew conviction and did not address the exclusion offense.

Chief Justice Stone’s opinion for the Court denied Hirabayashi’s petition in three steps. First, with high deference to military officials, the Court accepted that at least some persons of Japanese ancestry, in “numbers and strength [that] could not be precisely and quickly ascertained,” were a “menace to the national defense, which demanded that prompt and adequate measures be taken.”¹⁰⁶ Second, the Court accepted that innocent Japanese and Japanese-

evacuees in any other part of the country.”); *id.* at 201-02 (“[I]t is clear from . . . statements of the military authorities, from the attempts to secure migration prior to the initiation of detention, and from the fact that no program for the segregation of the loyal from the disloyal was commenced until established by the War Relocation Authority approximately four months after the detentions in Assembly Centers began, that such segregation was not the purpose of the Assembly Center detention in the *Korematsu* case.” (footnotes omitted)).

¹⁰³320 U.S. 81 (1943).

¹⁰⁴*Id.* at 85.

¹⁰⁵*Id.* at 89.

¹⁰⁶*Id.* at 99; *see also id.* at 101 (“We cannot close our eyes to the fact, demonstrated by recent experience, that in time of war residents having ethnic affiliations with an invading force may be a greater source of danger than those of a different ancestry.”). The Court also noted

American persons “could not readily be isolated and separately dealt with” from dangerous ones.¹⁰⁷ Third, the Court denied that a military curfew must regulate “all citizens, or on none,” because such a choice would improperly force the military either to “inflict[] *obviously needless* hardship on the many, or sit[] passive and unresisting in the presence of the threat.”¹⁰⁸

Although the *Hirabayashi* opinion stated (in the only language with continued force) that “[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality,”¹⁰⁹ the Court ultimately held that

The adoption by the Government, in the crisis of war and . . . threatened invasion, of measures for the public safety, based upon the recognition of facts and

“support” for the view that Japanese-Americans had failed “in large measure” to assimilate into white populations. *Id.* at 96, 98 (“As a result of all these conditions affecting the life of the Japanese, both aliens and citizens, in the Pacific Coast area, there has been relatively little intercourse between them and the white population. The restrictions, both practical and legal, affecting the privileges and opportunities afforded to persons of Japanese extraction residing in the United States, have been sources of irritation and may well have tended to increase their isolation, and in many instances their attachment to Japan and its institutions.”).

¹⁰⁷*Id.* at 99; *cf.*, *Hirabayashi v. United States*, No. 43-10,308 (Mar. 28, 1943) (Denman, J., dissenting) (unpublished opinion), *printed in Korematsu v. United States*, 140 F.2d 289, 302-03 (1943) (Denman, J., concurring in the result) (“Because of [segregated housing and limited] social intercourse, [white] people do not become familiar with the Mongolian physiognomy. The uniform yellow skin, and on first impression, a uniformity of facial structure, make ‘all Chinks and Japs look alike to me,’ a common colloquialism. Hence arises a difficulty for General DeWitt’s soldiers or the federal civil officers in picking out from the other Japanese crowded together in the segregated districts, and including men educated in Japan, the suspected saboteurs or spies or fugitives from a commando landing or hiding parachutists. Also the difficulty of identification of Japanese of known or suspected enemy aid, by descriptions telegraphed or written to white enforcement officers.”).

¹⁰⁸*Korematsu*, 320 U.S. at 95 (“We think that constitutional government, in time of war, is not so powerless and does not compel so hard a choice if those charged with the responsibility of our national defense have reasonable ground for believing that the threat is real.”).

¹⁰⁹*Id.* at 100.

circumstances which indicate that a group of one national extraction may menace that safety more than others, is not wholly beyond the limits of the Constitution and it is not to be condemned merely because in other and in most circumstances racial distinctions are irrelevant.¹¹⁰

Three Justices concurred: Douglas, Rutledge, and Murphy (who initially drafted a dissent).¹¹¹

Yet every Justice joined Stone's opinion, and none disputed his analysis.

A year after *Hirabayashi*, the Court considered DeWitt's orders concerning exclusion and relocation. Toyosaburo "Fred" Korematsu was an American citizen convicted of being in San Leandro, California, after DeWitt's exclusion order took effect. Korematsu challenged his conviction on equal protection grounds, and although the Supreme Court famously rejected that argument six to three, what is less known is that the conference vote was closer. Chief Justice Stone, joined by Black, Frankfurter, and Reed voted to affirm Korematsu's conviction. Roberts, Murphy, Jackson, and Douglas voted to reverse. Because votes are cast by seniority, and the rest of the Court was evenly divided, the final decision fell to Wiley Rutledge. In what Ferren imagines as a "moment of high drama on the nation's highest court," Rutledge told his colleagues: "I had to swallow *Hirabayashi*. I didn't like it. At the time I knew if I went along with that [curfew] order I had to go along with detention for [a] reasonably necessary time. Nothing but necessity would justify it."¹¹² Thus, Rutledge voted to affirm, Douglas later switched to join the majority, and the only dissenters were the very liberal Murphy and two moderate conservatives, Roberts and Jackson.

Most modern lawyers struggle to imagine a case more wrongly decided than *Korematsu*,

¹¹⁰*Id.* at 101.

¹¹¹FERREN, *supra* note 5, at 252.

¹¹²*Id.* at 249.

but of course that view owes largely to hindsight. When Roosevelt and DeWitt issued their orders in 1942, the United States had suffered an unthinkable surprise attack from an enemy less familiar than the other Axis powers. Major sabotage and espionage seemed realistic, and although actual invasion was less so, modern readers may not recall that a Japanese warplane had shelled the Pacific Coast, and submarines had surfaced just offshore.¹¹³ To be clear, there was certainly reason to doubt the military's asserted necessity even at the time --- and the government concealed information that would have raised far more doubts --- but few commentators (and fewer judges) would have staked national survival on such suspicions until later in the war. Some of what shapes our impressions today is knowing that U.S. military officials greatly exaggerated domestic perils, and such exaggeration, more than anything else, is what clarifies that Japanese-Americans were targeted mainly due to racial stereotypes and prejudice.¹¹⁴

Putting hindsight aside for a moment, it may be useful to reconstruct Rutledge's perspective to understand *Korematsu's* mistake. Given Rutledge's progressive views on race,¹¹⁵

¹¹³See, e.g., WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE* 188-92 (2000) (collecting contemporaneous evidence of the domestic threats and their popular perception).

¹¹⁴See, e.g., IRONS, *supra* note 100, at ix-x; YAMAMOTO *supra* note 100, at 9.

¹¹⁵FERREN, *supra* note 5, at 387 (quoting Louis Pollak's prediction that Rutledge "would have moved" against racial discrimination in public schools "if he'd had the chance."). See also Rutledge's conduct in *Morgan v. Virginia*, 328 U.S. 373 (1946), where Thurgood Marshall and William H. Hastie from the NAACP's Legal Defense Fund argued that a Virginia statute requiring racial discrimination in bus travel was invalid *as a burden on interstate commerce*. See Pollak, *Profile of a Justice*, *supra* note 4, at 208-10. At oral argument, Rutledge asked Hastie whether the main objection to the Jim Crow law should be equal protection, not commerce. Hastie responded that he and Marshall were not making such an argument, but that they "would return to the Court with a case making that argument in due course." *Id.* at 210. A majority of the *Morgan* Court accepted the NAACP's commerce challenge. But Rutledge, unwilling to paper over such deep questions of equality with commerce doctrine, wrote a one-line opinion: "Mr. Justice Rutledge concurs in the result." *Id.* at 209. "It is not unreasonable to speculate that Rutledge's laconic concurrence was a constitutional utterance of, ultimately, the first magnitude,"

and his reputation as a champion of individual rights (alongside Douglas, who joined the *Korematsu* opinion, and Black, who authored it), how could he vote against Fred Korematsu? The two-part explanation is not easy, nor wholly satisfactory. First, as Ferren explains, Rutledge trusted FDR in ways that modern readers may not fully grasp. Roosevelt had led the country through a Great Depression, using “fireside chats” to support policies and to enhance his personal charm. When *Korematsu* was decided in 1944, Roosevelt was *bien en route* to winning his country’s largest foreign war, and what is more, he had picked seven of the nine sitting Justices. If Roosevelt said that something was militarily necessary — as his Solicitor General did in *Hirabayashi* and *Korematsu* — that must have seemed to Rutledge, his colleagues, and much of the country a strong reason to believe it. Indeed, the government highlighted its own credibility by arguing in *Korematsu* that courts cannot accurately judge national security risks, especially as to World War II, which allegedly presented risks “wholly unprecedented in the history of this country,” including the unique peril of “fifth column” espionage committed by what would now be called “terrorist sleeper cells.”¹¹⁶ Rutledge’s conversations with his first law clerk, Victor Brudney, confirm the effectiveness of such deference arguments in *Hirabayashi*. When Brudney suggested that the Court might benefit from an FBI report, which had expressed doubts about the need for mass curfews and evacuations, Rutledge replied with possibly defensive astonishment:

What do you think you are doing? Don’t you understand that there are only nine of us sitting here, and that the generals have said this [curfew] is necessary for the preservation and security of the country? Pearl Harbor was attacked and more may happen. Who are we to question this? What makes you think any of us will question this? Too much is at

namely, it indicated Rutledge’s view of the general constitutionality of the “separate but equal” doctrine.

¹¹⁶Brief of the United States at 60, *Hirabayashi v. United States*, 320 U.S. 81 (1943) (No. 43-870); *see id.* at 34, 16.

stake, and we are too far removed from the realities.¹¹⁷

Part of that effect surely owed to Rutledge's trust, not in military officials generally, but in Roosevelt himself.

Second, as *Ahrens's* dissent makes clear, Rutledge was committed to legal principle, and he saw *Korematsu* as conceptually inseparable from *Hirabayashi* --- despite academics' consistently opposite view.¹¹⁸ Modern jurists study *Korematsu* as an indefensible affirmation of Japanese-American internment, and *Hirabayashi* as a curfew case of moderate insignificance.¹¹⁹

Justice Roberts's *Korematsu* dissent encapsulates today's orthodoxy:

[*Korematsu*] is not a case of keeping people off the streets at night as was [*Hirabayashi*], . . . nor a case of temporary exclusion of a citizen from an area for his own safety or that of the community On the contrary, it is the case of convicting a citizen as a punishment for not submitting to imprisonment in a concentration camp based on his ancestry, and solely because of his ancestry, without evidence or inquiry concerning his loyalty and good disposition towards the United States.¹²⁰

Comparing the briefs in *Korematsu* and *Hirabayashi*, however, yields a different picture.

