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"Undead" Wartime Cases: Stare Decisis and the Lessons of History

Harlan G. Cohen
University of Georgia, hcohen@uga.edu

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Harlan Grant Cohen*

References to the “lessons of history” are ubiquitous in law. Nowhere has this been more apparent than in recent debates over U.S. counterterrorism policy. In response to the Bush Administration’s reliance on World War II-era decisions—Ex parte Quirin, In re Yamashita, Hirota v. MacArthur, and Johnson v. Eisentrager—opponents have argued that these decisions have been rejected by the “lessons of history.” They argue that the history of wartime cases is one marked by Executive aggrandizement, panic-driven attacks on civil liberties, and overly quiescent courts—none of which should be repeated.

But what does it really mean to invoke the lessons of history? Is it merely a rhetorical device or should it have some role in determining the stare decisis effect of these old wartime cases? The fact that each of the four cases cited by the Bush Administration has since been set aside by the United States Supreme Court raises questions about whether stare decisis ever applied to them at all. Can the lessons of history answer those questions?

This Article explores the potential legal meanings of the “lessons of history.” It distinguishes and weighs a number of possible models for how history might be used: (1) history as facts complicating or undermining prior decisions; (2) history as precedent-replacement, with the judgments of Congress, the Executive, or others taking the place of that of judges; and (3) history as a vehicle for constitutional principles, like a fear of Executive aggrandizement in wartime or a belief that “the Constitution is not a suicide pact.” Using the four key cases here as examples—Quirin, Yamashita, Hirota, and Eisentrager—the Article examines the benefits and pitfalls of allowing courts to engage in each of these types of analysis. The result is a clearer understanding not only of how history should affect the fate of old wartime cases, but of the roles history can play more generally.

I. INTRODUCTION ........................................................... 958

II. “GOOD WAR,” QUESTIONABLE PRECEDENTS ............... 965
   A. Four Precedents from the Past ................................... 966
      1. Ex parte Quirin .................................................. 966
      2. In re Yamashita ................................................ 975
      3. Hirota v. MacArthur ............................................ 980
      4. Johnson v. Eisentrager ....................................... 983
   B. Stare Decisis ................................................................ 990

III. THE LESSONS OF HISTORY ........................................ 996

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* © 2010 Harlan Grant Cohen. Assistant Professor, University of Georgia School of Law; J.D., New York University School of Law 2003; M.A., History, Yale University 2000; B.A., Yale University 1998. Thank you to Dan Bodansky, Anthony Colangelo, Shirlee Tevet Cohen, Hillel Levin, Carlos Vázquez, and Ingrid Wuerth for reading drafts of this Article. Their insights and advice were invaluable. Thank you also to my research assistants Daniel Tilley, Jeffrey Fisher, Tina Termei, and Kristin Tessman. Their hard work and good judgment are on display throughout this Article.

957
I. INTRODUCTION

With the United States Supreme Court’s decision in *Munaf v. Geren* in 2008, the last in a series of World War II ghosts was temporarily put to rest.1 Following the terrorist attacks of September 11, 2001, the Bush Administration began reintroducing the country to a series of long-forgotten protagonists in World War II-era decisions. Richard Quirin, Tomoyuki Yamashita, Koki Hirota, and Lothar Eisentrager were each revived and pressed into service in defense of the Administration’s policies in the “War on Terror.” Faced once again with their fate, the Supreme Court has generally returned them to their graves: *Munaf v. Geren*1 distinguished *Hirota v. MacArthur,*3 *Boumediene v. Bush* distinguished or limited *Johnson v. Eisentrager,*4 *Rasul v. Bush* disavowed *In re Yamashita,*7 and *Hamdan v. Rumsfeld* distinguished *Ex parte Quirin.*9 It is not at all clear that they are there to stay.

What should we make of the appearance, and eventual exit, of these ghosts of wars past? In a sense, the appeal to World War II precedents was unremarkable. The shock of the September 11 attacks on the United States reminded many of the last major attack on U.S. soil, the Japanese attack on Pearl Harbor. Reaching for ways to describe the new threat to the nation—the new war that would have to

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2. *Id.*
7. 327 U.S. 1 (1946).
be fought—many Americans turned to the example of World War II, the “Good War,” fought by the “Greatest Generation.”\textsuperscript{10} The Bush Administration’s appeals to that era’s precedents in constructing its legal policies seem even less remarkable. The Administration did what lawyers always do when faced with new scenarios: it scanned the past for analogous precedents. Following sixty years of relative peace, administration lawyers had to look to the World War II era for cases involving detention of enemy combatants and trials by military commission. When the policies based on those precedents were eventually challenged, lower courts, faced with Supreme Court precedents supporting administration policies, followed principles of stare decisis and based their decisions on those precedents.

And yet, one by one, each of these World War II precedents has been set aside or distinguished by the Supreme Court. The rejection of these decisions suggests that the appeal to World War II was far less wise than it might have first appeared. In fact, a closer look at the particular period and decisions begs the question whether they were ever worthy of stare decisis (or even precedential effect) at all. Few of the traditional justifications for stare decisis seem to apply to these cases. These cases had been, for the most part, lost to history before September 11—few remembered \textit{Quirin}\textsuperscript{11} or \textit{Hirota}\textsuperscript{12}—and the cases were not the source of significant lines of precedent. Each is arguably unique; similar situations do not seem to have arisen over the intervening years and citations to these cases are few. As we have now been reminded, the facts of each were also highly unusual. The cases were decided very quickly, in a sense of panic, under pressure from the U.S. Government, and in the fog of war. Some of the decisions were criticized even then for what seemed like a whitewashing of unfair procedures and evidentiary discrepancies. Moreover, standing primarily for Executive-branch discretion, the cases did not become the source of important rights relied on by individuals.\textsuperscript{13} All of these

\begin{itemize}
  \item \textsuperscript{10} \textit{See generally} TOM BROKAW, THE GREATEST GENERATION (1998).
  \item \textsuperscript{11} \textit{Quirin}, 317 U.S. 1.
  \item \textsuperscript{12} \textit{Hirota v. MacArthur}, 338 U.S. 197 (1948).
  \item \textsuperscript{13} Though as Justice Scalia argued in dissent in \textit{Rasul}, the decisions were relied upon by the Bush Administration. \textit{Rasul v. Bush}, 542 U.S. 466, 497-98 (Scalia, J., dissenting) (“Normally, we consider the interests of those who have relied on our decisions. Today, the Court springs a trap on the Executive, subjecting Guantanamo Bay to the oversight of the federal courts even though it has never before been thought to be within their jurisdiction . . . .”).
\end{itemize}
facts suggest that these unique wartime cases are different from other precedents and deserve more scrutiny and less reliance than others.\textsuperscript{14}

How much weight then should these cases be given? In the absence of other traditional doctrinal justifications for stare decisis, the main reason left for respecting these precedents seems to be a belief that there is wisdom in the decisions of prior courts—wisdom that should not be discarded too quickly. Here, however, that wisdom is hotly debated and inextricably intertwined with difficult unanswered questions about the meaning of American history. The traditional history of these wartime cases paints them in a very negative light. Grouped together with the Court’s notorious decision in \textit{Korematsu v. United States}, which upheld the internment of Japanese-Americans,\textsuperscript{15} these cases have come to be seen as symbols of how an overly deferential Court can unwittingly aid an overly aggressive Executive in unnecessary, panic-driven wartime attacks on civil liberties.\textsuperscript{16} These World War II cases are seen as part of a larger pattern of wartime excess that includes the Aliens and Seditions Acts, World War I attacks on free speech, and the Palmer Raids, which demonstrate the dangers of an unchecked Executive, the power of jingoism, and the ease with which minority groups can become targets during a crisis.\textsuperscript{17} For those taking this view of history, the important precedent—the lessons to be followed—are the counter-reactions during peacetime, the determination, once the fog has lifted, that the government’s actions were unconstitutional or wrong. It is these determinations made during calm reflection, not those made by wartime courts, that should carry the most weight.

This view of American history, although popularly held, is not uncontroversial. A second counter-history has questioned the value of peacetime reassessments. Eric Posner and Adrian Vermeule, for

\begin{itemize}
\item[$\dagger$] See generally infra Part II.B. for a fuller discussion of the traditional standards for applying stare decisis and how they apply to these cases.
\item[$\ddagger$] 323 U.S. 214, 225 (1944).
\item[$\ddagger\ddagger$] See GEOFFREY R. STONE, \textit{Perilous Time}s 306 (2004) (discussing fallout and regret by decision makers after \textit{Korematsu}); David Cole, \textit{No Reason To Believe: Radical Skepticism, Emergency Power, and Constitutional Constraint}, 75 U. CHI. L. REV. 1329, 1349, 1353 (2008) ("Our own history demonstrates that it is far easier for government officials to declare emergencies and take on new powers than to declare the emergency over and give up those powers.").
\item[$\ddagger\ddagger\ddagger$] See STONE, supra note 16, at 13 ("[I]n each [wartime period] the United States went too far in sacrificing civil liberties . . ."); Cole, supra note 16, at 1349 ("The history of emergencies in the United States reflects a consistent pattern in which government officials target liberty-infringing security measures at the most vulnerable, usually foreign nationals, while reassuring the majority that their own rights are not being undermined.").
\end{itemize}
example, have argued that one can only really understand the needs of a crisis during the crisis, that hindsight only distorts the nature of the threats observed at the time and the appropriateness of a given response. It is to the wartime, not the peacetime, decisions that we should look for lessons on the proper balance between security and liberty. Posner and Vermeule thus go so far as to suggest that we are incapable of judging even whether the notorious Korematsu was rightly or wrongly decided. For them, the fact that prior Courts have consistently, in their considered judgment, chosen to defer to the Executive in wartime is evidence that such deference is the wisest policy. Despite the prevalence of both sets of arguments, little attempt has been made to reconcile them, to determine which history should be relevant and when.

These World War II cases might best be thought of as “undead.” They no longer seem to be live precedents, the passage of time and reflection having sapped them of their vigor, but they are not quite dead either, no later decision inflicting the final fatal blow. Instead, they refuse to be forgotten, lurching back into the frame. The dilemma posed by the rival histories of these cases thus resembles the one faced by the hero of a zombie movie: whether to put these decisions out of their misery once and for all or to try to save them and give them back their former lives.

It is this dilemma that animates this Article. This Article considers the fate of these undead wartime cases. It asks two

18. See ERIC A. POSNER & ADRIAN VERMEULE, TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS 5 (2007). Cass Sunstein and Jack Goldsmith have made a similar point, noting that the peacetime backlash against wartime curbs on civil liberties can be traced in large part to the United States’ unusual record of victories in war. Victory diminishes the perceived threat posed by the United States’ enemies. After each war, the Government’s actions are judged by many to have been unnecessary and excessive. Had the wars ended differently, Sunstein and Goldsmith point out, the judgment of history might have been quite different. Jack Goldsmith & Cass R. Sunstein, Military Tribunals and Legal Culture: What a Difference Sixty Years Makes, 19 CONST. COMMENT. 261, 285 (2002).


20. This was certainly true prior to the recent line of “War on Terror” cases, but it arguably remains true even now. Beholden to stare decisis, the Court has generally declined to overrule these decisions outright in the “War on Terror” cases, instead straining to distinguish their facts. See infra Part III. At times, critics have argued that the Court’s narrow reading of those earlier decisions has been unreasonable or objectively incorrect. See, e.g., Rasul v. Bush, 542 U.S. 466, 493 (2004) (Scalia, J., dissenting) (“Eisentrager’s directly-on-point statutory holding makes it exceedingly difficult for the Court to reach the result it desires today.”).

21. There seem to be at least three types of “undead” in popular culture: ghosts, zombies, and vampires. I am ambivalent whether one of these is a better description of these cases than the others.
intertwined questions: (1) how to interpret and apply the lessons of wartime or emergency history, and (2) what effect to give to the decisions made under crisis conditions. Should wartime cases like *Ex parte Quirin*, 317 U.S. 1 (1942); *Johnson v. Eisentrager*, 339 U.S. 763 (1950); *In re Yamashita*, 327 U.S. 1 (1946); and *Hirota v. MacArthur*, 338 U.S. 197 (1948) be given the same precedential treatment as other cases? And to what extent should our understanding of the history of those cases dictate their fate? In the absence of precedent, but the presence of history, what should courts do?

These are more difficult questions than they might first appear. Although it is common to disparage a precedent as old, or to argue that fundamental changes in circumstances have undermined a prior rule, it remains unclear exactly how such determinations should be made, or when, in the absence of a contrary line of decisions, history can trump precedent. Similarly, despite widespread statements that today's courts (and policy makers) must learn the lessons of history, it is unclear how courts should discern what those lessons are. If history is to play some doctrinal role in determining the fate of unique wartime cases, how should courts approach that analysis? What role should the history play? Is the history simply a set of facts complicating or undermining the prior decisions? Should it take the role normally filled by precedent, with the judgments of other actors—historians, the public, elected officials—taking the place of that of judges? Or should history serve as something else, as a repository of deeply held constitutional principles, like a fear of Executive aggrandizement in wartime or a belief that "the Constitution is not a suicide pact?"

26. In essence, this Article probes the question posed by the paradigm of undead wartime cases, *Korematsu*. It is easy to find statements that *Korematsu* has been overruled by the judgments of history, that while still on the books, it is no longer a live precedent. See, *e.g.*, *Korematsu v. United States*, 584 F. Supp. 1406, 1420 (N.D. Cal. 1984); Dennis J. Hutchinson, "*The Achilles Heel* of the Constitution: Justice Jackson and the Japanese Exclusion Cases," 2002 SUP. CT. REV. 455, 485 (2002). The question one must ask is, why? What is it about developments since *Korematsu* that deny the decision stare decisis? In the case of *Korematsu*, we are faced with an almost perfect storm of factors: congressional apology and compensation of detainees; passage of the Non-Detention Act; President Clinton's bestowal of the Medal of Freedom on Fred Korematsu; the vacating of Korematsu's conviction by a district court; apparently incontrovertible historical evidence that the threat of Japanese espionage was willfully exaggerated, if not maliciously fabricated; offhanded remarks by current Supreme Court Justices denouncing the decision; and unending examples of the popular belief that the decision was a mistake. See Eugene Gressman, *Korematsu: A Mélange of Military Imperatives*, 68 LAW & CONTEMP. PROBS. 15, 25 (2005). Which factors are doing the real work here, and how? Is *Korematsu sui generis*? Would anything short of
This Article seeks to cut through the confusion and determine when, if ever, history should counsel disregarding a prior wartime case. It seeks to develop an operational framework for using history’s lessons, not only as rhetoric, but as part of stare decisis doctrine. Importantly, this actually raises two distinct stare decisis questions. Normally, discussion of the weight of stare decisis focuses on whether some consideration, in this case history, can overcome the normal presumption of stare decisis. But this Article asks a second, more complicated question as well: whether history could ever keep the presumption of stare decisis from attaching in the first place.\footnote{This Article will generally only consider horizontal stare decisis, the extent to which a future panel of a court is bound by the same court’s prior decision. Additional policy considerations make vertical stare decisis, the extent to which future lower courts are bound, more complicated. Some of the arguments made here could be applicable to that context as well, but full consideration of how they would play out must be reserved for a future article.}

This Article begins by providing some background on each of those four cases discussed here: \textit{Quirin,}\footnote{\textit{Ex parte} Quirin, 317 U.S. 1 (1942).} \textit{Eisentrager},\footnote{Johnson v. Eisentrager, 339 U.S. 763 (1950).} \textit{Yamashita,}\footnote{In reYamashita, 327 U.S. 1 (1946).} and \textit{Hirota.}\footnote{Hirota v. MacArthur, 338 U.S. 197 (1948).} Decided during or immediately following World War II, all four raise questions about how history should judge the Court’s wartime record. Their common status as doctrinal orphans, decisions neither truly precedented nor generally followed as precedent, allows us to focus on the role history can and should play in determining their weight, while ignoring any of the countervailing considerations that a long line of consistent precedent might present.\footnote{Notably, this Article thus does not consider decisions like \textit{Youngstown Sheet \\& Tube Co. v. Sawyer}, 343 U.S. 579 (1952), whose authority has been buttressed by the lines of precedent refining its meaning and testing its conclusions.} At the same time, the facts of the four cases actually differ in important ways. A closer look at the specific facts of each reveals a few different possible meanings of the lessons of history, each with different potential roles to play in a stare decisis analysis. Part II.A thus lays out the facts surrounding such evidence suffice to strip a similar case of its authority? Whispers of \textit{Korematsu}'s status as “still good law” continue to crop up from time to time, see Aya Gruber, \textit{Raising the Red Flag: The Continued Relevance of the Japanese Internment in the Post-Hamdi World}, 54 U. Kan. L. Rev. 307, 332 n.138 (2006), and some have argued recently that whether \textit{Korematsu} was wrongly decided is an open question that historical hindsight cannot answer. See, e.g., Posner & Vermeule, \textit{supra} note 18, at 113; Richard A. Posner, \textit{Law, Pragmatism, and Democracy} 299 (2003) [hereinafter Posner, \textit{Law, Pragmatism, and Democracy}]; Richard A. Posner, \textit{Breaking the Deadlock: The 2000 Election, the Constitution, and the Courts} 171-73 (2001). Figuring out how history could overrule it is thus a serious question.
each case, what the Court held in each decision, how those precedents were treated by other courts prior to September 11, and finally, how each has been handled by the Court in cases concerning terrorism and the wars in Afghanistan and Iraq. Part II.B looks more closely at traditional notions of stare decisis and how they would treat the four World War II decisions. This Part concludes that neither the traditional reasons proffered for the policy of stare decisis nor the prevailing test for when it might be abandoned prove particularly helpful in determining the fate of these four decisions.

Part III asks whether the “lessons of history” might prove more useful. As Part III.A recounts, many have argued that it does. But few have been particularly clear about how those lessons should be used by judges or when they might supersede an earlier precedent. In fact, popular calls to learn the lessons of history tie a wide variety of different types of arguments into one tightly wound knot. Part III seeks to disentangle the various strands and assess separately their potential doctrinal relevance. After providing some background on the use of history in law more generally in Part III.B, Part III.C divides arguments about the relevance of history to these cases into three basic models. Model 1 looks to the history of the cases themselves and considers the role history may play in providing facts that complicate or undermine the legitimacy of the court’s opinions. Model 2 considers the role history might play as precedent-replacement. In this model, the history pointed to is not the history of each case but instead the subsequent history of reactions to the case. This Part explores the role that subsequent judgments of Congress, the Executive, or others might play when courts have largely remained silent. Finally, Model 3 considers the role history might play as a vehicle for constitutional principles. Here, it is our (or more accurately, judges’) current assessments of the “meaning” of history that take center stage. In this model, our assessment of the cases and their subsequent history provide support or validation for our beliefs that the Constitution must be protected from inevitable Executive aggrandizement in wartime or that “the Constitution is not a suicide pact,” and that wartime exceptions must be made. Each model is considered in light of the costs and benefits of overriding stare decisis. The goal is to develop clear, manageable models of history’s use that can clarify the treatment of these cases without unleashing the chaos and instability that traditional stare decisis doctrine is meant to prevent.