To start with the obvious, both concerned the validity of military orders from the same officer (DeWitt), authorized by the same statute and presidential order, based on the same asserted

¹¹⁷FERREN, *supra* note 5, 246.

¹¹⁸For early example of this academic consensus, see Dembitz, *supra* note 101, at 189-97, and Eugene V. Rostow, *The Japanese-American Cases -- A Disaster*, 54 YALE L.J. 489-533 (1945).

¹¹⁹A recent article argues that common legal education about the World War II cases is delinquent in failing to emphasize *Endo*, a case that granted habeas relief to a Japanese-American who the military authorities had determined was loyal. Patrick O. Guthridge, *Remember Endo?*, 116 HARV. L. REV. 1933 (2003). Of at least equal importance is the unfamiliarity of most jurists with *Hirabayashi*, the case that set forth a full and complete doctrinal groundwork to support *Korematsu*.

¹²⁰*Korematsu v. United States*, 323 U.S. 213, 225-26 (1944).

emergency, incorporating the same racial presuppositions, supported by the same dubious social science, asserting the same need for military deference, and invoking the same claim of judicial incompetence.¹²¹ Of course, Justice Roberts' dissenting opinion was correct that a curfew, even combined with near-house-arrest, is substantially less disruptive than relocation and detention. But closer factual analysis makes even that bright line less forceful. *Hirabayashi* was convicted not only of breaking curfew; he was found in a restricted area and was also charged with failing to report to a Civil Control Station under DeWitt's exclusion order. The latter count's validity was litigated and was squarely before the Court, yet no Justice addressed the subject.¹²² By comparison, *Korematsu*'s case did not — as many today believe — involve a challenge to indefinite detention, nor did it seek relief from relocation. *Korematsu* himself was not indefinitely detained, nor had he been relocated. Instead, he filed a direct appeal from his criminal conviction, and that conviction concerned his failure to report to a Civil Control Station, just like *Hirabayashi*.

From the perspective of the military and the Court, the convictions in *Korematsu* and *Hirabayashi* were valid for the same reasons: (i) they involved persons of presumptively “menac[ing]” Japanese descent (ii) who “could not readily be isolated and separately dealt with,”

¹²¹*Compare* Brief of the United States at 3-32, *Hirabayashi v. United States*, 320 U.S. 81 (1943) (No. 43-870) (discussing various racist and quasi-sociological theories arguing that people of Japanese descent were especially likely to be spies, saboteurs, and terrorists), *with* Brief of the United States at 3-15, *Korematsu v. United States*, 323 U.S. 213 (1944) (No. 45-12) (reciting and explicitly incorporating the *Hirabayashi* brief's discussion of racial tensions and military necessity).

¹²²“The first count charges that [*Hirabayashi*] . . . failed to report to a Civilian Control Station within the designated area, it appearing that appellant's required presence there was a preliminary step to the exclusion from that area of persons of Japanese ancestry.” *Hirabayashi v. United States*, 320 U.S. 81, 83-84 (1943).

and (iii) the military could use racial filters that might seem “odious” during peacetime to avoid imposing “obviously needless hardship” on the general populace. More specifically, the military judged that curfew and relocation were both needed to counter possible invasion, sabotage, and espionage. Although that conclusion was eventually proved wrong, and its supporting evidence flawed, even today one struggles to see a judicially cognizable difference between the curfew and the relocation.

Indeed, only one of *Korematsu*’s dissenters (Justice Roberts) even tried to distinguish the unanimous *Hirabayashi* decision.¹²³ The rest quietly renounced their year-old votes.¹²⁴ As for Roberts, he argued that *Korematsu* and *Hirabayashi* were different because the government’s exclusion order was “part of an over-all plan for forceable detention.”¹²⁵ The link between exclusion and detention was also explicit in *Hirabayashi*, of course. But more importantly, the *Hirabayashi* Court explicitly stated that the relevant federal statute, executive orders, and military proclamations were “not to be read in isolation” but were “parts of a single program and must be judged as such.”¹²⁶ A shortfall in Roberts’s dissent is his failure to realize that, although

¹²³*Korematsu*, 323 U.S. at 225 -26, 231-32 (Roberts, J., dissenting).

¹²⁴Murphy’s dissent effectively repents his concurrence in *Hirabayashi* and does not even cite the earlier decision. One might infer that his changed view resulted in part from more information the post-*Hirabayashi* government report concerning DeWitt’s justification and motives. *Id.* at 236 n.1 (Murphy, J., dissenting) (clarifying with notable detail that that report was not made public until after *Hirabayashi* was decided).

Jackson’s dissent also does not deny that *Korematsu*’s result follows logically from *Hirabayashi*. *Id.* at 246-47. Instead, he lists *Hirabayashi*’s principled expansion as an example of the inherent risks of wartime jurisprudence. In Jackson’s words, “we should learn something from [the *Hirabayashi*] experience,” and, his *Korematsu* vote indicates, we should not repeat it. *Id.* at 246.

¹²⁵*Id.* at 232 (Roberts, J., dissenting).

¹²⁶*Hirabayashi*, 320 U.S. at 103 (“[T]he Executive Order, the Proclamations, and the

the *Hirabayashi* curfew and travel limits were milder, they were just as much part of the military's overall, racially targeted security plan as were the evacuation and relocation orders. As was clear to the Court and was dispositive for Rutledge, the practical effects of *Korematsu* and *Hirabayashi* may have differed,¹²⁷ but their legal principles were similar indeed.

None of this remotely suggests that Rutledge voted correctly in *Korematsu*, but it does shift the error's location to *Hirabayashi*, a case where (during Rutledge's first year at the Court) even the most "heroic" *Korematsu* dissenter, Justice Murphy, was ultimately pressured by Frankfurter and Reed to accept the government's position.¹²⁸ As we have seen, the strongest critique of *Korematsu* is that the exclusion order was unnecessary, and that should have been evident from the government's weak arguments at the time. The same should be said of *Hirabayashi*'s curfew, however. There was most likely no adequate reason for imposing a mass curfew and travel restrictions on any population along the Pacific Coast, but even if there were, such regulations should have applied to all persons in sensitive areas. If one must imagine bands of black-clad, midnight saboteurs seeking to bomb factories or shipping docks, it is hard to see why their skin color or ancestry should matter much. Furthermore, as a matter of history, there was no evidence of sabotage or espionage undertaken by persons of Japanese descent; such

statute are not to be read in isolation from each other. They were parts of the same program and must be judged as such.”).

¹²⁷One must say “may have differed” because *Ex parte Endo*, 323 U.S. 283 (1944), decided the same day as *Korematsu*, effectively ended the government's internment program. See generally, Guthridge, *supra* note 118, at 1933 (providing exhaustive analysis *Endo*'s legal and factual details)

¹²⁸FERREN, *supra* note 5, at 244.

activities were undertaken by people of other ethnic groups.¹²⁹

The curfew and exclusion orders' irrationality not only gives lie to asserted military necessity, it also reveals a second source of revulsion at *Korematsu*, namely, its racism. Here too, the case seems more similar to *Hirabayashi* than different. Under an anti-discrimination model of equal protection, *Hirabayashi* and *Korematsu* were equally wrongheaded because both involved racial discrimination without a compelling, narrowly tailored interest.¹³⁰ Under an anti-subordination model, to exclude a racial group from their homes and communities is uniquely offensive — more even than curfew or house arrest — because it enforces diminished social and legal status to create a class of “domestic exiles.”¹³¹ Yet the decision to impose race-based curfews and travel restrictions also creates a second class of citizens, of “outsiders” within society's gates, and that alone would unquestionably violate anti subordination principles.

For present purposes, what may be most important from this discussion is the anachronism of evaluating the Japanese-American cases under any form of modern equal protection theory, none of which was even nascent during World War II.¹³² When *Korematsu*

¹²⁹See, e.g., YAMAMOTO, *supra* note 100, at 364.

¹³⁰See *Adarand Constructors v. Peña*, 515 U.S. 200, 235 (1995).

¹³¹See Owen Fiss, *Groups and the Equal Protection Clause*, in EQUALITY AND PREFERENTIAL TREATMENT 84 (Marshall Cohen, et al., eds., 1977); see also A COMMUNITY OF EQUALS: THE CONSTITUTIONAL PROTECTION OF NEW AMERICANS (1999).

¹³²Even the earliest modern touchstone of equal protection law, Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341 (1949), was not yet published. *But cf.* Dembitz, *supra* note 101, at 188 (proposing, in an echo of equal protection jurisprudence decades later, that “[w]hen the method chosen to meet the danger is one of racial discrimination, it should not be deemed reasonable unless the Government sustains the burden of demonstrating that available less stringent and more limited alternatives could not reasonably have been considered adequate”).

was decided, *Brown* was still a decade away, and the District of Columbia — likelarge swaths of the country — was unflinchingly segregated, with explicit discrimination from the public schools to the Capitol cafeteria.¹³³ Nor were the Justices unaware of how the country’s racial context applied to the Japanese-American cases. In *Hirabayashi* and *Korematsu*, the briefs cited *Plessy v. Ferguson* as ordinary precedent, to be debated and distinguished as legitimate authority, not the constitutional pariah it would later become.¹³⁴

Such historical context helps explain why the strong anti-racist language in Murphy’s dissent and the Court’s opinion did not ring with the clarity or principle they hold today.¹³⁵ The Justices lived and worked in a Jim Crow District of Columbia, and the Court oversaw a Jim Crow nation, with countless discriminatory acts against non-whites each day. Perhaps the most candid question is how such a tribunal could write that “[d]istinctions among citizens solely because of their ancestry are by their very nature odious to a free people,” and describe the United States, with no mention of legalized racism, as having “institutions founded upon the doctrine of equality.”¹³⁶ A decision upholding military racial classification and evacuation seems a poor occasion to proclaim (for the first time) that “all legal restrictions which curtail the civil

¹³³*See, e.g.*, GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY (1944), *cited in*, *Brown v. Board of Educ.*, 347 U.S. 483, 494 n.11 (1954).

¹³⁴Brief of the United States at 60, *Hirabayashi v. United States*, 320 U.S. 81 (1943) (No. 43-870); Reply Brief at 10, *Hirabayashi v. United States*, 320 U.S. 81 (1943) (No. 43-870).

¹³⁵*See, e.g.*, *Korematsu v. United States*, 323 U.S. 215, 242 (1944) (Murphy, J., dissenting) (“Racial discrimination in any form and in any degree has no justifiable part whatever in our democratic way of life.”).

¹³⁶*Hirabayashi v. United States*, 320 U.S. 81, 100 (1943).

rights of a single racial group are immediately suspect.”¹³⁷ Such phrases at best voice aspirations that would need a civil rights movement to become fledged possibilities. At worst, the claim that racial restrictions require “the most rigid scrutiny” bordered insincerity.¹³⁸ Thus, although legal principle surely did not support Rutledge’s (or his eight colleagues’) vote in *Hirabayashi*¹³⁹ Rutledge did not see (and the dissents did not state) a satisfying basis for changing ground in *Korematsu*.¹⁴⁰

2. Uncharged “Enemy Combatants”

Although hindsight and doctrinal shifts have now discredited *Korematsu* and *Hirabayashi*, neither has been overruled, and the Court had no other occasion to consider executive detention of uncharged citizens until *Hamdi v. Rumsfeld*.¹⁴¹ In late 2001, the United States took custody of Yaser Esam Hamdi, who had been captured and detained by the Northern Alliance in Afghanistan.¹⁴² The United States transferred Hamdi to Guantanamo Bay, but upon learning that Hamdi was an American citizen by birth, Hamdi was transferred to Virginia and finally to South Carolina.

¹³⁷*Korematsu v. United States*, 323 U.S. 215, 216 (1944).

¹³⁸*Id.*

¹³⁹As Rutledge explained to Chief Justice Stone, “I have had more anguish over [*Hirabayashi*] than any I have decided, save possibly one death case in the Ct. App.” FERREN, *supra* note 5, at 245. Rutledge was right to feel such anguish, but it is an irreducible shortcoming that he did not follow through on such concerns, which could have changed his vote.

¹⁴⁰To the modern mind, *Korematsu* should have been decided differently because of the great impact suffered by detained Japanese-Americans. But that analysis overlooks that the detention program had already been effectively stopped. See Guthridge, *supra* note 118, at 1933.

¹⁴¹124 S.Ct. 2633 (2004).

¹⁴²*Id.* at 2635-36.

In June 2002, Hamdi's father filed a federal habeas petition claiming that the government should appoint counsel and stop questioning Hamdi, and that his detention without charges or a hearing was illegal. According to Hamdi's father, Hamdi had been doing relief work in Afghanistan, where he had lived for under six months, and he neither trained nor fought against the United States.¹⁴³ In response, the government claimed that Hamdi's detention was lawful under the Authorization for Use of Military Force. They argued that Hamdi took up arms with the Taliban and was an "enemy combatant," *i.e.*, someone who was "part of or supporting forces hostile to the United States" and "engaged in an armed conflict against the United States."¹⁴⁴ The government supported its assessment with the sworn declaration of a federal official with second- and third-hand knowledge of Hamdi's case.

The district court was not satisfied and ordered the government to produce many documents *in camera*, including all interviews with Hamdi, the dates and locations of his detention, and all interviews with Northern Alliance members about Hamdi. The Fourth Circuit reversed, holding that anyone in a zone of active combat can be held based on an administrative finding of enemy combatant status. In essence, the Fourth Circuit allowed courts to review governmental assertions of fact, but not independently to evaluate the underlying evidence.¹⁴⁵

The *Hamdi* case reached the Court under *Korematsu*'s dark shadow. Fred Korematsu himself filed a brief asking the Court to hear Hamdi's case, and the World War II cases were

¹⁴³*Id.* at 2636.

¹⁴⁴*Id.*

¹⁴⁵*Id.* at 2638.

cited in several of the merits briefs.¹⁴⁶ There were, however, important and obvious differences. For example, *Hamdi* did not involve programmatic racial discrimination or mass removal of citizens. On the other hand, it did involve the authority to detain potentially innocent citizens based on executive judgments of fact and military necessity. That latter principle struck some observers as uniquely dangerous in a “War on Terror,” whose uncertain duration might result in long, indefinite terms of unwarranted detention.¹⁴⁷

The Supreme Court ruled eight to one that the Fourth Circuit was wrong, but it could not generate a majority opinion explaining that result. O’Connor wrote for a plurality (Rehnquist, Kennedy, and Breyer) that Congress’s Authorization of Military Force allowed President Bush to detain any “enemy combatant” on the battlefield who supported hostile forces and undertook armed conflict against the United States.¹⁴⁸ For detainees like Hamdi, who denied hostility against the United States, O’Connor said that procedures for determining enemy combatant status should be judged using *Mathews v. Eldridge*’s due process test, balancing detainees’ liberty

¹⁴⁶Brief of Amicus Curiae Fred Korematsu in Support of Petitioners, *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004) (No. 03-6696); *see, e.g.*, Brief of Amici Curiae of the American Civil Liberties Union, et al., in Support of Petitioners at 25, *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004) (No. 03-6696); Brief of Amici Curiae of the Washington Legal Foundation, et al., in Support of Respondents at 20-21, *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004) (No. 03-6696); *see also, e.g.*, Brief for United States Senators John Cornyn and Larry E. Craig as Amicus Curiae in Support of Donald H. Rumsfeld at 17 (citing *Hirabayashi*), *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004) (No. 03-6696).

¹⁴⁷*Cf.* Mark Tushnet, *Defending Korematsu?: Reflections on Civil Liberties in Wartime*, 2003 WISC. L. REV. 273, 279 (2003) (“There already long duration of the ‘war on terrorism’ suggests that we ought not think of it as a war in the sense that World War II was a war. It is, perhaps, more like a condition than a war -- more like the war on cancer, the war on poverty, or, most pertinently, the war on crime. To say that law is silent during a more-or-less permanent condition is quite different from saying that law is silent during wartime.”).

¹⁴⁸*Id.* at 2642 (holding that persons determined to be Taliban fighters could be detained at least during active United States combat in Afghanistan).

interests against governmental security interests.¹⁴⁹ Applying that approach, the plurality required that detainees be allowed to dispute the government’s enemy combatant findings before a neutral decisionmaker. In some cases, however, the plurality said that the government might legitimately use hearsay evidence, withhold military documents, or use independent military tribunals as decisionmakers.¹⁵⁰ With such dicta as a backdrop, the plurality endorsed broad district court discretion and issued generous instructions on remand:

We anticipate that a District Court would proceed with the caution that we have indicated is necessary in this setting, engaging in a factfinding process that is both prudent and incremental. We have no reason to doubt that courts faced with these sensitive matters will pay proper heed both to the matters of national security that might arise in an individual case and to constitutional limitations safeguarding essential liberties that remain vibrant even in times of security concerns.¹⁵¹

Hamdi’s plurality certainly tried to reject *Korematsu*’s legacy, and O’Connor grandly recognized lessons of “history and common sense . . . that an unchecked system of detention carries the potential . . . for oppression and abuse of others who do not present [a] threat,” and “reaffirm[ed] . . . the fundamental nature of a citizen’s right to be free from involuntary confinement by his own government without due process of law.”¹⁵² There is, however, reason

¹⁴⁹Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

¹⁵⁰*Id.* at 2649 (“Any factfinding imposition created by requiring a knowledgeable affiant to summarize [documents regarding battlefield detainees] to an independent tribunal is a minimal one.”).

¹⁵¹*Id.* at 2652.

¹⁵²*Id.*; *see id.* at 2648-49 (“It is during our most challenging and uncertain moments that our Nation’s commitment to due process is most severely tested; and it is in these times that we must preserve our commitment at home to the principles for which we fight abroad. . . . These essential constitutional promises may not be eroded.”); *id.* at 2650 (“We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation’s citizens. Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most

to doubt that the plurality’s multifactor test, left predominantly for federal district courts to balance, will sufficiently discipline executive decisionmaking, especially given the government’s power to forum shop by changing a detainee’s location.¹⁵³

To be more specific, much of what made the World War II cases difficult was the urgency of security threats when DeWitt’s orders issued. By contrast, Hamdi’s detention seemed distant from vital security interests, especially as more months passed. Furthermore, the Court decided Hamdi’s case in the summer of 2004, just after the press had reported terrible events concerning the exercise of presidential detention authority in Abu Ghraib and elsewhere.¹⁵⁴ Such factors combined with the government’s strict litigating position — which would have displaced nearly all judicial review — to undermine the governmental credibility that was critical to earning Rutledge’s vote in *Hirabayshi* and *Korematsu*.¹⁵⁵ Even so, a President who is more like FDR,

assuredly envisions a role for all three branches when individual liberties are at stake.”); *id.* (“[I]t would turn our system of checks and balances on its head to suggest that a citizen could not make his way to court with a challenge to the factual basis for his detention by his government, simply because the Executive opposes making available such a challenge.”); *id.* at 2651 (“Any process in which the Executive’s factual assertions go wholly unchallenged or are simply presumed correct without any opportunity for the alleged combatant to demonstrate otherwise falls constitutionally short.”)

¹⁵³*Rumsfeld v. Padilla*, 124 S. Ct. 2711 (2004) (applying strictly a place-of-the-body rule under venue principles).

¹⁵⁴For discussion among popular print media, see, for example, Seymour M. Hersh, *Torture at Abu Ghraib*, THE NEW YORKER, May 10, 2004; Mark Bowden, *Lessons of Abu Ghraib*, THE ATLANTIC MONTHLY, July/August, 2004; Josh White, *Army General Advised Using Dogs at Abu Ghraib, Officer Testifies*, WASHINGTON POST, July 27, 2004, at A18. Television images and internet sources of such news were also available during this period.