Considering a number of variations on these three models and applying them to the facts of Quirin, Eisentrager, Yamashita, and
HIROTA, Part III.D concludes that the doctrinal force of the lessons of history is both narrower and broader than their proponents seem to suggest. Where history raises specific questions about the facts of a particular case (Model 1) or records a particular consensus on its authority (Model 2), it seems reasonable to eliminate the presumption of stare decisis altogether, essentially creating a blank slate for a new Court. However, few, if any, wartime cases are likely to meet this exacting standard. Broader understandings of the lessons of history that seek to draw larger principles from a larger set of cases (Model 3) may be more broadly applicable and may provide arguments for or against overruling particular decisions, but these understandings will have little more force than their general persuasiveness.

Although the discussion in this Article is limited to four specific cases, this framework should be useful in considering a much broader category of wartime cases. In time, some of today's terrorism cases might merit such analysis. Another generation may be haunted by Yaser Esam Hamdi, Shafiq Rasul, Salim Ahmed Hamdan, Lakhdar Boumediene, or Mohammed Munafs. Moreover, historical claims have been made about many peacetime decisions, some undead and some very much alive. Although the lessons learned in this Article are not perfectly applicable to them, they should provide a useful starting point for considering the role historical judgments might play more generally.

II. "GOOD WAR," QUESTIONABLE PRECEDENTS

Long dormant and largely forgotten, a series of World War II-era decisions of the United States Supreme Court were reawakened following the September 11 attacks on the World Trade Center and Pentagon. In their efforts to construct and defend detention policies for the War on Terror, the Bush Administration focused on four precedents in particular: Ex parte Quirin, In re Yamashita, Johnson

33. 317 U.S. 1; 339 U.S. 763; 327 U.S. 1; 338 U.S. 197.
36. 317 U.S. 1.
v. Eisentrager, and Hirota v. MacArthur. This Part lays out some of the background of each case, the subsequent treatment of each decision in other cases and scholarship, the ways in which the Bush Administration relied on each decision, and the eventual treatment of that claim by the Supreme Court.

A. Four Precedents from the Past

1. Ex parte Quirin

In June 1942, eight German would-be saboteurs landed in two groups, one on Long Island and the other in Florida. After evading a Coast Guardsman, the Long Island group shed their German uniforms and buried them along with their explosives before slipping off to New York City. The Florida group arrived undetected in bathing suits and slipped off to various locations within the United States. At least two of the men were U.S. citizens, and a number of them had questionable loyalty to their mission. One, George John Dasch, went so far as to contact the FBI and warn it of the plot. Based on the information he provided, the other seven were quickly rounded up and taken into custody. The FBI, eager to claim credit for the arrests and afraid to admit that the arrests occurred only with the help of one of the plotters, buried Dasch’s involvement.

Upon the advice of various officials, including Justice Frankfurter, that a military commission would afford the President greater flexibility in dictating procedures and rules of evidence than a normal court martial, President Roosevelt ordered that all eight men, including Dasch, be tried by a military commission made up of seven generals with power to admit any evidence of “probative value to a reasonable man” and to impose the death penalty based on a two-thirds

37. 327 U.S. 1.
38. 339 U.S. 763.
40. Vázquez, supra note 35, at 222-23.
41. Id. at 221. Another would-be plotter who was suspicious of Dasch’s loyalty opted not to join the plot. Burger apparently cooperated with Dasch’s plot to turn himself in and may have left clues as to the whereabouts of the uniforms and explosives. A third plotter, Haupt, had a plausible story about joining the plot to escape Germany and return to the United States. Id. at 223.
42. Id. at 222-23; Louis Fisher, Nazi Saboteurs on Trial: A Military Tribunal and American Law 33-34 (2003). Interestingly, as late as 1956, the arrest of the plotters was being attributed to “the alertness of a coastguardman and the thorough follow-up [by] the FBI.” Alpheus Thomas Mason, Inter Arma Silent Leges: Chief Justice Stone’s Views, 69 Harv. L. Rev. 806, 813 (1956).
vote. The order also precluded resort to the civil courts of the United States.

The eight men were charged with violations of the laws of war, the Articles of War, and conspiracy. On July 8, 1942, the trial before the military commission began literally shrouded in secrecy—heavy black drapes covered the windows of the room where the trial was being held.

While the trial was proceeding, counsel for the men began to consider seeking Supreme Court review of the constitutionality of the military commission's authority. They first sought permission from the President to mount such a challenge, permission they were tepidly granted. Defense counsel then reached out to Justice Roberts, who convened a meeting with Justice Black, defense counsel, the prosecutor, and Attorney General Biddle on July 23, 1942. The Justices then consulted with as many other Justices as could be reached by telephone. On July 27, the Court announced that it would break its summer recess to hear arguments on July 29. Popular opinion, reflected in the newspapers of the day, was out for blood and ill-disposed to the Supreme Court's decision. President Roosevelt was also less than thrilled, telling Biddle: "I want one thing clearly understood, Francis. I won't give them up . . . . I won't hand them over to any United States marshal armed with a writ of habeas corpus."

The hearing took place on July 29, after testimony was finished in the commission but before final arguments. One-hundred eighty pages of briefs and the 3000-page transcript from the trial were delivered to the Court that day. Justice Douglas, still travelling from the West Coast, missed the first day. Justice Byrne sat for the argument despite having already accepted a position in the Roosevelt

43. None of the generals had any legal training. Vázquez, supra note 35, at 224-26.
44. Id. at 225.
45. Id. at 226.
46. Goldsmith & Sunstein, supra note 18, at 266; see also Mason, supra note 42, at 814 ("Trial by military commission commenced [on] July 8, in strict secrecy . . . .").
47. Vázquez, supra note 35, at 227.
48. Id.
49. Id.
50. Id. at 228.
51. Mason, supra note 42, at 815.
52. Goldsmith & Sunstein, supra note 18, at 266; Mason, supra note 42, at 815.
54. Vázquez, supra note 35, at 229-30.
Administration. Justice Murphy, in uniform as a reserve army officer, recused himself on Justice Frankfurter's suggestion. It has been suggested that Justice Frankfurter feared that the liberal Murphy might side with the plotters. Evidence of how the plot was discovered was not remarked upon during the hearing, perhaps because Dasch's attorney had not filed a petition for habeas corpus or perhaps because oral argument was open to the public.

Oral argument was conducted before the Court for approximately nine hours, over the course of two days. At noon on July 31, less than a day after arguments ended and in the middle of closing arguments in the commission, the Court issued a per curiam opinion denying relief, promising that a full opinion explaining their position would follow. On August 1, closing arguments ended; on August 3, the commission convicted the men and sentenced them to death; and on August 8, six of the men (Dasch and Burger had their sentences commuted) were executed. The Court's full opinion would not be issued for another three months.

Writing the opinion under such circumstances turned out to be more difficult than perhaps originally thought. Chief Justice Stone, who had the responsibility of writing the opinion, described the process as "a mortification of the flesh," and admitted that he found it "very difficult to support the Government's construction of the articles of war." Part of the problem was the timing. Having heard and decided the case before the military commission verdict was announced, any statement about the process for appealing the verdict was arguably not ripe and should have been left an open question. Six of the men had already been executed, however, rendering their future arguments moot. Stone also had to deal with other restive Justices; Justice Jackson had threatened to write a concurrence granting broad power and discretion to the President, and Justice Frankfurter distributed an imagined conversation between himself and the dead saboteurs haranguing both the plotters for the audacity to petition for the writ and the other Justices for considering the petition. In the end, Justice Douglas expressed regret that the case had been decided without a ready opinion, noting that "once ... the examination of the grounds that had been advanced is made, sometimes those grounds

55. Id. at 231-32.
56. Danelski, supra note 53, at 72.
57. Vázquez, supra note 35, at 232-34.
crumble.” And even Justice Frankfurter would later observe that *Quirin* was “not a happy precedent.”

The full decision that the Court eventually released included a number of important holdings. As an initial matter, the Court held that notwithstanding the President’s proclamation denying access to the courts, enemy aliens have the right to challenge the statutory and constitutional legality of their detention and trial. In this case, however, that challenge failed. The Court held that “to seize and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war” is “[a]n important incident to the conduct of war,” and that “[b]y his Order creating the present Commission[, the President] has undertaken to exercise the authority conferred upon him by Congress, and also such authority as the Constitution itself gives the Commander in Chief.” Where individuals, including citizens, are charged with recognized violations of the laws of war (in this case, crossing military lines out-of-uniform for the purpose of waging war), trial by military commission is constitutional. The Court suggested off-handedly that it was the absence of a law-of-war violation that distinguished *Ex parte Milligan*, the Court’s Civil War-era precedent suggesting that military commissions were unconstitutional while the civil courts remained open. The Court otherwise ignored the seemingly on-point precedent, a point for which it has been criticized. The Court did not decide whether the President could establish military commissions on his authority, finding that by recognizing the possibility of military commissions in article 15 of the Articles of War, Congress had authorized them.

58. *Id.* at 234 (quoting Transcriptions of Conversations between Justice William O. Douglas and Professor Walter F. Murphy, Cassette No. 10: June 9, 1962 (internal quotation marks omitted)).
61. *Id.* at 28-29.
62. *Id.* at 29, 46.
63. 71 U.S. 2 (1866).
64. *See, e.g.*, Vázquez, supra note 35, at 240 (discussing treatment of *Milligan* in *Quirin*); Danelski, supra note 53, at 76 (summarizing arguments that *Quirin* gutted *Milligan* without overturning it).
65. *Quirin*, 317 U.S. at 28. Article 15 declared:

[T]he provisions of these articles conferring jurisdiction upon courts martial shall not be construed as depriving military commissions . . . or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by statute or by
The Court relied on *Quirin* in *In re Yamashita*, to both uphold the Japanese general’s right to challenge his trial in the Philippines and to uphold the legality of the military commission that tried him. 66 *Hirota* and *Eisentrager* would both distinguish *Quirin* to deny access to the writ of habeas corpus. 67 After World War II cases finally petered out, citations to *Quirin* still made their way into a smattering of Supreme Court opinions, but usually to support the rule that Fifth and Sixth Amendment jury rights are inapplicable to military trials. 68 Other cases cited *Quirin* chiefly for secondary holdings or dicta. 69 No decision prior to September 11 cited it for the President’s authority to hold and try suspected enemies of the state without normal due

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66. 327 U.S. 1, 9, 20 (1946); see also Rasul v. Bush, 542 U.S. 466, 475 (2004) (“The Court has, for example, entertained the habeas petitions . . . of admitted enemy aliens convicted of war crimes during a declared war and held in the United States . . . .” (citing *Quirin*). 67. Johnson v. Eisentrager, 393 U.S. 763, 780 (1950) (citing *Quirin* (holding that *Quirin* was distinguishable because in *Quirin*, the prisoners were held in D.C., arrested by civil authorities, and charged at a time when civil courts functioned); Hirota v. MacArthur, 338 U.S. 197, 208 (1948) (citing *Quirin* (distinguishing *Quirin* because in Hirota the President acted through an international tribunal). 68. See, e.g., Middendorf v. Henry, 425 U.S. 25, 34 (1976) ("In *Ex parte Quirin*, 317 U.S. 1, 40 (1942), it was said that ‘cases arising in the land or naval forces’ . . . are expressly excepted from the Fifth Amendment, and are deemed excepted by implication from the Sixth." (alteration in original)); O’Callahan v. Parker, 395 U.S. 258, 261 (1969) (quoting same portion of *Quirin*); Reid v. Covert, 354 U.S. 1, 37 (1957) (same); United States ex rel. Toth v. Quarles, 350 U.S. 11, 37 (1955) (Reed, J., dissenting) (same); Burns v. Wilson, 346 U.S. 137, 152 (1953) (Douglas, J., dissenting) (same); Whelchel v. McDonald, 340 U.S. 122, 127 (1950) (same). 69. See, e.g., Hohn v. United States, 524 U.S. 236, 246 (1998) (“[D]enial by the district court of leave to file the petitions in these cases was the judicial determination of a case or controversy, reviewable on appeal to the Court of Appeals.” (quoting *Quirin*, 317 U.S. at 24)); Walters v. Nat’l Ass’n of Radiation Survivors, 473 U.S. 305, 350-51 (1985) (Brennan, J., dissenting) (“This Court has not hesitated to exercise this power of swift intervention in cases of extraordinary constitutional moment and in cases demanding prompt resolution for other reasons.” (citing *Quirin*)); Gosa v. Mayden, 413 U.S. 665, 686 (1973) (“Moreover, a military tribunal is an Article I legislative court with jurisdiction independent of the judicial power created and defined by Article III.”); Cousins v. Wigoda, 409 U.S. 1201, 1204 (1972) (citing *Quirin* as rare example of the Court holding a Special Term); Fay v. Noia, 372 U.S. 391, 401-02 (1963) (“It is no accident that habeas corpus has time and again played a central role in national crises, wherein the claims of order and of liberty clash most acutely, not only in England in the seventeenth century, but also in America from our very beginnings, and today.” (footnote omitted) (citing *Quirin*)); Kennedy v. Mendoza-Martinez, 372 U.S. 144, 159-60 (1963) (“The powers of Congress to require military service for the common defense are broad and far-reaching . . . .” (citing *Quirin*)); Reid, 354 U.S. at 5-6 (“The United States is entirely a creature of the Constitution.” (citing *Quirin*)).
process rights.\textsuperscript{70} Courts of appeals and district court citations are similar.\textsuperscript{71}

All of that changed after September 11. Quin\textit{in} quickly became the foundation stone of the Bush Administration’s detention policy.\textsuperscript{72} In Quin\textit{in}, the Administration found support for the detention of American citizens as enemy combatants without trial or access to counsel,\textsuperscript{73} broad presidential discretion to create military commissions to try suspected terrorists without Fifth and Sixth Amendment protections, the implicit congressional authorization of such commissions, and even the implication that the President could create such commissions against the wishes of Congress.\textsuperscript{74}

These interpretations forced the Court to grapple with the meaning of the Quin\textit{in} precedent. In \textit{Hamdi v. Rumsfeld}, Justice O’Connor, writing for a plurality of the Court, accepted the

\textsuperscript{70} The closest the Court comes are \textit{Reid}, 354 U.S. at 38-39 (“Moreover, it has not yet been definitely established to what extent the President, as Commander-in-Chief of the armed forces, or his delegates, can promulgate, supplement or change substantive military law as well as the procedures of military courts in time of peace, or in time of war.”), and \textit{Madsen v. Kinsella}, 343 U.S. 341, 355 (1952) (“By thus recognizing military commissions in order to preserve their traditional jurisdiction over enemy combatants unimpaired by the Articles, Congress gave sanction, as we held in \textit{Ex parte Quin}, to any use of the military commission contemplated by the common law of war.”) (quoting \textit{Yamashita}, 327 U.S. at 20)).

\textsuperscript{71} See, \textit{e.g.}, Wright v. Markley, 351 F.2d 592, 593 (7th Cir. 1965) (“Military tribunals are not governed by the procedure for trials prescribed in the Fifth and Sixth Amendments, including a trial by jury.”) (citing Quin\textit{in}); United States \textit{ex rel. Okenfus v. Schulz}, 67 F. Supp. 528, 530 (S.D.N.Y. 1946) (“The Sixth Amendment is not applicable to courts-martial.”) (citing Quin\textit{in}); United States v. Montgomery Ward & Co., 150 F.2d 369, 382 (7th Cir. 1945) (“The Constitution thus invests the President as Commander in Chief with the power to wage war which Congress has declared, and to carry into effect all laws passed by Congress for the conduct of war . . . .”) (quoting Quin\textit{in}, 317 U.S. at 26); Weightman v. United States, 142 F.2d 188, 191 (1st Cir. 1944) (“[T]he President, aside from his ordinary peace-time powers, has power to take action with respect to conscientious objectors . . . .”) (citing Quin\textit{in}); O’Callahan v. Chief U.S. Marshal, 293 F. Supp. 441, 442 (D. Mass. 1966) (“[T]he statutory authorization to courts-martial is well within the constitutional powers of the legislature.”) (citing Quin\textit{in}).

\textsuperscript{72} See, \textit{e.g.}, Memorandum from Jay S. Bybee, Assistant Attorney Gen., Office of Legal Counsel, to Attorney Gen. (June 8, 2002), \textit{available at} \url{http://www.justice.gov/opa/documents/memomilitarydetention06082002.pdf} (discussing Quin\textit{in} at length to support the military detention without trial of Jose Padilla, an American citizen arrested in Chicago); 25 Op. Off. Legal Counsel 1, 6 \textit{Legality of the Use of Military Commissions To Try Terrorists} (2001), \textit{available at} \url{http://www.justice.gov/olc/2001/pub-millcommfinal.pdf} (relying primarily on Quin\textit{in} to support President’s creation of military commissions, implicit congressional authorization of such commissions, and even implication that the President could create such commissions against the wishes of Congress).

\textsuperscript{73} See Bybee, \textit{supra} note 72; \textit{see also} Rumsfeld v. Padilla, 542 U.S. 426, 432 (2004) (“On the merits, the Government contended that the President has authority to detain Padilla militarily pursuant to the Commander in Chief Clause of the Constitution, Art. II, § 2, cl. 1, the congressional AUMF, and this Court’s decision in \textit{Ex parte Quin}.”).