¹⁵⁵Hamdi’s attorney understood and underscored this point; at oral argument, he began his rebuttal with a sardonic summary of the government’s position as “trust us.” Oral Argument, *Hamdi v. Rumsfeld*, 124 S.Ct. 2633 (2004) (No. 03-6696), 2004 WL 1066082 (Apr. 28, 2004); *cf.* Neal K. Katyal, *Executive and Judicial Overreaction in the Guantanamo Cases*, 2004 CATO S. CT. REV. 49 (2004).

with greater popularity and more demonstrable threats to national survival than the current War on Terror, might find O'Connor's flexible constitutional analysis even easier to overcome than the "most rigid scrutiny" that failed to protect Mr. Korematsu. In that sense, although *Hamdi's* plurality is praised in some circles for having resisted contemporary muscle-flexing, attention to history suggests that the result may not prove effective if the country truly faces "another *Korematsu*."¹⁵⁶

Four Justices refused to join O'Connor's opinion even though they agreed that *Hamdi's* detention was unsupportable. Justice Scalia, joined by Justice Stevens, wrote that due process bars detention of any citizen without criminal charges unless Congress suspends habeas corpus. That argument seems inconsistent with precedent, and its inflexibility could, as a political matter, lead Congress to suspend the writ more often, thereby allowing even unconstitutional detention to escape judicial remedy.¹⁵⁷

¹⁵⁶One of course should not overstate the Court's power to control executive decisions in times of true crisis. Cynics might suggest that, for popular Presidents facing true, demonstrable threats, it makes no difference what any court says. The popular touchstone for such a view is Biddle's statement that "[t]he Constitution has not greatly bothered any wartime President," FRANCIS BIDDLE, IN BRIEF AUTHORITY 218 (1962), but might also reach back to Hamilton's Federalist 78, which describes the judiciary as "least dangerous" precisely because it lacks the military and financial force to implement its decisions. THE FEDERALIST No. 78 (Alexander Hamilton).

Such views undervalue the modern Court's political authority. When the Court ordered Roosevelt to release Endo, he not only complied, but shut down the mass detention program. See, e.g., YAMAMOTO, *supra* note 100, at 174-75. The most egregious interbranch conflict in the detention context was Lincoln's famous failure to comply with Chief Justice Taney's order in *Merryman*. See REHNQUIST, *supra* note 131, at 32-43. But even in that one-person case, Lincoln quickly sought a congressional remedy, and defied only a Chief Justice riding circuit (*i.e.*, speaking only for himself) whose reputation was bruised by *Dred Scott*. Indeed, among the great fortuities of United States history is the strong record of federal compliance with unfavorable Supreme Court decisions.

¹⁵⁷*Cf. id.* at 2682-83 (Thomas, J., dissenting). Any description of such political risks is

Justice Souter wrote a separate opinion, joined by Justice Ginsburg, based on the Non-Detention Act of 1971. That statute provides that “[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress,”¹⁵⁸ and Souter described its purpose by explicit reference to historical conditions surrounding World War II:

[T]he Emergency Detention Act of 1950 . . . authorized the Attorney General, in times of emergency, to detain anyone reasonably thought likely to engage in espionage or sabotage. That statute was repealed in 1971 out of fear that it could authorize a repetition of the World War II internment of citizens of Japanese ancestry; Congress meant to preclude another episode like the one described in *Korematsu v. United States*.¹⁵⁹

By repeatedly characterizing the Non-Detention Act as “intended to guard against a repetition of the World War II internments,” Justice Souter linked the country’s widespread dissatisfaction with *Korematsu*’s result with operative legal authority guarding against its recurrence, at least for citizens.¹⁶⁰ Souter went further, articulating his reasoning’s constitutional premise:

unavoidably speculative and contingent. Our tradition of infrequently suspending habeas corpus might well survive Scalia’s constitutional proposal, resulting in less detention beyond judicial procedure. *See generally* Dembitz, *supra* note 101, at 178 & n.11 (documenting the historical examples of suspending the writ). The point is we simply cannot be sure.

¹⁵⁸ 18 U.S.C. § 4001(a) (2000).

¹⁵⁹ *Hamdi*, 124 S. Ct. at 2652 (Souter, J., concurring in the result); *see id.* at 2654 (“[Congress] adopted § 4001(a) for the purpose of avoiding another *Korematsu*.”); *id.* at 2656 n.2 (noting “the congressional object of avoiding another *Korematsu*”). As for the other *Hamdi* opinions, Scalia agreed with Souter’s statutory result, but, averse to legislative history, he declined to recognize its historical pedigree and objectives. *Id.* at 2671 (Scalia, J., dissenting). By contrast, the plurality agreed with Souter’s general characterization of the statute, but not with his application thereof. *Id.* at 2640 (plurality). Oddly, Thomas’s dissent did not even mention 18 U.S.C. § 4001(a). *Id.* at 2674 (Thomas, J., dissenting).

¹⁶⁰ Souter also rested his analysis on a presumption against executive detention allegedly derived from *Endo*. *Id.* at 2654-55. The inevitable other side of *Endo*, however, is the fact that *Korematsu* was decided on the very same day. *Cf.*, Gutheridge, *supra* note 101, at 1965-70. Thus, it is hard to find in *Endo* any general presumption against executive detention; such broad principles would seem inconsistent with *Korematsu*, where executive power was not limited to

The defining character of American constitutional government is its constant tension between security and liberty, serving both by partial helpings of each. . . . For reasons of inescapable human nature, the [Executive] branch of the Government asked to counter a serious threat is not the branch on which to rest the Nation's entire reliance in striking the balance between the will to win and the cost in liberty on the way to victory; the responsibility for security will naturally amplify the claim that security legitimately raises. . . . Hence the need for an assessment by Congress before citizens are subject to lockup, and likewise the need for a clearly expressed congressional resolution of the competing claims.¹⁶¹

In response, the government mainly argued that the Non-Detention Act was satisfied because Hamdi's detention did occur "pursuant to an Act of Congress," namely, the Authorization of Military Force.¹⁶² But Justice Souter compared the modern statute to that relied upon in *Korematsu*. After all, the detention of Japanese-Americans was also supported by a broad congressional authorization of force, that is, the declaration of war. By logic, if the Anti-Detention Act was drafted in order to prevent another *Korematsu*, it must require a clearer, more specific statutory basis for detention than appeared in World War II. That historical test is the

implementing the least restraint "clearly and unmistakably indicated by the language [Congress] used." *Ex parte Endo*, 323 U.S. 283, 300 (1944). More likely, *Endo* differed from *Korematsu* chiefly in that the government had explicitly found that Endo was loyal to the United States. *Id.* at 294.

It is also important that Souter's analysis (and the Non-Detention Act) only extended to citizens. See David Cole, *Enemy Aliens*, 54 STANF. L. REV. 953 (2002) (discussing myriad risks of allowing protections of liberty to hinge on citizenship). Moreover, the sharp distinction between citizens and non-citizens is what allowed Murphy to say in *Hirabayashi*: "Today is the first time, so far as I am aware, that we have sustained a substantial restriction of the personal liberty of citizens of the United States based upon the accident of race or ancestry." Slaves, as the technically correct premise goes, were not citizens. See also Dembitz, *supra* note 101, at 176 ("[T]he Japanese ancestry program brought to our law the first Federal measure of racial discrimination applicable to citizens . . ."). The failure even to mention slavery among such racial discrimination illustrates, in starkest form, how unsatisfying legal rules based on citizenship can be.

¹⁶¹*Hamdi*, 124 S. Ct. at 2655 (Souter, J., concurring in the result).

¹⁶²The government's other argument was that the Non-Detention Act applied only to detention by civil authorities, not to detention by military authorities. *Id.* at 2639 (plurality)

greatest strength of Souter’s opinion; it distinguishes his interpretation of the Non-Detention Act from other, notoriously malleable “clear statement rules,” and it creates an objective, bright-line standard by which to measure future assertions of authorized detention.¹⁶³ The Authorization of Military Force broadly allows the President to use “all necessary and appropriate force,” but, like the World War II statute, it contains no specific indication of an authority to detain. In Souter’s view, Congress’s language (drafted quickly after September 11) was focused on military power and sought broadly “to authorize the use of armies and weapons, whether against other armies or individual terrorists.”¹⁶⁴ Absent any apparent legislative intent to “augment Executive power to deal with dangerous citizens within the United States,” Souter found the Authorization of Military Force insufficiently clear and specific to satisfy the Non-Detention Act.¹⁶⁵

Souter acknowledged two possible exceptions to that clear statement rule. First, the government argued (and the plurality agreed) that the Authorization of Military Force allowed the President not only to engage troops, but also implicitly allowed him to pursue any “fundamental and accepted . . . incident of war.”¹⁶⁶ Souter indicated that wartime Presidents could indeed “deal with enemy belligerents according to the treaties and customs of the laws of

¹⁶³For criticism of Souter’s opinion, see Cass R. Sunstein, *Minimalism at War*, 2004 Sup. Ct. Rev. 47, 94-95, and Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2103-06 & n.271 (2005). Neither of these articles addresses the core of Souter’s argument, namely, that the Non-Detention Act was designed to produce a different outcome in a case like *Korematsu*. If one accepts that premise, Souter’s conclusion seems directly to follow.

¹⁶⁴*Id.* at 2657 (Souter, J., concurring in the result).

¹⁶⁵*Id.*

¹⁶⁶*Hamdi*, 124 S. Ct. at 2640 (plurality).

war.”¹⁶⁷ But he believed the government had the burden of demonstrating compliance with the laws of war, and he found that demonstration inadequate in *Hamdi*.¹⁶⁸ Specifically, Souter cited the Geneva Convention’s mandate that captives be treated as prisoners of war until their individual status is determined by a “competent tribunal.”¹⁶⁹ In 2002, the President proclaimed that all detainees from al Qaeda and Taliban are not prisoners of war because those organizations do not follow the law of war and lie outside the Geneva Convention’s protection. As Souter noted, however, that categorical determination cannot resolve whether it was proper to deny Hamdi prisoner-of-war status, at least until a competent tribunal hears his claim *not to be* a member of al Qaeda or the Taliban. Souter did not resolve whether the government actually violated the Geneva Convention or the laws of war more generally, but he tentatively wrote that “the Government has not made out its claim that in detaining Hamdi in the manner described, it is acting in accord with the laws of war authorized to be applied against citizens by the Force Resolution.”¹⁷⁰ Accordingly, he found the laws-of-war exception inapplicable as a matter of federal common law.

Second, Justice Souter recognized that “in a moment of genuine emergency, when the Government must act with no time for deliberation, the Executive may be able to detain a citizen if there is reason to fear that he is an imminent threat to the safety of the Nation and its

¹⁶⁷*Id.* at 2657 (Souter, J., concurring in the result).

¹⁶⁸*Id.* at 2659.

¹⁶⁹*Id.* at 2567-68 (citing Articles 4 and 5 of the Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, [1955] 6 U.S. T. 3316, 3320, 3324 T. I. A. S. No. 3364).