Administration’s argument that the President was authorized by Congress’s Authorization of the Use of Military Force (AUMF) to detain individuals as enemy combatants.\textsuperscript{75} Quoting \textit{Quirin}, Justice O’Connor recognized that “[t]he capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, by ‘universal agreement and practice,’ are ‘important incident[s] of war.’”\textsuperscript{76} As such, “[I]n permitting the use of ‘necessary and appropriate force,’ Congress has clearly and unmistakably authorized detention in the narrow circumstances considered here.”\textsuperscript{77} Further citing \textit{Quirin}, Justice O’Connor found that “[t]here is no bar to this Nation’s holding one of its own citizens as an enemy combatant.”\textsuperscript{78} In response to criticism of the \textit{Quirin} precedent, Justice O’Connor answered:

\textit{Quirin} was a unanimous opinion. It both postdates and clarifies \textit{Milligan}, providing us with the most apposite precedent that we have on the question of whether citizens may be detained in such circumstances. Brushing aside such precedent—particularly when doing so gives rise to a host of new questions never dealt with by this Court—is unjustified and unwise.\textsuperscript{79}

At the same time, however, Justice O’Connor rejected Justice Thomas’s argument that \textit{Quirin} granted the President broad unreviewable authority over wartime detentions.\textsuperscript{80} Softening the potential meaning of \textit{Quirin}, she found that regardless of the President’s authority to detain alleged enemy combatants, citizen-detainees have a number of rights, and must be given “a fair opportunity to rebut the Government’s factual assertions before a neutral decisionmaker.”\textsuperscript{81} In dissent, Justice Scalia went much further, questioning Justice O’Connor’s willingness to rely on \textit{Quirin} at all.\textsuperscript{82} Justice Scalia recalled the decision’s unusual history and timing and remarked that “[t]he case was not this Court’s finest hour.”\textsuperscript{83} Justice Scalia also

\begin{itemize}
\item \textsuperscript{75} Hamdi v. Rumsfeld, 542 U.S. 507, 517 (2004).
\item \textsuperscript{76} \textit{Id.} at 518 (second alteration in original) (quoting \textit{Quirin}, 317 U.S. at 28, 30).
\item \textsuperscript{77} \textit{Id.} at 519.
\item \textsuperscript{78} \textit{Id.}
\item \textsuperscript{79} \textit{Id.} at 523.
\item \textsuperscript{80} \textit{Id.} at 587-88, 593 (Thomas, J., dissenting).
\item \textsuperscript{81} \textit{Id.} at 533 (majority opinion).
\item \textsuperscript{82} \textit{See id.} at 570 (Scalia, J., dissenting).
\item \textsuperscript{83} \textit{Id.} at 569.
\end{itemize}
criticized that Court’s treatment of *Milligan*, a decision he felt better captured the constitutional principles at issue.\(^\text{84}\)

A more direct challenge to *Quirin* came two years later, as the Court was forced to decide the constitutionality of the President’s order creating military commissions to try detainees in the War on Terror—an order directly patterned off of Roosevelt’s 1942 Proclamation. Justice Stevens, writing for a majority of the Court in *Hamdan*, first pointed to *Quirin* as support for choosing to consider the habeas petition at issue in the case.\(^\text{86}\) Justice Stevens went on to accept the Government’s argument that, as in *Quirin*, Congress had implicitly authorized the President to convene military commissions under appropriate circumstances by using the same language in article 21 of the Uniform Code of Military Justice (UCMJ) as had been used in article 15 of the Articles of War.\(^\text{87}\) This was notwithstanding Justice Stevens’ description of *Quirin*’s characterization of article 15 of the Articles of War as “controversial.”\(^\text{88}\) However, Justice Stevens rejected the argument that *Quirin* provided “a sweeping mandate for the President to ‘invoke military commissions when he deems them necessary.’”\(^\text{89}\) Instead, Congress only authorized the President to convene commissions where authorized by the “common law of war” and in compliance with the rules laid down by Congress in the

84. See id. at 570 (citing *Ex parte Milligan*, 71 U.S. 2 (1866)) (“*Quirin* purported to interpret the language of *Milligan* . . . .”); id. at 571 (“But even if *Quirin* gave a correct description of *Milligan* . . . .”); id. at 572 n.4 (“The plurality’s assertion that *Quirin* somehow ‘clarifies’ *Milligan* is simply false. As I discuss, the *Quirin* Court propounded a mistaken understanding of *Milligan* . . . .” (citations omitted)).

85. See id. at 567 n.1 (“Whatever *Quirin*’s effect on *Milligan*’s precedential value, however, it cannot undermine its value as an indicator of original meaning. . . . *Milligan* remains ’one of the great landmarks in this Court’s history.’” (quoting *Reid v. Covert*, 354 U.S. 1, 30 (1957))).

Justice Souter took a different tack, arguing that if the government is to rely on *Quirin* as authorization to invoke the laws of war it must also follow the laws of war regarding detainee treatment. See id. at 551 (Souter, J., concurring in part, dissenting in part).

86. *Hamdan v. Rumsfeld*, 548 U.S. 557, 589 (2006). Justice Scalia disagreed, finding that “[b]ecause Congress has created a novel unitary scheme of Article III review of military commissions that was absent in 1942, *Quirin* is no longer governing precedent.” Id. at 678 (Scalia, J., dissenting).

87. Id. at 592-93 (majority opinion) (“The provisions of this code conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions, provost courts, or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by statute or by the law of war may be tried by such military commissions, provost courts, or other military tribunals.” (quoting Uniform Code of Military Justice, 10 U.S.C § 821, art. 21 (2006))).

88. Id. at 593.

89. Id. (quoting Brief for Respondents at 17, *Hamdan*, 548 U.S. 557 (No. 05-184)).
UCMJ.90 Moreover, Justice Stevens hinted that the President had no authority to act in contravention of Congress's wishes,91 a 180-degree flip of the Government's reading of Quirin.92

Writing for the majority, Justice Stevens went on to find President Bush's military commission order inconsistent with the UCMJ, which established a set of standards for such commissions stricter than those in the World War II Articles of War.93 Writing for a plurality, Justice Stevens held that the primary charge against Hamdan (conspiracy), failed to meet Quirin's requirement of a law of war violation recognized by "universal agreement and practice."94

Justice Thomas dissented, arguing that Quirin granted the President broad discretion to define both procedures for, and law-of-war offenses triable by, military commissions.95 The majority decision, in his view, "is contrary to the presumption we acknowledged in Quirin, namely, that the actions of military commissions are 'not to be set aside by the courts without the clear conviction that they are' unlawful."96

The Court's most recent statement on the Government detainee policy, Boumediene,97 took the marginalization of Quirin one step further. Acknowledging that the Court in Quirin had limited its habeas review to "only the lawful power of the commission to try the petitioner for the offense charged" and not to "any question of the guilt or innocence of petitioners," the Court linked that standard to the level of process, full adversarial military trials, the petitioners had already

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90. Id. at 593-94. Justice Kennedy agreed with this reading in his concurrence. Id. at 641 (Kennedy, J., concurring) ("If the military commission at issue is illegal under the law of war, then an offender cannot be tried 'by the law of war' before that commission.").
91. Id. at 593 n.23 (majority opinion) ("Whether or not the President has independent power, absent congressional authorization, to convene military commissions, he may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers.").
92. Ex parte Quirin, 317 U.S. 1 (1942); see also supra note 72 and accompanying text.
93. Hamdan, 548 U.S. at 620.
94. Id. at 603 (quoting Quirin, 317 U.S. at 30) (internal quotation marks omitted).
95. Id. at 689 (Thomas, J., dissenting) ("However, 'charges of violations of the law of war triable before a military tribunal need not be stated with the precision of a common law indictment.'" (quoting In re Yamashita, 327 U.S. 1, 17 (1946))); id. at 709 n.16 (Thomas, J., dissenting) ("[T]his Court's unequivocal interpretation of Article 21 [preserves] the common-law status of military commissions and the corresponding authority of the President to set their procedures pursuant to his Commander in Chief powers.").
96. Id. at 690 (emphasis added by Hamdan Court) (quoting Quirin, 317 U.S. at 25).
received.98 Having yet to receive such process, habeas review of the Guantanamo detainees’ petitions might be considerably broader.99

2. In re Yamashita

The Court’s next consideration of the legality of military commissions did not come until after World War II was over. A few weeks after Japan’s surrender in September 1945, General Tomoyuki Yamashita, Japan’s military governor of the Philippines during the last stages of the war in the Pacific, was arraigned before a military commission of five American officers.100 He was charged with failing to control the troops under his command as they committed an assortment of atrocities during the chaotic weeks following General MacArthur’s return to the Philippines.101 In December 1945, a military commission convened by General MacArthur found Yamashita guilty “upon secret written ballot, two-thirds or more of the members concurring,”102 and sentenced him to death.103

After his petition for a writ of habeas corpus was denied by the Supreme Court of the Philippines, Yamashita appealed to the U.S. Supreme Court.104 As Justices Murphy and Rutledge would observe in their vociferous dissents, Yamashita’s trial was quite controversial and raised numerous questions of basic fairness.105 First, there was considerable question whether Yamashita could legitimately be held liable for the atrocities that took place.106 His troops had disobeyed his orders to leave Manila, and it was unclear that Yamashita even knew of the atrocities taking place. U.S. troops had cut Japanese communi-

98. Id. at 2271 (quoting Yamashita, 327 U.S. at 8; Quirin, 317 U.S. at 25) (internal quotation marks omitted).
99. Id.
101. Green, supra note 100, at 151.
105. Id. at 26 (Murphy, J. dissenting); id. at 41 (Rutledge, J. dissenting); see also Hamdan, 548 U.S. at 618 ("Yamashita") generated an unusually long and vociferous critique from two Members of this Court."); Green, supra note 100, at 154 (describing Murphy’s dissent as “a fierce attack”); Stephen I. Vladeck, Deconstructing Hirota: Habeas Corpus, Citizenship, and Article III, 95 Geo. L.J. 1497, 1508 (2007) ("Justices Murphy and Rutledge each wrote separate, erudite, and angry dissents from the majority opinion.").
106. Yamashita, 327 U.S. at 40 (Murphy, J., dissenting) ("The only conclusion I can draw is that the charge made against the petitioner is clearly without precedent in international law or in the annals of recorded military history.")
cation lines, and officers who had actually participated in the atrocities corroborated Yamashita's testimony that he had not known what was happening in Manila.

Further, three days before trial, charges related to fifty-nine new atrocities were added to the sixty-four already charged; no extra time was allowed to prepare additional defenses. Following rules promulgated by MacArthur that permitted the introduction "of anything which in the commission's opinion 'would be of assistance in proving or disproving the charge,' without any of the usual modes of authentication," the commission allowed in "[e]very conceivable kind of statement, rumor, report, at first, second, third or further hand, written, printed or oral, and one 'propaganda' film." In the process, the commission rejected defense objections "for nearly every kind of defect under any of the usual prevailing standards for admissibility and probative value," even "reprimand[ing] counsel for continuing to make objection[s]."

Despite these concerns, a majority of the Court voted to uphold Yamashita's conviction. In an opinion by Chief Justice Stone, the Court reaffirmed its holding in *Quirín* that Congress had authorized trial by military commission, even in a case like Yamashita's that took

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107. Green, *supra* note 100, at 151. As Justice Murphy observed:

In other words, read against the background of military events in the Philippines subsequent to October 9, 1944, these charges amount to this: "We, the victorious American forces, have done everything possible to destroy and disorganize your lines of communication, your effective control of your personnel, your ability to wage war. In those respects we have succeeded. We have defeated and crushed your forces. And now we charge and condemn you for having been inefficient in maintaining control of your troops during the period when we were so effectively besieging and eliminating your forces and blocking your ability to maintain effective control. Many terrible atrocities were committed by your disorganized troops. Because these atrocities were so widespread we will not bother to charge or prove that you committed, ordered or condoned any of them. We will assume that they must have resulted from your inefficiency and negligence as a commander. In short, we charge you with the crime of inefficiency in controlling your troops. We will judge the discharge of your duties by the disorganization which we ourselves created in large part. Our standards of judgment are whatever we wish to make them."

*Yamashita*, 327 U.S. at 34-35 (Murphy, J., dissenting).

108. *Id.* at 57-58 (Rutledge, J., dissenting).


111. *Id.* at 57-58.

112. *Id.* at 25.
place after the fighting had ended. The Court further held that Yamashita's alleged failure to control his troops was a cognizable violation of the laws of war and that the evidentiary and procedural rules laid out in the Articles of War and the Geneva Conventions were inapplicable to him because the Articles of War applied only to trials of American personnel and the Geneva Conventions applied only to trials for crimes committed after capture. Most notably, the Court held that it could consider only the lawfulness of the military commission's authority to try Yamashita: "If the military tribunals have lawful authority to hear, decide and condemn, their action is not subject to judicial review merely because they have made a wrong decision on disputed facts."

Justices Murphy and Rutledge each wrote angry dissents. Both argued that the Fifth Amendment right to due process applied to Yamashita's trial and detailed ways in which that right had been violated. Justice Rutledge lambasted the Court for accepting in Yamashita's commission "a power so unrestrained to deal with any human being through any process of trial," and Justice Murphy intimated that Yamashita was the victim of heightened emotions and a desire to avenge Japanese atrocities.

Although cited in a few other World War II cases, in particular, Johnson v. Eisentrager, few cases prior to September 11 mentioned Yamashita. Between 1951 and 2001, the Supreme Court cited

113. Id. at 7-12, 12-13.
114. Id. at 15-17, 19-20, 22-23 (citing Articles of War, 10 U.S.C. §§ 1471-1593 (1946); Geneva Convention art. 60, July 27, 1929, 47 Stat. 2021).
115. Id. at 8.
116. See Green, supra note 100, at 154 (describing Murphy's dissent as a "fierce attack"); Vladeck, supra note 105, at 1508 (characterizing dissents as "angry").
118. See id. at 29 (Murphy, J., dissenting) ("If we are ever to develop an orderly international community based upon a recognition of human dignity it is of the utmost importance that the necessary punishment of those guilty of atrocities be as free as possible from the ugly stigma of revenge and vindictiveness. Justice must be tempered by compassion rather than by vengeance.").
Yamashita only five times and only once after 1955. Most often, the case was cited as one of a string of cases distinguishing habeas jurisdiction and appellate review. The only post-Eisentrager case citing Yamashita for one of its core holdings, namely, that the President's authority to establish military commissions in occupied territory may sometimes survive the cessation of hostilities, is Madsen v. Kinsella, a 1953 case involving the trial of an American serviceman's wife for a murder committed in Allied-occupied Germany. District and appellate court citations to the cases are also buried in string-cites, are similarly rare, and are similarly focused on the nature of habeas jurisdiction.

After September 11, Yamashita became part of the Bush Administration's legal justification of trials by military commission, playing something of a second-fiddle role to the more important


121. See, e.g., Schlesinger, 420 U.S. at 746, 751; Brown, 344 U.S. at 485; Burns, 346 U.S. at 139. Less clearly, in United States ex rel. Toth v. Quarles, 350 U.S. at 13-14, the Court cites Yamashita in a footnote to the sentence: “The 1950 Act cannot be sustained on the constitutional power of Congress ‘To raise and support Armies,’ ‘To declare War,’ or to punish ‘Offences against the Law of Nations.’”

122. See Madsen, 343 U.S. at 348-49, 352, 355 (“His authority to do this sometimes survives cessation of hostilities.”); see also id. at 355 (“The jurisdiction exercised by our military commissions in the examples previously mentioned extended to nonmilitary crimes, such as murder and other crimes of violence, which the United States as the occupying power felt it necessary to suppress. In the case of In re Yamashita, following a quotation from Article 15, this Court said, ‘By thus recognizing military commissions in order to preserve their traditional jurisdiction over enemy combatants unimpaired by the Articles, Congress gave sanction, as we held in Ex parte Quirin, to any use of the military commission contemplated by the common law of war.’” (citation omitted) (quoting Yamashita, 327 U.S. at 20)).

123. See, e.g., Williams v. Heritage, 323 F.2d 731, 732 (5th Cir. 1963); Fischer v. Ruffner, 277 F.2d 756, 758 (5th Cir. 1960); Shaver v. Ellis, 255 F.2d 509, 511 (5th Cir. 1958); Bisson v. Howard, 224 F.2d 586, 589 (5th Cir. 1955); Burns v. Lovett, 202 F.2d 335, 339 (D.C. Cir. 1952); Schilder v. Gusik, 195 F.2d 657, 659 (6th Cir. 1952). A couple of more recent cases cite Yamashita on command responsibility. See Hilao v. Estate of Marcos, 103 F.3d 767, 777 (9th Cir. 1996); Kadie v. Karadžić, 70 F.3d 232, 242 (2d Cir. 1995).
"UNDEAD" WARTIME CASES

Quiin. In particular, the Administration argued that Yamashita recognized that the trial of enemy combatants was a fundamental incident of war and that as a result the President was authorized to establish military commissions by Congress’s Authorization of the Use of Military Force (AUMF). It also suggested that Yamashita counseled judicial deference to the Executive in the establishment of such commissions.

Confronted with the precedent in Hamdan, the Court significantly reduced its relevance. Although the Court noted that Yamashita recognized the use of military commissions, it presented that precedent as a limitation on that power rather than as a broad grant. The Court emphasized that the power to create military commissions recognized in Yamashita “can derive only from the powers granted jointly to the President and Congress in time of war,” and despite Yamashita’s controversial holding on the laws of war, a plurality cited it for a requirement that military commission charges accurately state violations of the laws of war and found that the “conspiracy” charge against Hamdan failed to meet that test. Moreover, although the Court did not overrule Yamashita, Justice Stevens, who had clerked for Justice Rutledge, used the dissents in that case to paint the precedent in a decidedly negative light. Writing for the majority, he referred to the Yamashita Court’s ruling as “notorious,” and noted that “[t]he procedures and rules of evidence employed during Yamashita’s trial departed so far from those used in courts-martial that they generated an unusually long and vociferous critique from two Members of this Court.” More importantly, he

126. See id. at 13 (“Because the Military Order applies to alien enemy combatants who are captured during the ongoing war with al Qaeda, both the traditional deference this Court pays to the military justice system and the vital role played by that system are at their pinnacle.” (citing Yamashita, 327 U.S. at 11)).
128. Id. at 591.
129. Id. at 599. But see id. at 681 (Thomas, J., dissenting) (arguing that Yamashita preserves presidential authority to prescribe rules and procedures for military commissions and mandates deference to executive interpretations of the laws of war).
130. Green, supra note 100, at 112.
132. Id. at 618.
observed that criticism of the *Yamashita* trial had led to changes in both the UCMJ and the Geneva Conventions that "seriously undermined" *Yamashita's* holding on evidentiary standards and "stripped [it] of its precedential value."  

3. **Hirota v. MacArthur**

*Hirota v. MacArthur* is perhaps the most obscure of these decisions: it has some of the oddest facts, its holding is difficult to discern, and it has been invoked most rarely. In *Hirota*, the Court considered petitions for a writ of habeas corpus brought by Baron Koki Hirota, a former Japanese Prime Minister and Foreign Minister, and six other Japanese citizens who had been convicted by the International Military Tribunal for the Far East (IMTFE), the Japanese counterpart to the Nuremberg tribunal. Hirota, the only civilian sentenced to death by the tribunal, was convicted for his involvement in the war against China and "complicity in the Rape of Nanking." He had retired from public service before the Japanese attack on Pearl Harbor.

Hirota brought his petition under the Court's original jurisdiction, an unusual form of relief that had not been granted since 1925 and had only been granted three times since 1891, but that was requested by hundreds of Japanese and Germans convicted by war crimes tribunals following World War II. Each of the dozens of petitions brought by German nationals prior to *Hirota* had been rejected without opinion by 4-4 votes; Justice Jackson, who had been chief prosecutor at Nuremberg, recused himself from each decision. Only for *Hirota* did Justice Jackson choose to vote for hearing the petition. Four judges dissented from the decision to schedule an argument on the merits. It is not clear what changed with *Hirota*. The Court may have been swayed by Justice Rutledge, who had threatened to file an opinion shaming the court if it failed to hear the petition. At the same time,

133. *Id.* at 618, 620.
134. 338 U.S. 197 (1948).
136. *Id.* at 1500.
137. *Id.* at 1515.
138. *Id.* at 1511.
139. *Id.* at 1500. For a comprehensive discussion of the mechanism and the specific doctrinal circumstances that made it suddenly popular following World War II, see generally Vladeck, *supra* note 105.
140. *Id.* at 1510-11.
141. *Id.* at 1515-16.
"UNDEAD" WARTIME CASES

Hirota was the first petition brought by Japanese rather than German citizens and thus a degree removed from Jackson's participation at Nuremberg. When it became clear after the argument that his vote was no longer needed to break the tie, Justice Jackson again recused himself. Justice Douglas recorded his concurrence with the majority's decision to deny the petition, promising an opinion that would arrive six months after that of the rest of the Court. Justice Murphy dissented without an opinion. Justice Rutledge reserved his vote, but died before recording it.