¹⁷⁰*Id.* at 2659 (Souter, J., concurring in the result).

people.”¹⁷¹ Although existing criminal law would usually suffice to neutralize such threats, Souter in any event noted that Hamdi had been detained *for over two years* with no asserted or demonstrated emergency in sight. Concluding that there was no emergency to support Hamdi’s detention, Souter finished with a flourish: “Whether insisting on the careful scrutiny of emergency claims or on a vigorous reading of [the Non-Detention Act], we are heirs to a tradition given voice 800 years ago by Magna Carta, which, on the barons’ insistence, confined executive power by ‘the law of the land.’”¹⁷²

Especially for readers attuned to Rutledge’s role in *Korematsu*, what is most striking in Souter’s concurrence is its blend of principle and craft. With explicit appreciation of the Court’s World War II errors, Souter construed the Non-Detention Act as a safeguard for constitutional values and liberties. Unlike the Constitution itself, which has a mixed history of protecting rights in wartime, the statute was more easily construed as an uncontaminated (though limited) embodiment of national ideals of individual protection during crises. The upshot of Souter’s approach was to create a solidly persuasive justification for ending Hamdi’s two-year detention without charges, and to emphasize historical and legislative features that might deflect possible charges of constitutional lawmaking.¹⁷³

¹⁷¹*Id.*

¹⁷²*Id.*

¹⁷³The constitutional question (addressed in Scalia’s opinion) of whether Congress and the President may ever detain civilian citizens without initiating ordinary criminal proceedings or suspending the writ of habeas corpus is a deep one, and the Solicitor General said that any ruling against the government would be “constitutionally intolerable.” Brief for the Respondents at 46, *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004) (No. 03-6696). In light of such political and institutional pressure on the Court, and given the risks of creating inflexible constitutional barriers regarding war powers in a conflict whose details remain novel and somewhat obscure, Souter’s disposition of *Hamdi* on statutory grounds has much to recommend itself.

By contrast, O'Connor's opinion, despite other virtues, only partly tackled *Korematsu's* greatest problem — the governmental manipulation of facts and risk assessments in wartime. Souter's opinion deliberately called such historical dangers to mind, even while taking strong steps to prevent their repetition. By requiring a clear congressional statement before citizens are detained without charges, and by explicit reminder of what may happen when such power is granted, Souter provided the very sort of calm, normatively grounded analysis that Rutledge might have admired, even in an opinion to correct his own greatest mistake.¹⁷⁴¹⁷⁵

C. *Yamashita* and *Hamdan*

1. A Japanese Commander

¹⁷⁴To be clear, Souter's opinion did not abandon the constitutional field altogether. He suggested that notice, fair rebuttal, neutral decisionmaker, and counsel are required --- presumably as a matter of constitutional law. But he could not agree with the plurality's endorsement of evidentiary presumptions against the defendant or with the use of military tribunals. *Hamdi*, 124 S. Ct. at 2660 (Souter, J., concurring in the result). Another benefit of Souter's approach is that, by leaving the constitutional issue aside, the political branches may on occasion see fit to grant more presidential power than an Article III judge would have thought apt.

A final, possibly coincidental link to Rutledge is Souter's disposition in *Hamdi*. (One must say "possibly" because, aside from Souter's notable attention to the Court's history, Souter is Rutledge's lineal descendant on the Court and may appreciate his importance more than most.) Justice O'Connor's plurality voted to remand Hamdi's case for a *Mathews v. Eldridge* balancing with respect to the accuracy of Hamdi's "enemy combatant" status. Four other Justices — Souter, Ginsburg, Scalia, and Stevens — voted to release Hamdi from detention, and only Justice Thomas voted to affirm the Fourth Circuit's decision. With no majority of Justices supporting any one disposition, a four-to-four vote would have affirmed the Fourth Circuit's judgment by divided Court. The Court also could have dismissed the writ of certiorari as improvidently granted, thereby also allowing the Fourth Circuit's ruling to stand. To avoid that anomaly, Souter and Ginsburg compromised, citing a Rutledge opinion that was the first to explain and acknowledge the need for such accommodations. *Screws v. United States*, 325 U.S. 91, 134 (Rutledge, J., concurring in the result). Souter's *Hamdi* opinion presented a clear and unyielding articulation of its substantive commitments, yet out of respect for the Court, his colleagues, and the individual interests at stake, Souter was able to reach a practical compromise — just as Rutledge is famous for having done in his time.

Our last pair of cases involves Justice Rutledge’s celebrated dissent in *In re Yamashita*,¹⁷⁶ and a pending Supreme Court case, *Hamdan v. Rumsfeld*, which addresses executive authority to try detainees in military tribunals. Lieutenant General Tomoyuki Yamashita took command of Japan’s 14th Area Army just two weeks before General MacArthur’s “return” to the Philippines began. Outnumbered by advancing Americans four to one, Yamashita could not control his subordinates. Some officers disobeyed orders to withdraw from Manila, and their troops committed unspeakable atrocities against civilians until United States forces overran the city; other Japanese officers led counter-guerilla missions that killed 25,000 civilians.¹⁷⁷

Japan surrendered on September 2, 1945, and Yamashita did so one day later. On September 25, the United States charged Yamashita with violating the law of war, and on October 8, he was arraigned before a commission of three American military officials, none of whom was a lawyer. Although the commission was formally created by Lieutenant General Wilhelm D. Styer, President Roosevelt had earlier endorsed the trial of Japanese military officials by military commissions, and General MacArthur (at the behest of Roosevelt and the Joint Chiefs of Staff) issued rules and regulations to govern such trials, specifically including Yamashita’s.¹⁷⁸

¹⁷⁵327 U.S. 1, 41 (1946) (Rutledge, J., dissenting).

¹⁷⁶John T. Gano, *The Yamashita Case and the Constitution*, 25 OR. L. REV. 143 (1946) (calling the opinion “masterful” and “penetrating”); J. WOODFORD HOWARD, JR., MR. JUSTICE RUTLEDGE: A POLITICAL BIOGRAPHY 369, 374 (1968) (describing it as “undoubtedly a great opinion,” and “a careful examination of detail” that articulates a vision of fairness that is “commend[ed] as a precept”); Charles Fairman, *The Supreme Court on Military Jurisdiction: Martial Law in Hawaii and the Yamashita Case*, 59 Harv. L. Rev. 833, 870 (1946) (explaining that “[w]hether one agrees with him or not on his several points . . . one must respect the ideal of justice” that Rutledge advocates).

¹⁷⁷FERREN, *supra* note 5, at 2.

¹⁷⁸*Yamashita*, 327 U.S. at 10-11.

The government's bill of particulars listed sixty-four atrocities committed by Yamashita's subordinates, and alleged that he had "unlawfully disregarded and failed to discharge his duty as commander to control the operations of the members of his command, permitting them to commit [the enumerated] brutal atrocities and other high crimes against the people of the United States and of its allies and dependencies, particularly the Philippines."¹⁷⁹ Yamashita pled not guilty, and three days before trial, the prosecution issued new charges detailing fifty-nine more atrocities committed by other officers. Yamashita's attorneys sought, but were denied, a continuance to address the new allegations. In a nineteen-day trial, the prosecution introduced as evidence 286 witnesses' testimony and 423 exhibits, a vast amount of which was hearsay.¹⁸⁰ In his defense, Yamashita testified that he had not known of any misconduct, and two officers who had personally directed atrocities corroborated his account. On December 7, 1945 --- four years to the day after the Pearl Harbor attack --- the military commission found Yamashita guilty "upon secret ballot, two-thirds or more of the members concurring," and sentenced him to death by hanging.¹⁸¹

Yamashita filed a petition for habeas corpus,¹⁸² objecting chiefly that (i) trial by military commission was unlawful because the war with Japan had ceased, (ii) the charge against him was not a violation of the law of war, (iii) the commission's use of depositions and hearsay evidence

¹⁷⁹FERREN, *supra* note 5, at 4-5.

¹⁸⁰Only two witnesses purported to connect Yamashita directly to any atrocity, and those statements were so discredited that the prosecution did not mention them in closing arguments. *Id.* at 6.

¹⁸¹*Yamashita*, 527 U.S. at 6.

¹⁸²*Id.* at 4-6.

violated due process, the Geneva Conventions of 1929, and the Articles of War (the statutory rules governing military justice).¹⁸³ General MacArthur initially wished to execute Yamashita without waiting for judicial approval, but the Secretary of War ordered him to wait.¹⁸⁴ In turn, the Supreme Court initially wished not to hear the case at all, but relented and granted certiorari under pressure from Rutledge.¹⁸⁵

After six hours of oral argument, the Court denied Yamashita's claims six to two, with Jackson recused. Chief Justice Stone's majority opinion began by recounting legal and historical authority for military commission trials regarding offenses against the "law of war."¹⁸⁶ In such cases, the Court explained, judicial review is only available within a limited habeas corpus proceeding that leaves the reexamination of factual disputes to military officials. Nonetheless, the Court held that "Congress by sanctioning trials . . . by military commission . . . [implicitly] recognized the right of the accused to make a defense," including a "right to contend that the Constitution or laws of the United States withhold authority to proceed with the trial."¹⁸⁷

¹⁸³See Jack Goldsmith & Cass R. Sunstein, *Military Tribunals and Legal Culture: What a Difference Sixty Years Makes*, 19 CONST. COMMENT. 261, 283 (2002). Yamashita also alleged that the United States wrongfully failed to provide advance notice to Switzerland, the neutral power representing Japan's interests, in violation of the Geneva Convention. *Yamashita*, 527 U.S. at 6.

¹⁸⁴FERREN, *supra* note 5, at 8.

¹⁸⁵*Id.* ("To a former law clerk, Victor Brudney, Rutledge later wrote: "[T]here was a three-day battle in conference over whether we would hear the thing at all. From then on the pressure was on full force.").

¹⁸⁶*Yamashita*, 527 U.S. at 7-9; see *Ex parte Quirin*, 317 U.S. 1 (1942); U.S. CONST, art I, sec. 8, cl. 10 (granting Congress power "to define and punish . . . Offenses against the Law of Nations").

¹⁸⁷*Yamashita*, 527 U.S. at 9.