The rest of the Court issued a three-paragraph, nine-sentence per curiam opinion. It is hard to derive a clear rule from the decision. The per curiam reads like a list of facts militating against granting the writ without any clear indication of which, if any, were decisive:

The petitioners, all residents and citizens of Japan, are being held in custody pursuant to the judgment of a military tribunal in Japan. Two of the petitioners have been sentenced to death, the others to terms of imprisonment. They filed motions in this Court for leave to file petitions for habeas corpus. We set all the motions for hearing on the question of our power to grant the relief prayed and that issue has now been fully presented and argued.

We are satisfied that the tribunal sentencing these petitioners is not a tribunal of the United States. The United States and other allied countries conquered and now occupy and control Japan. General Douglas MacArthur has been selected and is acting as the Supreme Commander for the Allied Powers. The military tribunal sentencing these petitioners has been set up by General MacArthur as the agent of the Allied Powers.

Under the foregoing circumstances the courts of the United States have no power or authority to review, to affirm, set aside or annul the judgments and sentences imposed on these petitioners and for this reason the motions for leave to file petitions for writs of habeas corpus are denied.

The Court heard no further original petitions related to war crimes tribunals. As Stephen Vladeck explains, the number of Japanese and German prisoners in U.S. custody diminished rapidly after the case, and Eisentrager's subsequent holding that convicted enemy war criminals

142. Id. at 1515.
143. Id. at 1517-18.
145. Vladeck, supra note 105, at 1508, 1517.
146. Hirota, 338 U.S. at 197-98.
147. Id. at 198.
criminals outside the United States had no constitutional right of habeas rendered such petitions useless. 148

Between Eisentrager v. Johnson and September 11, the Hirota per curiam was cited only once by the Supreme Court, and then only for the proposition that "[i]t has been assumed that this Court has no jurisdiction to issue an original writ of habeas corpus except when issuance of the writ has been first denied by a lower court. . . . [T]he Court has not settled the question." 149 Citations to the case in district and circuit court opinions are also rare between 1951 and 2001 and usually appear only as a potential gloss on the rule from Ahrens v. Clark that habeas petitioners must file their petitions in the district in which they are being confined. 150 Additionally, a few decisions point to Hirota as analogous to cases concerning nonreviewable decisions made by foreign governments or courts. 151

But Hirota suddenly became more relevant during the war in Iraq. Two American citizens, Shawqi Omar and Mohammad Munaf, were detained in Iraq by American forces operating under U.N. mandate as part of Multinational Force-Iraq (MNF-I). 152 Both petitioned for writs of habeas corpus to enjoin their transfer to Iraqi authorities, who the petitioners alleged might torture them. The Bush Administration argued that MNF-I was an international force and that Hirota precluded federal court jurisdiction when the petitioners were being held by an international body. The United States Court of Appeals for the District of Columbia Circuit, parsing the language of the Hirota per curiam, distinguished Omar's petition and found jurisdiction based on the fact that Omar, unlike Hirota had not yet been "convicted" by a non-U.S. court. 153 Because Munaf had already been convicted by an

149. Parisi v. Davidson, 405 U.S. 34, 48 n.1 (1972). Justice Douglas's concurrence was cited in one other case as part of a cf cite to the proposition that "[w]here American citizens confined overseas (and thus outside the territory of any district court) have sought relief in habeas corpus, we have held, if only implicitly, that the petitioners' absence from the district does not present a jurisdictional obstacle to the consideration of the claim." Braden v. 30th Judicial Circuit Court, 410 U.S. 484, 498 (1973).
152. Munaf v. Geren, 482 F.3d 582, 582-83 (D.C. Cir. 2007).
Iraqi court, however, the D.C. Circuit found Hirota controlling and determined that it lacked jurisdiction. The Supreme Court took a different view. The Court neither clarified the exact meaning of Hirota nor overruled it; instead the Court found the earlier decision irrelevant to Omar and Munaf’s petitions. Focusing on the language of the habeas statute, 28 U.S.C. §§ 2241(c)(1),(3), which “provides that a federal district court may entertain a habeas application by a person held ‘in custody under or by color of the authority of the United States,’” the Court found that Omar and Munaf were by the administration’s own admission held “under . . . the authority of the United States.” As the Court explained, regardless of the formal status of MNF-I, “The United States acknowledges that Omar and Munaf are American citizens held overseas in the immediate ‘physical custody’ of American soldiers who answer only to an American chain of command.” For good measure, the Court also noted that Omar and Munaf differed from Hirota in their status as American citizens. Exactly what Hirota means and whether its holding is still relevant would thus have to wait for another day.

4. Johnson v. Eisentrager

The last of the four cases to reach the Supreme Court was Johnson v. Eisentrager. Eisentrager involved twenty-one German nationals who had been captured in China, convicted by an American military commission there for violating the laws of war, and subsequently sent to Landsberg Prison in Germany to serve their sentences. Noting that the case “requires us to consider questions basic to alien enemy and kindred litigation which for some years have been beating upon our doors,” Justice Jackson, writing for the majority, rejected the petitions. The opinion runs through a list of reasons to reject them. First, notes Jackson, “We are cited to no instance where a court, in this or any other country where the writ is known, has issued it on behalf of an alien enemy who, at no relevant time and in no stage

154. Munaf, 482 F.3d at 583. By the time the case was heard by the Supreme Court, however, Munaf’s conviction had been vacated. Harlan Grant Cohen, International Decisions: Munaf v. Geren, 102 AM. J. INT’L L. 854, 855 (2008).
156. Id. at 2216 (quoting 28 U.S.C. § 2241(c)(1), (3) (2006)).
157. Id.
158. Id. at 2218.
160. Id. at 765-66.
161. Id. at 768.
of his captivity, has been within its territorial jurisdiction.

Jackson then goes on to discuss the various ways in which aliens, enemy aliens, and citizens have historically been treated differently for constitutional purposes. He explains that the alien "has been accorded a generous and ascending scale of rights as he increases his identity with our society," and that previous cases granting resident aliens the same rights as citizens dealt specifically with aliens within U.S. territory. Nonresident enemy aliens, he observes, have generally received fewer rights and have not been granted access to U.S. courts during wartime, and "these prisoners at no relevant time were within any territory over which the United States is sovereign, and the scenes of their offense, their capture, their trial and their punishment were all beyond the territorial jurisdiction of any court of the United States."

But he continues on to explain the practical difficulties with granting these petitioners the writ. He observes that the question here is whether the writ constitutionally applies to a "prisoner of our military authorities" who

(a) is an enemy alien; (b) has never been or resided in the United States; (c) was captured outside of our territory and there held in military custody as a prisoner of war; (d) was tried and convicted by a Military Commission sitting outside the United States; (e) for offenses against laws of war committed outside the United States; (f) and is at all times imprisoned outside the United States.

To grant the writ to these prisoners might mean that our army must transport them across the seas for hearing. This would require allocation of shipping space, guarding personnel, billeting and rations. It might also require transportation for whatever witnesses the prisoners desired to call as well as transportation for those necessary to defend legality of the sentence. The writ, since it is held to be a matter of right, would be equally available to enemies during active hostilities as in the present twilight between war and peace. Such trials would hamper the war effort and bring aid and comfort to the enemy. They would diminish the prestige of our commanders, not only with enemies but with wavering neutrals. It would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive

162. Id.
163. Id. at 769-76.
164. Id. at 770.
165. Id. at 778.
166. Id. at 777.
abroad to the legal defensive at home. Nor is it unlikely that the result of such enemy litigiousness would be a conflict between judicial and military opinion highly comforting to enemies of the United States.  

Jackson also observes that granting habeas rights would most likely not result in reciprocal treatment since few other states even have such a writ.

Finally, Jackson considers the substance of their petition, rejecting both their claims under various treaties and the Fifth Amendment. The Fifth Amendment specifically excludes American servicemen from coverage; it would be highly anomalous to provide that coverage to enemy servicemen. Beyond that, Jackson finds no basis for their complaint that the military commission lacked jurisdiction to try them. In the end, Jackson’s laundry list of reasons to reject the petitions left the exact holding of the decision difficult to discern.

Unlike the other three cases discussed in this Article, the Court’s first sustained attempt to grapple with the true meaning of

167. *Id.* at 778-79.
168. *Id.* at 779.
169. *Id.* at 783.
170. *Id.* at 790 (“We are unable to find that the petition alleges any fact showing lack of jurisdiction in the military authorities to accuse, try and condemn these prisoners or that they acted in excess of their lawful powers.”).
172. Although cited by the Court fleetingly in a few cases, none of those cases relied on *Eisentrager*’s central holding or holdings regarding the rights of extraterritorial enemy prisoners; most cited the decision solely for stray language on tangentially related topics. See, e.g., *Landon v. Plasencia*, 459 U.S. 21, 32 (1982) (citing *Eisentrager* for proposition that an alien’s constitutional status changes when he gains admission and develops permanent ties to United States); *Fedorenko v. United States*, 449 U.S. 490, 506 (1981) (citing *Eisentrager* regarding statutory interpretation); *Mora v. McNamara*, 389 U.S. 934, 938 (1967) (Douglas, J., dissenting) (citing *Eisentrager* for Judiciary’s unwillingness to challenge Executive wartime decisions); *Lamont v. Postmaster Gen.*, 381 U.S. 301, 307-08 (1965) (Brenner, J., dissenting) (“To succeed, the addressees would then have to establish their standing to vindicate the senders’ constitutional rights as well as First Amendment protection for political propaganda prepared and printed abroad by or on behalf of a foreign government.”) (citation omitted) (citing *Eisentrager*, 339 U.S. at 781-85)); *Reid v. Covert*, 354 U.S. 1, 8 (1957) (“This Court and other federal courts have held or asserted that various constitutional limitations apply to the Government when it acts outside the continental United States.”); *Burns v. Wilson*, 346 U.S. 844, 851-52 (1953) (citing *Eisentrager* in string cite on “whether an American citizen detained by federal officers outside of any federal judicial district, may maintain habeas corpus directed against the official superior of the officers actually having him in custody”). Citations from lower courts prior to *Verdugo-Urrutia* are similar, though some do rely on the decision in rulings regarding extraterritorial constitutional rights. See, e.g., *United States v. Fedorenko*, 597 F.2d 946, 952 (5th Cir. 1979) (“[N]ot only is United States citizenship a ‘high privilege,’ it is a priceless treasure.” (quoting *Eisentrager*, 339 U.S. 778-79).
the *Eisentrager* holding came before September 11 in the 1990 case *United States v. Verdugo-Urquidez*. In that case, the Court was forced to consider whether Fourth Amendment warrant protections applied to a search done in Mexico in connection with the American trial of a Mexican national. The Court split over *Eisentrager*'s meaning. Chief Justice Rehnquist, writing for the majority, found *Eisentrager* "emphatic" in its holding that aliens abroad were not protected by the Fifth Amendment. Justice Kennedy, concurring in the holding, further noted the distinction drawn in *Eisentrager* between citizens and aliens. Justice Brennan, however, dissenting from the holding, thought Rehnquist had "mischaracterize[d]" *Eisentrager*'s holding. By his reading, the Court in *Eisentrager* had held that "[i]t is war that exposes the relative vulnerability of the alien's status." *Verdugo-Urquidez* thus gave new life and possibly new meaning to *Eisentrager*. Following *Verdugo-Urquidez*, a number of circuit courts cited the two cases together for the proposition that some Bill of Rights protections did not apply to aliens abroad. But it was the war

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74. Id. at 270. Rehnquist also found Justice Jackson's practical concerns in *Eisentrager* compelling and reasoned that similar considerations militated against applying the Fourth Amendment in *Verdugo-Urquidez*. Id. at 273.
75. Id. at 276.
76. Id. at 290.
77. Id. (quoting *Eisentrager*, 339 U.S. at 771 (internal quotation marks omitted)).
78. Id. at 291.
79. See, e.g., Harbury v. Deutsch, 233 F.3d 596, 604 (D.C. Cir. 2000) (citing *Eisentrager* in refusing an extraterritorial application of the Fifth Amendment to noncitizens); United States v. Gecas, 120 F.3d 1419, 1430 (11th Cir. 1997) (citing *Eisentrager* for proposition that the Court "has refused to apply ... procedural protections ... to our government's treatment of foreign citizens in foreign countries"); Cuban Am. Bar Ass'n v. Christopher, 43 F.3d 1412, 1428 (11th Cir. 1995) (citing *Eisentrager* as "emphatic" rejection of extraterritorial reach of Fifth Amendment); Haitian Ctrs. Council, Inc. v. McNary, 969 F.2d 1326, 1343 (2d Cir. 1992) (citing *Eisentrager* for proposition that "the Court has rejected the claim that aliens are entitled to Fifth Amendment rights outside sovereign territory" (quoting *Verdugo-Urquidez*, 494 U.S. at 269)); Ashkir v. United States, 46 Fed. Cl. 438, 441-42, 443 (Fed. Cl. 2000) ("Moreover, in Johnson, the Supreme Court recognized that any analysis of the limited extraterritoriality of the criminal protections of the Fifth Amendment was extendable to the entire Bill of Rights." (citing *Eisentrager*, 339 U.S. at 784)).
in Afghanistan and the decision to house detainees captured there and elsewhere in the world in Guantanamo Bay, Cuba, that put the holding in *Eisentrager* squarely in focus. In a series of cases, the Bush Administration argued that the detainees had no right to challenge their status as enemy combatants in U.S. courts and that *Eisentrager* precluded jurisdiction over the detainees' habeas petitions.

In *Rasul*, both the D.C. District Court and Court of Appeals agreed that *Eisentrager* precluded jurisdiction over habeas petitions brought by aliens held abroad. Writing for a majority of the Supreme Court, Justice Stevens disagreed. *Eisentrager*, he explained, looked only at whether habeas jurisdiction would be constitutionally required in the absence of a statutory grant of jurisdiction. Based on their prior decision in *Ahrens*, the Court assumed that a district court only had statutory authority over habeas petitions when the petitioners were located within that court's territorial jurisdiction. Accordingly, the Court looked only at whether the *Eisentrager* petitioners, then held in Germany, were constitutionally guaranteed the writ. *Ahrens*, however, had been overruled by a later decision, *Braden v. 30th Judicial Circuit Court*, which held that it was the custodian's, and not the petitioner's, presence in the court's territorial jurisdiction of the court that mattered for jurisdiction under the habeas statute. “Because *Braden* overruled the statutory predicate to *Eisentrager*’s holding,” Justice Stevens explained, “*Eisentrager* plainly does not preclude the exercise of § 2241 jurisdiction over petitioners’ claims.”

For good measure, though, Justice Stevens hinted that *Eisentrager*’s constitutional holding was also irrelevant to the Guantanamo detainees’ petitions, noting that Justice Jackson listed six facts “crucial” to his rejection of jurisdiction in *Eisentrager*, most of which were not true of the Guantanamo detainees:

They are not nationals of countries at war with the United States, and they deny that they have engaged in or plotted acts of aggression against the United States; they have never been afforded access to any tribunal, much less charged with and convicted of wrongdoing; and for

181. *Id* at 476.
182. *Id* at 476-78 (citing *Ahrens v. Clark*, 335 U.S. 188, 192 (1948)). Note that as with *Yamashta, Ahrens* provoked a dissent from the judge Justice Stevens once clerked for, Wiley Rutledge. As in *Hamdan*, Stevens uses the opportunity of writing the majority opinion in *Rasul* to breathe new life into Rutledge’s dissent. See Green, *supra* note 100, at 114.
more than two years they have been imprisoned in territory over which
the United States exercises exclusive jurisdiction and control.185

Justice Kennedy expanded on this hint in his concurrence.186 For
Justice Kennedy, Jackson’s multifaceted analysis in Eisentrager
reflected a careful attempt to manage the separation of powers and to
balance judicial review and executive authority.187 Different situations
will warrant a different balance;188 based on the totality of factors in
Eisentrager, the Court found judicial involvement through the writ
inappropriate.189 For Justice Kennedy, the situation in Rasul, however,
was markedly different in at least two important ways: “First,
Guantanamo Bay is in every practical respect a United States territory,
and it is one far removed from any hostilities.”190 Second, whereas the
Eisentrager petitioners had already had an opportunity to challenge
their detention in a trial before a military commission, the Rasul
petitioners had not been given any opportunity to challenge their
indefinite detention or their status as enemy combatants—a status they
contested.191 For Kennedy, these two facts shifted the balance in favor
of judicial involvement.192

Justice Scalia found both Justice Stevens’ and Justice Kennedy’s
reading of Eisentrager “implausible in the extreme.”193 As he read it,
Eisentrager specifically rejected application of the habeas statute to
aliens held abroad, a holding Braden did nothing to disturb, and held as
a constitutional matter “that aliens abroad did not have habeas corpus

185. Id. at 476.
186. Kennedy rejected Stevens’ argument about the relationship between Braden and
Eisentrager. Id. at 485 (Kennedy, J., concurring) (“[T]he Court’s approach is not a plausible
reading of Braden or Johnson v. Eisentrager.”).
187. See id. at 485-86 (“Eisentrager considered the scope of the right to petition for a
writ of habeas corpus against the backdrop of the constitutional command of the separation
of powers.”).
188. See id. at 487 (“[F]aithful application of Eisentrager, then, requires an initial
inquiry into the general circumstances of the detention to determine whether the Court has
the authority to entertain the petition and to grant relief after considering all of the facts
presented.”).
189. Id. at 486 (“Because the prisoners in Eisentrager were proven enemy aliens found
and detained outside the United States, and because the existence of jurisdiction would have
had a clear harmful effect on the Nation’s military affairs, the matter was appropriately left to
the Executive Branch and there was no jurisdiction for the courts to hear the prisoner’s
claims.”).
190. Id. at 487.
191. Id. at 488.
192. See id. (“In light of the status of Guantanamo Bay and the indefinite pretrial
detention of the detainees, I would hold that federal-court jurisdiction is permitted in these
cases.”).
193. Id. at 489 (Scalia, J., dissenting).
By Justice Scalia’s reading, the majority and concurrence did not interpret or distinguish *Eisentrager*; they overruled it.\(^{95}\) Worse still, “[T]he Court springs a trap on the Executive, subjecting Guantanamo Bay to the oversight of the federal courts even though it has never before been thought to be within their jurisdiction—and thus making it a foolish place to have housed alien wartime detainees.”\(^{96}\)

Either way, Justice Stevens’ majority opinion did nothing to disturb *Eisentrager’s* constitutional holding, whatever it might be. That question was soon presented to the Court after Congress intervened to remove statutory habeas jurisdiction. In *Boumediene*, Justice Kennedy expanded his multifactor, separation of powers, balancing analysis.\(^{97}\) For Kennedy, *Eisentrager* did not represent a formal rule denying constitutional habeas protection to aliens held outside the sovereign territory of the United States.\(^{98}\) Instead, Kennedy focuses on other “authoritative” language of *Eisentrager* that suggested a functional test based on practical considerations.\(^{99}\) Noting the factors listed by Jackson in *Eisentrager*, Kennedy finds:

> [A]t least three factors are relevant in determining the reach of the Suspension Clause: (1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner’s entitlement to the writ.\(^{200}\)

Kennedy concludes that the Guantanamo detainees, whose status as enemy combatants was disputed and not yet been fully adjudicated and who were housed in territory far from the battlefield and subject to the United States de facto sovereignty and plenary control, have a constitutional right to habeas corpus.\(^{201}\)

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194. *Id.* at 502. He also found any distinction between U.S. control over Landsberg and U.S. control over Guantanamo untenable. *Id.* at 500.
195. See *id.* at 497 (“The reality is this: Today’s opinion, and today’s opinion alone, overrules *Eisentrager* . . .”).
196. *Id.* at 497-98.
198. See *id.* at 2236 (“A constricted reading of *Eisentrager* overlooks what the Court sees as a common thread unifying all these cases: The idea that extraterritoriality questions turn on objective factors and practical concerns, not formalism.”).
199. *Id.* at 2257-58 (“Practical considerations weighed heavily as well in *Johnson v. Eisentrager* . . .”). Kennedy finds such a functional interpretation of *Eisentrager* to be more in line with the Insular Cases which preceded it and *Reid v. Covert* which followed it. *Id.*
200. *Id.* at 2259.
201. *Id.* at 2260-62.
Justice Scalia, again in dissent, thoroughly rejected this reading. The Administration had “relied on our settled precedent in \textit{Johnson v. Eisentrager}, when he established the prison at Guantanamo Bay for enemy aliens,” and had good reason to do so: “\textit{Eisentrager} could not be clearer that the privilege of habeas corpus does not extend to aliens abroad. By blatantly distorting \textit{Eisentrager}, the Court avoids the difficulty of explaining why it should be overruled.”\textsuperscript{202}

Regardless of whether Justice Scalia was right, doctrinally \textit{Eisentrager} remained good law after \textit{Boumediene}, and lower courts have applied it as such. In a case involving the potential release of detainees into the United States, the D.C. Circuit found the Fifth Amendment inapplicable to the Guantanamo detainees on the strength of \textit{Eisentrager’s} precedent.\textsuperscript{203}

\textbf{B. Stare Decisis}

Stare decisis is the “[p]olicy of courts to stand by precedent and not to disturb settled point[s].”\textsuperscript{204} For inferior courts, that policy is a binding rule. Lower courts must follow the rules laid out in the decisions of higher courts. For future panels of the same court, the effect of stare decisis is less clear, but it operates at the very least as a strong presumption. “\textit{Stare decisis} is not an inexorable command,” the United States Supreme Court has explained, but it is “the preferred course,” and “usually the wise policy.”\textsuperscript{205} Although stare decisis has become quite controversial of late, particularly with regard to constitutional cases,\textsuperscript{206} it remains today, as it was in Benjamin Cardozo’s time, “at least the everyday working rule of our law.”\textsuperscript{207} The presumption in any given case is that prior precedents should be followed. And so it was with each of the four World War II-era cases

\begin{itemize}
  \item \textsuperscript{202} \textit{Id.} at 2294, 2302 (Scalia, J., dissenting) (citation omitted) (“[T]he great weight of legal authority indicates that a federal district court could not properly exercise habeas jurisdiction over an alien detained at [Guantanamo Bay].” (alteration in original) (quoting Memorandum from Patrick F. Philbin & John C. Yoo, Deputy Assistant Attorneys Gen., Office of Legal Counsel, to William J. Haynes II, Gen. Counsel, Dep’t of Def. (Dec. 28, 2001))).
  \item \textsuperscript{203} \textit{See} Kiyemba v. Obama, 555 F.3d. 1022, 1026 (D.C. Cir. 2009) (“[T]he due process clause does not apply to aliens without property or presence in the sovereign territory of the United States.” (citing \textit{Johnson v. Eisentrager}, 339 U.S. 763, 783-84 (1950))).
  \item \textsuperscript{204} \textit{BLACK'S LAW DICTIONARY} 1406 (6th ed. 1990) (citing Neff v. George, 4 N.E.2d 388, 390-91 (Ill. 1936)).
  \item \textsuperscript{205} Payne v. Tennessee, 501 U.S. 808, 827-28 (1991) (internal quotation marks omitted).
  \item \textsuperscript{206} Id.
  \item \textsuperscript{207} \textit{Benjamin N. Cardozo, The Nature of the Judicial Process} 20 (1949).
\end{itemize}
discussed here. The lower courts felt obliged to follow their precedents, and the Supreme Court, even in narrowing or avoiding the specific rules of those cases, never overruled any of them.

Various arguments have been made for adhering to the policy of stare decisis. As the Supreme Court has explained, “Stare decisis is the preferred cause because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.” It also promotes an interest in finality in the law.

Stare decisis has been justified as supportive of the “[s]tability and continuity of political institutions” and rule of law values as a basis for “coordinated decisionmaking.” It has also been justified as providing a well of reasoned decision making, utilizing the experience and judgment of many generations of decision makers or as part of a common law process of working the law pure.

The poor fit between the four World War II cases discussed above and the doctrinal justifications for stare decisis should be apparent. At the very least, these are far from paradigmatic cases for such treatment. Far from part of a long line of tradition, these cases are best described as historical orphans. With the possible exception of Eisentrager, these cases were largely novel and were not themselves

208. Payne, 501 U.S. at 827.
209. Id. (“Adhering to precedent ‘is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than it be settled right.’” (quoting Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting))).
the result of any "consistent development,"\(^1\)\(^2\) \(^3\) Quirin,\(^1\)\(^4\) in fact, seems at odds with \textit{Ex parte Milligan},\(^1\)\(^5\) the most pertinent prior precedent. Nor, again with possible exception of \textit{Eisentrager}, were the rules in these decisions developed in subsequent case law.\(^1\)\(^6\) Prior to 2001, these cases had largely been forgotten and citations to them were insignificant and few.\(^1\)\(^7\) The singularity of these precedents lowers the stakes of choosing not to follow them; neither the stability of the court nor respect for its decisions seem legitimately threatened by the dismissal of four long-forgotten cases. Nor can it be said that the rules reflected in the four decisions have been worked pure by later courts or proven wise by later applications.

Stability, predictability, and other rule-of-law principles all seem odd fits for justifying adherence to these four decisions. Certainly, the Bush Administration hoped that these decisions would prove accurate predictions of how the current Court might hold, and some have argued that these decisions reflect stable rules applicable in wartime.\(^1\)\(^8\) But at the same time, all four decisions recognize wartime exceptions to the due process rights individuals have in peacetime. They present rules vastly different from those individuals normally expect and courts normally apply. It seems strange to argue that rules that have not been applied for fifty years should be used now out of concern for stability and predictability.

So should the four decisions be given a presumption of \textit{stare decisis}? In \textit{Planned Parenthood v. Casey}, the Court suggested four specific factors that should be considered before deciding to depart from \textit{stare decisis} and overrule a prior case.\(^1\)\(^9\) These include (1) "whether the rule has proven to be intolerable simply in defying practical workability"; (2) "whether the rule is subject to a kind of

\(^{215}\) \textit{Eisentrager} is at least in line with territorial views of the Constitution's scope visible in \textit{In re Ross}, 140 U.S. 453 (1891), holding that the Constitution does not give temporary subject the right to trial by jury from crimes committed outside United States, and the Insular Cases. \textit{See, e.g.,} Dorr v. United States, 195 U.S. 138, 149 (1904) (holding that right of trial by jury did not extend to Philippines); Territory of Hawaii v. Mankichi, 190 U.S. 197, 218 (1903) (holding that constitutional protection did not apply in territorial Hawaii); Downes v. Bidwell, 182 U.S. 244 (1901) (holding that Constitution did not fully apply in Puerto Rico); \textit{see also supra} notes 173-182 and accompanying text.

\(^{216}\) \textit{Ex parte Quirin}, 317 U.S. 1 (1942).

\(^{217}\) 71 U.S. 2, 77 (1866); \textit{see Vázquez, supra} note 35, at 240-41 (discussing tensions between \textit{Milligan} and \textit{Quirin}).

\(^{218}\) Johnson v. Eisentrager, 339 U.S. 763 (1950); \textit{see supra} notes 172-178 and accompanying text.

\(^{219}\) \textit{See supra} Part II.A.

\(^{220}\) \textit{Cf. Posner & Vermeule, supra} note 18, at 4-5.


HeinOnline -- 84 Tul. L. Rev. 992 2009-2010
reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation"; (3) "whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine"; or (4) "whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification." The Court has also explained that it does not "apply stare decisis as rigidly in constitutional [cases] as in nonconstitutional cases." On the contrary, "Considerations in favor of stare decisis are at their acme in cases involving property and contract rights, where reliance interests are involved . . . ."

These four factors, however, are meant to capture the costs and benefits of overruling the prior decision or departing from it. They do not really answer the question of whether stare decisis should attach to a decision in the first place. This is an important distinction. Suggesting that stare decisis should not apply is not the same as suggesting the prior decision should be overruled or ignored. Instead, the question is whether the prior opinion should be given any special weight in deciding a current case. The normal presumption of stare decisis might be thought of as a deferential standard of review—the prior holding will be upheld unless there are particularly strong reasons not to. The real question posed by the four undead wartime cases discussed here is when the rule in a prior precedent should be looked at de novo. In the absence of a presumption of stare decisis, a prior decision might be viewed as persuasive authority. If a court finds

222. Id.
224. Id. at 828.
225. In essence, in the absence of stare decisis, one might treat the prior case much as state courts treat the decisions of other state's courts or in the manner many have suggested foreign decisions should be treated: as an important data point about how another court treated a similar issue, one whose reasoning might be persuasive or might not. See, e.g., Osmar J. Benvenuto, Note, Reevaluating the Debate Surrounding the Supreme Court's Use of Foreign Precedent, 74 FORDHAM L. REV. 2695, 2726-30 (2006) (laying out arguments in favor of foreign decisions as persuasive evidence). The decisions of foreign courts need to be examined carefully—the courts, constitutional provisions, and local circumstances may all differ in ways that make their opinions less pertinent to a U.S. case. See, e.g., Stephen Breyer, Assoc. Justice, U.S. Supreme Court, Keynote Address at the American Society of International Law Proceedings (Apr. 2-5, 2003), 97 AM. SOC'Y INT'L L. PROCE. 265, 268 (2003) (making clear that foreign precedent must be "briefed fully, with a comprehensive explanation of the legal relationship[.]"). These wartime decisions, separated from us by history rather than geography, may need to be examined in the same way. See M.N.S. SELLERS, REPUBLICAN LEGAL THEORY: THE HISTORY, CONSTITUTION AND PURPOSES OF LAW IN A FREE STATE 99 (2003) ("Legal history is comparative law without travel.").
the prior reasoning persuasive or illustrative it may choose to reaffirm the prior rule. Alternatively, it may reject the prior court's reasoning and with it, that court's result.

The four *Casey* factors do not really go to this question. Even so, they make a very weak case for applying stare decisis to the four cases discussed here. The first factor, whether the rule has proven practically "intolerable" or "unworkable," is simply inapposite to these cases. The rules have not been applied since then, so there is little evidence one way or the other. Whether the underlying facts have changed is similarly difficult to answer. Both everything and nothing has changed since World War II. Aside from the obvious fact that the enemy is different, the nature of the war is different (rather than a pitched battle between two leagues of states, the United States is now embroiled in a global conflict with a terrorist organization), the applicable international law is different (new Geneva Conventions were ratified in 1949 and modern human rights only developed after World War II), and modern society is obviously different (people and information travel with ease unimaginable in the 1940s). On the other hand, little has changed. Warfare still raises the same questions of institutional competence and separation of powers and the same concerns about expediency, secrecy, intelligence gathering, and civil rights.

The second factor, reliance, seems similarly inapposite. The Bush Administration did argue that it relied on the four precedents in planning its post-September 11 strategies. Guantanamo Bay was specifically chosen as a detention site based on *Eisentrager*'s seeming promise that extraterritorial detentions would be beyond judicial review, a point Justice Scalia highlighted in his *Rasul* dissent. Although this would seem like the type of reliance that "would lend a special hardship to the consequences of overruling," the Court has suggested that this second *Casey* factor is meant less to protect the

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226. See *Casey*, 505 U.S. at 845-55.
229. *Johnson v. Eisentrager*, 339 U.S. 763, 778 (1950); see *Rasul*, 542 U.S. at 506 (Scalia, J., dissenting) (criticizing majority opinion for frustrating "our military commanders' reliance upon clearly stated prior law").
Government than to protect individuals. Certainly, it would seem severe to curtail individual rights merely to avoid inconveniencing the Government.

Opponents of the Bush Administration's policies have made arguments concerning the third Casey factor, arguing that the availability of habeas corpus has expanded considerably since the 1940s, that decisions like Eisentrager are based on outdated notions of territoriality, and that the highly technical approach of the four World War II decisions looks increasingly quaint, outdated, or strange. And Justice Stevens used such an argument in his Rasul opinion, arguing that Eisentrager's statutory holding had been based on precedents about habeas procedure that have since been rejected. But, in general, arguments about developments in related areas of law depend on one's definition of related areas of law. One could argue that the relevant categories include equal protection and habeas law. But one could also argue that the only truly relevant area is emergency or wartime law, neither of which have necessarily changed. In a sense, the answer seems largely indeterminate, boiling down to one's preconception of the principles relevant to these wartime cases.

Altogether, what one is left with is a highly uncertain doctrinal case for stare decisis. Few of the justifications for stare decisis suggest granting a presumption in favor of the four World War II cases considered here, and the factors normally considered for and against overruling a prior rule seem decidedly inapposite or uncertain. Whether or not stare decisis should be applied to these cases seems instead to involve some broader judgment of the wisdom of these decisions. Have the holdings of these wartime cases come to be seen as morally or constitutionally "intolerable"? Have our background understandings of the constitutional values at stake in these cases changed enough to sap them of their vigor? Answering these questions requires a more serious historical inquiry, the topic that will be tackled in the next Part.
III. **THE LESSONS OF HISTORY**

A. **Teachers and Students**

While stare decisis’s message may be hard to hear in these cases, shouted proclamations about the “lessons of history” have been hard to tune out. Articles, books, and speeches drawing lessons from the history of wartime cases, often explicitly admonishing that the “lessons of history” be heeded, have been ubiquitous. Sometimes these lessons are cast in broad terms, as the lessons of wartime cases more generally. Other times, the calls are more specific, asking us to heed the lessons of a particular case, like *Quirin* or *Yamashita*. But the lessons to be learned fit a relatively standard model: In response to

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234. See, e.g., The Hon. Frank J. Williams et al., *Still a Frightening Unknown: Achieving a Constitutional Balance Between Civil Liberties and National Security During the War on Terror*, 12 *Roger Williams* U. L. Rev. 675, 746 (2007) (“What is shocking is the failure by many to put the current crisis, including war making in historical perspective. As always, there is much to be learned from history.”); Geoffrey R. Stone, *A Lawyer’s Responsibility: Protecting Civil Liberties in Wartime*, 22 Wash. U. J.L. & Pol’y 47 passim (2006) (“One of the lessons of American history is that when episodes of military conflict arise we not only compromise our liberties, but we do so excessively and to a degree we often come later to regret. The challenge is to understand why that happens, to avoid repeating the same pattern of mistakes in the present and in the future, and to articulate the role of lawyers in addressing those questions.”).

235. See, e.g., Ronald W. Meister, *In Time of War: Hitler’s Terrorist Attack on America*, N.Y.L.J. Oct. 11, 2005, available at http://www.cll.com/files/RWMNYLJArticle.PDF (book review) (discussing “the weakness of *Quirin* as a precedent,” questioning whether the courts had learned “the beneficial lessons of history,” and pondering “whether the current Supreme Court will consider *Quirin* to be a valuable precedent, or instead regard it as the Court and the country at large have come to view its notorious decision two years later in *Korematsu*’); Judith Resnik, *Invading the Courts: We Don’t Need Military “Tribunals” to Sort Out the Guilty*, 25 Legal Times 14 (2002) (“Many of us who teach that case [*Quirin*] had grouped it with other ‘war cases’—the 1940s decisions in *Korematsu* and *Hirabayashi*... *[W]*e know now that the restrictions on civil rights tolerated by the Supreme Court in [*Quirin*] were unnecessary and wrong.”); Michal R. Belknap, *A Putrid Pedigree: The Bush Administration’s Military Tribunals in Historical Perspective*, 38 Cal. W. L. Rev. 433, 480 (2002) (“As we have seen, the history of American military commissions is not a happy one.... Their tainted history suggests that they can only tarnish a just war on terrorism.”).

236. See, e.g., Harlington Wood, Jr., “Real Judges,” 58 *NYU Ann. Surv. of Am. L.* 259, 274 (2001) (“But now, because of the terrorists’ uncivilized attacks, the use of a military tribunal is again being considered as advocated by Attorney General Ashcroft. When I saw that in the paper several weeks ago I took the liberty of sending copies of the dissent of Justice Rutledge and Justice Murphy from the *Yamashita* case to the Attorney General so that neither he nor his staff would overlook the history lessons to be learned.” (footnote omitted)); Major Bruce D. Landrum, *The Yamashita War Crimes Trial: Command Responsibility Then and Now*, 149 Mil. L. Rev. 293, 300-01 (1995) ("[I]f prosecutors must prove command responsibility... they will have to prove that the accused 'knew or had reason to know' of the violations and then wrongfully failed to act... [A]ny conviction obtained without such proof would only martyr the accused and likely would not 'meet the judgment of history.' Such proof are the lessons of *Yamashita.*" (footnote omitted)).
wartime threats, the Executive branch reacts aggressively, often at the expense of civil liberties and vulnerable minorities.\textsuperscript{237} While some of these reactions are rational good-faith responses to apparent threats, others are panic-driven overreactions,\textsuperscript{238} politically driven attempts to look decisive,\textsuperscript{239} or opportunistic exploitations of public fear.\textsuperscript{240} Judges, paralyzed by a want of information and afraid to put Americans at risk, scrap their customary scrutiny of Executive acts and defer.\textsuperscript{241} Only with the return of peace, do Americans realize the overreactions and regret the attacks on civil liberties.\textsuperscript{242} The “lesson” of this history is that the cycle must be broken and civil liberties vigilantly guarded in wartime.\textsuperscript{243}

\textsuperscript{237} Cole, supra note 16, at 1349 (“The history of emergencies in the United States reflects a consistent pattern in which government officials target liberty-infringing security measures at the most vulnerable, usually foreign nationals, while reassuring the majority that their own rights are not being undermined.”).

\textsuperscript{238} See Stone, supra note 234, at 52 (“So, throughout our history we have a pattern of overreacting to the demands of wartime and unnecessarily restricting civil liberties.”); Geoffrey R. Stone, War Fever, 69 Mo. L. Rev. 1131, 1148 (2004) (“On the other hand, history is replete with instances in which the nation has excessively suppressed civil liberties in wartime without any compelling or even reasonable justification.”); David Cole, Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis, 101 Mich. L. Rev. 2565, 2590 (2003) (“[T]he public and their elected representatives are especially prone to overreaction during times of crisis.”).