On the merits, the Court first upheld the President’s authority to conduct trials by commission after hostilities ceased, “at least until peace has been officially recognized by treaty or proclamation.”¹⁸⁸ Next, the Court upheld Yamashita’s conviction under the law of war on a theory of ineffective command that merely “permitt[ed]” subordinates to commit atrocities.¹⁸⁹ The Court cited international conventions that arguably presupposed effective military commanders,¹⁹⁰ but the majority’s core argument was that such command responsibility was necessary to accomplish the law of war’s “purpose to protect civilian populations and prisoners of war from brutality.”¹⁹¹

Finally, the Court rejected all challenges to the military commission’s lax evidentiary standards.¹⁹² Yamashita invoked the Articles of War, which barred the use of depositions in “any

¹⁸⁸*Id.* at 12. That conclusion rested on practicalities of capturing war criminals, a scholarly consensus, and examples from United States history. *E.g., id.* (“No writer on international law appears to have regarded the power of military tribunals . . . as terminating before the formal state of war has ended.”); *id.* at 11 (“[O]nly after [hostilities]’ cessation could the greater numbers of [war criminals] and the principal ones be apprehended and subjected to trial.”).

¹⁸⁹*Id.* at 13-18.

¹⁹⁰*Id.* at 15-16 (citing an Annex to the Fourth Hague Convention of 1907, the Tenth Hague Convention, and the Geneva Red Cross Convention); *cf. id.* at 16 (citing United States military tribunals rulings and international arbitrations to similar effect).

¹⁹¹*Id.* at 15. *But cf. id.* at 16 (overstating grossly the view that international law “plainly imposed” on Yamashita “an affirmative duty to take such measures as were within his power and appropriate in the circumstances to protect prisoners of war and the civilian population.”); *id.* at 16 (“We do not make the laws of war but we respect them so far as they do not conflict with the commands of Congress or the Constitution.”).

¹⁹²“The regulations prescribed by General MacArthur . . . directed that the commission should admit such evidence ‘as in its opinion would be of assistance in proving or disproving the charge, or such as in the commission’s opinion would have probative value in the mind of a reasonable man.’” *Id.* at 18.

military court or commission” considering a capital case, and which forbade hearsay and opinion evidence “before courts-martial, courts of inquiry, military commissions, and other military tribunals.”¹⁹³ The Court held those provisions inapplicable to Yamashita, however, because one of the Articles of War introductory provisions named only the United States Army and accompanying personnel as “the persons . . . subject to these articles”; it did not name enemy combatants.¹⁹⁴ Thus, the Court held that, even though Congress had amended the Articles of War to recognize the existence of military commissions, it “left the control over . . . procedure where it had previously been, with the military command.”¹⁹⁵

Yamashita also cited the Geneva Conventions of 1929, which required prisoners of war to be tried “only by the same courts and according to the same procedure as in the case of persons belonging to the armed forces of the detaining Power.”¹⁹⁶ Yamashita’s trial had indisputably violated the Articles of War’s evidence standards that would have governed court martials concerning United States personnel.¹⁹⁷ But the Court found the Geneva Conventions applicable only to prisoner-of-war prosecutions for acts committed *while in detention*, not acts before capture.¹⁹⁸

Yamashita’s constitutional objection to the commission’s evidentiary standards was

¹⁹³*Id.* at 18 & nn 5-6 (quoting the relevant statutes).

¹⁹⁴*Id.* at 19.

¹⁹⁵*Id.* at 20.

¹⁹⁶*Id.* at 20-21.

¹⁹⁷*See supra* note 183 (citing Articles of War regulating the use of hearsay and documentary evidence).

¹⁹⁸*Yamashita*, 527 U.S. at 23.

summarily dismissed as follows:

For reasons already stated we hold that the commission's rulings on evidence and on the mode of conducting these proceedings against petitioner are not reviewable by the courts, but only by the reviewing military authorities. From this viewpoint it is unnecessary to consider what, in other situations, the Fifth Amendment might require, and as to that no intimation one way or the other is to be implied.¹⁹⁹

In sum, the Court concluded, Yamashita's trial "did not violate any military, statutory, or constitutional command."²⁰⁰

Two dissents issued Justice Murphy's was a fierce attack on the "command responsibility" theory under which Yamashita was convicted. Citing the Fifth Amendment, and a "philosophy of human rights which makes the Constitution the great living document it is," Murphy refused to accept that Yamashita could be killed for his subordinates' wrongdoing, especially when he was not alleged to have known of such crimes, and when American forces themselves had dismantled Japanese lines of command in order to undermine Yamashita's ability to direct his troops.²⁰¹

Rutledge's dissent (which Murphy joined) focused on the procedures in Yamashita's trial, which he viewed as raising profound issues of fairness and judicial role:

At bottom my concern is that we shall not forsake in any case, whether Yamashita's or another's, the basic standards of trial which, among other guarantees, the nation fought to keep; that our system of military justice shall not alone among all our forms of judging be above or beyond the fundamental law or the control of Congress within its orbit of authority; and that this Court shall not fail

¹⁹⁹*Id.* at 25.

²⁰⁰*Id.* at 26.

²⁰¹*Id.* at 26 (Murphy, J., dissenting); *cf.*, *e.g.*, *id.* at 40-41 (implying that Yamashita's trial was affected "a prevailing degree of vengeance," at a time when "emotions are understandably high" and it is "difficult to adopt a dispassionate attitude").

in its part under the Constitution to see that these things do not happen.²⁰²

After setting forth a litany of departures from standard conventions of criminal adjudication --- prohibiting ex post facto substantive liability, inadequate notice, liability without knowledge, inadequate time to prepare a defense, and evidence without confrontation --- Rutledge concluded that “[w]hether taken singly . . . as departures from specific constitutional mandates or in totality as in violation of the Fifth Amendment’s command . . . a trial so vitiated cannot stand constitutional scrutiny.”²⁰³ Given such massive procedural problems, Rutledge simply stated that “this was no trial in the traditions of the common law and the Constitution.”²⁰⁴

Of course, the government and the majority did not claim that Yamashita’s trial satisfied due process and civilian law. Instead, the Court held that trials by military commission were effectively immune from civil law standards and civil courts’ oversight. Rutledge described such deference as plausible in contexts of “military necessity” or “battlefield” authority, but found such concepts irrelevant after hostilities’ end. The ancient maxim that laws are silent in the noise of arms has less force when the arms themselves are quiet²⁰⁵

Rutledge then addressed the Court’s analysis of the Articles of War and the Geneva Convention. As with the *Ahrens* dissent, Rutledge’s opinion was detailed, precise, and

²⁰²*Id.* at 42 (Rutledge, J., dissenting).

²⁰³*Id.* at 45.

²⁰⁴*Id.* at 56; *cf. id.* at 61 (declaring that the time pressures and surprises imposed on Yamashita’s defense counsel “deprived the proceeding of any semblance of trial as we know that institution”).

²⁰⁵*Id.* at 47 (“There is a maxim about the law becoming silent in the noise of arms [Inter armis silent leges.] But it does not follow that this would justify killing by trial after capture or surrender, without compliance with laws or treaties made to apply in such cases, whether trial is before or after hostilities end.”).

exhaustive. For each of the majority’s arguments, he offered counterarguments that the Court did not try to answer. The *Yamashita* opinions merit closer attention than this space permits but what is most important, as in *Ahrens*, is the normative commitment driving Rutledge’s technical analysis. He viewed the *Yamashita* majority as imposing “no law restrictive upon [Yamashita’s capital] proceedings other than whatever rules and regulations may be prescribed . . . by the executive authority or the military.”²⁰⁶ Thus, Rutledge concluded his forty-page dissent in plain terms: “I cannot accept . . . that anywhere in our system resides or lurks a power so unrestrained to deal with any human being through any process of trial.”²⁰⁷ Whether objections be based in common-law fairness, constitutional due process, Articles of War, international law, or all of the above, Rutledge’s dedication to legal rule and judicial role could not conscience “trial” procedures as shoddy as those that caused Yamashita’s death.

2. Bin Laden’s Driver

Forty years after *Yamashita*, Rutledge’s broadest worries about the effects of that case never emerged,²⁰⁸ and it may be that the errors affecting Yamashita’s trial had been largely forgotten or dismissed as “not the Court’s finest hour.”²⁰⁹ Today’s “War on Terror,” however,

²⁰⁶*Id.* at 81.

²⁰⁷*Id.*

²⁰⁸For example, Rutledge seemed to fear that *Yamashita*’s departure from conventional procedures would cause a pervasive decline in United States criminal procedure. *See id.* at 81 (“For once [the door against procedural abuse] is ajar, even for enemy belligerents, it can be pushed back wider for others, perhaps ultimately for all.”). Similarly, although Rutledge’s post-War hopes of entering “a new era of law in the world” were never fully realized, it is hard to lay much of the blame upon the Court’s largely ignored result in *Yamashita*.

²⁰⁹*Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2669 (2004) (Scalia, J., dissenting) (characterizing thus the Court’s ruling in *Ex parte Quirin*, 317 U.S. 1 (1942), which upheld a military commission’s decision to execute German saboteurs, including one United States

has brought military commissions again to the fore. On November 13, 2001, citing the Authorization of Military Force, the Commander in Chief power, and statutory provisions that incorporate the Articles of War, Bush ordered that any al Qaeda member or other international terrorist designated by him should be tried in a military commission for violating the law of war.²¹⁰

In November 2001, Afghani forces captured Salim Ahmed Hamdan; the United States took custody and transferred him to Guantanamo. In July 2003, Bush announced “reason to believe” that Hamdan was a member of al Qaeda, or had aided terrorism against the United States, and he designated Hamdan for trial in a military commission.²¹¹ On October 3, 2004, Hamdan was evaluated by a Combatant Status Review Tribunal, which found he was an enemy combatant.²¹² Separately, Hamdan was charged before a military commission with a conspiracy to commit murder, property damage, and terrorism.²¹³ The government alleged that Hamdan was Osama bin Laden’s driver and bodyguard, who delivered arms to al Qaeda members and trained with high performance weapons, all the while knowing that bin Laden and al Qaeda organized the September 11 terrorist attacks.²¹⁴ Hamdan’s military commission contains three U.S.

citizen).

²¹⁰Order Concerning the Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (2001).

²¹¹Hamdan v. Rumsfeld, 415 F.3d 33, 35 (D.C. Cir. 2005). From then until October 2004, Hamdan was held in solitary confinement.

²¹²*Id.* at 36.