\textsuperscript{239} See Cole, supra note 16, at 1350 (“Accordingly, politicians will pursue ‘the course of least resistance’—selectively sacrificing the liberties of vulnerable groups in the name of furthering the security of the majority. It is much easier to sell an initiative that denies the rights only of foreign nationals than one that requires everyone to sacrifice their rights.”); Stone, supra note 238, at 1140-41 (“In such circumstances, the best way to alleviate public fear may be to demonstrate that the government is taking action, whether or not such action is likely to be effective. Although this may calm the public, the very fact that the government takes drastic action may also affirm the legitimacy of the fear.”).

\textsuperscript{240} See David Strauss, Presentation at Free Speech in Wartime Conference (Jan. 16, 2005), 36 Rutgers L.J. 919, 921 (2005) (identifying threat of opportunism in wartime reactions and using Japanese internment as particularly good example of phenomenon); Stone, supra note 238, at 1149 (“Laws restricting civil liberties are especially appealing to public officials in wartime because they are relatively inexpensive, cater to public fear, create the illusion of decisive action, burden only those who already are viewed with contempt, and enable public officials to silence their critics in the guise of serving the national interest.”).


\textsuperscript{242} See Stone, supra note 234, at 48 (“One of the lessons of American history is that when episodes of military conflict arise we not only compromise our liberties, but we do so excessively and to a degree we often come later to regret.”).

\textsuperscript{243} \textit{See id.} at 52 (“[I]t is not clear that when the situation arises again, and the same fears overtake the nation, we will be any better at addressing the problem.”); \textit{id.} at 53 (“A critical challenge, then, is to figure out how to learn from our own history and how to use that
Although this story is oft-repeated, it can be difficult to discern exactly how it should be used by judges. Are prior precedents useless? If so, which ones? The specifics seem mumbled. Part of the problem is that those proclaiming the lessons of history are often unclear to whom they are speaking, who they hope will heed these lessons. Sometimes, they seem to be speaking primarily to the political branches, warning them not to repeat the policies earlier courts upheld. Other times, they seem to be speaking to the American public, warning them not to tolerate the policies chosen by their wartime leader and endorsed by their wartime courts. At times, it is unclear whether the true target of their wrath is the decisions of the Court or the government policies they upheld. Perhaps most confusingly, these commentators express extreme skepticism about what courts can do, practically accepting poor wartime performance as inevitable. Nonetheless, despite this cynicism and confusion, explicitly or implicitly, these would-be teachers seem to be talking to courts as well, warning them not to follow their past mistakes and learning in a way that prevents, or at least makes less likely, the repetition of the same errors over and over again.

244. See, e.g., Joseph Margulies, The Right to a Fair Trial in the War on Terror, 10 Gonz. J. Int’l L. 57, 58-59 (2006) ("I am astounded at how a-historical, how mindless, and how utterly ignorant the administration seems to be of the lessons of history . . . ."); Stone, supra note 234, at 53-54 (discussing the role government lawyers should play in policing abuses during wartime); Stone, supra note 238, at 1142 (“Congress could also respond better in the future by taking the Constitution more seriously. Just as a deeper understanding of civil liberties might enable the public to react more calmly to the exigencies of wartime, so too a deeper appreciation of constitutional rights might help their elected senators and representatives better meet their responsibilities.”); id. at 1144 (“A similar evaluation applies to the executive.”); Belknap, supra note 235, at 480 (learning from Quirin the lesson that military commissions are a bad idea, rather than that the Court was wrong to uphold them).

245. See, e.g., Margulies, supra note 244, at 59 (speaking to lessons “we” should learn from history); Geoffrey R. Stone, Foreword: A Culture of Civil Liberties, 36 Rutgers L.J. 825 passim (2005) (regularly invoking “we” as students of history’s lessons); David Cole, The Priority of Morality: The Emergency Constitution’s Blind Spot, 113 Yale L.J. 1753, 1755 (2004) (“History suggests that we ought to do everything we can to restrict suspicionless preventive detention, not to expand it.”) (first two emphases added).

246. Another problem is that Korematsu thoroughly dominates these discussions, obscuring everything else.

247. See, e.g., Stone, supra 234, at 54 (“Through history the Court has a mixed record in meeting its responsibilities.”); Bruce Ackerman, The Emergency Constitution, 113 Yale L.J. 1029, 1043 (2004) (“If Hugo Black fell down on the job, will his successors do any better?”); Cole, supra note 245, at 1761 (explaining that Bruce Ackerman would replace judicial review with a supermajoritarian escalator “because courts are largely ineffectual on matters of national security,” and observing that “[t]here is substantial and familiar evidence to support that charge”).
asking them to look at future wartimes cases with the lessons of previous wars in mind.  

There is one group of commentators that is clearer in its directions to judges. A number of commentators have argued that the traditional criticisms of wartime decisions are infected with hindsight bias—from their peacetime perch, modern critics diminish the threats those prior courts had to consider. Instead, these counter-commentators assert an alternative lesson of history, that these wartime decisions represent the best attempts by judges faced with the very real dangers and uncertainties of wartime to balance concerns for national security and liberty and as such should be followed.  

This Part asks what courts can or should do with all these competing suggested lessons and considers the role history should play in determining the stare decisis effect of these four decisions. After first putting the question into some context for the problem of using history, this Part lays out three possible models of what we might mean when we suggest that judges learn the lessons of history: (1) history as facts about the original case that undermine our confidence in the substantive decision or the process by which it was decided; (2) history as extrajudicial “replacement-precedent” with the post-decision judgment of the elected branches, the public, or possibly others taking center-stage; and (3) history as a vehicle of constitutional principal, as a means for understanding constitutional commitments. Intriguingly,

248. See, e.g., Geoffrey R. Stone, National Security v. Civil Liberties, 95 CAL. L. REV. 2203, 2209 (2007) (“Because we know from experience that there is a pattern of excessive restriction of civil liberties in wartime, courts in the twenty-first century must abandon the ‘logical’ presumption of deference to executive and military authority and employ a more rigorous standard of review.”); Stone, supra note 241, at 1329 (“Throughout our history, judges have erred too much on the side of deference in times of crisis. Like other citizens, judges do not want the nation to lose a war, and they certainly do not want to be responsible for a mass tragedy.”); Stone, supra note 245, at 829 (“We should not expect too little of our judges. They have an essential role to play in these circumstances, and we should not be too quick to invite them to abdicate their responsibilities.”); Stone, supra note 238, at 1145 (“What is the appropriate role of courts in wartime? To what extent can—and should—the Constitution, as interpreted and applied by the judiciary, restrain the pressures for wartime suppression of dissent?”); id. at 1152 (“As the Court has learned by experience and sustained reflection, if the nation is to preserve civil liberties in the face of wartime fear and hysteria, the Court must articulate clear constitutional rules that are not easily circumvented or manipulated by prosecutors, jurors, Presidents, or even future Supreme Court Justices.”).  

249. See, e.g., POSNER & VERMEULE, supra note 18, at 86 (“With the benefit of hindsight, the early reactions might seem inexplicable except as the result of panic. But this does not do justice to the problem that the government faces at the time of emergency, when uncertainty is great and the consequence of error may be catastrophic.”); POSNER, LAW, PRAGMATISM, AND DEMOCRACY, supra note 26, at 299.  

250. See, e.g., POSNER & VERMEULE, supra note 18, at 4-5.
these three models differ not only in how history is used, but also in the period of history to be investigated. Each focuses on a different period of time: The first looks at the history of the case itself. The second looks at the history of the period following the Court's decision. The third, finally, looks at the present, at contemporary reactions to the case and its holding. These Parts consider when, if ever, any of these models should play a role in the stare decisis analysis of earlier cases.

B. History's Mysteries

Law and history have a long and tangled relationship.251 History and historical arguments make regular appearances in judicial opinions and briefs. *Eisentrager* spent considerable space discussing the historical treatment of enemy aliens by the United States,252 and its successor, *Boumediene*, delved deeply into the scope of the writ of habeas corpus in pre-1789 Great Britain.253 Moreover, the process of parsing precedent looks in many ways like historical analysis; courts do not only look to prior opinions for wisdom, but carefully interrogate the facts of those cases to determine whether current ones are truly analogous.254

Originalism has provided the deepest discussion of the relationship between history and stare decisis. Recent debates over when and whether stare decisis should be applied have focused on potential conflicts between precedent and original public meaning. With the *Casey-Roe*255 line of abortion-rights cases as their main inspiration, scholars have debated whether judges should always, sometimes, or never overrule decisions that conflict with their assessment of the Constitution's original meaning.256 At first glance,
that question might seem analogous to the question posed here: namely, the extent to which history’s approbation for a particular opinion should affect its value as precedent. Both questions involve historical investigations and focus on the meaning of constitutional history; arguments against a precedent from originalism might be framed as arguments that history shows a case was wrongly decided. Both questions ask when a current judge should second-guess the analysis of a prior one.

But upon closer analysis, it becomes clear that such discussions reveal little about the application of the lessons of history suggested here. Originalist discussions of stare decisis are concerned with the prehistory of a particular opinion. The assumption is that historical materials dictated a particular holding that the actual holding can be measured against. There is a binary quality to the historical analysis: the opinion is either right or wrong in its assessment of the original meaning of a particular provision. In a sense, the question lines up well with the either-or nature of the Casey stare decisis factors; in both

311 (2005) (arguing that Supreme Court should follow original meaning over its own precedent and overturn Casey).

257. None of this is meant to discount the possibility that originalist arguments might be relevant to the cases discussed here. Nor should this imply that the lessons of history would trump original meaning. The point instead is that the question of original history is a different one from the one posed here, and originalist analysis of the cases here is accordingly set-aside for another time. To the extent that originalist history dictates a particular answer in one of these cases, whether the one adopted by the Court or not, see Boumediene, 128 S. Ct. at 2303-07 (Scalia, J., dissenting); its effect must be considered, but that would be the topic of another paper.

Interestingly though, the wartime cases discussed here have rarely turned on questions of original meaning. Rather than focusing on the content of specific powers or rights granted by the Constitution, these cases have focused on balancing different rights and powers against one another or on mediating interbranch conflicts. Many of these cases are best framed as cases about deference, about when the judiciary should second-guess decisions made by the Executive or Congress and when it should defer. The one possible exception would be the question whether habeas corpus is available to aliens held outside the United States raised first in Eisentrager, 339 U.S. 763, and later in Rasul v. Bush, 542 U.S. 466 (2004), and Boumediene, 128 S. Ct. 2229. In Boumediene, 128 S. Ct. at 2246, Justice Kennedy does look at the purpose and scope of habeas corpus in 1789, a question of original meaning. But even there, the original meaning plays a limited role: Justice Kennedy finds the historical evidence regarding the scope of the writ ambiguous, relying on the history instead to support his views on the Judiciary’s role in reviewing the Executive. Once jurisdiction over the habeas petitions is established, Justice Kennedy returns to a fact-specific balancing test. The relief available to habeas petitioner turns on “how much process is due” under the circumstances. Eisentrager, the case it distinguishes and whose stare decisis effect is in question here, seemed to turn at least as much on practical concerns regarding the effect of judicial review in such a case as it does on the historical scope of the writ. For an interesting discussion of originalist theory’s imperfect fit with and apparent disinterest in foreign affairs law, see generally Ingrid Wuerth, An Onginalism for Foreign Affairs?, 53 St. Louis U. L.J. 5 (2008).
cases, the question is whether the particular holding should be followed or overruled. Most of all, originalist theories imbue the history they are concerned with, the history of a provision’s ratification, with legal (or specifically, constitutional) meaning. Originalist history becomes the proper method of legal interpretation; its authority flows from the Constitution itself.

The lessons of history invoked here, on the other hand, look at the history following a particular court decision. They ask whether subsequent information or events have undermined the wisdom of a prior decision. While it is possible that subsequent history may indicate that the case was wrongly decided, it may not go that far; it may simply raise questions about the earlier court’s process or logic that undermine the authority of the holding. A future court applying logic or processes taught by the lessons of history might reach the same result as the earlier court. Moreover, the authority to look at such history is far less clear. Why should it matter what subsequent observers thought of a particular opinion?258

This does not mean that looking to post-decision history is without precedent. As seen above, subsequent historical considerations are actually baked into the stare decisis analysis, though in a narrow way.259 The Casey factors ask how the rule has operated since being handed down, whether the rule has engendered reliance, how other related rules have developed over the interim, and whether key facts underlying the rule have changed or come to be seen differently.260 All of these questions look at the history of the rule since the earlier case had been decided. More broadly, lawyers often attack a rule by arguing that a case cited is “old,”261 seemingly recognizing that time might strip a precedent of its potency, and the law does recognize

258. There are, of course, constitutional theories that seek to explain how subsequent historical events can undermine a precedent. See, e.g., BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS (1998). But such “living constitution” theories generally explain how constitutional meaning can be changed by the passage of time. The lessons of history invoked here do not have such high aspirations. They do not argue that constitutional meaning has changed, but rather that the original court got something wrong.

259. See supra Part II.B.


261. See, e.g., Keeler v. Harford Mut. Ins. Co., 672 A.2d 1012, 1017 (Del. 1996) (“But precedents, over time, may lose their acceptability . . . .”); Brief of Appellant at 13, Massey v. Delaware, No. 82, 2009 (Del. June 11, 2009) (“As stated previously, and contrary to the outdated and distant cases cited by the Appellee . . . .”); Brief of Respondent at 10, Grant v. Laughlin Envtl., Inc., No. 09-0391 (Tex. May 29, 2009) (“Petitioner focuses on two cases that are allegedly ‘precedent’ requiring the First Court of Appeals to apply the “unclean hands” exception to awarding quantum meruit awards: a thirty-year-old case from Houston, Norris of Houston v. Gafas, and a fifty-eight-year-old case out of Amarillo, Rodgers v. Tracy.”).
the concept of desuetude—that is, that a rule can lose it force as law if long ignored and unenforced. The fifty-year lapse between the World War II cases discussed here and their reconsideration after September 11 might be thought of in a similar way. Yet standards for desuetude are notoriously difficult to define and opinions citing the principle are rare.\footnote{262. See generally Desuetude, 119 HARV. L. REV. 2209 (2006) (arguing in favor of desuetude). The doctrine “currently enjoys recognition in the courts of West Virginia and nowhere else.” Id. Desuetude has been discussed in a number of cases, although generally rejected. See, e.g., United States v. Jones, 347 F. Supp. 2d 626, 629 (E.D. Wis. 2004) (discussing but ultimately rejecting desuetude as defense against Migratory Bird Treaty Act because there had been recent prosecutions); United States v. Elliott, 266 F. Supp. 318, 326 (S.D.N.Y. 1967) (“We find little analytical aid in merely applying, or refusing to apply, the rubric of desuetude. The problem must be approached in terms of that fundamental fairness owed to the particular defendant that is the heart of due process.”).}

The hesitance surrounding concepts like desuetude is easy to understand.\footnote{263. Other similar concepts might include “fundamental changes in circumstances” in contract and treaty law. The international law version of this argument, \textit{rebus sic stantibus}, is notoriously rarely applied. See Harlan Grant Cohen, \textit{Finding International Law: Rethinking the Doctrine of Sources}, 93 IOWA L. REV. 65, 90-92 (2007).} One of the main functions of the legal system is to promote stability and predictability. Stability and predictability are also key components of the law’s and courts’ perceived legitimacy. Other countervailing legal interests, like justice, may at times outweigh those principles, but courts are predictably wary of endorsing a legal theory as potentially destabilizing as desuetude. The potential destabilizing effects of using history to trump precedent must similarly be taken into account. Too broad or indeterminate a role for history in stare decisis doctrine could unravel the predictability of precedent altogether. In an effort to provide clarity to cases like those discussed here, such a doctrine might instead spread chaos and uncertainty through the entire legal system.

Further complicating the search for a method of using history here is the fact that lawyers and judges have often used history badly. Lawyers have been accused by historians of practicing law-office history,\footnote{264. See, e.g., Sanford Levinson, \textit{For Whom Is the Heller Decision Important and Why?}, 13 LEWIS & CLARK L. REV. 315, 327 (2009) (criticizing opinions in \textit{Heller} as examples of “law office history”).} or history-lite,\footnote{265. See generally Martin S. Flaherty, \textit{History “Lite” in Modern American Constitutionalism}, 95 COLUM. L. REV. 523 (1995).} or forensic history\footnote{266. See generally John Phillip Reid, \textit{Law and History}, 27 LOY. L.A. L. REV. 193, 204 (1993).}—all poor imitations of
the real thing. Lawyers are accused of cherry-picking historical facts that fit the arguments they would like to make, rather than trying to understand historical events and the contexts in which they arose. While lawyers often look to history for "answers," historians are quick to point out that history involves subtle interpretations of the past and rarely dictates the outcome of cases. History is much better at complicating our understandings of the past than at confirming them.

These criticisms need to be kept in mind as we determine how to use the "lessons of history" with regard to these wartime cases. While there are many views of how history should be used, certain basic historical principles like change over time, context, causality, contingency, and complexity, may prove useful guideposts in figuring out what the lesson of history should actually teach.

C. Three Models

1. Model 1: History Complicates

Perhaps the simplest and most obvious use of history is as a source of information about the original case or decision. Where an investigation of the facts surrounding the case reveals anomalies, errors, or even malfeasance in either the facts on which the decision relied or the process by which the decision was made, we might say that "history" counsels skepticism and undermines the decision's precedential value. This use of history comes closest to one of the usual stare decisis factors, "whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification." Using history in this way also seems both logical and reasonable. Decisions gain legitimacy and value as precedent from their honest consideration of facts through proper legal

267. Of course, the ire of historians does not, by itself, make lawyers' use of history "wrong." It could very well be that "bad history" is good law and that what is a misuse of history for historians is a perfectly prudent use for lawyers. See Cass R. Sunstein, The Idea of a Useable Past, 95 COLUM. L. REV. 601, 602 (1995) ("The historian and the constitutional lawyer have legitimately different roles."); Reid, supra note 266, at 222 (suggesting that "forensic history" might serve certain useful legal functions even if it fails as matter of history).

268. See Reid, supra note 266, at 195-97 ("In discovering the past, the historian weighs every bit of evidence that comes to hand. The lawyer, by contrast, is after the single authority that will settle the case at bar.").


process. Where either seems missing, particularly as a result of apparent deceit, a decision warrants greater scrutiny. This model for using history’s lesson also fits well with arguments that history is best used to add complexity and context and to complicate our understanding of past events.272

Ex parte Quirin presents a perfect case for applying history in this way.273 As explained above, the story of Quirin is one that immediately raises skepticism about the decision. The military commission was convened under a veil of secrecy,274 and the true facts of how the plot was foiled were kept from the public and possibly even the Court.275 The Government was as concerned with looking capable and determined as it was with bringing the plotters to justice.276 The military commission's procedures were of questionable fairness, with highly permissive evidence rules and a panel of nonlawyer judges. The procedures were also difficult to square with the Articles of War.277 Justice Frankfurter played an unusual role in the decision, first advising the Government on how to design the military commissions in question and then appealing to his colleagues’ patriotism to pressure them into finding in the Government’s favor.278 The entire case took place under extreme time-pressure: the lawyers had little time to prepare for the military commissions and less to prepare for the Supreme Court hearing, the Court began hearing the case even before it had read the 180 pages of briefs and the 3000 page transcript of the military commission hearing, and it decided the case only three days after arguments began.279 The Court also decided the case under pressure from the President, whose threat to ignore the Court if it

272. See, e.g., Flaherty, supra note 265, at 553-54 (explaining that historical inquiry “requires viewing, or at least attempting to view, events, ideas, and controversies in a larger context”); William E. Nelson, History and Neutrality in Constitutional Adjudication, 72 Va. L. Rev. 1237, 1248-49 (1986) (“Buried within the concept of credibility is a further criterion for evaluating historical interpretations—complexity. . . . Because historians are aware that reality is in fact complex, they will normally find the more complex of two historical interpretations to be the more credible . . . .”); see also Cohen, supra note 254, at 1469 (“History is a process of learning, not a database to be mined. Understanding the lessons of the past requires care, humility, and engagement.” (footnote omitted)).


274. See supra note 46 and accompanying text (noting the dark curtains used to keep out prying eyes).

275. See supra note 42 and accompanying text.

276. See supra note 42 and accompanying text.


278. Id. at 230, 233-34.

279. See supra note 54 and accompanying text.
decided against him made it to the justices. Finally, in the three months between the short per curiam that decided the case and the fuller opinion explaining the decision, six of the plotters were executed and consensus over the Court's reasoning disintegrated. Multiple justices on both the Quirin court and contemporary ones have questioned the precedential value of the case. If ever the history of a case suggested giving it less authority, Quirin would fit the bill.

But using history in this way is actually more complicated than the near-universal derision of Quirin might make it look. First, there are various different questions that can be raised about the facts of the earlier case, and it is not clear that all of them counsel treating the prior decision in exactly the same way. The question could be about (1) the process through which the Court's decision was made, (2) the facts considered by the Court, or (3) facts of the government policy the Court was weighing. Second, it is unclear how specific the evidence of anomalies needs to be. Must it be specific to facts of a specific decision or could it be something known about some decisions used to raise questions about a broader category of similar cases?

a. Which Facts?

Suggesting that a precedent should be scrutinized where there are questions about the process through which the Court heard the case and rendered its holding seems easy to justify and easy to doctrinalize. This version of the lessons of history is particularly attractive because it is decision-neutral: the precedential value of the case is not determined by which way the Court came down or by whether or not a future Court agrees with it. Of course, the concomitant of that decision-neutrality is that under this version of the lessons of history, the whole decision is rendered questionable. One cannot pick and choose which aspects of the decision to scrutinize. In the case of Quirin, this would mean that its authority on presidential power is as questionable as its authority for the Court's power to consider enemy-detainee claims through habeas corpus. All aspects of the decision are tainted by tainted process.

280. See supra note 53 and accompanying text.
281. See supra note 55 and accompanying text.
283. It was the latter holding that Justice Stone hoped would be the lasting contribution of the case. See Vázquez, supra note 35, at 236. Some have argued that while the Court's pro-government holdings should be scrutinized, its pro-detainee holdings should survive. If the problem with Quirin is its deferential stance, such a distinction between the
This version of the lessons of history is also extremely narrow and few decisions will be affected by it. There is no evidence that any of the other three cases considered here, Yamashita, Hirota, or Eisentrager, involve this sort of tainted process. For sure, all of them were decided under a certain amount of pressure from the government, and Eisentrager and Hirota seem to have been decided to stop a flood of similar petitions. Hirota was also subject to behind-the-scenes politicking by the justices that led to Jackson’s nonrecusal and recusal, to a concurring opinion that appeared months after the per curiam, and to a vote that was never actually lodged. All of these anomalies, however, look quite ordinary for Supreme Court opinions, and none seem to raise real concerns about the legitimacy of the process underlying the Court’s holdings.

A second way the history of the case might be relevant is in raising questions about the facts considered by the Court. This could involve either the Court’s misrepresentation of certain facts it knows or a party’s misrepresentation of facts that the Court then relies on. The first resembles questions about proper process, and where such allegations arise, it seems reasonable to question an opinion’s authority. The second is more complicated. Generally speaking, a lie by the government relied upon by the Court should not automatically undermine that Court’s holding. To the extent that the Court’s holding is keyed to the facts it considered, that holding should remain sound. Different facts might just require a different holding. To the extent to which a future case involves facts that resemble those presented by the

holdings makes sense. If, however, the problem is that the Court’s process was questionable, all aspects of the decision must be scrutinized. Perhaps the Court agreed on habeas jurisdiction solely in order to rubber stamp the FDR Administration’s policy.

287. See supra notes 138-141 and accompanying text.
288. See supra notes 140-144 and accompanying text.
289. History might also be used to show that a decision was based on a fact, then believed to be true, but now known not to be. Changing scientific knowledge might have this effect. One might characterize the use of sociological evidence to demonstrate that separate schools did have a detrimental effect on children in Brown v. Board of Education, 347 U.S. 483, 494-95 (1954), in this way. An analogous argument here might be that Eisentrager was based on assumptions about international travel and communication that are no longer true today. See, e.g., Brian McEvoy, Classified Evidence and the Confrontation Clause: Correcting a Misapplication of The Classified Information Procedures Act, 23 B.U. INT’L L.J. 395, 493 (2005). A broader argument, that Eisentrager grew out of older notions of territoriality that are now outdated, might be shoe-horned in here, but probably fits better into the traditional Casey factor that looks at changes in related areas of the law. Eisentrager, 339 U.S. 763; Planned Parenthood v. Casey, 505 U.S. 833, 855 (1992).
government and considered by the Court in the earlier case, the precedent would seem valid. Here though, in the context of these wartime cases, many of the holdings revolve specifically around the level of deference the Court should grant the Executive. In these cases, lies by the government could undermine the authority of the Court's opinions. They may suggest that the deference was ill-gotten and no longer deserved. They may suggest that where the Court had assumed the government could be trusted, in fact, it cannot.290

Again though, none of the cases considered here clearly exhibits these kinds of anomalies. In *Ex parte Quirin*, it is possible that the Court was misled about how the plotters were captured and whether any of them had tried to turn themselves in, but it is not clear that those facts were really relevant to the final decision.291 The most that might be said of the others is that in an attempt to garner more deference from the Court, the government misled the Court in its assessment of the threats to the United States.292 But this sort of deception, to the extent it occurred, is much more generalized, and does less to complicate the facts of a particular case than to raise questions about deference more generally.

The third type of anomaly that history might stir up is questions concerning the government policies considered by the Court in each of the cases. Considering that those invoking the lessons of history are often unclear whether they are speaking to judges, policy makers, or the public, it would be unsurprising if it were these sorts of questions that were actually being raised.293 Thus the relevant questions unearthed by history might be the unfairness of the military commission process given to either the German would-be saboteurs or General Yamashita,294 the questionable nature of the charges against Yamashita, or the questionable nature of the MacArthur-run

293. See supra notes 244-245 and accompanying text.
International Military Tribunal for the Far East that heard the case against Hirota. The history invoked here might also question the necessity of the processes chosen by the government, particularly departures from ordinary civil or military trial practice. Here the facts unearthed by history sweep more broadly, potentially affecting all of the cases except Eisentrager.

But using history in this way is far more problematic. Concluding that the underlying decision by policy makers was wrong (the decision to try the saboteurs by military commission), does not automatically mean that the Court was wrong in refusing to second-guess that policy maker's decision. Whether a court should defer turns not only on the likelihood that the policy maker will get it wrong, but also on institutional concerns about finality, efficiency, legitimacy, and the Court's relative ability, compared to the policy maker, to get it right. A Court may be right to defer even where hindsight proves the policy ill-chosen.

b. Which Decisions?

Facts about the underlying policies may be more relevant if they begin to establish a pattern. If history teaches us that the government often or systematically adopts policies that unnecessarily burden the rights of detainees, it might raise some questions about some of the Court's holdings in the area. This raises the second large question about Model 1, how general or specific the questionable facts must be. Can the facts history teaches about one case or multiple cases undermine other decisions that fall into some similar category? Should flawed process or tainted facts or questionable policies in Quirin\textsuperscript{295} or Yamashita\textsuperscript{296} make Courts suspicious of other wartime precedents like Hirota\textsuperscript{297} or Eisentrager?\textsuperscript{298}

A broader use of Model 1 seems much closer to the lessons of history invoked in many articles and books.\textsuperscript{299} It looks for broad lessons, for example, that governments often overreact in wartime, that governments will claim as much authority as the other branches will let them, that governments often overstate threats, that policies systematically burden minorities or foreigners, or that Courts are too deferential to claims of wartime necessity, and applies them to a more

\begin{thebibliography}{99}
\bibitem{295} 317 U.S. 1.
\bibitem{296} 327 U.S. 1.
\bibitem{297} 338 U.S. 197.
\bibitem{298} 339 U.S. 763 (1950).
\bibitem{299} See supra Part III.A.
\end{thebibliography}
general category of cases. That category might be narrower, for example, all cases involving military commissions or the rights of alleged enemy detainees; the category could also be broader, for example, all cases decided by a particular Court, like the FDR Court, or even all wartime cases.

There are a number of problems though with this broader version of Model 1. First, defining the relevant category of cases can be far more difficult than it might initially appear. For example, while many are quite cavalier in invoking “wartime” or “emergency” cases,300 others have pointed out that the category is virtually impossible to define.301 Are all cases on any topic decided while the nation is at war “wartime” cases?302 When does the war for these purposes begin and end? Cases from before the actual outbreak of hostilities303 and after formal surrenders (including three of the cases here, Yamashita,304 Hirota,305 and Eisenrager),306 have at times been referred to as wartime cases.307 Similarly, Posner and Vermeule have argued that the higher judicial scrutiny in Boumediene than in Hamdi reflects the former’s longer distance from the original emergency—that is, September 11.308 Could Hamdi be a wartime case, but Boumediene not? Nor is it clear which wars count. What about the Vietnam War or the first Gulf War or the Cold War? To the extent that these lessons are meant to distinguish some period or some set of cases from another, the inability to define the relevant categories seems fatal. If wartime cases

300. See supra Part III.A.
301. For a particularly insightful discussion of this problem, see generally Mary L. Dudziak, Law, War, and the History of Time, 98 CAL. L. REV. (forthcoming 2010).
302. There may be reason to think they are. See generally Lee Epstein et al., The Supreme Court During Crisis: How War Affects Only Non-War Cases, 80 N.Y.U. L. REV. 1 (2005).
303. For example, Minersville School District v. Gobitis, 310 U.S. 586 (1940), a decision upholding a flag salute law, has been sometimes described as a peacetime case decided before American entrance into World War II and sometimes as a wartime case decided under the shadow of impending war. Compare Jack N. Rakove, The Constitution in Crisis Times, 2 CARDDOZO PUB. L. POL’Y & ETHICS J. 11, 14 (2003) (focusing on how outbreak of war after Gobitis affected how it was viewed), with Richard Danzig, How Questions Begot Answers in Felix Frankfurter’s First Flag Salute Opinion, 1977 SUP. CT. REV. 257, 266-67 (1977) (“Gobitis was written against the backdrop . . . of the need to mobilize America for war . . .”).
307. See Ludecke v. Watkins, 335 U.S. 160, 167 (1948) (“War does not cease with a cease-fire order, and power to be exercised by the President such as that conferred by the Act of 1798 is a process which begins when war is declared but is not exhausted when the shooting stops.”).
308. Posner & Vermeule, supra note 18, at 51.
cannot be distinguished from nonwartime cases, it becomes difficult to argue that stare decisis should treat them in a different way.

But an even bigger problem with the broader uses of Model 1 is that the higher the level of abstraction of the lesson, the farther it is removed from the particular questionable case, the more contestable the lesson becomes.\(^{309}\) As previously noted, there are actually two competing versions of the lessons of history.\(^{310}\) The one largely discussed so far teaches that wartime cases were wrongly decided and that their mistakes should not be repeated. A second group of commentators, however, takes the opposite view, arguing that the proper lesson to be learned from wartime cases is that deference to the Executive during war is wise.\(^{311}\) These commentators argue that post-war assessments of wartime decisions are plagued by hindsight biases.\(^{312}\) In the face of uncertain threats, the government will often take actions that may in retrospect seem unnecessary. This does not, however, mean that the action was an unreasonable response to the information then available, nor that a Court, based on the limited information available to it, was wrong in deferring to the Executive branch. These commentators often point to the institutional strengths and weaknesses of the Executive and Judicial branches, arguing that the Executive's control of the military, diplomacy, and intelligence, as well as its ability to act quickly, make it the best-situated branch to deal with crises. Courts, slow and deliberative, with great expertise in rights but limited expertise in sifting intelligence, are wise to defer during emergencies and reassert themselves when calm returns.\(^{313}\) The robust pattern of history, in which the Executive and Judiciary act in exactly this way, demonstrates its inherent wisdom.\(^{314}\)

\(^{309}\) Such abstraction may also be bad history. See, e.g., MARGARET MACMILLAN, DANGEROUS GAMES: THE USES AND ABUSES OF HISTORY 37 (2008) ("Bad history ignores such nuances in favor of tales that belong to morality plays but do not help us to consider the past in all its complexity."); Richard A. Primus, Judicial Power and Mobilizable History, 65 MD. L. REV. 171, 173 (2006) ("As careful historians are keenly aware, there are serious intellectual hazards in trying to extract grand patterns, let alone grand arcs of normative meaning, from any rich and complicated historical record."). Moreover, these broad abstracted stories can be subjected to the same types of historical critiques described above. One might point to the apparently clean facts of a particular case, for example Eisenstenger, in an effort to undermine a story that groups it together with the flaws of Quirin or Korematsu. In fact, this might be specifically what good history requires. See Reid, supra note 266, at 204-05 (calling on historians "to learn to harass historical jurisprudence").

\(^{310}\) See supra notes 18-19, 249-250 and accompanying text.

\(^{311}\) POSNER & VERMEULE, supra note 18, at 4-5.

\(^{312}\) See, e.g., id. at 86.

\(^{313}\) Id. at 4-5, 18, 30-31, 161-81.

\(^{314}\) Id. at 5, 15-18.
The first story has a clear advantage over this second story when the wartime decision in question reflects the sort of specific procedural or factual flaws discussed above. Regardless of the general wisdom of deference, the particular holding is going to be of questionable authority. Moreover, the first story probably retains some advantage with regard to decisions particularly similar or closely related to one with evident flaws. Thus the authority of a Yamashita, which does not have any of the known procedural anomalies of Quirin, might nonetheless be suspect because its holding relied primarily on Quirin, involved a substantially similar question, and was decided relatively soon after by substantially the same justices. The farther a decision gets from the type of flaws reflected in Quirin, however, the harder it becomes to choose between the two stories. In fact, for many or perhaps even most wartime cases, the two stories may actually be in equipoise—equally persuasive. A judge may still have an opinion as to which story is truer and that opinion may still be useful in considering a current wartime case, but it becomes much harder to say that one story or the other should be given a doctrinal role. The broader version of Model 1 may better capture what people mean when they call upon judges to learn the lessons of history, but it is much more difficult to form into a stare decisis principle.

2. Model 2: History Augments

A second potential way the lessons of history might be relevant to determining the stare decisis effect of these wartime decisions is as a type of precedent-replacement. In the absence of judicial opinions developing and testing the holdings of these wartime cases, we might instead look to the acts and opinions of various extrajudicial actors. Even where courts have been silent, time and experience might thus "work the law pure." A judge may still have an opinion as to which story is truer and that opinion may still be useful in considering a current wartime case, but it becomes much harder to say that one story or the other should be given a doctrinal role. The broader version of Model 1 may better capture what people mean when they call upon judges to learn the lessons of history, but it is much more difficult to form into a stare decisis principle.

315. For example, take Eisentrager, 339 U.S. 763 (1950). One might point to the fact that Eisentrager was decided by the same FDR Court that fell over itself to rubber stamp the President's policy in Quirin, 317 U.S. 1 (1942). Justice Jackson, who wrote the opinion in Eisentrager, apparently favored an even more deferential decision in Quirin than the one Chief Justice Stone ended up writing. See Vázquez, supra note 35. Eisentrager, the argument might go, thus reflected the same overeagerness to defer to Executive wartime policy. But Jackson also dissented in Korematsu, 323 U.S. 214 (1944), and overruled the President in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). Putting Eisentrager in the context of those opinions might make it look judicious, well-reasoned, and responsible.

316. See infra notes 345-372 and accompanying text (discussing Model 3).

317. See supra note 214 and accompanying text.
This use of extrajudicial sources as precedent actually has a long pedigree in U.S. foreign relations and national security law. For various reasons that include separation of powers concerns embedded in the political question doctrine, courts rarely rule on major questions of foreign affairs or war-making authority. As a result, scholars, courts, and government actors have long turned to political branch precedents to help determine the meaning and scope of various foreign affairs and national security powers. Perhaps the most well-known endorsement of this use of history is Justice Frankfurter's statement in his *Youngstown Sheet & Tube Co. v. Sawyer* concurrence that

>a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on "executive Power" vested in the President by § 1 of Art. II.\(^{318}\)

But endorsements of the importance of political branch history in this area are widespread.\(^{319}\)

*Korematsu*, a decision not directly considered here, presents a good example of how this Model 2 version of history's lesson might undermine the authority of a particular decision.\(^{320}\) No Court has yet had the opportunity to opine directly\(^{321}\) on the status of *Korematsu* as precedent, but other actors have been quite vocal in rejecting the opinion. Congress expressed its displeasure in the 1971 Non-

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318. *Youngstown*, 343 U.S. at 610-11 (Frankfurter, J., concurring).
319. See, e.g., United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 327-28 (1936) ("A legislative practice such as we have here, evidenced not by only occasional instances, but marked by the movement of a steady stream for a century and a half of time, goes a long way in the direction of proving the presence of unassailable ground for the constitutionality of the practice, to be found in the origin and history of the power involved, or in its nature, or in both combined."); see also Peter J. Spiro, *War Powers and the Sirens of Formalism*, 68 N.Y.U. L. Rev. 1338, 1355 (1993) (book review) ("It is rather the 'court of history,' an accretion of interactions among the branches, that gives rise to basic norms governing the branches' behavior in the area." (footnote omitted)).
320. 323 U.S. 214.
Detention Act, by legislating that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." Congress went even further in 1988, granting an official apology, payments of $20,000 to each surviving internee, and the establishment of a public education fund. Similarly, President Clinton spoke for the Executive Branch in repudiating the decision by bestowing the Medal of Freedom on Fred Korematsu. Outside the government, there appears to be near universal agreement that the decision was wrong and a stain on the Court's record.