²¹³*Id.*

²¹⁴*Id.* at 35-36.

colonels, and its procedures are set by regulation.²¹⁵

Hamdan filed for habeas corpus in federal district court, claiming *inter alia* that the President lacked authority to use a military commission, and that the commission's procedures were unlawful. As the case advanced, Hamdan stressed three arguments: (i) that the Geneva Conventions of 1949 required a competent tribunal to decide his prisoner-of-war status before any trial by military commission,²¹⁶ (ii) that he was denied the right to attend all proceedings against him, in violation of the Geneva Conventions of 1949, the Uniform Code of Military Justice, the Constitution, and common law,²¹⁷ and (iii) that his commission was unlawful because it was not authorized by Congress.²¹⁸

The district court, directly applying the Geneva Conventions of 1949, ordered that, unless a "competent tribunal" were to find that Hamdan was not a prisoner of war, he must be tried before an ordinary court martial, not a military commission.²¹⁹ The D.C. Circuit reversed --- in a panel that included John Roberts --- and held that Congress had authorized the use of military

²¹⁵*Id.* at 36.

²¹⁶The basic logic of this argument relies on Article 5 of the Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, [1955] 6 U.S. T. 3316, 3324 T. I. A. S. No. 3364, which requires signatory states to presume prisoner-of-war status unless that status is adequately rebutted. A prisoner of war, in turn, is entitled to trial by the same procedures that are used to try the signatory nation's own troops --- a requirement that undeniably is not satisfied in Hamdan's case.

²¹⁷All sides agreed that Hamdan had been excluded from the voir dire process of selecting commissioners from his trial, and that Hamdan would also be excluded from at least two days of testimony during presentation of the government's case. *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152, 171 (D.D.C. 2004).

²¹⁸See Neal Katyal & Laurence Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 11 YALE L.J. 1259-1280-93 (2003).

²¹⁹*Hamdan*, 344 F. Supp. 2d at 173.

tribunals.²²⁰ The panel went on to reject Hamdan’s international law claims for three reasons. First, it held the Geneva Conventions unenforceable in federal courts. Second, it held that Hamdan could not assert prisoner-of-war status and that the military tribunal was “competent” to reject any such assertion. Third, it held the Geneva Conventions inapplicable to al Qaeda’s activities.²²¹ The D.C. Circuit also denied Hamdan’s claims under the Uniform Code of Criminal Justice, and held those restrictions almost entirely inapplicable to military commissions.²²²

3. Rutledge Again?

Hamdan has now petitioned for certiorari, and regardless of whether the Court hears his case, or that of another defendant tried by military commission, the basic issue that occupied Rutledge’s dissent is inescapable, namely, whether there are any limits that constrain the executive’s choice of procedures in military commissions.²²³ Many of the technical arguments supporting the outcome in *Yamashita* have changed. For example, unlike the 1929 Geneva Conventions that *Yamashita* invoked, the Geneva Conventions of 1949 relevant to *Hamdan* were explicitly drafted to regulate trials for misconduct committed before (not just during) detention.²²⁴ Similarly, whereas *Yamashita* read the Articles of War to regulate only trials

²²⁰*Hamdan*, 413 F.3d at 38.

²²¹*Id.* at 38-42.

²²²*Id.* at 42-43.

²²³*See* Petition for a Writ of Certiorari, *Hamdan v. Rumsfeld* (Aug. 8, 2005) (No. 05-184); *cf.* Amicus Brief of Office of Military Commissions, Chief Defense Counsel in Support of Certiorari (Sept. 7, 2005) (No. 05-184) (“The certiorari petition raises systemic issues that challenge the military commission’s very existence. These issues will affect every military commission case and will persist regardless of the outcome of petitioner’s particular case.”).

²²⁴FERREN, *supra* note 4, at 242.

concerning United States military personnel, the Uniform Code of Military Justice now covers all persons within the military's jurisdiction.²²⁵ In response to such changes, the government now offers different technical arguments opposing judicial review, claiming that federal courts lack authority to implement *any* of the Geneva Convention's safeguards, and that military commissions (of any sort of person) are altogether exempt from normal military rules.²²⁶

For our purposes, what is most critical is not such questions' answers, but the renewed centrality of Rutledge's sixty-year-old concern that "we shall not forsake in any case . . . the basic standards of trial which . . . the nation fought to keep," that "our system of military justice shall not alone . . . be above or beyond the fundamental law or the control of Congress," and that the Supreme Court "shall not fail in its part under the Constitution to see that these things do not happen."²²⁷ In Hamdan's case or another like it, today's Court will decide whether military commissions are bound by our traditions of criminal adjudication --- traditions that may be located in the common law, the Geneva Conventions the United States has signed, the Uniform Code of Military Justice, and the Constitution as well. If the Court holds all of those legal resources inapplicable, on whatever set of contestable bases, the result will be unmistakable. Military commissions will (again?) represent an area of unchained executive power, where Presidents may freely apply any blend of engineered results and ostensible fairness that suits their political taste.

It would be unfair to say that President Bush has created or authorized the creation of

²²⁵*Id.*

²²⁶Brief for the Respondents in Opposition at 25-29, *Hamdan v. Rumsfeld* (Sept. 7, 2005) (No. 05-184).

²²⁷*In re Yamashita*, 327 U.S. 1, 42 (Rutledge, J., dissenting).

military commissions as “kangaroo” or “drum-head” courts. Indeed, the procedures for modern military commissions may compare well to Yamashita’s more blatantly skewed trial. For example, Hamdan’s commissioners are all legally trained, and any conviction would, en route to the President’s desk, be reviewed by a panel of exceptionally talented lawyers.²²⁸ Furthermore, Hamdan has access to counsel, he received a copy of the charges, he will be presumed innocent, the case against him must be proved beyond reasonable doubt, he may generally confront the government’s witnesses if they are reasonably available, and his counsel will receive even classified materials before they are used against him.²²⁹

In both *Yamashita* and *Hamdan*, however, “more is at issue than [individual defendants’] fate.”²³⁰ For it is one thing to say that Presidents, under the Geneva Convention and otherwise, have broad discretion to try enemy combatants, or even that missteps in Hamdan’s case are not so egregious as to require judicial action.²³¹ One might or might not agree with such a ruling, but it is something quite different to grant (as the D.C. Circuit did) the President an unrestrained

²²⁸Hamdan v. Rumsfeld, 344 F. Supp. 2d 152, 167 & n.13 (D.D.C. 2004).

²²⁹On the other hand, the regulations governing military commissions provide no right to a speedy trial, they permit the admission of unsworn statements in lieu of testimony, and they provide that the presumption of innocence and right to remain silent are not “enforceable” rights, arguably allowing them to be stripped at any time. *See* Brief for Appellee at 2-3, Hamdan v. Rumsfeld, 415 F.3d 33, 35 (D.C. Cir. 2005) (No. 04-5393) (citing 32 C.F.R. §§ 9.6(d)(3), 9.10-11 (2004)).

²³⁰*In re Yamashita*, 327 U.S. 1, 41 (1946) (Rutledge, J., dissenting).

²³¹The latter argument may be the legal realist point underlying the D.C. Circuit’s discussion of abstention, which would require Hamdan to raise objections to the military commissions’ procedures before the military commission itself, with the possibility of judicial review only thereafter. *See* Hamdan v. Rumsfeld, 415 F.3d 33, 42 (D.C. Cir. 2005) (applying such abstention and refusing to hear certain of Hamdan’s procedural challenges under the Geneva Conventions). *But see id.* at 42-43 (rejecting, without any discussion of abstention principles, Hamdan’s procedural challenges under the Uniform Code of Military Justice).

discretion to set procedures for military commissions as a matter of preference. Using the World War II experience as background, the relatively “mild” use of military commissions in *Hamdan* might --- as *Hirabayashi* was --- be a “wedge case” that leads courts to accept relatively small departures from ordinary legal norms, which then serve to justify extreme measures. For example, if military commissions are (as the government argues) unconstrained by the Constitution, common law, the Geneva Conventions, and almost all of the Uniform Code of Military Justice, it is hard to see how any procedural safeguards --- from notice to counsel to confrontation to impartial decisionmakers --- would be more than a matter of grace.

By way of conclusion, let us assume that some members of today’s Court share Rutledge’s concern about lawless military commissions. The most apparent response, applied by *Hamdan*’s district court, would be to hold the Geneva Conventions in relevant part “self-executing,” that is, judicially enforceable.²³² That issue has occupied a great deal of briefing and academic debate in *Hamdan*.²³³ However, two less recognized, equally potent options emerge from our earlier pairs of cases. First, the Court could expand the part of Stevens’s *Rasul* opinion addressing extraterritoriality. The government’s chief argument against *Hamdan*’s constitutional arguments is that “aliens outside the United States [do not] have due process rights under the Federal Constitution.”²³⁴ But *Rasul*’s analysis of extraterritoriality (which Scalia thought

²³²*Hamdan*, 344 F. Supp. 2d at 163-65.

²³³See, e.g., Jinks & Sloss, *Is the President Bound by the Geneva Conventions?*, 90 CORNELL L. REV. 97 (2004); Carlos Vazquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT’L L. 695, nn. 36, 63.

²³⁴Brief for the Respondents in Opposition at 19 n.11, *Hamdan v. Rumsfeld* (Sept. 7, 2005) (No. 05-184) (quoting *United States v. Verdugo-Urquidez*, 494 U.S. 259, 269 (1990) (rejecting “the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States”)).

superfluous) found that presumptions against extraterritorial application of United States law inapplicable to Guantanamo Bay, because the extraordinary level of United States control brought it “*within the territorial jurisdiction of the United States.*”²³⁵ That same reasoning, which in *Rasul* supported application of the habeas statute to Guantanamo Bay, could in *Hamdan* extend constitutional rights to detainees in Guantanamo Bay. The question would of course remain whether particular constitutional rights are categorically inapplicable to trials by military commission at any location, but the Court’s answer under that approach would be in an important sense uniform: *Hamdan* would be entitled to the same constitutional rights in Guantanamo Bay as he would in Miami, and within United States territory, aliens are normally entitled to the same constitutional rights as United States citizens.²³⁶ Naturally, the Court might make allowances for particular military commission procedures, but such a ruling would at least ensure (as Rutledge tried to in *Yamashita*) that the executive’s use of military commissions outside the field of battle hostilities remains integrated with ordinary norms of procedural justice and subject to significant oversight by Article III courts.²³⁷

²³⁵*Rasul v. Bush*, 124 S. Ct. 2686, 2696 (2004) (emphasis added) (internal quotation marks omitted).