None of the four decisions here reflect such a clear record of official and unofficial repudiation. *Quirin* and *Yamashita* probably come closest. While the Japanese Internment was clearly the focus of the Non-Detention Act, it could be argued that the Act's prohibition on unilateral executive detention was enacted with the Roosevelt Administration's entire record in mind, including the detention of the Nazi saboteurs in *Quirin*. Multiple Justices involved in the *Quirin* decision also questioned what they had done. Aside from that, both *Quirin* and *Yamashita* have been widely condemned by scholars—the former for the Court's questionable departures from normal procedure and the latter for the Court's willingness to overlook the blatant unfairness of Yamashita's military trial. *Eisenbringer* and *Hirotta* may have their detractors, but it is hard to argue that there is any sort of consensus, official or unofficial, that they were wrongly decided. The most one could say of those is that some consensus has coalesced that the Court was too deferential to the government's World

326. See discussion supra note 26.
327. 317 U.S. 1 (1942).
328. 327 U.S. 1 (1946).
331. Landrum, supra note 236, at 296-97.
333. 338 U.S. 197 (1948).
War II-era excesses, an assessment capacious enough to include all four decisions considered here.

It is far from clear that such a broad version of Model 2’s extrajudicial precedent warrants a doctrinal role in determining a decision’s stare decisis effect. The notable narrowness of Justice Frankfurter’s formulation is illustrative. Justice Frankfurter confines the relevance of historical practice to those that are “systematic,” “unbroken,” and “never before questioned,” where Congress and the President have consistently concurred.\(^3\) Other justices and scholars have treated political branch practice far less strictly, finding authority in much more fleeting practices and much less clear consensus.\(^3\) But Frankfurter’s caution is understandable. Integrating a consistent practice of both political branches into a doctrinal analysis can be relatively straightforward, but once these standards are loosened things become far less clear. How many instances of a particular practice must one find? How much congressional dissent can be brushed aside?

Using extrajudicial sources as replacement-precedent faces the same problems. So long as all actors have spoken and are in apparent agreement about a particular decision, as they appear to be in Korematsu\(^3\) and may be in Quirin,\(^3\) it may be relatively easy to use their views as a gloss on the decision’s meaning and authority.\(^3\) But where they disagree, or even remain silent, as they arguably have with regard to Yamashita,\(^3\) Hirota,\(^3\) and Eisentrager,\(^4\) it is far less clear that they should have that role. Moving from official to unofficial views presents similar problems. While asking what the public thinks of a particular wartime decision has some visceral appeal, the question is far from simple. Who is the public, and how does one ascertain its views? Are legal scholars stand-ins? How about historians? Commentators seem in general agreement on Yamashita, but views of

\(^{334}\) Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring).

\(^{335}\) See, e.g., Dames & Moore v. Regan, 453 U.S. 654, 686 (1981) (quoting Frankfurter but finding congressional acquiescence and Executive practice based on less than clear evidence and reasoning by analogy); see also POSNER & VERMEULE, supra note 18, at 48 (criticizing Dames & Moore on that basis).

\(^{336}\) Korematsu v. United States, 323 U.S. 214 (1944).

\(^{337}\) 317 U.S. 1 (1942).

\(^{338}\) This is of course assuming, as we consistently have here, that the opinion has not been approved by a later court or relied upon by the public.

\(^{339}\) 327 U.S. 1 (1946).

\(^{340}\) 338 U.S. 197 (1948).

\(^{341}\) 339 U.S. 763 (1950).
Eisentrager or Hirota are less clear. What if, as in the case of the two stories described above,342 commentators disagree? Does the majority story or the conventional wisdom win out?

Using Model 2 this way also threatens to be massively destabilizing. One need only think of an initially unpopular decision like Brown v. Board of Education to see the potential problem with any rule that requires less than complete consensus to negate an opinion's precedential effect.343 Looser versions of Model 2 would incentivize any group of actors who dislike a particular opinion to make sure they are the loudest voices heard. Altogether, such difficulties suggest that anything beyond clear official repudiation of a decision is best excluded from the initial stare decisis analysis.344

3. Model 3: History Tests

Both of the first two Models present plausible accounts of how the "lessons of history" might undermine the precedential value of particular decisions and may capture what some observers mean when they appeal to history's lessons. But both are pretty technical, focused on the flaws or perceptions of particular cases or categories of cases. Many of the appeals to history, on the other hand, seem much more expansive, sweeping across the entire category of wartime cases to glean broad lessons in constitutional principle. Such lessons might teach that minorities are particularly vulnerable in wartime and that courts must be equally vigilant in protecting their rights,345 or that the Executive branch will claim as much authority as it can in a crisis (for both noble and ignoble reasons) and that courts must not abdicate their own role too easily,346 or that the Executive branch often overstates the threats faced by the country and that its claims must thus be carefully scrutinized.347 Even those who read history the opposite way often paint with broad strokes, learning from the grand pattern of wartime cases that courts are wise to defer to Executive expertise during an emergency or that "the constitution is not a suicide pact," and that civil

342. See supra notes 18-19, 249-250 and accompanying text.
344. Though of course other views of the decision may factor into the traditional factors for overcoming the stare decisis presumption once it attaches. See supra Part II.B.
345. See supra note 237 and accompanying text.
346. See supra notes 238-241 and accompanying text.
347. See supra notes 237-241 and accompanying text.
liberties must take a backseat to national survival. Such broad lessons seem to be best captured by a third Model of history's potential use: history as a vehicle for constitutional principle.

At first glance, such appeals look suspiciously like the sorts of the "law-office histories" so often derided by historians and legal scholars alike. Law-office history describes the way lawyers and judges selectively quote history to affirm a desired legal argument or preconceived belief. As one critic explains, law-office history involves “the selection of data favorable to the position being advanced without regard to or concern for contradictory data or proper evaluation of the relevance of the data proffered.” Law-office history has also been criticized for its undisciplined presentism, treating historical facts as if they occurred today rather than recognizing the unique context of the past. As a result, some law-office histories have been so far removed from any historical reality as to subject judges accepting them to ridicule. Finding evidence of broad constitutional principles in the flaws of a select group of cases might fall into this same trap.

But, some have suggested that there are defensible ways to use history as a source of constitutional principle or meaning, even where the historical story told would not meet historians’ standards. John Reid recounts that “forensic” history, an “imagined” history of constitutional principles, has served as a powerful restraint on both government and judges by providing an imagined, but widely believed set of traditions that cannot easily be set aside. Others have noted that history can play an important rhetorical, discursive, or

348. See POSNER & VERMEULE, supra note 18, at 21-31.
349. See, e.g., Sunstein, supra note 267, at 603-04 (criticizing constitutional lawyers who draw concrete lessons from highly generalized readings of history or who find lessons in history that simply replicate their political commitments); Flaherty, supra note 265, at 554 ("Here legal scholars, in what in its worst form is dubbed 'law office history,’ notoriously pick and choose facts and incidents ripped out of context that serve their purposes."); Reid, supra note 266, at 197-203 (discussing criticism of law-office history).
350. Alfred H. Kelly, Clio and the Court: An Illicit Love Affair, 1965 SUP. CT. REV. 119, 122 n.13 (1965); see also Reid, supra note 266, at 204 (“Law office history does not lead the judge to a decision. In almost every instance when history is employed, the decision has already been formulated. Unprofessional history is used to explain the decision, to make the decision more palatable, or, in most cases, to justify the decision.").
351. See Festa, supra note 254, 482-83.
352. See, e.g., Sunstein, supra note 267, at 604 (criticizing Robert Bork's use of history); Reid, supra note 266, at 198 (ridiculing Justice Blackmun as "the pot calling the kettle black" for ridiculing Justice Scalia for treating history as a "grab-bag"); Reid, supra note 266, at 203, 219 (discussing criticism of Justice Black).
353. Reid, supra note 266, at 203-22.
pedagogical role by serving as a vessel for, as a means of communicating, abstract constitutional traditions and principles. There is, nonetheless, a serious danger that history will be misused. As Reid notes: “It is an open question, even when judges employ the past in a good-faith effort toward neutral judgment, whether they can, in fact, select by some historical method data that will safely guide them to conclusions not predetermined by personal choice.”

One key to using this Model responsibly is recognizing that the constitutional principles are not dictated by the past. Instead, the story handed down, to the extent it resonates and is persuasive, helps the present generation to understand and test its own political commitments. This is part of what distinguishes Model 3 from the broader versions of Model 1. Broader versions of Model 1 try to draw broad (and possibly indefensible) historical patterns from a few historical data points. They might, for example, look at the flaws of Quirin and use them as proof that the government has and will overreach in wartime. The flaws of Quirin serve a different role in Model 3. Model 3 asks not what Quirin proves, but instead how we react to it. The flaws of Quirin are used to test our understanding of constitutional principles. Those flaws might convince us that deference in wartime carries too many risks to the rule of law and that as a result we want courts to be more vigilant in their scrutiny of the Executive. Alternatively, we might look at Quirin and note that the saboteurs had been guilty and that despite its flaws no long-term harm was done to the Constitution. Based on this assessment, we might decide that some additional deference to the Executive in wartime might be desirable.

In a sense, Model 3 thus uses the history of cases like Quirin, Yamashita, Hirota, or Eisentrager as a real-life law school

355. See Primus, supra note 309 (criticizing the use of historical facts in this way).
357. See Primus, supra note 309, at 173 (“Nonetheless, it is a feature of American constitutional discourse that narratives and images from American history are invested with meaning, and those meanings are sometimes presented as embodying deep truths about American constitutional history. These conceptions of history are among the influential sources of value in constitutional adjudication.” (footnote omitted)).
358. Reid, supra note 266, at 223.
359. Cf. Kalman, supra note 354, at 124 (“For what we all say about the past and history tells us something about the past and history but even more about ourselves.”).
360. See supra notes 299-316 and accompanying text.
361. See discussion supra note 309.
363. Id.
hypothesical. Our present day reactions to the cases and the relative persuasiveness of particular “lessons” derived from them help us to test and, in the end, understand what we believe about the constitutional principles at issue.\textsuperscript{367} Whereas the first two Models of history look at the past—the first at the history of the decision itself and the second at the subsequent history of reactions to the decision—Model 3 thus focuses on the present. In this third Model, the question is how people today come to understand the meaning of a particular decision and its history.

A version of this Model might be seen in Justice Kennedy’s \textit{Boumediene} opinion.\textsuperscript{368} Rejecting the idea that the pre-1789 history of habeas corpus is dispositive in determining the scope of the suspension clause, Kennedy instead finds in the history a story of constitutional principle.\textsuperscript{369} The history of habeas in Britain illustrates a deep and longstanding rejection of unreviewable executive authority and commitment to separation of powers.\textsuperscript{370} It is this historical principle that then guides his interpretation of both the Suspension Clause and the meaning of \textit{Eisentrager}.\textsuperscript{371}

This may be an attractive understanding of what the lessons of history can do and may better capture what commentators mean than the first two Models. Its subjectivity, however, makes it much more controversial and considerably more problematic to doctrinalize. This Model of the lessons of history, by its nature, recognizes that constitutional meaning will be a battleground on which opposing histories are arrayed against each other.\textsuperscript{372} Under Model 3, the
meaning of Quirin,\textsuperscript{373} Yamashita,\textsuperscript{374} Hirota,\textsuperscript{375} or Eisentrager\textsuperscript{376} will be determined not by the past, but by our assessment of it. Whether eventual victory goes to those telling a cautionary tale about wartime overreaching or those praising our flexible wartime constitution will be largely determined by the persuasiveness of their account. The events of the past do not dictate a victor. Accordingly, such a Model seems much better situated to help a Court to decide whether to uphold or overrule a prior precedent than to determine whether it should be treated as precedent at all.

\textit{D. Lessons Learned}

So what do the lessons of history tell us to do with the four undead wartime cases here? Are they to be killed or saved? As the three Models above indicate, much depends on what we mean by the lessons of history.

There is a powerful case to be made that where the lessons of history fall into the narrower formulations of Model 1, they should prevent the initial attachment of stare decisis to the decision. Thus where history uncovers facts about the original decision that might undermine its procedural or substantive legitimacy, as it appears to do with regard to Quirin, that decision should carry no presumption of authority.\textsuperscript{377} Courts need not ignore it—they might still find its reasoning on one issue or another persuasive—but they also need not feel beholden to it. This version of the lessons of history, however, is very narrow and only speaks to the stare decisis effect of Quirin and possibly Yamashita. Other versions of this Model might be broad enough to speak to Hirota and Eisentrager but draw lessons far too debatable to justify negating those decisions’ precedential value altogether.

A similar story can be told about Model 2. Where a decision has not been reaffirmed over some long period of time and political actors

\begin{itemize}
\item \textsuperscript{373} Ex parte Quirin, 317 U.S. 1 (1942).
\item \textsuperscript{374} In re Yamashita, 327 U.S. 1 (1946).
\item \textsuperscript{375} Hirota v. MacArthur, 338 U.S. 197 (1948).
\item \textsuperscript{376} Johnson v. Eisentrager, 339 U.S. 763 (1950).
\item \textsuperscript{377} As mentioned above, which aspects of the holding will be deemed nonprecedential depends on what about the decision is flawed. If the problem is factual, then only those aspects of the decision based on those facts need be disqualified. If, however, the issue is procedural, then the entire decision might be tainted. \textit{See supra} note 283 and accompanying text.
\end{itemize}
and the public are unified in their opposition to it, there appears to be a good reason to deny the decision a presumption of stare decisis effect. Such a situation might be thought of as the desuetude of an opinion. But none of the four decisions meet this test and only *Quirin* and *Yamashita* come close.

Model 3 is more expansive and could speak to the fate of all four opinions. But by moving its focus off the particular decision in question and onto broad constitutional principles, it also ceases to speak directly to the legitimacy of the prior precedent. Model 3 lessons of history may disapprove of the rule in *Hirota* or *Eisentrager*, but they do not suggest that those decisions never had any stare decisis value at all.

This does not make Model 3 useless in deciding the fate of these wartime cases. On the contrary, Model 3 lessons may actually be determinative of whether a case like *Hirota* lives on or is killed off. As explained above, even if stare decisis does initially attach to these opinions, their uniqueness and long absence from the scene makes the pull of stare decisis on them weak. Whether to keep the rule or overrule it may turn completely on the Model 3 lessons of history we find most persuasive. If the Court is persuaded that the history of wartime cases is one of over-deference by courts, that history should be strong enough to break any weak ties tethering us to the prior opinion. *Hirota*, a decision with particularly weak ties to stare decisis (or *Quirin* or *Yamashita* for that matter) can be put to rest. The other story, that the Constitution is not a suicide pact and must be flexibly interpreted in emergencies, would have the opposite effect. That story suggests that peacetime thinking and precedent is simply irrelevant to emergencies and must be discounted. When those are removed from the equation, the stare decisis pull on these wartime decisions looks strong. For one who finds that history persuasive, *Hirota* will look as alive as it did five decades ago.

Even where the ties of stare decisis are stronger, as they may be with regard to *Eisentrager*, there may still be a role for Model 3 history. The narrow versions of Model 1 and Model 2 are quite powerful, perhaps eliminating stare decisis altogether, but their use depends on the absence of judicial reaffirmations of the rule. If a rule in *Quirin* is considered and reaffirmed in cases lacking *Quirin*'s flaws, as some arguably were in *Hamdi* and *Hamdan*, those new decisions can essentially buff the rule clean. Similarly, if we knew of procedural errors in *Eisentrager*, its reconsideration in *Verdugo-Urquidez* might have eliminated the applicability of Model 1 to its holding. The same
is true of Model 2. If future courts reaffirm a particular rule, Model 2
historical claims become nothing more than a battle between branches.
In both cases, we may be concerned with exactly how and when the
rule is reaffirmed—Yamashita’s quick reaffirmation of Quirin may not
count nor might an unthinking string cite—but in general, decisions
will have to be truly undead for the first two to apply.

Model 3, however, is not constrained in that way. Although
Model 3 arguments about historical principles will be particularly
powerful when a decision is undead, for example, in Hirota, they will
continue to have force even after a decision is reaffirmed. If a
persuasive historical story suggests that one decision, for example,
Eisentrager, was a wrong turn, a decision reaffirming it, for example,
Verdugo-Urquidez, will simply seem another step in the wrong
direction. An increasing number of reaffirmations might diminish the
persuasiveness of a historical story, but it cannot convince a believer
that that story is wrong.

Notably, although each of the three Models endorsed here
suggests that stare decisis can be overcome by history in at least some
circumstances, all three generally cabin the destabilizing effects that
might be associated with such a rule. Models 1 and 2 require
extraordinarily specific facts and a clear absence of societal reliance on
a decision. Arguments based on Model 3 will generally only be
persuasive to the extent to which they resonate with widely held
understandings about the law.\footnote{Notably, this makes these uses of history to override or undermine stare decisis considerably less destabilizing than more common originalist attacks on stare decisis. While originalist arguments against stare decisis often seek to overrule a current position based on information about what an earlier public expected, the move away from a decision here usually matches public expectations, or at least does not overturn them.} Applied in the rigorous ways
described above, all three Models may be able to keep their
destabilizing effects within relatively confined limits.

IV. EPILOGUE

apparent inapplicability of Models 1 and 2 to those cases, it looks like
their fate will continue to be fought on the battleground of competing
historical and constitutional principles. Meanwhile, the stare decisis

378. Notably, this makes these uses of history to override or undermine stare decisis considerably less destabilizing than more common originalist attacks on stare decisis. While originalist arguments against stare decisis often seek to overrule a current position based on information about what an earlier public expected, the move away from a decision here usually matches public expectations, or at least does not overturn them.
effect of *Quirin* and *Yamashita*, which Model 1 might finally have felled, seem largely moot. Both cases have largely been replaced by *Hamdi* and *Hamdan*.

But the framework developed here may have broader use. First, today’s live terrorism controversies may be tomorrow’s undead precedents. It is impossible to predict which of today’s precedents will continue to be cited and which will be forgotten, but much as World War II revived the importance of *Ex parte Milligan* and the War on Terror revived *Quirin*, a conflict decades away may awaken some forgotten War on Terror case. We do not know how history will treat the current cases, but the framework in this Article could help in considering their eventual fate.

Moreover, claims about the lessons of history are widespread across the law and the Models developed here should have at least some applicability beyond undead wartime cases. Although broader versions of Models 1 and 2 meant to extrapolate defects from wartime cases generally were considered above, those versions appear to be too flawed to really use. Instead the strongest versions of Models 1 and 2 look at an individual decision itself; that decision’s context, wartime or otherwise, is relevant only insofar as it produces the specific flaws in or the specific reaction to that decision itself. Accordingly, arguments from Models 1 and 2 can be made about any long-forgotten case that is either deeply flawed or roundly renounced. Wartime is more important to Model 3, at least insofar as it looks for broad lessons that can be learned and applied to some category of cases, but the standards it lays out for using the lessons of history as vehicles for constitutional principles are widely applicable to any area where constitutional traditions or counter-traditions are invoked. Although this Article cannot determine the fate of every historical claim against every decision—each decision must be considered individually—my hope is that the framework for thinking about history’s lessons described here can at least provide a place to start.

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382. 71 U.S. 2 (1866).
383. *See supra* notes 299-316, 339-344 and accompanying text.