²³⁶*See, e.g., Cole, supra* note 158, at 978-79 (“The Constitution does distinguish in some respects between the rights of citizens and noncitizens. But in fact, relatively little turns on citizenship status. The right to vote and the right to run for federal elective office are restricted to citizens, but all of the other rights are written without such limitation. . . . Specifically, the Court has stated that neither the First nor the Fifth Amendment ‘acknowledges any distinction between citizens and resident aliens.’ For more than a century, the Court has recognized that the Equal Protection Clause is ‘universal in [its] application to all persons within the territorial jurisdiction, without regard to differences of . . . nationality.’ . . . And when noncitizens, no matter what their status, are tried for crimes, they are entitled to all of the rights that attach to the criminal process.” (footnotes omitted)).

²³⁷From the perspective of court-watching, it may be important that John Roberts, if he is confirmed, would be recused from deciding the *Hamdan* case, because he was on the D.C.

A second legal response rests in Souter's *Hamdi* concurrence. There, Souter acknowledged an implicit exception to the Non-Detention Act, which allows Presidents to "deal with enemy belligerents according to the treaties and customs of the laws of war."²³⁸ Souter thus construed the laws of war as a determinant of executive power --- which is indisputably subject to judicial review --- rather than a source of detainees' individual rights. That characterization allowed Souter to analyze executive compliance with the Geneva Convention without engaging well-traveled debates over whether the Convention is "self-executing." Federal courts may or may not have authority to enforce individual rights under the Geneva Conventions. But the judiciary has undisputed responsibility to enforce valid limits (from whatever source) on executive power.²³⁹

In *Hamdan*, military commissions are roundly acknowledged to be primarily creatures of common law, designed to deal with alleged violations of the law of war.²⁴⁰ In that light, the contours of presidential power to use military commissions --- either generally, or when they contravene otherwise applicable constitutional safeguards --- may be defined by the limits of

Circuit panel that decided the case. Under such circumstances, the dispositive fifth vote might be Justice Kennedy's. The same might be true if President Bush chooses a strong conservative to succeed Justice O'Connor.

²³⁸*Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2657 (2004) (Souter, J., concurring in the result). This principle could derive from a common-law limitation of the Non-Detention Act or of the Authorization of Military Force.

²³⁹*Cf. Yamashita*, 527 U.S. 1, 9 (1947) ("Congress by sanctioning trials . . . by military commission . . . [implicitly] recognized the right of the accused to make a defense," including a "right to contend that the Constitution or laws of the United States withhold authority to proceed with the trial.").

²⁴⁰Compare such common-law status and function to Souter's analysis of the laws-of-war exception to the Non-Detention Act, *see supra* notes 165-70 and accompanying text.

United States treaty and other international law obligations. Such analysis would preserve executive power to use trials by military commission, but would also maintain judicial involvement at least to ensure that such trials adhered to “the judicial guarantees which are recognized as indispensable by civilized peoples.”²⁴¹

To be clear, judicial reliance on either of these doctrinal approaches is not beyond doubt. Yet each yields a defensible foothold supporting judicial involvement in cases like Hamdan’s, and right now --- not a moment later --- is the time to collect and evaluate such arguments. Our country has known several eras of significant security threats, and each has become famous or infamous based on its legal response. The Civil War era witnessed suspension of habeas corpus and military commissions;²⁴² the World War II era allowed mass racial detentions and martial law.²⁴³ Likewise, the modern Court has written, and will again write, opinions concerning executive detention that determine the life or death of scores of individuals, contribute to the United States’ perception as supporting the rule of law and human freedom, and affect history’s judgment of our own capacity to learn from the past in shaping the future. With O’Connor’s departure from the bench, the dispositive vote in those cases may fall to her successor, or to Kennedy, and the country must fervently hope that a majority of the Court will find a way to honor the high juridical standards that such political pressure requires.

III. Conclusion: You Are What You Read

²⁴¹ Geneva Convention Relative to the Treatment of Prisoners of War, Art. 3, 6 U.S.T. 3316 (1949). This requirement of “Common Article 3” is applicable to prisoners of war and civilians alike.

²⁴² REHNQUIST, *supra* note 148, at 118-37.

²⁴³ *See, e.g.*, IRONS, *supra* note 100, at vii; YAMAMOTO, *supra* note 100, at 194.

A final, separate lesson from Ferren's book and Rutledge's story concerns judicial biography as a genre. This Review has offered a two-part argument that Rutledge and his work deserve greater attention. But some readers may wonder, "If Rutledge really is such a fine jurist, and his work so central to issues surrounding executive detention, why don't we hear of him more often?" Before answering, let us briefly consider why the practice of judicial namedropping is so prevalent in United States legal culture. Even as Chinese language students measure achievement in part by memorizing certain numbers of Kanji, there is a sense in which students of United States law are measured by their knowledge (or ignorance) of certain judicial names and personalities.

Part of that tradition owes to the significance of judges and their decisions in United States history. This country has an undeniable fetish for our Constitution --- with powerful moral attachment to free speech, due process, and equal protection --- and American judges have established themselves in the public eye as the singular oracles who give the instrument voice.²⁴⁴

Another factor is the absence of any educational "career track" for common-law judges; thus, individuals' skills and arts more naturally seem personal or even idiosyncratic. Given timeless debates over whether wisdom is something that can be taught,²⁴⁵ our system of training and picking judges seems to suppose that judgment is largely a feature of who someone is, rather than what they learned in any school.

²⁴⁴For descriptions and instantiations of this phenomenon, see, for example, BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 3-31 (1998); DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS* (1997); LARRY D. KRAMER, *THE PEOPLE THEMSELVES* 9-34, 207-48 (2004).

²⁴⁵PLATO, *Meno*, in *THE COLLECTED DIALOGUES OF PLATO* 354 (Edith Hamilton & Huntington Cairns, ed.) (1961).

For those and other reasons, discussion of judges and judicial role flows through two overlapping channels. First, a propositional or discursive mode attempts to formulate principles to define and delimit proper judicial behavior. Ronald Dworkin's work is an abstract example of such discussion;²⁴⁶ so is Alexander Bickel's,²⁴⁷ Owen Fiss's,²⁴⁸ Cass Sunstein's,²⁴⁹ and many narrower efforts to define what judges ought to do in particular circumstances. The discursive mode describes judicial role in explicit terms, but such precatory abstractions have drawn vehement criticism,²⁵⁰ and they have seldom had the cultural influence that one might expect.

A second, more popular mode of discussing is narrative or biographical. Many if not most debates about judges orbit a charted constellation of "heroes" and "villains." Names like John Marshall, William Brennan, Felix Frankfurter, Louis Brandeis, Roger Taney, John Harlan (I and II), Antonin Scalia, Oliver Wendell Holmes, and perhaps a dozen more stand out in the popular imagination as different "types" of judges. Their lives, values, and decisions are thought to stand for something, even though that "something" may not be precisely explained; and when one name or another is invoked, listeners nod with some understanding of what is meant.

One of the more common tasks students perform in law school is to identify their most and least favorite Justice --- current and all time. Through cycles of debate and education, such

²⁴⁶RONALD DWORKIN, *LAW'S EMPIRE* (1986).

²⁴⁷ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962).

²⁴⁸OWEN FISS, *THE LAW AS IT SHOULD BE* (2003).

²⁴⁹CASS SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* (2001).

²⁵⁰*See, e.g.*, RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* (1999).

personalities are refined as positive and negative role models, and many lawyers retain such images of “good” and “bad” judges long after their interest in Dworkin or Bickel has dimmed. To state an important truism, such students fill the ranks of future lawyers, judges, and professors, and that alone explains why judicial biographies --- the most comprehensive form of the narrative mode --- remain an indispensable element of United States legal culture.

The problem, if it can be called that, is that academic biographers tend to focus on eye-catching judges with long (preferably evolving) service to the Court and a special capacity to fascinate, whether it be a Holmesian epigram, Cardozoan synthesis, Marshallian tour de force, Douglasian tumult, or some role in sparking some revolution (or at least reformation) in the law. We have always felt a need for judges with intellectual and personal verve, and we always will. But the narrative mode too often overlooks that judging is not a flashy business. Law by nature is a largely conservative enterprise, where “creative” arguments are suspect and the “unprecedented” is heresy.

Throughout Rutledge’s life story, one sees a judge profoundly committed to legal craft (perhaps too much in a case like *Korematsu*), and also steeped in compassion and awareness of law’s human impact. In one commentator’s marvelous phrase, “Rutledge was rarely eloquent. The judicial beachheads he took were won, not by sleight-of-words, but on the merits.”²⁵¹ But what may be most satisfying about celebrating such a judge is that his intellectual vigor stands forever joined with an utter absence of pyrotechnic phosphorus.

When Ferren’s book ends, with a description of Rutledge’s death, the reader must inevitably draw her own conclusions about how this judge’s life and career should be judged.

²⁵¹Pollak, *Profile of a Judge*, *supra* note 4, at 191.

Some observers have implied that, had Rutledge lived longer, his name might have earned common mention beside Frankfurter's or Black's.²⁵² Perhaps that is true. But it is also true that Rutledge's too-short career marked a judicial path very different from his colleagues. Wechsler spelled out some of Rutledge's distinctive characteristics in his pre-nomination memo: modesty, principle, judgment, and "constant evidence of the quality — so treasured in Holmes — of pointing [out] the implications of small things, if only by defining an underlying reason for a rule or a concealed principle of its growth."²⁵³

The feelings most likely to strike readers when they finish Ferren's book are some sadness that the story was not longer, and corresponding surprise that a largely uncelebrated man, who served on the Supreme Court for only six years, could upon closer examination sustain such a solid impression of being such a very good judge. It is that sense in which Ferren's book marks a significant contribution to legal literature. The work not only portrays a distinctive type of judge; the underlying story itself invites us to rethink how judges are valued in legal culture, and how judicial biography figures into that process.

Although it took fifty years for Rutledge's biography to reach us, the ideas raised by his story concerning judicial role and values are uniquely timely today, as the country chooses one new Justice and braces to choose another. Although the confirmation process, like several aspects of modern life, has become highly partisan, that need not preclude a worthy result. Today's selections for the Court will be examined by our next generation's judicialbiographers , and if John Ferren has chosen a surpassingly good subject from the past, let us hope most of all

²⁵²*Id.* at 177.

²⁵³FERREN, *supra* note 5, at 215.

that our politicians choose others of similar quality for the future.